# ADVISORY COMMITTEE
# ON
# CIVIL RULES

**Washington, DC**
**May 22-23, 2006**
**Volume I**

# AGENDA
# ADVISORY COMMITTEE ON CIVIL RULES
# MAY 22-23, 2006

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

   A. Supreme Court approved proposed rules amendments
   B. Minutes of January 6-7, 2006, Standing Rules Committee meeting

2. **ACTION** – Approving minutes of October 27-28, 2005, Committee meeting

3. Comprehensive Style Project

   A. **ACTION** – Approving proposed "style" amendments to Rules 1-86 and transmitting them to the Standing Rules Committee

   B. **ACTION** – Approving proposed amendments to "stylized" Rules 16, 26, 33, 34, 37, and 45 to account for e-discovery amendments that are expected to take effect in December 2006 and transmitting them to the Standing Rules Committee

      i. Analysis of supersession concerns raised about the effect of amended "stylized" rules on conflicting statutory provisions
      ii. Memorandum on guiding principles governing style project
      iii. Charts listing recurring "global" issues and renumbered subdivisions

   C. **ACTION** – Approving proposed "style-substance" amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40, 71.1, and 78 and transmitting them to the Standing Rules Committee

   D. **ACTION** – Approving proposed revisions to Forms 1-35 to become Forms 1-82 and transmitting them to the Standing Rules Committee

   E. Summary of comments on proposed "style" and "style-substance" amendments

   F. Notes on November 18 University of Chicago hearing on style project

4. **ACTION** – Approving publication of proposed new Rule 62.1 or, alternatively, amendments to Rule 60(c), dealing with indicative rulings

5. **ACTION** – Approving publication of proposed new Rule 5.2, implementing E-Government Act of 2002 to provide privacy protection for filings electronically transmitted to a court

6. **ACTION** – Approving publication of proposed amendments to Rule 48 on jury polling

7. Report on proposed uniform rules amendments governing time computation

8. Report of subcommittee on Rule 30(b)(6) and Rule 26, dealing with depositions of witnesses testifying on behalf of an organization and disclosure of expert witness testimony

9. **ACTION** – Approving publication of proposed amendments to Rules 15 and 13 governing relation back of amended pleadings

   A. Subcommittee report

   B. Background information

10. Report on proposed amendments to Rules 54 and 58 in conjunction with proposed amendments to Appellate Rule 4, dealing with effect of a motion for attorney's fees on the time to appeal

   A. Report from Professor Steven Gensler on research of and recommendations on proposed amendments to Rules 54 and 68

   B. Federal Judicial Center report on motions filed for attorney fee's awards and time to appeal

   C. Background information

11. New Evidence Rule 502 proposed by Advisory Committee on Evidence Rules, protecting against waiver of attorney-client privilege and work-product protection

   A. Draft Rule 502 submitted to Standing Rules Committee by Advisory Committee on Evidence Rules with a recommendation to publish it for public comment

   B. Advisory Committee on Evidence Rules report accompanying new rule

   C. Public comments submitted on proposed new rule bearing on Civil Rules

   D. Memorandum from Gregory Joseph describing proposed new rule

12. Report on proposed amendments to Rule 56, dealing with summary judgment

13. Report on proposed amendments dealing with "notice" pleading

   A. Memorandum on survey of case law dealing with pleadings requirements

   B. Background information from agenda material prepared for October 2005 Committee meeting

14. Next meeting in Nashville, Tennessee, on September 7-8, 2006

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April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 5, 9, 14, 16, 24, 26, 33, 34, 37, 45, 50, and 65.1; Form 35; and new Rule 5.1.

2. That the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions be, and they hereby are, amended by including therein the amendments to Rules A, C, and E, and new Rule G.

[See infra., pp. ___ ___ ___.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona
**Draft Minutes**

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## ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

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

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, senior attorney in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

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

Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, was unable to attend in person, but he participated by telephone in the bankruptcy portion of the meeting.

In addition to Associate Attorney General McCallum, the Department of Justice was represented at the meeting by Benton J. Campbell, Counselor to the Assistant Attorney General for the Criminal Division. Alan Dorhoffer attended on behalf of the U.S. Sentencing Commission.

At the committee's request, Professor Alan N. Resnick, Donald B. Ayer, and James C. Duff made presentations to the committee.

## INTRODUCTORY REMARKS

Judge Levi reported that he and Professor Coquillette had met with the new Chief Justice. He said that John Roberts will be an excellent Chief Justice and a very good friend to the rules process. He noted that the Chief Justice had served on the Advisory Committee on Appellate Rules for five years, and he would have become the new chair of that committee on October 1, 2005, but for his appointment to the Supreme Court. The committee conveyed its congratulations to Chief Justice Roberts and wished him great success in his new endeavor.

Judge Levi added that Judge Samuel Alito, chair of the Advisory Committee on Appellate Rules until October 1, 2005, had also been nominated to the Supreme Court. The committee congratulated Judge Alito on his selection and wished him well in his confirmation hearings and his future position on the Court.

Judge Levi noted that Professor Patrick Schiltz, reporter to the Advisory Committee on Appellate Rules, had just been nominated by the President to be a district judge for the District of Minnesota. He thanked Professor Schiltz for his excellent service and dedication as a reporter. The committee congratulated Professor Schiltz and wished him success.

Finally, Judge Levi reported that Judge Carl Stewart had been appointed by the Chief Justice as the new chair of the Advisory Committee on Appellate Rules. He emphasized that the high quality of these four appointments reflects very well on the quality of the membership of the rules committees as a whole.

Judge Levi noted that the terms of two members of the Standing Committee had expired on October 1, 2005 – Charles J. Cooper and David M. Bernick. He pointed out that neither was able to attend the meeting, but Professor Coquillette read a letter of appreciation from Mr. Cooper expressing his view that his participation in the work on the committee had been among the most rewarding service of his professional career. Judge Levi added that Mr. Bernick will attend the next committee meeting.

Judge Levi also welcomed Mr. Cox and Mr. Maledon as new members to the committee and read their impressive professional qualifications.

Judge Levi reported that the Judicial Conference at its September 2005 session had approved many rule amendments as part of its consent calendar, including some relatively controversial rules. The amendments included the package of changes to the civil rules relating to discovery of electronically stored information. They also included amendments to the evidence rules, including Rule 408 (use of admissions made in the course of settlement negotiations in a later criminal case) and Rule 609 (automatic

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal

the trial judge's granting of a judgment of acquittal. He noted that the advisory committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.**

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that legislation had passed the House of Representatives to undo the 1993 amendments to FED. R. CIV. P. 11 (sanctions), thereby requiring a court to impose sanctions for every violation of the rule. The legislation would also require a federal district court to suspend an attorney from practice in the court for a year if the attorney has violated Rule 11 three or more times.

Mr. Rabiej noted that other provisions had been added to the bill on the House floor. One would prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety.

Mr. Rabiej pointed out that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law had held an oversight hearing in July 2005 on the judiciary's implementation of the new bankruptcy legislation. He noted that Judge A. Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, had appeared on behalf of the Judicial Conference and testified as to the substantial amount of work accomplished by the rules committees, other Judicial Conference committees, and the Administrative Office. Mr. Rabiej reported that the testimony had been very impressive, and Judge Small had reassured the Congressional subcommittee that the judiciary would be able to meet all the statutory deadlines.

Mr. Rabiej said that proposed legislation to allow cameras in federal courtrooms at the discretion of the presiding judge was gathering steam. He noted that the Judicial Conference generally opposes cameras in the courtroom.

Mr. Rabiej reported that the rules office had received a request from the Foreign Intelligence Surveillance Court in October to comment on its local rules and to inquire about the rules process in general. He said that he and Professor Capra had reviewed the court's rules, and the court had accepted virtually all their suggested comments.

Judge Levi noted that the Director of the Administrative Office, Leonidas Ralph Mecham, had announced his retirement, and a search committee of judges had been appointed by the Chief Justice to assist him in recommending a replacement.

Mr. McCabe reported that the Administrative Office's rules web site had become very popular. He noted that the staff had posted all rules committee minutes and reports back to 1992, and they will soon post all the committee agenda books back to 1992. He added that all public comments are now being posted as they are received, and the rules office is attempting to locate all the key records of the rules committees – especially

minutes and reports – back to the earliest days of the rules program. These records, once posted, should be of substantial benefit to scholars, judges, and lawyers.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of various pending projects of the Federal Judicial Center, as summarized in Agenda Item 4. He directed the committee's attention to two projects involving the federal rules.

First, the Center is examining the impact of the Class Action Fairness Act of 2005 on the resources of the federal courts. The study will begin by determining whether there has been any increase in the number of class actions filed as a result of the Act. Center staff will then examine whether there have been any changes in the workload burdens of the district courts. Finally, they will also look at the burdens imposed by class actions on the courts of appeals. Mr. Cecil reported that there are serious limitations on the data available, and researchers are going through individual case records on a district-by-district basis.

Second, Mr. Cecil described the Center's project to address ongoing confusion regarding the standard of review in patent claims construction. He noted that about one-third of the patent cases are remanded to the district courts on claims construction issues. He said that a survey was being conducted of district judges and attorneys to identify case-management techniques that might improve the claims-construction process and to explore whether some increased ability for interlocutory appeals in patent cases would be helpful.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 5).

Judge Stewart reported that the advisory committee had no action items to present. He pointed out that the committee had just completed its marathon efforts to approve new Rule 32.1, governing citation of opinions. He said that the thorough work of the committee, the extent of the public comments, and the invaluable research produced for the committee by the Federal Judicial Center and the Administrative Office had shown that the Rules Enabling Act process had worked exceedingly well.

Judge Stewart noted that the advisory committee would meet next in April 2006 and would address a number of issues described in the agenda book.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Morris and Judge Zilly (by telephone) presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 12, 2005 (Agenda Item 6).

Professor Morris reported that the committee had met twice since the last Standing Committee meeting and had conducted numerous teleconferences in order to complete work on the package of official forms and interim rules to implement the omnibus bankruptcy legislation. He pointed out that the interim rules and the forms had been circulated to the courts in August 2005 and posted on the rules web site for public comment. The advisory committee considered the public comments and made a few essential changes in the interim rules and the forms at its September 2006 meeting. He added that every district had adopted the interim rules without change or with very minor changes.

Professor Morris said that the advisory committee will meet next in March 2006, and it plans to submit a package of permanent rule revisions for publication at the June 2006 meeting of the Standing Committee. The proposed national rules will build on the interim rules and include a number of other provisions not included in the interim rules and some amendments unrelated to the bankruptcy legislation.

Professor Morris reported that the advisory committee had also conducted a cover-to-cover study of the restyled civil rules at the request of the Advisory Committee on Civil Rules. He explained that the civil rules apply generally in adversary proceedings, and they may be applied in contested matters. In addition, some bankruptcy rules are modeled on counterpart provisions in the civil rules. He noted that the advisory committee had broken into six groups, each of which carefully reviewed an assigned block of rules, checked for any possible impact on the bankruptcy rules, and examined whether any changes were needed in language or cross-references. At the end of this detailed study, he said, the advisory committee found very few problems with the restyled civil rules, and it communicated its observations to the Advisory Committee on Civil Rules.

Judge Zilly added that the individual members of the advisory committee had spent an enormous amount of time studying the new bankruptcy legislation and drafting the interim rules. In addition, they devoted an enormous amount of time to revising the official bankruptcy forms and devising new forms to implement the new procedural

requirements of the legislation. He noted that the official forms took effect on October 17, 2005, following approval by the Executive Committee of the Judicial Conference.

*Historical Perspective*

At the request of Judge Levi, Professor Resnick gave the committee a historical perspective on the bankruptcy system and the Federal Rules of Bankruptcy Procedure.

He explained that the Constitution gives Congress authority to establish uniform laws on the subject of bankruptcy and to make bankruptcy exclusively federal. The first meaningful national bankruptcy law, he said, was enacted in 1898, and it lasted until 1978. The 1898 Bankruptcy Act was amended substantially in the 1930s. Enactment of Chapter 11 in 1938 marked a major move away from liquidation and towards saving businesses.

By the late 1960s, several bankruptcy experts thought that it was time to conduct a complete review of the bankruptcy system. So Congress passed a law in 1968 creating a national bankruptcy commission, comprised of members of Congress, law professors, judges, and lawyers. The commission filed a report in 1973 that recommended replacing the 1898 Act with a new substantive bankruptcy law and a revised bankruptcy court structure. From 1973 to 1978, a great deal of debate ensued over the commission's recommendations, both in Congress and in the bankruptcy community, and in 1978 Congress enacted a new Bankruptcy Code and a new Article I court structure.

New procedural rules were needed to implement the 1978 Code. But there was not sufficient time to promulgate rules under the regular Rules Enabling Act process before the provisions of the 1978 Code took effect on October 1, 1979. Therefore, the Advisory Committee on Bankruptcy Rules drafted a set of "suggested interim rules" over a period of nine months. They were circulated to the courts in October 1979, with the notation that they had not been approved either by the Standing Committee or the Judicial Conference. They were generally adopted by the courts as local rules. The advisory committee then began work on drafting the new Federal Rules of Bankruptcy Procedure, which eventually took effect in 1983.

In 1982, the Supreme Court declared the jurisdictional provisions of the 1978 law unconstitutional in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). In 1984, new legislation was enacted that cured the jurisdictional defects and created the current bankruptcy court system under which bankruptcy jurisdiction is vested in the district courts and then delegated to the bankruptcy judges. The new court structure was reflected in a package of rule amendments that took effect in 1987. In 1986, the pilot U.S. trustee program – which took over the estate administration responsibilities in

bankruptcy cases – was made a nationwide system. The advisory committee drafted rule amendments to implement the U.S. trustee system, and they took effect in 1991.

In the early 1990s, credit and lending groups complained that the pendulum in bankruptcy had swung too far toward protecting debtors at the expense of creditors, and they initiated efforts to change the Bankruptcy Code. In 1994, Congress created another national bankruptcy review commission, which issued a comprehensive report in 1997. But the credit community was not satisfied with the recommendations, and their efforts led to the introduction of legislation in 1997 that would amend the Code substantially to better protect creditors' rights. The legislation was pending in each Congress from 1997 until April 2005, when it was enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At first, the Advisory Committee on Bankruptcy Rules did not move to draft potential rule changes to implement the pending legislation because its future was uncertain. In fact, the bill was vetoed by President Clinton. But with the election of President Bush in 2000, it appeared very likely that it would be enacted soon. So, the advisory committee, under the leadership of Judge Small, retained two additional bankruptcy law professors as consultants and began to study the legislation in depth to determine what changes would be needed in the bankruptcy rules and forms. By 2002, the committee had developed rough drafts of rules amendments.

The legislation was eventually enacted in April 2005, and it contained a general effective date of October 17, 2005. Fortunately, the six-month grace period gave the judiciary and the Department of Justice time to accomplish the many tasks required of them. The advisory committee, through concentrated efforts and starting from the 2002 drafts, was able to complete an emergency package of interim rules and revised official forms.

Professor Resnick said that the legislation was very controversial and had been opposed by the National Bankruptcy Conference, a committee of the American Bar Association, and virtually all bankruptcy judges and academics. But it was strongly supported by the credit card companies, banks, landlords, and certain other special interest groups.

In consumer cases, the legislation imposes additional restrictions on debtors, particularly Chapter 7 debtors. Among other things, they must undergo credit counseling and debtor education, and they must submit to a means test to determine whether they are presumed to be abusing the bankruptcy system. The test examines the debtor's monthly income, expenses, and discretionary income. Consumer bankruptcy lawyers, moreover, must meet new requirements and are exposed to additional liability that may lead them to raise their fees or go out of the consumer bankruptcy business.

For Chapter 11 business cases, a court's ability to extend the debtor's exclusive period to file a plan has been limited. The new law, moreover, generally makes it harder for small businesses to reorganize. It also gives landlords additional authority regarding leases.

Professor Resnick said that the legislation also contains some very good provisions, such as the new Chapter 15, dealing with cross-border insolvencies, and provisions dealing with health care, nursing homes, and patient rights. It also allows direct appeals from the bankruptcy court to the court of appeals in appropriate circumstances.

Professor Resnick pointed out that there are many technical flaws and ambiguities in the 500-page legislation, largely because it was drafted by special interest groups and lobbyists, and Congress was reluctant to make any changes. Moreover, he said that he thought it unlikely that Congress would enact technical amendments to correct the flaws in the near future.

He reported that the day after the legislation was signed, on April 21, 2005, the Advisory Committee on Bankruptcy Rules held a meeting of its subcommittee chairs and committee staff to decide on organizing its work. The committee decided at the outset that it should not wait the full three years it normally takes to complete the rules process. Rather, it had to produce forms and interim rules before the October 17, 2005 effective date of the legislation.

In Professor Resnick's view, there were three reasons for the advisory committee to act expeditiously. First, many of the existing national rules were now inconsistent with the statute. Second, rules and forms were needed quickly to implement the various new concepts and procedures contained in the law, such as the means test and Chapter 15 cross-border insolvency. Third, the new law explicitly directed the Judicial Conference to promulgate several new rules and forms.

Professor Resnick noted that the format of the interim rules drafted by the advisory committee differs from interim rules issued in the past. The committee, he said, decided to create the interim rules as amendments to the existing national rules, striking through deleted provisions and underlining new provisions. The interim local rules, therefore, will become the advisory committee's first draft of the proposed permanent amendments to the national rules.

He pointed out that the advisory committee had encountered a number of difficult problems in drafting the rules and forms. First of all, addressing some of the provisions in the legislation required a great deal of technical and specialized expertise in several different areas. Moreover, the advisory committee did not have time to benefit from public

comment. It adopted a subcommittee system, with six different subcommittees addressing different aspects of the legislation – consumer provisions, business provisions, cross-border insolvency, health care, appeals, and forms. Professor Resnick praised Judge Zilly as a truly amazing chair, delegating work to the subcommittees, but also serving as an active participant in the work of every subcommittee.

After the advisory committee had completed and published the interim rules and forms on the Internet in August 2005, it received a number of helpful public comments pointing out a few technical errors. The advisory committee quickly made the corrections at its September 2005 meeting.

Professor Resnick pointed out that the advisory committee had drafted interim rules only in those areas where it was important to have a rule in place by October 17, 2005, such as where the new statute conflicted with an existing national rule. The advisory committee, he said, had involved the U.S. trustee organization in all its deliberations and activities, and it received a good deal of help and advice from the U.S. trustees.

The advisory committee also tried to make the rules and forms as neutral as it could on substantive issues. For the most part, it tried to leave the resolution of ambiguities in the legislation up to the courts. But in several instances it had to resolve ambiguities in order to devise the rules and forms. Most importantly, he said, in his opinion, every member of the advisory committee left behind any personal views or opposition to the legislation, and everybody worked hard to implement the law faithfully. The advisory committee, moreover, tried to be as transparent as possible, posting its work product on the Internet. The entire staff of the Administrative Office was outstanding, and particular appreciation is due to Patricia Ketchum, who was the centerpiece of the committee's efforts to redraft the bankruptcy official forms.

Professor Resnick said that he believes that it is very unlikely that the advisory committee will consider making any additional changes in the interim rules. Instead, it will concentrate on drafting the permanent amendments to the national rules. In the process, it will look at the actual experiences of the courts in using the interim rules, review all the public comments, and add some additional rules and forms at its March 2006 meeting.

In conclusion, Professor Resnick said that the advisory committee should approve a complete set of amendments to the national rules and official forms at its March 2006 meeting and publish them for public comment in August 2006. The revisions, therefore, will be on track under the regular Rules Enabling Act process, and the revised national rules would become effective on December 1, 2008.

Mr. McCabe added that the Act also contains a number of provisions that adversely impact the finances of the federal judiciary. For example, it allows debtors to petition for filing in forma pauperis. If the petition is granted, the judiciary loses its designated portion of the filing fee, which is used to fund basic court operations. Moreover, if the debtor does not pay a filing fee, there is no statutory authority in a chapter 7 case to pay the case trustee the $60 fee that funds the trustee's work. In addition, the Act imposes substantial additional work and costs on the courts. Among other things, the Administrative Office is required to compile and report substantial new statistics in areas that are of no direct concern to the business needs of the judiciary. The Act's requirements have required the Administrative Office to expedite development of a multi-million dollar new statistical infrastructure capable of receiving and processing the new statistics.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachment of December 15, 2005 (Agenda Item 7).

### *Amendment for Publication*

### FED. R. CIV. P. 8(c)

Judge Rosenthal reported that the advisory committee had only one action item to present. She explained that FED. R. CIV. P. 8(c) (pleading affirmative defenses) lists "discharge in bankruptcy" as one of the affirmative defenses that a party must plead. She said that bankruptcy judges had suggested to the advisory committee that the rule is incorrect because § 524 of the Bankruptcy Code specifies that a discharge voids any judgment obtained on the discharged debt. It also operates as an injunction against a creditor bringing any action to collect the debt. Therefore, a discharge is not an affirmative defense as a matter of substantive bankruptcy law.

Judge Rosenthal said that the advisory committee was seeking authority to publish a proposed amendment to eliminate "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c). She added, however, that the advisory committee did not plan to publish the amendment immediately, but would hold it for publication as part of a package of amendments at a later date.

**The committee without objection approved the proposed amendment for publication at a later date by voice vote.**

*Informational Items*

*Style Project*

Professor Cooper provided a status report on the work of the advisory committee in restyling the body of civil rules. He noted that the project to restyle all the federal rules of procedure had been initiated in the early 1990's by Judge Robert Keeton and Professor Charles Alan Wright. Their goal was to rewrite the rules to achieve greater clarity and ease of use without changing meaning or substance. In addition, they sought to eliminate inconsistencies and to use language consistently throughout the federal rules of procedure.

Professor Cooper pointed out that the Federal Rules of Appellate Procedure had been the first body of rules to be restyled. They were followed by the restyled Federal Rules of Criminal Procedure. Now, the Advisory Committee on Civil Rules had completed a style revision of all the Federal Rules of Civil Procedure, which it published for comment in February 2005. Professor Cooper noted that the advisory committee had received 21 written comments to date and had held one hearing in Chicago. The hearing, he said, was essentially a comprehensive round table discussion on the restyled rules with Gregory P. Joseph and Professor Stephen B. Burbank, who represented the views of a group of 21 distinguished lawyers and professors who had read the restyled rules carefully and provided detailed written comments to assist the advisory committee.

Professor Cooper noted that a majority of the reviewing group had expressed the view that the project to restyle the civil rules should not proceed further because it could introduce inadvertent changes in the meaning of rules and possibly lead to litigation and added transactional costs. It might also preclude a more comprehensive overhaul of the civil rules. He also reported that members of the reviewing group had expressed concern that if the entire body of civil rules were re-adopted as a package, the supersession clause of the Rules Enabling Act process might cause mischief by overturning statutory provisions. Professor Cooper responded, though, that the advisory committee was considering a number of options for dealing with this problem.

Judge Rosenthal added that there had been no supersession problems when the restyled criminal rules were promulgated. Professor Cooper agreed that the fears expressed at the time about the criminal and appellate rules had not been realized in practice. He noted, for example, that the Department of Justice had reported that lawyers in its various divisions had not experienced any problems with the other restyled rules. Three of the law professors at the meeting added that they regularly read all the reported decisions in their fields and have not seen a single problem to date with the restyled rules.

Judge Rosenthal said that much of the public commentary on the restyled rules had been very positive, adding that the new rules are much clearer, easier to understand, and easier to use. She said that the advisory committee had been extraordinarily disciplined in its work and had avoided making any changes in language where there could be a potential change in meaning. She also thanked the Litigation Section of the American Bar Association for its help in supporting the project and providing very helpful input.

*Other Amendments Under Consideration*

Judge Rosenthal reported that the advisory committee had been so occupied with the restyling and electronic discovery projects that it had put aside a number of other issues. She listed several future committee agenda items, including:

(1) Rule 15 (amended and supplemental pleadings) – whether to consider changes in the automatic right of a party to amend its pleading or in the provision allowing relation back of an amendment changing the party against whom a claim is asserted, if the plaintiff files a case without knowing the name of the defendant but later discovers the name;

(2) Rule 26(a)(2)(B) (pretrial disclosure of expert testimony) – whether reports should have to be filed by employees who only sporadically give expert testimony;

(3) Rule 30(b) (notice of deposition) – whether to address a number of problems and possible misuses of the rule in taking depositions of institutional witnesses;

(4) Rule 48 (number of jurors and participation in the verdict) – whether the rule should be amended to include a provision on polling the jury as found in FED. R. CRIM. P. 31;

(5) Rule 58(c)(2) (entry of judgment in a cost or fee award) – together with Rule 54(d)(2) (motion for attorneys' fees) and FED. R. APP. P. 4 (timing of a notice of appeal) – whether to examine the practical effect of the provisions that give a district judge discretion to suspend the time to file an appeal when a motion is filed for attorney fees;

(6) Rule 60 (relief from judgment or order) — whether the rule should be amended, or a new rule drafted, to authorize a district court to make "indicative rulings" on post-trial motions when a pending appeal has deprived it of jurisdiction; and

(7) Rule 56 (summary judgment) – whether the rule should be rewritten to provide time limits, specify standards for granting summary judgment, and cure the disconnect between the text of the rule and the way that summary judgment motions are actually litigated in the courts.

Finally, Judge Rosenthal said that the advisory committee has also had on its agenda for a long time a controversial suggestion to reexamine notice pleading in the civil rules. She said that a number of courts are tempted to impose heightened pleading requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker,* 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

*Amendments for Publication*

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

FED. R. CRIM. P. 1

Judge Bucklew explained that the proposed amendment to Rule 1 (scope and definitions) would merely incorporate the statutory definition of a "crime victim" set forth in the Crime Victims' Rights Act. She added that the statutory definition was quoted in full in the proposed committee note.

FED. R. CRIM. P. 12.1

Judge Bucklew said that the proposed amendment to Rule 12.1 (notice of alibi defense) would provide that a victim's address and telephone number not be given automatically to the defendant if an alibi defense is made. The amendment would give the court discretion to order disclosure of the information or to fashion an alternative procedure giving the defendant the information necessary to prepare a defense, but also protecting the victim's interests.

Two members questioned the language of proposed new subparagraph (b)(1)(B) that places the burden on the defendant to establish a need for the victim's address and telephone number. They said that the presumption should be reversed. Thus, the rule would provide that the defendant has the right to speak with the victim, and the government would have the burden of showing that there is a need to protect the victim's interests. One participant suggested that the advisory committee might consider drafting alternate versions of the provision and including both in the publication of the rules. Another suggested that the matter might simply be highlighted in the covering letter accompanying the publication.

FED. R. CRIM. P. 17

Judge Bucklew said that the proposed amendment to Rule 17 (subpoena) would require court approval to obtain a subpoena served on a third party that calls for personal or confidential information about a victim. The court could also require that the victim be given notice of the subpoena and an opportunity to move to quash or modify it.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require the court to consider the convenience of any victim in setting the place of trial.

FED. R. CRIM. P. 32

Judge Bucklew pointed out that the proposed amendments to Rule 32 (sentencing and judgment) would delete the current definition in the rule of a victim of a crime of violence or sexual abuse. The new, broader definition of a "crime victim," taken from the Crime Victims' Rights Act itself and incorporated in FED. R. CRIM. P. 1 (definitions), includes all federal crimes. The amended rule would also eliminate the current restriction that only victims of a crime of violence or sexual abuse are entitled to be heard at sentencing. The other proposed changes in the rule, she said, were relatively minor.

FED. R. CRIM. P. 43.1

Judge Bucklew explained that Rule 43.1 (victim's rights) was a completely new rule. She said that the advisory committee had debated whether to incorporate the changes implementing the Crime Victims' Rights Act into a single new rule or spread them throughout the rules. She said that the committee consensus was to place the principal changes in one rule.

Judge Bucklew said that subdivision (a) of the new rule deals with the right of a victim to receive notice of every public court proceeding, to attend the proceeding, and to be reasonably heard at certain proceedings. She noted that the government has the burden of using its best efforts to provide victims with reasonable, accurate, and timely notice of every court proceeding. Professor Beale added that paragraph (a)(3) uses the term "district court," rather than "court," to make sure that the rule does not provide a right to be heard in the court of appeals. This limitation tracks the language of the statute.

Some participants questioned whether all the provisions set forth in the proposed new rule are actually needed because most of them are specified in the Crime Victims' Rights Act itself. One participant noted, moreover, that FED. R. EVID. 615 already allows a court to exclude witnesses so that they cannot hear the testimony of other witnesses. Judge Bucklew and Professor Beale responded that victims' groups have argued strongly that pertinent provisions of the Act should be highlighted and located in the key provisions of the rules used every day by the bench and bar. They added that the advisory committee did not go beyond the substance of the statute itself in any way, but the committee was convinced that it was necessary to include some of the key victims' statutory provisions in the rules themselves.

One participant noted that the rules committees generally avoid repeating statutory language in the rules. Another added that the Standing Committee in its local rules project had discouraged the courts from repeating statutes in local rules because it can create style problems and lead to legal conflicts.

One member suggested that the new rule should not be numbered as Rule 43.1 because the preceding rule, FED. R. CRIM. P. 43, deals only with the presence of the defendant. He recommended that one of the open rule numbers, taken from abrogated rules, should be used. It was the consensus of the committee that an abrogated rule number should be used or the new rule placed at the end of the rules.

One member questioned the meaning of proposed subdivision (b), which states that the court must decide promptly "any motion asserting a victim's rights." Judge Bucklew explained that the main purpose of the amendment was to emphasize the need for the court to act promptly. Professor Beale added that the statute covers the matter and uses the word "forthwith." She said that the rule may not strictly be necessary, but it is politically important. Another member suggested that the rule should be limited to motions asserting a victim's rights "under these rules." The committee consensus was to include the additional language.

Judge Bucklew reported that paragraph (b)(1) states that the rights of a victim may be asserted either by the victim or the government. One member suggested that paragraphs (1) through (4) do not fit well under subdivision (b), but should become new subdivisions (c) through (f). Judge Levi recommended that the advisory committee consider whether renumbering of the provisions would be appropriate.

The participants suggested a number of other potential improvements in language and organization of the rule for the advisory committee to consider.

**The committee without objection approved the proposed amendments and new rule, including the changes suggested by the members, for publication by voice vote.**

*Informational Items*

Judge Bucklew reported that the Standing Committee had returned the proposed amendments to Rule 29 (judgment of acquittal) to the advisory committee for further consideration. She said that drafting the rule had been more difficult than anticipated. A subcommittee had been working on it, and the advisory committee expected to present a draft rule to the Standing Committee for action at its June 2006 meeting.

As revised, Rule 29 would allow a judge to deny a motion for acquittal before the jury returns a verdict, or to reserve decision on the motion until after a verdict. But if the judge decides to *grant* the motion of acquittal, the judge would have to wait until after the jury returns a verdict – unless the defendant waives double jeopardy rights. The proposed rule sets forth what the judge must tell the defendant in open court, and it addresses the substance of the defendant's waiver.

One member opposed the rule and said that the Standing Committee had not returned the rule to the advisory committee with an implied endorsement. Judge Bucklew responded that the instruction to the advisory committee was to produce the best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

*Informational Items*

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford,* the advisory committee would not move forward with any rule amendments dealing with hearsay. Judge Smith also reported that the advisory committee was considering a possible amendment governing evidence presented in electronic form.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Schiltz presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 9, 2005 (Agenda Item 10).

Judge Kravitz pointed out that the subcommittee included several practicing lawyers, and it was blessed with having Professor Schiltz as its reporter. He reported that the subcommittee's work had begun with a memorandum drafted by Professor Schiltz that outlined all the potential time-computation issues in the federal rules. The memorandum, he said, had been circulated to the committee reporters for comment and then considered at a subcommittee meeting in October 2005.

Judge Kravitz explained that the subcommittee was focusing at the moment on how time should be computed, rather than on the specific time limits scattered throughout the rules. The latter, he said, would be addressed later by the respective advisory committees.

Judge Kravitz noted that the subcommittee had decided preliminarily to propose a number of changes in how time is computed, the most significant of which would be to eliminate the "10-day rule," set forth in FED. R. CIV. P. 6(e) and counterpart provisions in the appellate, bankruptcy, and criminal rules. The existing rules, he explained, specify two different ways of counting time. If a time period specified in a civil, criminal, or appellate rule is 10 days or less, intervening weekends and holidays are excluded in the computation. But if a time period set forth in a rule is 11 days or more, weekends and holidays are in fact counted. (For bankruptcy rules, the dividing line is 8 days, rather than 11.) Judge Kravitz said that by abolishing the "10-day rule," all days would then be

counted in the future. And if the last day of a prescribed period is a weekend or holiday, the deadline would roll over to the next weekday.

Professor Schiltz said that in drafting a proposed model rule, the subcommittee had decided against simply eliminating the "10-day" language in the current rule. That approach, he said, might be too subtle and could be missed by lawyers. Instead, the proposed rule attracts attention to the change and tells the bar affirmatively to count every day or hour.

Judge Kravitz said that after the subcommittee makes its final recommendations, the individual advisory committees will take a hard look at the impact on each of the specific deadlines in their rules. For example, 10-day deadlines in the current rules would necessarily be shortened because the parties will no longer get the benefit of excluding weekends. The advisory committees, thus, might wish to increase some 10-day deadlines to 14 days.

He added that the time-computation subcommittee was comprised largely of members of the advisory committees. The members, he said, would be expected to go back to their respective advisory committees and take a leading role in examining and adjusting the deadlines. Judge Kravitz added that the subcommittee's recommendations would be completed by early 2006, circulated to the advisory committees for comment, and considered by the Standing Committee in June 2006. After reviewing all the comments, the subcommittee would send its recommendations to the advisory committees and ask them to proceed with making any needed changes in their deadlines.

Judge Kravitz reported that the subcommittee had also considered amending the time-computation rules to take account of electronic filing and service. Anticipating that electronic filing and service will become virtually universal in the future, the subcommittee discussed eliminating the provision that gives a party three additional days to act after being served by mail, electronically, or by leaving papers with the clerk's office. He pointed out that the practicing attorneys on the subcommittee were strongly of the view that as long as mail remains a service option, the three additional days must be retained. But, he said, even though the additional three days had been provided to encourage the use of electronic service, that incentive is probably no longer needed. Judge Kravitz said that the subcommittee needs to address the three-day rule, and it would likely decide to retain the three-day rule for mail but eliminate it for other kinds of service.

In addition, Judge Kravitz said, the subcommittee had drafted a provision to calculate time periods stated in hours, rather than days. Professor Schiltz explained that the subcommittee had drafted a simple rule that would extend a deadline by 24 hours if the last day falls on a weekend or holiday.

Judge Kravitz said that the subcommittee had also addressed the issue of "backwards counting," such as in computing the deadline for a party to file a paper in advance of a hearing or other event. Professor Schiltz pointed out that the proposed draft states that when the last day is excluded, the computation "continues to run in the same direction," *i.e.*, backwards. Thus, if the final day of a backward-looking deadline falls on a Saturday, the paper would be due on the Friday before the Saturday, not on the Monday following the Saturday.

Judge Kravitz reported that the subcommittee also considered whether all time limits in the rules should be expressed in seven-day increments, but decided not to mandate such a rule. Rather, it would encourage the advisory committees to keep such a protocol in mind as they adjust deadlines in response to the subcommittee's new time-counting rule.

## REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. He noted that proposed amendments to the rules had been published in August 2005 to implement section 205 of the E-Government Act of 2002. The legislation requires the Supreme Court to prescribe rules –

> "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Fitzwater reported that some comments had been received on the proposed rules, but there had been only one request to testify at a scheduled public hearing. He also noted that he had recently attended a conference at which some concern had been expressed regarding the viability of the two-tier access system contemplated in the proposed rules, under which certain sensitive records would be made available at the courthouse, but not on a court's web site.

One of the members pointed out that many of the provisions dealing with electronic filing are set forth in local court standing orders and general orders, rather than in local court rules. He suggested that it would be very helpful if the committee provided guidance to the courts and circuit councils as to what matters should be placed in local rules and what should be set forth in orders.

PANEL DISCUSSION ON THE LEGACY OF CHIEF JUSTICE REHNQUIST

Judge Levi explained that he had asked former committee member Charles Cooper and current committee member Judge Kravitz to put together a panel reflecting on the rich legacy of the late Chief Justice William H. Rehnquist and his contributions to the federal rulemaking process. He noted, though, that after putting the program together, Mr. Cooper was unable to attend because of a last-minute conflict. Judge Levi noted that both Judge Kravitz and Donald Ayer had been law clerks of the late Chief Justice, and James Duff had served as the chief justice's administrative assistant, *i.e.*, chief of staff, from 1996 to 2000.

Judge Kravitz explained that he would speak about the personal qualities that impressed him most about the late Chief Justice when he had served as his law clerk. Mr. Ayer, he said, would then discuss the Chief Justice's legacy on the important issue of federalism. Finally, he added, Mr. Duff would speak about the Chief Justice as the administrative leader of the Third Branch and his support of the rules program.

Judge Kravitz noted that Mr. Ayer has an active appellate practice in Washington and had served in the past as the principal deputy to the Solicitor General, as Deputy Attorney General, and as the U.S. attorney for the Eastern District of California. Mr. Duff, he said, is the managing partner in the Baker Donelson law firm in Washington and also serves as the legislative counsel for the Federal Judges Association.

Judge Kravitz said that he had read many tributes to the late Chief Justice and saw a number of common themes reflected in them. The eulogists all recognized the same character traits in Chief Justice Rehnquist, namely: (1) how brilliant he was; (2) what a wonderful teacher he was; (3) how well he understood the Supreme Court as a decision-making body; and (4) how decent, modest, and normal he was for a person of such enormous stature and authority.

As for his brilliance, Judge Kravitz said, the Chief Justice's mind was encyclopedic and his memory prodigious. He had an amazing ability to memorize citations, and he knew details about every congressional district. He could cite poetry, Gilbert and Sullivan librettos, and literature by heart. He could also dictate completely polished opinions into a tape recorder without any editing.

He was a dedicated teacher who spent a great deal of time with his law clerks. He had regular conferences with his clerks, but he did not have them write bench memos. Rather, he would tend to go for a walk with the clerks on the Mall and talk to them about cases and upcoming issues and opinions. He saw it as a way of training the clerks to think on their feet, without notes. It was also his way of preparing for arguments.

As a training device, he would have the clerks write opinions on stays, even though not strictly needed. He told them that it was important for them to be able to write under pressure. He set very tough deadlines and had the clerks produce draft opinions within 10 days after argument. He also spent a great deal of time teaching the clerks about life and about family, and he was very interested in the clerks' plans for the future.

He was also a master of the politics of the Court and how the Court functioned as a decision-making body. He knew how to move the Court and how to marshal a majority of votes in a case.

Finally, Judge Kravitz added, William Rehnquist's most important quality was his basic decency. In some courts, he noted, disputes arise among the judges, and dissenters occasionally use uncivil language. But the Chief Justice was overwhelmingly civil and polite. He got along very well with his ideological opponents, and he knew that the best way to influence people was with kindness.

He deeply loved his family, and they were the most important thing in his life. His law clerks put on skits, and he was the butt of their jokes and loved it. In all, he had great common sense, pragmatism, and good judgment.

Mr. Ayer agreed with the observations of Judge Kravitz and said that the great successes of the Chief Justice had everything to do with who he was as a person. He was a phenomenon in melding all these great personal qualities, and he ended up being loved by all the members of the Court. Mr. Ayer emphasized that very few people in high places today possess the same qualities.

The Chief Justice, he said, was also a person with a vision and an indelible sense of what the Constitution is and should be. He had an agenda and knew where he wanted to go. Thus, over the course of 33 years on the Court, he moved the Court in his direction, particularly in cases involving religion, habeas corpus, federalism, and criminal procedure.

Mr. Ayer presented a scholarly review of the late Chief Justice's decisions regarding federalism – the area where he affected the law most profoundly. The Chief Justice's allegiance, Mr. Ayer said, was to the union intended by the founding fathers that balanced federal and state powers. He was an activist in trying to restore that balance of power and undo the expansions of federal power that began with the New Deal.

Mr. Ayer divided his detailed analysis of the federalism cases into three broad areas: (1) "commandeering," *i.e.,* where Congress orders the behavior of state employees; (2) narrowing the Commerce Clause power of the federal government; and (3) the 11th Amendment and sovereign immunity.

Mr. Duff concurred that William Rehnquist was an extraordinary man with a combination of great talents. His support of the rules process was no different from the approach he took with everything else. He was intimately familiar with all the agendas of the Judicial Conference committees, including items on the Conference's consent calendar. He invariably would ask penetrating questions about agenda items that went right to the heart of a matter.

In the late 1980s, before the Chief Justice streamlined the Judicial Conference's operating procedures, Conference sessions used to go on for several days, as each committee chair would read his or her report. Chief Justice Rehnquist, though, pushed most of the work from the Conference to its committees. He instituted the discussion and consent calendars, and he rotated the committee members and chairs. Nevertheless, he recognized that there is a need for greater continuity in the area of the federal rules, so he extended the terms of some rules committee chairs and members.

Mr. Duff said that the Chief Justice had an exacting sense of the separation of powers and the balance between the federal government and the states. He was also passionate about the independence of the judiciary. He recognized the important role of the rules committees, both in guiding Congress on procedural matters and in maintaining judicial independence.

Mr. Duff pointed to *Nixon v. United States,* involving the impeachment of a federal judge who had been convicted of perjury and imprisoned. Judge Nixon challenged the procedures chosen by the Senate in having a committee, rather than the full body, take the evidence at his impeachment trial. The opinion of the Supreme Court held that since the Constitution authorizes the Senate to conduct impeachment trials, the Senate can decide on its own procedures. He said that the decision was very important to the separation of powers and works ultimately to the benefit of the judiciary when it exercises its own powers. The rules committees, he said, need to exercise their authority over court procedures wisely and keep Congress from filling a vacuum with statutes.

Mr. Duff said that both sides of the aisle praised the Chief Justice for his leadership role in the impeachment trial of President Clinton. He pointed out that the chief justice and he had met with the Senate leadership to discuss trial procedure, and the exchanges had been very cordial. The chief justice had offered to conduct the trial as an ordinary trial, but the Senate had its own idea as to how the trial should be conducted. The Chief Justice, he said, was able to adapt very well to the Senate's rules.

In conclusion, Mr. Duff pointed out that in addition to his role as the leader of the Supreme Court, 84 different statutes give the chief justice administrative responsibilities.

Mr. Rabiej reported that the Chief Justice never announced his views regarding any rules proposal before the Judicial Conference. Nevertheless, he was able to affect the outcome of a proposal by shaping the procedure. For example, at its September 1999 session, the Conference had before it an important package of rules dealing with the scope of discovery and disclosure. Normally, only one rules committee chair would be allowed to speak. But with the 1999 package, the Chief Justice allowed both the chair of the Standing Committee and the chair of the civil advisory committee to address the Conference. He also decided who would speak first on an issue. Thus, he let both rules committee chairs speak first on the discovery rules package, before any opponent could speak. In addition, speakers normally would be given only five minutes to make a presentation, but the Chief Justice allowed the rules committee chairs a great deal more time. In the end, the 1999 rules package was approved by one vote.

Mr. Rabiej pointed out that several years ago, legislation had been introduced in Congress that would have required that a majority of the members of each rules committee be practicing lawyers. The Chief Justice, he said, made a number of phone calls, and the issue quickly died down. In addition, Mr. Rabiej said, the Chief Justice established the tradition of having the chair and the reporter of the Standing Committee meet annually with him to discuss the current and future business of the rules committees.

Judge Kravitz concluded the panel discussion by reading a letter from Judge Anthony Scirica, former chair of the Standing Committee, emphasizing how supportive Chief Justice Rehnquist had been in rules matters and how he had been the best friend of the rules process.

## NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 22-23, 2006, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

# DRAFT MINUTES

## CIVIL RULES ADVISORY COMMITTEE

## OCTOBER 27-28, 2005

The Civil Rules Advisory Committee met on October 27 and 28, 2005, at the Vintners Inn in Santa Rosa, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. David Bernick, a former member of the Standing Committee, also attended. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., attended as an observer.

Judge Rosenthal opened the meeting by introducing new members Campbell and Gensler. She noted that the members they replaced, Dean John Jeffries and Judge Shira Scheindlin, were each unable to attend this meeting, but that Judge Scheindlin expects to attend the November 18 Style Project hearing. Both Dean Jeffries and Judge Scheindlin sent messages to express their appreciation of the years they spent working with the Committee.

*November 18 Style Rules Hearing*

It seems likely that the November 18 hearing will be the only one of the three scheduled Style Project hearings to be held. The November 18 hearing will focus on a presentation of the work done by a group organized by Professor Burbank and Gregory Joseph. Several teams, each composed of one academic and one practicing lawyer, divided the rules among them. They have prepared a thorough, rule-by-rule, study of the published Style Rules. The study looked for possible changes of meaning and also sought still better ways of restyling. They also have deliberated on the wisdom of undertaking the Style Project. The Committee is extraordinarily grateful to them for undertaking this work. The format of the November 18 "hearing" will not be the usual "witness-testimony" format. Instead, it will be more in the form of roundtable discussion.

One of the questions to be addressed in November will be the question whether the Style Project might have unintended supersession effects. The concern is that because all of the Civil Rules will, according to the intended schedule, take effect as a package on December 1, 2007, some rules may supersede statutes enacted after the day an inconsistent rule provision was originally adopted. This would reverse the situation on November 30, 2007, when the inconsistent statute would have superseded the earlier inconsistent rule provision. An example is provided by Rule 11. Rule 11 was last amended in 1993. The Private Securities Litigation Reform Act was enacted in 1995, including provisions that supersede inconsistent provisions in Rule 11. The argument might be made that Style Rule 11 will come to supersede the 1995 statute.

Brief discussion pointed out three matters of common agreement within the Committee. First, the Style Project is not intended to effect any change in the supersession effects of any rule. Each rule should have the same supersession effect on December 1, 2007, as it had on November 30. This conclusion inheres in the purpose to restate the rules' language without any change of meaning. Second, the Style Project can be accomplished without changing the supersession effect of any rule. Third, the question remains open as to how best to ensure the intended non-effect. It would be possible to expand the first paragraph of the Committee Note to each rule that explains the purpose of the Style changes; the alternative of providing the additional explanation only in the Committee Note to Rule 1 would save many repetitions, but might not draw attention when

arguments are made about the supersession effects of a particular rule and statute. A second approach would be to include a statement of the null effect in the Supreme Court Order that transmits the Style Rules to Congress. This would be clear, but could easily become even more obscure to most lawyers and judges than a statement in the Rule 1 Committee Note. A third approach would be to include the statement in Style Rule 86, which addresses the effective date of rules amendments. Perhaps some other approach may be found. The question is how to establish an accessible rule of interpretation.

Discussion noted that the only similar question to arise with either the Appellate Rules or the Criminal Rules focused on Criminal Rule 48(b) and the Speedy Trial Act. The Criminal Rules Committee decided to restyle the rule, but not to attempt to revise it to conform to the statute. They attempted to make clear the intent to have no effect on the relationship between statute and rule. There has not been any hint that this approach has led to any difficulty.

The first signs of the overall reactions of the Burbank-Joseph group indicate that individual views on the wisdom of the Style Project vary. Some are enthusiastic. Others are mildly uneasy. Still others are opposed, some strongly. There has not been time yet to evaluate the direct responses on a rule-by-rule basis — they have only just arrived — but a quick initial scan shows both familiar issues and new issues. There do not seem to be great difficulties on the individual rule level.

*April Meeting Minutes*

The draft minutes for the April 14-15, 2005 Committee meeting were approved, subject to technical corrections.

*September Judicial Conference*

Judge Rosenthal reported that all of the Civil Rules amendments proposed for adoption by the Standing Committee were approved on the Judicial Conference consent calendar. The amendments included the several rules changes dealing with discovery of electronically stored information, new Supplemental Rule G on civil asset forfeiture, and amended Rule 50(b) to enhance the procedure for renewing a motion for judgment as a matter of law after submission to the jury.

Judge Levi observed that the June Standing Committee agenda was the fullest in memory. The Evidence Rules Committee brought up four rules to resolve longstanding circuit conflicts. One that caught particular attention deals with the admissibility in later proceedings of statements made in settlement discussions. This proposal also was approved on the Judicial Conference consent calendar.

The Bankruptcy Rules Committee has been incredibly busy. The new bankruptcy legislation requires rules changes and new forms within six months. Approximately ten years worth of rulemaking was accomplished in four months, leaving time to disseminate the results. The rules and forms alike deal not only with complex technical issues, but also with important policy questions.

Appellate Rule 32.1 was very controversial in the Judicial Conference. Four circuits do not permit citation of "unpublished" opinions; nine do. The leading opponent of Rule 32.1, which allows parties to cite "nonprecedential" opinions, concluded his remarks by observing that the rule would be retroactive. A motion to make the rule prospective was not much opposed. Having agreed that the rule would require the circuits to allow citation only of opinions adopted after the rule takes effect, the Conference overwhelmingly approved the rule.

Judge Rosenthal added that the Standing Committee spent a lot of time on the electronic-discovery rules. As challenging as these were, they were all approved and no Judicial Conference

member sought to take them off the consent calendar. Informal expressions by several members well-informed on electronic-discovery issues indicated that they had planned to move the rules to the discussion calendar, but that careful study of the proposals showed that they were much improved from earlier versions and did not require discussion. That is a great compliment to the way the process worked, not only with the hard work in the Advisory Committee and Standing Committee, but also in the thoughtful work done by so many participants in the public comment period and in the several meetings that prepared the way before the rules were published.

It was noted that several rules changes will take effect on December 1, 2005. One is a new Rule 5.1, expanding the procedures that implement the right of the United States Attorney General or a state attorney general to intervene in litigation that includes a challenge to a federal or state statute. The others clean up small details. The package headed toward an effective date of December 1, 2006, includes many broader changes.

*Legislative Report*

John Rabiej reported that this Congress again is considering a bill to restore mandatory sanctions to Rule 11. Among other provisions it would require suspension from practice after "three strikes." Similar bills have been introduced in earlier Congresses, always in the House; a bill passed the House in the last Congress, but was not taken up in the Senate. The Administrative Office has again sent a letter expressing Judicial Conference opposition to the legislation, including an account of the Federal Judicial Center survey that showed overwhelming support among federal judges for the 1993 Rule 11 amendments. The House is likely to vote on the bill soon, and to send it to the Senate.

*E-Government Rules*

Judge Fitzwater noted that the E-Government Rules, including Civil Rule 5.2, have been published. He attended a Courtroom 21 conference last week where the rules were discussed. The "two-tier" provision of Civil Rule 5.2, presumptively limiting remote public electronic access to records in social security and immigration cases, drew the most comment. The conference group included people who have strong interests in public access to court records and who fear that this provision is at the top of a slippery slope that will lead to additional restrictions on remote public access.

*Administrative Office*

Peter McCabe observed that there is a budget crisis throughout the judiciary. The Administrative Office has many open positions. But Jeff Barr will be working with the Rules Office on a regular basis.

Advisory Committee and Standing Committee agenda materials soon will be available on line.

Old records, back to 1934, are gradually being put into electronic form. Some records continue to be missing, but real progress has been made.

The Rules website is being used a lot more now. It will prove to be an invaluable research tool as more and more information is made available. The research will be particularly helpful in enabling retrieval of the work of earlier committees on topics that relate to current projects. If Rule 56 is restored to the active agenda, for example, the extensive work that went into the proposal that failed of adoption in 1991 will be a great help.

*Federal Judicial Center Report*

Judge Rosenthal prefaced the Federal Judicial Center Report by noting that the Judicial Conference is committed to study the Class Action Fairness Act's impact on federal courts. This Committee will be involved. The study will help to illuminate additional resource needs that may emerge from an increase in federal-court class actions. In addition, the Act requires a report on good settlement practices within 12 months. Beyond that, the Act may generate practices that have a general impact on Rule 23, showing a need for further work on Rule 23.

Thomas Willging described the FJC proposal distributed to the Committee as an overview of the study design. Other Judicial Conference committees will focus primarily on the impact of CAFA on federal-court resources. It is important that the study also do what it can to shed light on rule-based issues.

The study will focus on three aspects of impact. One is the impact on filings — how many new class actions are brought to federal courts as a result of CAFA? How can the incremental CAFA filings be distinguished from natural growth in class actions? The increment cannot be measured directly, but it may be approximated through a process of triangulation. One factor will be whether the action involves state claims — but if federal claims are included, it will remain uncertain whether the federal claims were added only because the plaintiff anticipated that the action would in any event wind up in federal court. Distinctions will be drawn between cases originally filed in federal courts and cases brought to federal courts by removal. The types of action will be considered, in such categories as personal injury, product liability, property damage, and so on. Trend lines in filings for these various types of actions will be considered; we know that class-action filings increased in the 10 years before CAFA, and can account for that in projecting what would have happened without CAFA.

A second aspect of impact will be at the motions level and beyond. Are there more motions to dismiss or to remand? For class certification? To approve settlements? What types of classes are defined — nationwide, statewide, or something else? Comparisons at the motions level will be difficult. The study will compare the two years from February 18, 2003 through February 17, 2005 with the two years from February 18, 2005 through February 17, 2007. This will not be a direct measure of CAFA's impact, but it will shed some light. This is a fast-moving field.

At the appellate level, there will be a new form of appeal jurisdiction from orders granting remand — how many appeals are sought? How many are granted?

The study will be able to generate preliminary information about filing and removal rates within a few months. But more complete information will take 2 years, 3 years, or even longer. The study cannot be rushed without skewing the information provided.

Discussion began by noting that apart from the jurisdiction provisions, CAFA includes other provisions that bear more directly on Rule 23 practice. Coupon settlements and attorney fees are regulated. Notice of settlements must be given to public authorities. Section 1715(b)(5) goes beyond Rule 23(e)(2) in requiring notice of "side agreements." This and other provisions could affect opt-out choices. It is possible that the impact on federal courts will be shaped by the desire of all parties to be in state court, where it may be easier to achieve a binding settlement.

Discussion continued by noting that some of the inconsistencies between CAFA procedures and Rule 23 may not affect many cases. The "Bank of Boston" provision, for example, § 1713,

allows approval of a settlement that obliges any class member to pay sums to class counsel that would result in a net loss to the class member only on a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss. This sort of settlement will not occur frequently, if ever. Some of the information that must be provided to federal and state officials on settlement will be difficult to get; it is beyond what Rule 23(e) requires. The cost of not providing it is that people are not bound by the settlement; this may create an incentive to avoid federal court. It has been rare to dismiss an action after certification in order to refile in state court; if that starts to happen, it may be a good sign that these CAFA provisions are having an impact on practice.

There is a lot of CAFA case law so far, but it focuses on the effective date, including the impact of Rule 15 relation-back concepts on amendments made after the effective date in actions filed before the effective date. It focuses also on assigning the burden on a motion to remand — does it lie on the removing party, or on the party who seeks remand?

It was noted that the study will be able to show appearances by the officials who get CAFA notices.

The study also will be able to show whether actions seem to concentrate in particular federal courts.

It was further noted that Rule 23 proposals have been kept on hold to see how the Amchem decision plays out. Experience under CAFA may help to show whether these questions should be taken up again.

One troubling question is what happens when the parties stipulate to certification of a class for purposes of seeking approval of a proposed settlement but the settlement is not approved. Should they be estopped from questioning certification of the same class for litigation purposes? A much-criticized Seventh Circuit decision says that agreement on a class definition and certification for settlement should remain binding even if the settlement is not approved. It was noted that this can be a real problem for a defendant — once you start down the settlement road, you need to define a class you can live with. But it should remain possible to argue that a class that is manageable for settlement purposes is not manageable for trial.

Another observation was that it will be interesting to see what unintended effects CAFA will have. One possibility is that the parties will "park" cases in state courts to provide an escape from federal court. Having settled, they may prefer to seek approval in a state court to avoid the possible disruption of notice to government officials; when the settlement is mutually desired, no party has an incentive to remove the action to federal court even though CAFA removal would be available.

CAFA also may lead to more frequent and more sophisticated attacks on settlements, not only by public officials but by other objectors. A lawyer connected to a state attorney general will be able to get authority to appear for the attorney general, mounting a well-financed attack. "The stakes will increase." "Bad" objectors may gain increased influence.

*Agenda — General*

Judge Rosenthal introduced the agenda by noting that this meeting provides a contrast to the intense work at recent meetings to advance proposals dealing with major, complex, and often controversial topics. There will be a lot of final-stage work on the Style Project over the next several months, but the time has come to draw back a bit to consider what topics might be addressed next.

The agenda book presents three types of materials. First are a number of lingering agenda suggestions that might be dropped from the docket for lack of foreseeable interest over the next few

years.

A second type involve a number of discrete topics that have been considered at intervals, without ever benefiting from sufficient time for an informed decision whether to develop a concrete proposal or to move on without proposing changes. Included in this group are such topics as "indicative rulings"; pleading amendments, both in general and with respect to relation back; jury polling; and Rule 30(b)(6) depositions of an organization.

The third set of topics includes longer projects. The time counting project has been launched by appointing a subcommittee that crosses the several advisory committees. Judge Mark Kravitz chairs the subcommittee; Chilton Varner is the Civil Rules member. The subcommittee has developed a template for common issues that span the several sets of rules. The template will be submitted to the advisory committees for consideration at the spring meetings. Once methods of computing time are set, each advisory committee will consider the need to adjust specific time periods in its own set of rules. For the Civil Rules, consideration of specific time periods will extend beyond simple accounting for changes in the computation rules. Some of the specific periods present obvious problems — indeed the problems are so apparent that no one expects them to be observed.

Two other possible long projects include reconsideration of notice pleading and revising the procedures that surround summary judgment. These projects would consider basic issues of how courts decide cases, and the ways in which parties and lawyers litigate. For many years various groups have asked that these topics be seriously considered. The present purpose is not to decide what the outcome might be, nor even to decide immediately whether to commit to a full-blown project. Instead the purpose is to begin deliberating the question whether one or both of these subjects is ripe for further work in the near future.

Finally, the Class Action Fairness Act may provide an occasion for deciding whether we should soon return to the class-action provisions of Civil Rule 23. It is too early even to guess what impacts it will have, but the consequences may generate new issues that will require consideration.

*Time Project*

Chilton Varner reported on the work of the Standing Committee Subcommittee that is directing the time project. The Subcommittee is primarily responsible for achieving a uniform approach by the several advisory committees to the rules that govern time computations. In addition to uniformity, simplification is an important goal. The specific periods allowed for specific procedures are left to the primary responsibility of each advisory committee.

The Subcommittee has met once and has reached consensus on a number of issues. Many issues have presented no problem. All the sets of rules, for example, agree that the day from which a time period runs should be excluded in computing the period.

The "11-day" rule, on the other hand, is confusing. This is the rule that excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11 days. [In the Bankruptcy Rules the period is less than 8 days.] It is counter-intuitive that a 14-day period often can be shorter than a 10-day period. The Subcommittee believes that "days should be days." If that approach is adopted, the Appellate Rules Committee can revise the few Appellate Rules that deliberately refer to "calendar days" in order to escape the 11-day rule.

The Subcommittee has agreed that the changes in time-computing rules should be made simultaneously in all of the individual sets of rules. As a practical matter that will require that all of the work in reconsidering specific time periods will have to be done by a single effective date.

Eliminating the 11-day rule, for example, would have a dramatic effect on the meaning of the many 10-day periods in the Civil Rules. Many of those periods should be reconsidered before the new computing rule takes effect.

There is continuing uncertainty as to what should be done with the rules, such as Civil Rule 6(a), that excuse filing on a day when the clerk's office is inaccessible because of "weather or other conditions." Electronic filing tests this rule in at least two directions. In one direction, difficulties with computer systems may mean either that the court's system is unable to accept filings or that the filer's system is unable to transmit a filing. In another direction, the court's computer system may be accessible for filing when weather or other conditions prevent access to the clerk's office. It is not clear whether the time has come to adapt these rules to the circumstances of electronic filing.

The Subcommittee began with a disposition to eliminate the provisions such as Civil Rule 6(e) that allow an additional 3 days for filing after service by any means other than personal service. But study has suggested that there may be difficult issues here; no resolution has been reached. It may be that this question is bound up with disposition of the individual time periods allowed by specific rules — they may be made sufficient to allow for delays in transmission by mail, computer malfunctions, and the like. At the same time, elimination of Rule 6(e) and parallel rules might tempt lawyers to pick a mode of service that as a practical matter reduces the time available to respond.

Another issue that needs consideration is the handling of periods expressed in hours. Some statutes are beginning to adopt such periods. If the final hour falls on a Saturday, Sunday, or legal holiday, when should the constructive concluding hour run?

Another set of problems arise from "backward-looking" deadlines, such as the Civil Rule 56(c) requirement that a summary-judgment motion be filed at least 10 days before the time fixed for a hearing. The difficulties arise because often there is not a fixed date to count back from.

Discussion began with the observation that time rules are very important. Lawyers devote great effort to calculating time periods, yet mistakes are made. And periods expressed in terms of service can raise difficult fact disputes; when a period can be measured with respect to filing there is a clear event that the court knows without difficulty.

Another set of questions may arise from the scope of the time rules. Civil Rule 6(a), as parallel provisions in other rules sets, applies to computing time periods set by statutes. This aspect of the rule may generate some unanticipated consequences.

Yet another set of questions arises from the Civil Rule 6(b) combination of generous provisions for extending time periods with a flat prohibition on extending the times for motions under Rules 50, 52, 59, and 60. The prohibition generates two kinds of problems. One is that lawyers frequently overlook this rule, seeking extensions that cannot be given. When on occasion a judge cooperates in overlooking the rule, the consequence can be loss not only of the right for post-judgment relief but also loss of the right to appeal. The other problem is that the 10-day periods provided in Rules 50, 52, and 59 may be too brief to support effective motions in complex cases. District courts can circumvent this problem by the expedient of delaying entry of judgment, but that approach requires that the need for more time be anticipated and even then exists in tension with the prohibition against a direct extension.

It also was noted that the Criminal Rules Committee likes the oft-repeated suggestion of one participant that time periods often should be expressed in multiples of 7 days. The advantage would be to reduce the number of occasions on which a period ends on a Saturday, Sunday, or legal holiday.

A choice must be made as to the best method for considering the great many time periods established in the Civil Rules. It may be desirable to provide for consideration by dividing the Committee into two subcommittees, with review in the full Committee. But it may be desirable instead to address the questions initially in the full Committee to facilitate uniform approaches.

*Agenda Cleansing*

The agenda materials included brief summaries of 33 proposals that have been held on the docket, some of them for several years, without eliciting any sign of interest. Some of them seem worthy ideas that nonetheless are too much points of detail to warrant constant fiddling with the rules. They were presented for discussion on a rule that any member could retain any proposal on the docket for further development at a future meeting. There was brief discussion of two of the proposals.

Uncertainty was expressed as to the nature of the problems that might arise from the 2000 Rule 5(d) amendment that reduces the filing of discovery materials; in 1999 the Standing Committee was concerned that the change might affect evidentiary privileges. There has not been any sign of difficulty since the amendment took effect, and the Reporter of the Evidence Rules Committee sees no reason for concern.

Another of these items suggested amendment of Rule 7.1 to address failure to provide the required disclosure statement. The Rules Office staff conducted a survey of district court clerks in 10 districts, large and small. Nine of the ten said there was no problem. The clerk for the Southern District of Indiana said there is a problem, but not one that merits rule revision. Failure to file a required statement is handled by contacting the parties.

A motion to delete all of these items from the discussion docket passed unanimously.

*Rule 8(c)*

Apart from the notice pleading question discussed separately, the agenda presents two small questions about Rule 8(c). Each emerged from the Style Project.

One question is whether the designation of "contributory negligence" as an affirmative defense should be revised to reflect the general adoption of comparative negligence in place of contributory negligence. Only a few states continue to cling to contributory negligence. A change, however, would force choice of a new term. Should it be comparative negligence? Comparative fault, because comparison is used with respect to non-negligence claims, as when a manufacturing defect claim of strict liability is met by a defense that the plaintiff was negligent in using the defective product? Or, more accurately still, comparative responsibility because the single numerical allocation of responsibility encompasses both degree of departure from the required standard of care and also relative causal contribution? It was observed that there is no apparent sign of difficulty arising from continued reference to contributory negligence, either because everyone understands it to embrace comparative responsibility or because the extension is automatically made by example through the residuary language of Rule 8(c) encompassing "any other matter constituting an avoidance or affirmative defense." Given the disposition of the larger questions addressed to Rule 8(c), no final determination was made on this question.

The second question was raised by the longstanding suggestion that "discharge in bankruptcy" is no longer an affirmative defense. Judge Walker expanded on this suggestion. Present 11 U.S.C. § 524 carries forward former section 14f, added to the Bankruptcy Act in 1970. Under § 524 a discharge 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 debt discharged in bankruptcy as a personal liability of the debtor, whether or not the discharge is waived. Violation of § 524 is punishable as contempt. It is no longer viewed as an affirmative defense. A default judgment obtained in violation of § 524 is void.

It was agreed that "discharge in bankruptcy" should be deleted from the list of illustrative affirmative defenses in Rule 8(c). There is no pressing problem, as witnessed by the long survival of this example after it became irrelevant. The change will be made as part of the next convenient package of amendments published for comment.

Discussion beyond those two issues raised the question whether all of the list should be deleted in favor of a simple statement that a defendant should plead any matter that is an affirmative defense under applicable law. That would avoid potential confusions with state law, which may supply different characterizations than the federal rules do. Many of the matters enumerated are likely to arise far more often in state-law cases than in federal-question cases.

It was asked whether it really would be wise to remove the list of examples from Rule 8(c). To be sure, the list is incomplete. And it would be a mistake to attempt to generate a more complete list, in part because of the substantive overtones and in part because the list never will be fully complete. But there is some value in offering common illustrations — although such items as injury by fellow servant may be hopelessly antiquated.

It was concluded that these questions should be carried forward, to be considered as part of any broader exploration of notice pleading that may be undertaken. If there is no broader project, the questions might be considered again independently.

*Rule 15*

The agenda book presents two pleading topics. One is the question whether the broad general approach of "notice" pleading should be reconsidered. The other is a narrower set of questions addressed to the amendment practice established by Rule 15. Movement away from notice pleading might have a profound impact on amendment practice, but it remains useful to consider possible revisions of Rule 15 within the present notice pleading system. There are compelling reasons to draw back from any general rejection of notice pleading, reasons that in turn ensure that any change will be made only after protracted consideration and debate. A subcommittee considered Rule 15 questions not long ago, and recommended that any study be deferred pending completion of other large projects. Those projects have been completed, and the time is ripe to begin defining the next set of projects. For that matter, one special aspect of Rule 15(c) has come on for substantial attention this year as courts struggle with the need to apply the February 18, 2005 effective date of the Class Action Fairness Act jurisdiction and removal provisions to litigation commenced earlier but subject to later amendments.

Four options are suggested for dealing with these issues: a thorough revision of Rule 15; a very narrow revision of Rule 15(c)(3) to allow relation back not only when there is a mistake but also when there is a lack of information as to the identity of a new defendant; do nothing now, but keep these questions on the docket for future consideration; and purge Rule 15 from the docket.

A somewhat more detailed summary of the Rule 15 materials was provided.

One discrete set of questions arises from the seemingly odd provision in Rule 15(a) that cuts off the right to amend once as a matter of course on the filing of a responsive pleading but not on the filing of a responsive motion. Judges have suggested that this should be changed — among the

suggestions submitted to the Committee are that the right to amend as a matter of course should be eliminated, or that it should terminate when a motion to dismiss is filed. Particular irritation is expressed over the experience of encountering an amended complaint filed after submission of a motion to dismiss. Many other revisions are possible, including a revision that would allow amendment as a matter of right within a defined period after a responsive pleading or motion is filed. This generous approach might be defended on the grounds that it remains possible to misplead a valid claim and that leave to amend would almost certainly be granted to any plaintiff who wishes to persist in face of the initial objections.

Other general Rule 15 suggestions have been that Rule 15(b) may be too generous in its approach to amendment at trial; that amendment should be accomplished by filing a complete amended pleading rather than a separate document that must be considered together with earlier pleadings; and that Rule 13(f) might be better integrated with Rule 15.

A different Rule 15 issue has held a place of honor on the agenda for several years. It began with a simple suggestion to amend Rule 15(c)(3). One of the tests for permitting relation back of an amendment changing the party against whom a claim is asserted is that within an appropriate time the new party must have notice so that it knew or should have known that it would have been sued "but for a mistake concerning the identity of the proper party." This language has been tested in many cases in which the plaintiff knew that it could not identify a party that it would make a defendant if identification were possible. Recurring illustrations are provided by actions claiming unlawful police behavior in which the plaintiff cannot name the police officers involved. Several circuits have ruled that in such cases there is no "mistake" and that an amendment naming the proper police officer defendant cannot relate back even though all other (c)(3) requirements are satisfied. It is possible to conjure up reasons to explain this result — the plaintiff who knows of the identity problem should work harder, or file earlier in the limitations period. But these reasons are not compelling. The Third Circuit has rejected them in forceful dictum, and has suggested that the rule should be amended to allow relation back when the new defendant knows it would have been named but for a "mistake or lack of information concerning the identity of the proper party."

Consideration of this seemingly simple proposal initially leads to the question whether other aspects of Rule 15(c) might usefully be considered at the same time. But this way lies madness. As a matter of abstract theory, it is possible to imagine many untoward results arising from the invocation of Rule 4(m) in (c)(3). There is no indication that these possibilities in fact have emerged in practice, but it is fair to wonder whether it is proper to amend the rule even in a small way when it presents manifest opportunities for mischief.

Beyond the drafting problems with present Rule 15(c)(3) lies the central question whether (c)(2) and (c)(3) present genuine Enabling Act questions. (c)(1) provides for relation back when "permitted by the law that provides the statute of limitations applicable to the action." That means that the only occasion for invoking (2) or (3) arises then the applicable limitations law does not permit relation back. These paragraphs operate to defeat a defense established by controlling limitations law. How is this a matter of practice or procedure that does not abridge or modify the defendant's substantive rights and enlarge the plaintiff's substantive rights? There may indeed be cases in which the problem really is one of pleading misadventure, and in which all reasonable limitations policies have been satisfied. The case that prompted the adoption of Rule 15(c)(3), Schiavone v. Fortune, 1986, 477 U.S. 21, may well be such a case. It involved the mistaken designation of the defendant under the name of the division that committed the allegedly wrongful acts rather than under the proper corporate name. The 1991 Committee Note begins by stating that Rule 15 is "revised to prevent parties against whom claims are made from taking unjust advantage

of otherwise inconsequential pleading errors to sustain a limitations defense." But in many cases — and particularly in cases where the plaintiff knows that it cannot identify an intended defendant — the problem is not really a problem of pleading procedure. It is one of limitations policy. Rule 15(c) can be defended as good limitations policy, but is that enough? Is it enough because Courts have accepted relation back under Rule 15(c) since 1966 without hesitating over Enabling Act abstractions?

Discussion began by asking whether law professors tend to think there are serious Enabling Act problems with Rule 15(c). One answer was that "it is problematic." Another answer began with the observation that before 1991 it was possible to argue that then-Rule 15(c) governed relation back exclusively, prohibiting relation back outside its terms even if state law would permit it. The First Circuit rejected this argument, and properly so. Present (c)(1) is a desirable recognition that federal courts should honor state law that permits relation back. But what of the situation where state law prohibits relation back? It has been accepted for a long time that 15(c) properly permits what state law does not permit. If it is not currently invalid, a small change might not make any difference. At the same time, it can be predicted that any change will encourage some academic doubters to renew the general question of validity. And it is possible that state attorneys general also will challenge it — they have a strong interest in the many civil rights actions challenging acts by state officials.

It was suggested that it would be possible to address the 15(a) questions and then perhaps think about subdivision (c) as a matter of "fairness."

The discussion concluded at this point to defer to the last remaining agenda item, Rule 30(b)(6). It was agreed that Rule 15 would be carried forward for future discussion. It may prove useful to again seek work in a subcommittee before bringing these questions back to the full committee.

*Rule 26(a)(2)(B): Employee Expert Witnesses*

This topic was brought to the docket by a law review article submitted as a suggestion. Rule 26(a)(2)(B) clearly limits the obligation to disclose an expert witness report to expert trial witnesses who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve the giving of expert testimony." That means that a report need not be provided for an employee who will testify as an expert witness but whose duties as an employee do not regularly involve the giving of expert testimony. Or so it seems. A majority of the reported cases dealing with this subject take a different approach. They say that disclosure of an expert report is a good thing because it facilitates deposition of the expert, and might at times make it unnecessary to depose the expert. The Committee Note extols the virtues of expert witness reports. In effect, the Committee did not really appreciate what it was doing when it wrote the rule text, so the rule should be read to require a report because an employee who does not regularly give expert testimony is specially retained or employed to give testimony in this case.

These cases fairly pose the question: if the 1993 rule had it right, something might be done to restore the intended meaning. But if the cases are right in believing that a report should be required, finding no worthy distinction based on the regularity with which a particular employee provides expert testimony, something might be done to adopt this revisionist view in the rule text.

Discussion began with the observation that this is a real problem in practice. The conflict in the cases may not be resolved in a particular case until it is too late to do it some other way. A careful response is to give notice to the other side that a particular witness is or is not required to give a report, inviting a response in case of disagreement. There is a particularly serious problem

with privilege waiver.

It was noted that in 1997 the ABA Litigation Section offered a report, subsequently withdrawn, complaining that some courts were requiring treating physicians to give expert witness reports under 26(a)(2)(B) even though the Committee Note offers them as a clear illustration of expert witnesses who need not give a report and the cases recognize that a treating physician becomes specially retained or employed only if asked by a lawyer to do something in addition to regular treatment and testimony based on the treatment.

A further question may arise from the relationship to Rule 26(b)(4)(B), which severely limits the right to depose an expert who has been retained or specially employed in anticipation of litigation but who will not be used as a witness at trial.

The problem of privilege waiver is addressed in the Rule 26(b)(2)(B) Committee Note, where it is observed that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Some lawyers continue to fight a rearguard argument that work-product information need not be included in the report even though it was consulted in forming the expert's opinion.

It was asked whether, apart from possible problems of work-product and privilege, there is a good reason not to require a report?

One response was that the 1993 changes in the wording of Rules 26(b)(3) and (4) have introduced uncertainty about the extent of work-product protection for employees. There is a risk that some will be designated as nontestifying "retained" experts to shield against discovery.

A second response was that an employee may be designated as an expert witness under Evidence Rules 702, 703, or 705 because the party is not sure whether the testimony can be admitted as lay opinion testimony under Rule 701. Requiring an "expert" report in these circumstances may be too much.

Beyond opinion, moreover, employee witnesses often will be testifying to blends of historic fact and opinion quite different from the opinions typically provided by a professional expert witness. The universe of information considered by an employee may be far broader than the information provided to a professional expert witness. There may be compelling reasons to enable employee witnesses to talk with the employer's attorneys under shield of privilege. There was a lot of law to that effect before adoption of Rule 26(b)(2)(B).

Privilege was recognized as a problem, but with the suggestion that it tends to be raised early on in the litigation as the parties discuss deadlines for exchanging reports. The careful practitioner, moreover, will ask who has the burden: is it on the party offering a witness to give a report? Or on the other party to depose the witness? If there is no obligation to give a report, a trial-witness expert can be deposed without waiting for the report. Questions asked at deposition may be blocked by an assertion of privilege. Then the privilege question will need to be addressed.

This line was pursued further by asking why it should make any difference to privilege whether a report is required. If privilege and work-product protection should be waived by offering information to a witness for consideration in forming an expert opinion, adoption of an expert-report requirement does nothing more than advance the point at which the otherwise protected information must be revealed. Examination at deposition or trial should be subject to the same waiver principle

even though there was no requirement to disclose a report. If the Committee Note to Rule 26(b)(2)(B) got it right, it is not because there is a distinction with respect to privilege waiver between expert trial witnesses who are obliged to give a disclosure report and those who are not. The same holds true for the Evidence Rule 612 provisions on production of documents used by a witness to refresh recollection, provisions that may be invoked at deposition as well as at trial.

This discussion led to the question whether indeed privilege-waiver theories should distinguish between hired experts (and the functional equivalent in employees who regularly give expert testimony) and employees who occasionally are called upon to give expert testimony. There may be an important difference between the need to disclose a 10-page advocacy summary provided to a hired expert witness and the full range of information available to an employee who may of necessity be involved in helping to prepare the fact information required to try the case. Truly privileged information may deserve protection, being careful to distinguish merely "confidential" information that may deserve a protective order but not the absolute protection of privilege. This distinction may be implicit in the 1993 Committee Note to Rule 26(b)(2)(B), and in turn reflect on the reasons for distinguishing between employees whose duties regularly involve giving expert testimony and other employees sporadically called upon to provide expert testimony.

This thought was expressed more succinctly. The "hired gun" expert witness is a better subject for privilege waiver than the employee who is no more than an occasional trial expert witness. The rule is designed to focus on the independent expert.

A subtle variation was suggested: perhaps privilege should be waived only if the employee actually relied on the privileged information in forming an opinion. If it was merely considered but not relied upon, there would be no waiver.

It was noted that Professor Capra, Evidence Rules Committee Reporter, believes that there is a lot of confusion in this area and that it deserves further work.

Further discussion reiterated concern that several cases seem to disregard what the rule clearly says about reports from employees who do not regularly give expert testimony. It may be better to require reports from all expert trial witnesses, subject to protecting privilege and work-product information. On the other hand, protecting privilege and work product may prove particularly difficult with respect to employees. And it is important that a party know what are the consequences of designating an expert trial witness.

At the end of the discussion it was concluded that the 1993 rule may well have got it right, but that there are very difficult problems of privilege in addition to the question whether it is better to identify a category of employee expert trial witnesses subject to deposition directly without an obligation to first disclose an expert report. The question will be carried forward for discussion at the spring meeting. Among the materials to be considered may be a revision of Rule 26(b)(2)(B) that sharpens the distinction now drawn among categories of employee experts and that provides Committee Note discussion that further explains the problems of privilege and work-product waiver.

*Rule 30(b)(6): Organization as Deponent*

Professor Marcus introduced Rule 30(b)(6) by noting that it was adopted in 1970 to cure the runaround corporate defendants inflicted on people seeking corporate information. Whoever might be named as deponent would prove unable to provide pertinent information, leading to a practice requiring chains of successive depositions that was called "bandying." Deposition of the organization makes the organization responsible for designating people who will testify for it on the subjects identified in the deposition notice. Even with this procedure, courts still regularly find that

corporations have not met the obligation to identify knowledgeable witnesses.

The current questions were initiated by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. They suggest that Rule 30(b)(6) is used in overreaching ways, and in particular is used to intrude on work-product protection. The tensions seem to focus on how much effort is required by the organization deponent to educate individuals in all of the "matters known or reasonably available to the organization." In addition, there are common efforts to argue that an organization's designated witness "binds" the organization by deposition answers. And there are more general concerns that these depositions are used to dig too deep.

It is not clear how far any real problems that may be identified are susceptible of correction by rules changes. The New York Bar proposal would change Rule 30(b)(6) only by limiting the inquiry to "factual" matters; the rest of their suggestions are framed as best-practice guides. It does not seem likely that the Committee will conclude that this rule should be repealed, although other means are available to address the "runaround" problem. It would be possible to address the "admission" problem in rule text; part of the strategy might be to allow changed statements of position but only by supplementing the deposition. The Rule 26(e)(1) duty to supplement an expert witness deposition might be a useful model. The numerical limit questions also can be answered directly — if an organization designates ten persons to appear at its deposition, does that exhaust the presumptive ten-deposition limit? Does each person count as a separate deposition for the limit to one day of seven hours, even though in form this is a single deposition of the organization? If some changes are made in the rule text, finally, it may be appropriate to describe and address the background problems in the Committee Note.

Judge Rosenthal then introduced David Bernick, recently a member of the Standing Committee. He was asked to describe his experience with Rule 30(b)(6) depositions because of his extraordinary range of experience in discovery and actual trial of highly complex cases and because his years on the Standing Committee have assured his understanding of the opportunities and limits of the Enabling Act process.

Mr. Bernick began discussion with a "war story." The witness designated to testify for a corporation about document management procedures did not know about a particular document showing advice by a British lawyer to an affiliated company. The document was the subject of a default sanction in an Australian court in litigation involving an affiliated company, not the corporation that was deponent in the United States proceeding. But the federal court ordered sanctions for failure to provide a witness with knowledge of the document, in face of the argument that to produce a witness with knowledge of the document would necessarily waive privilege. Very complex issues can be involved.

The problems arise from a conflict between substantive corporate law and trial evidence rules. A corporation is a legal construct. Evidence rules focus on reliable, ascertainable facts. Corporate "knowledge" or "action" is derived by inference from the facts of what corporate people do. A judge or jury has to draw inferences, for example, as to what the entity "knew"; it is difficult to reconcile the nature of the party — a legal construct — with evidence rules that do not focus on entities.

Rule 30(b)(6) operates in this context. It operates by creating a über-person whose knowledge is commensurate with what anyone in the organization knows or could reasonably learn. And this testimony binds the organization — the deponent speaks as the organization. And this person can speak for the legal positions of the organization.

The organization deposition serves functions that also can be served by other discovery devices. Rule 33 interrogatories and Rule 36 requests to admit can gather facts. It functions with respect to "ultimate facts" — is the product "safe"? That function can be served by interrogatories, requests to admit, and depositions of persons who have personal knowledge. It also is used to ask for contentions; depositions ordinarily are not used for that, although there may be cases in which the very decision to file the case is a fair subject. Ordinarily interrogatories or requests to admit should be used for contention discovery.

Finally, the unique function of the organization deposition as it has developed is to provide evidence that is dispositive of what the organization can say. Once said by the deponent, the statement becomes the organization's position on the issue. These are treated as "organization facts" within the organization's custody or control. Rule 33 might at times be used for this purpose, but it is not often used this way. Interrogatories are used in the early stages of the litigation and there is flexibility in answering that forestalls limiting effects. The answers to interrogatories made early in a litigation reserve the right to change or supplement. And if one party asks another party to supplement interrogatory answers, the supplementing can be done by way of incorporating depositions and expert reports — for this reason, supplementation is commonly not requested.

In other settings, depositions rarely provide case-dispositive facts. Requests to admit might be used for this purpose late in the litigation, but it is difficult to frame the requests and the response usually will be a denial. But Rule 30(b)(6) is being used to establish case-dispositive evidence early in the litigation.

The rationale for adopting Rule 30(b)(6) was to solve the runaround problem. It is fair to address that problem. But current usage of the rule goes far beyond that initial purpose. And case law probably will not solve the problem. Nothing in the rule text addresses it. The problem can be solved only by reading into the rule a gloss that does not appear from the language.

Work-product doctrine does not of itself defeat contention discovery; Rules 33 and 36 establish that.

Only an amendment will cure the problem. And amendment should not be difficult. What is needed is a statement of the purpose served by an organization deposition. It is designed for discovery of the "locations of information," so that the vastness of the entity does not hide the information. Use for this purpose early in the litigation is desirable. What does exist, where does it exist, who was it that did the relevant things?

So the rule could authorize a deposition "to ascertain the location of facts discoverable under these rules and within the custody or control of the organization." If for some reason it seems desirable to use these depositions as a uniform vehicle for conducting all discovery of the organization, "location of" could be omitted — "to ascertain the facts discoverable under these rules and within the custody or control of the organization." Discovery would be limited to facts, not contentions, but still could be dispositive as to the facts testified to.

The first question asked after this presentation was why the problem is anything more than a Rule 37 problem focused on an organization's failure to designate someone who has the required corporate knowledge? The answer was that "the consequence is way beyond sanctions." If the witness says "I do not know what testing we did fifty years ago" the deposition statement is used at trial to show that the organization is irresponsible.

Then it was asked why an organization does not address these problems by seeking a protective order? The answer is that present practice is not seen as a misuse of the rule. The

problem is the scope of what can properly be asked as the rule is understood. The inquiry can ask more than any person knows. The designated person or persons are required to know everything known anywhere within the organization, and their answers are binding. The Evidence Rules are driven by personal knowledge; a rule 30(b)(6) deponent is required to testify to things that are not personal knowledge.

Beyond that, it is a real burden to have to litigate arguments whether the designated persons failed to do their homework properly. But that burden is less important than the use that is made at trial. If the organization argues that the deposition statement is not right, the opposing party will use the inconsistency — they said one thing, now they say that's not right, when will they get it right?

One Committee member observed that he had obtained a protective order against an adversary's attempt to use a Rule 30(b)(6) deposition to shift the burden of discovery to the organization. Mr. Bernick agreed that the rule should not be used in that way, but noted that many judges disagree. They demand that the organization produce persons with both personal and attributed knowledge. "Undue burden" might be used as a limit, but it has not yet proved a generally effective argument.

It was asked whether courts do permit trial testimony that contradicts things said at the organization deposition — whether the problem is not binding effect, but the admissibility of the conflicting deposition statement? Mr. Bernick responded that some courts do preclude contradiction at trial, and that even if contradiction is permitted the scope of the trial evidence may be limited.

This deposition problem is quite different from the problem that an organization can speak at trial, as at deposition, only through persons. The people who testify at trial will be the right people, the people with the right personal knowledge. And they do not bind the organization on the ultimate issues. The problem, still, is the scope of what the deposition witness is required to speak to — the inquiry is not limited to personal knowledge. For this reason, the requirement that the deposition notice specify the topics for inquiry does not provide effective protection. And if the organization produces witnesses who disagree, they will be asked "what is the organization's position" on the disagreement.

An organization that designates its own trial witnesses thinks long and hard about who they should be. They can be limited to specific topics. They are not required to testify to the ultimate legal conclusion. The pharmaceutical witness will not be asked to address the clinical studies, and so on.

The source of the problem is in large part the obligation to testify to "matters known or reasonably available to the organization." The entity is the deponent. What makes sense is to require it to designate people who learn about where to go to get the information, to identify the witnesses that should be deposed because they have personal knowledge, to identify the documents that should be searched for.

It was asked what should be done when an action is based on long-ago facts that are outside the personal knowledge of any of the organization's people? Mr. Bernick's response was that a rule limited to the location of evidence could include a duty to find who, even including retirees or other no-longer-related people, may have personal knowledge. There is a distinction among people who know of direct experience, people who know only because they are educated specifically for the purpose of discovery, and people who know not of their personal experience but because in the ordinary course of their duties for the organization they learn the relevant information. The problem of Rule 30(b)(6) arises only with respect to those who must be educated for the purpose of discovery, not for other reasons.

So, it was observed, if an employee reads documents solely for the purpose of preparing for an organization deposition, this is "30(b)(6) 'knowledge,'" not real knowledge. The point can be emphasized by asking what happens if the 30(b)(6) witness testifies very effectively. The other side does not use the deposition. If the organization puts the witness on the stand, the witness cannot testify to 30(b)(6) knowledge unless she can be qualified as an "expert" on the subject. But if the other side likes the deposition, it can be used as the deposition of the organization.

It was asked whether, before 1970, the deposition testimony of a person who is an officer, director, or managing agent of an organization "bound" the organization. It was thought that the testimony was binding, but that the deposition of other organization employees did not bind the organization at all. So today, it is possible that an organization may not find anyone other than an officer, director, or managing agent that is willing to testify at the organization deposition — then it may still be "bound."

A quite different perspective was offered. "[M]atters known or reasonably available" could be read as a restriction on the scope of the deposition and preparation, not a broadening. If the rule were revised, the Committee Note might explain that the location of documents and the identity of fact witnesses are proper subjects; that fifty-year-old information is not; that contentions are not. And an organization should be able to ask for a protective order — for example, to argue that the only purpose of asking about fifty-year-old information is to set the organization up for inappropriate use of the deposition at trial.

It was agreed that an actively interested judge can prevent abuses. But organization deposition problems do not interest many judges. Protective-order motions rarely succeed. The problems will not be solved by hoping that judges will suddenly become interested.

It was observed that some organization lawyers have said that they like 30(b)(6) depositions because they can pick the best deponent. Mr. Bernick responded that you can do this for your trial witnesses. But it is a hassle in major cases. Abuse happens only in a small minority of cases, but when it happens it is a real problem.

And if you produce someone for a 30(b)(6) deposition, you may be ordered to produce the same person for a second deposition.

Mr. Bernick renewed his suggestion that the rule should be amended to direct that the organization's person "must testify about the location of facts discoverable under these rules and within the custody or control of the organization." This is legitimate. It saves a great deal of time. "[L]ocation of facts" for this purpose includes documents and people.

It was suggested in response that it still may be useful to employ 30(b)(6) to dispose of issues easily dealt with. This would not be to seek admissions about matters that are in controversy, but instead to find out what actually is in controversy.

A different suggestion was that the rule would be improved if it still directed the organization to produce a person made knowledgeable about a designated topic, but made it clear that the deposition has no greater effect on the organization than if the same witness had been deposed individually.

Another suggestion was that the rule might be amended to make clear that the scope is a limitation, not an invitation: the deposition "must be limited to matters known or reasonably available to the organization."

The discussion concluded that there is a lot to think about on this topic. It may prove useful

to designate a subcommittee to consider these issues. Consultation with the Evidence Rules Committee may be in order. Further work will be done.

*Lawyer Signatures on Rule 33, 36 Responses*

An ambiguity — or perhaps a conflict — arises from the relationship between Rule 26(g)(2), adopted in 1983, and earlier provisions of Rules 33 and 36. Rule 26(g)(2) says that every discovery response shall be signed by at least one attorney of record, or by an unrepresented party. The Committee Note says explicitly that "[t]he term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests." There seems no question — an attorney is to sign the answers to interrogatories and also answers to requests to admit.

Rule 33(b)(2), however, says that answers to interrogatories "are to be signed by the person making them, and the objections signed by the attorney making them." The direction that the person making the answers also sign them has appeared in Rule 33 from the beginning. The direction that the attorney sign objections was added in 1970; it is obviously sensible to direct that objections be signed by the attorney, who is more responsible than the party for understanding the reasons that may make an interrogatory objectionable. There is no indication of any intent that the attorney provide a second signature on the answers; that question is posed only by the 1983 adoption of Rule 26(g)(2).

The second paragraph of Rule 36(a) is similar. Each matter of which admission is requested is admitted unless the party addressed by the request serves "a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Here too the language seems to contemplate that the party or the attorney, one or the other, may sign. This provision also dates from 1970, made as part of the decision to delete the former requirement that a party addressed by a request to admit respond by a sworn statement. The Committee Note says, among other things, that Rule 36 admissions function very much as pleadings do, perhaps indicating that an attorney signature suffices.

On the face it, reconciliation seems easy. The later and more specific requirements of Rule 26(g)(2) were clearly intended to require the lawyer for a represented party to sign answers to interrogatories and to requests to admit as discovery "responses." On this view, the only question is whether more specific drafting should be undertaken, perhaps as part of the final stages of the Style Project.

Discussion began with the question why it makes any sense to have both attorney and party sign a discovery response. The lawyer wants the party or its representative to sign the interrogatory answer to impress the obligation of full and truthful answers. It makes sense to have the lawyer sign objections, but why the answers? The signature makes the lawyer vouch for the answers: is that appropriate? It was noted that the Model Rules of Professional Responsibility hold a lawyer responsible if the lawyer knows an answer is false; "if you're responsible, you should sign." But it also was suggested that "an angry judge" does not distinguish between lawyer and party when "an answer is bad" — it makes no difference who signed it. The lawyer is "on the hook" even without signing.

In similar vein, it was suggested that "response" should be taken out of Rule 26(g), leaving Rules 33 and 36 as they are. One problem might be that an opposing party will argue that the lawyer's signature should be admitted in evidence when an interrogatory answer is admitted, putting the lawyer's credibility in issue at trial.

Several members said they had never seen a lawyer sign answers to interrogatories; the lawyer signs the transmittal, but not the answers.

This much discussion suggested that whatever else might be done, the question is too important to be addressed through the Style Project. But that leaves the question whether something should be done to achieve a smoother fit between these rules.

Some members suggested that the topic would be controversial if an amendment is proposed, and that it is better to avoid the controversy unless there is some sign that there are actual difficulties in practice.

But it was suggested that the question may not be so simple. Rule 26(g) was specifically adopted to import standards similar to Rule 11 into discovery practice, and Rule 11(d) was later adopted to make it clear that Rule 11 governs all other matters while Rule 26(g) governs discovery responses. It is important to maintain in the rules a clear sense of attorney responsibility for diligent and truthful answers to all modes of discovery, recognizing that the problems presented by questionable deposition testimony are different. That is what the 1983 Committee Note to Rule 26(g) says.

In the end it was concluded that this topic should be carried forward on the docket without any immediate need for further work. If there is some sign of real difficulties in practice, it can be taken up again.

*Rule 48: Jury Polling*

It has been suggested that the Civil Rules should include a provision on jury polling. A model is ready to hand in Criminal Rule 31(d). This model allows the court to poll the jury on its own, and requires a poll if it is requested by any party. Polling both ensures that the verdict is indeed the verdict of all jurors, and may reveal problems while there still is an opportunity to solve them without need for a new trial.

The Federal Judicial Center was asked to gather figures on the frequency of hung juries as an indication of the possible risk that routine polling might result in frequent new trials. A study of more than 100,000 jury trials over a period of 25 years from 1980 through 2004 showed that fewer than 1% of civil jury trials result in a hung jury. This information suggests that there is not likely to be much of a problem in this direction.

Committee members expressed the view that this is a good suggestion, with no significant disadvantage.

One possible problem was noted with the language of Criminal Rule 31(d), which calls on the court to poll the jurors "individually." It has been argued on a recent appeal, not yet decided, that "individual" polling requires that the court poll each juror separately in chambers, apart from the other jurors. Resolution of the appeal will indicate whether there is indeed a problem, or whether there is convenient authority to cite to show there is no problem.

It was asked whether it would be better in Civil Rule 48 to use the same expression as in Civil Rule 49, offering as one option a "new trial" rather than "declare a mistrial and discharge the jury." The reference to mistrial in the Criminal Rule may reflect the sensitivity that surrounds double-jeopardy interests: a new trial may not always be available after a mistrial. But it was suggested that since the Civil Rule will address a problem addressed by a parallel Criminal Rule, it is better to adopt exactly the same expression unless there is some more persuasive reason for departure.

This topic will be the subject of a proposal to publish a rule at the spring meeting.

*Rules 54(d)(2), 58(c)(2), Appellate Rule 4*

The Appellate Rules Committee, in response to questions explored in Wikol v. Birmingham Public Schools Bd. of Educ., 6th Cir.2004, 360 F.3d 604, has suggested that Civil Rule 58(c)(2) be amended to impose a deadline for exercising the trial court's authority to order that a motion for attorney fees suspend the time to appeal the judgment on the merits. The Sixth Circuit opinion, and the exchanges between the Civil Rules and Appellate Rules Reporters, clearly demonstrate the complexity of the interrelated rules provisions that must be navigated to understand present procedure. They also reveal a potential flaw in the language of Rule 58(c)(2) that could, in unsympathetic or maladroit hands, lead to a foolish result enabling the trial court to extend appeal time long after it has concluded.

If that abstract description seems to call for a rule amendment, however, it may be met by countervailing concerns. The core complexity of Appellate Rule 4 has withstood many rounds of revision. Given the rule that appeal time limits are mandatory and jurisdictional, appeals will continue to be lost for missteps in reading or understanding. The rule has been made complex to respond to competing pressures — there is a strong desire to force prompt decisions whether to appeal after the trial court has concluded its actions in the case, but also a strong desire to support orderly resolution by the trial court of post-trial motions that should be decided by the trial court and ordinarily should be decided before there is any appeal. The complexity of the rules that seek to integrate fee motions with appeal time is no different.

The appeal-time issues are framed by the "bright-line" rule that an otherwise final judgment remains final even when there is a pending motion for attorney fees. That means, if there were no contrary rules provisions, that any appeal must be taken in the time allowed without regard to action on the fee motion. This consequence in turn means either that there must be two appeals, one on the merits and the other on the fee motion, or else that the right to appeal on the merits is lost if not timely exercised before disposition of the fee motion. In many cases it may be desirable to tend to the appeal on the merits before the fee issue comes on for decision in the trial court. But in other cases it may be desirable to arrange for disposition of all issues, merits and fees, in a single appeal.

Rule 58(c)(2) responds to these competing interests by establishing trial court discretion to order that a timely motion for attorney fees under Rule 54(d)(2) suspends the time for appealing on the merits. This is accomplished by cumbersome language that invokes both Civil Rule 59 and Appellate Rule 4: "the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." According to Appellate Rule 4(a)(4)(A)(iv) and (v) timely Rule 59 motions end the running of appeal time; a new appeal period starts to run on entry of the order disposing of the last remaining motion among those enumerated in 4(a)(4)(A).

This explicit invocation of one part of Appellate Rule 4 is made more complicated by the implicit invocation of other parts of Rule 4 arising from the Rule 58(c)(2) reference to a notice of appeal that "has been filed and has become effective." These words incorporate separate parts of Rule 4. One is Rule 4(a)(2), which directs that a notice of appeal filed after a decision is announced but before entry of judgment "is treated as filed on the date of and after the entry." Although filed, the premature notice is not yet "effective." In itself this provision does not create much complication. But the premature notice, and also a notice filed after entry of judgment, take effect only provisionally; the effect is ended by the filing of a timely motion of the sort that suspends appeal time under 4(a)(4). Those notices "take effect" within the meaning of Rule 58(c)(2) only on disposition of the last of the motions designated in 4(a)(4).

The upshot of all of this is that the trial court is given authority to make a nuanced ruling on appeal timing, similar in some ways to the Civil Rule 54(b) discretionary authority to enter final judgment on disposing of one or more claims, or all claims among two or more parties, before complete disposition of an entire case. If it seems useful to let an appeal on the merits proceed while the attorney-fee motion remains to be decided, the trial court need do nothing. If it seems useful to postpone the appeal on the merits while the attorney-fee motion is decided, the trial court can act to suspend appeal time until the moment when a notice of appeal has "become effective." If there is a timely post-trial motion within the Appellate Rule 4(a)(4) categories, the trial court can consider this matter up to the time it disposes of the last such motion.

So, given this carefully crafted structure, what is wrong — apart from the need to figure it all out? A brief description of the Wikol case illustrates a possible shortcoming in Rule 58(c)(2) as adopted. The time line was this:

(1) March 22: the plaintiffs, having won a jury verdict, move for attorney fees.
(2) March 27: judgment on the merits entered.
(3) May 15: fee motion denied.
(4) May 24: plaintiffs move for a 58(c)(2) order.
(5) June 14: plaintiffs file a notice of appeal.
(6) July 11: Rule 58(c)(2) order extending appeal time. entered.

The court concluded that the June 14 notice was effective to appeal denial of the fee motion because it was filed within the appeal period measured from May 15. Because it was effective in part, it cut off the authority to extend appeal time, even though it was not effective as to the merits because untimely as measured from entry of judgment on March 27. The July 11 order was not effective. The court was concerned, however, that it had been required to work through several interrelated rules to reach this result, and invited the advisory committees to consider possible simplifications or clarifications.

The circumstances of the Wikol case illustrate the ways in which parties may run afoul of these rules. They also illustrate a bizarre possibility. Suppose the plaintiffs had not filed a notice of appeal on June 14. The Rule 58(c)(2) order entered on July 11 might then be found effective, because the court would have acted before a notice of appeal had been filed and become effective. Never mind that at that point no notice of appeal could become effective absent a Rule 58(c)(2) order. This reading would establish discretionary authority to revive expired appeal time long after the opposing parties had thought the case concluded. Presumably trial courts would seldom grant such orders, but any such order would run contrary to the general purposes and character of Appellate Rule 4.

What might be done to address this possible problem?

The agenda materials sketched two approaches, neither of them entirely satisfactory. One is a partial response to the Appellate Rules Committee's suggestion that Rule 58(c)(2) include a deadline by which the trial court must exercise the authority to extend appeal time. This version allows an extension only if the court gives notice or a party moves within 14 days after a timely attorney-fee motion is made. That would establish a clear cut-off for raising the question, well short of the present rule that allows the court to act at any time before disposing of the last timely motion made under Rules 50, 52, or 59 (or a Rule 60 motion that would be timely as a Rule 59 motion). At the same time, it would not force the court to act immediately, and without more does not establish a point that cuts off the time to act so long as the question was raised at the required time. It has the virtue of eliminating the bewilderment an uninitiate practitioner might encounter in reaching a confident understanding of what it means to act "before a notice of appeal has been filed and has

become effective." An alternative version would substitute the limit that the court may act before a timely notice of appeal has been filed and become effective. This version would directly defeat the possible argument that the present rule allows a court to extend appeal time on the basis of a notice that, because not timely, could never become effective. But it would not alleviate the complexity of the present rules, and might somehow manage to aggravate the complexity.

Quite different approaches are possible. One would be to rescind Rule 58(c)(2) and the parallel provision in Appellate Rule 4. The result would be that the time to appeal judgment on the merits always runs uninterrupted from the entry of judgment. The appeal from disposition of the fee motion must be taken separately. Consolidation of both appeals may be possible, but that will depend on the progress of the case in the trial court and in the court of appeals. The opposite approach would be to rescind Rule 58(c)(2) and amend Appellate Rule 4 to provide that a timely motion for attorney fees always suspends the time to appeal judgment on the merits. If indeed some cases benefit from having the merits appeal resolved before the fee motion is decided, this approach would defeat that benefit (unless the Appellate Rules were amended to allow the notice of appeal on the merits to become effective before disposition of a timely fee motion, an additional complexity that few are likely to wish).

Discussion began with the suggestion that it would be useful to know how courts now exercise the Rule 58(c)(2) authority to adjust appeal timing. Do courts routinely direct that appeal time be suspended? Routinely refuse to suspend appeal time? Mix the effects of their orders because it has proved desirable to adjust according to the understood different needs of different cases?

The desire for additional data was lauded as a good idea. One practicing lawyer commented that in all the cases he had encountered where the parties disagree about postponing appeal on the merits the judge has allowed the petition and failed to suspend appeal time. It was agreed that there is "a lot of confusion in the bar," and that information about the use made of Rule 58(c)(2) would be a good starting point. There are clear tensions pitting the desire to avoid piecemeal appeals against the fear that appeal on the merits should not be long delayed.

It may be desirable to move forward with this project because it ties directly to the time project. The Federal Judicial Center will be asked whether it is possible to undertake a study that will provide better information about the ways in which Rule 58(c)(2) is now used. In any event, the questions should remain on the agenda for active pursuit.

*Rule 60 or 62.1: "Indicative Rulings"*

Several years ago the Solicitor General suggested that the Appellate Rules Committee adopt a rule addressing the relationships between district courts and courts of appeals when a party seeks relief from an order that is the subject of a pending appeal. The Appellate Rules Committee considered the proposal and — without making any recommendation whether a rule should be adopted — concluded that the matter is better considered within the framework of the Civil Rules.

Most of the attention has focused on motions to vacate a judgment under Civil Rule 60. The pendency of an appeal does not toll the time for seeking Rule 60 relief. The motion must be made within a reasonable time, subject to a maximum limit of one year for motions made under the most frequently invoked paragraphs, Rule 60(b)(1), (2), and (3). The motion, moreover, must be made in the district court. The district court is in a far better position to evaluate the grounds for relief. The district court, however, lacks power to grant a motion addressed to a judgment that is pending on appeal; this area of practice, as many others, is governed by the longstanding rule that only one court should have control. A clear practice to address the resulting dilemma has been adopted in

most circuits. The district court has authority to consider the motion. It has authority to deny the motion. But the district court lacks authority to grant the motion. If it believes that relief should be granted it can "indicate" that it would grant relief if the case were remanded for further proceedings. (Variations also appear. The Ninth Circuit practice denies district-court authority to deny the motion — the district court can consider the motion and can indicate what it would do if the case were remanded, whether to grant or deny. The Second Circuit apparently dismisses the appeal without prejudice to reinstatement after the district court acts on the motion.)

There may be sound reasons to adopt a rule that governs this "indicative ruling" procedure. Even though practice is well established in most circuits, many lawyers and some judges are not aware of it. An explicit rule provision could avoid many false starts and some mistakes. A rule also would establish a uniform national practice for all courts. Beyond that, a rule might helpfully address some details of practice. The agenda drafts, for example, require the moving party to notify the court of appeals when the motion is made and again when the district court has decided what it would do. Notice would enable the court of appeals to regulate its own proceedings in relation to the district court, and to decide promptly whether to remand if the district court indicates that a remand is desirable.

The agenda drafts raise other questions, some small and some not so small. They would allow a district court to indicate that remand is desirable not to grant relief but to justify a considerable investment of energy needed to determine whether to grant relief. They address the question whether the indicative ruling procedure should be triggered by filing a notice of appeal or instead should follow the model of present Rule 60(a) that allows district-court action until the appeal is docketed in the court of appeals. These are small questions.

A much larger question is whether a rule defining an indicative ruling procedure should be limited to Rule 60. The Solicitor General's proposal encompassed other situations in which a pending appeal defeats district-court authority to grant relief. It may be that a general approach would be more suitable in the Appellate Rules than in the Civil Rules because of the broad range of circumstances that may be presented by appeals taken before a truly final judgment. Or it may be that the topic is simply too broad to approach in any rule. Quite different questions arise in the many different settings that permit interlocutory appeals. It seems to be accepted that a district court generally may not act on the very order that is pending on appeal without permission from the court of appeals. The authority to modify a preliminary injunction that is the subject of a pending appeal, for example, is sharply limited. But district courts retain authority to manage many other parts of the litigation. Section 1292(b) and Civil Rule 23(f), for example, expressly address the question whether proceedings should be stayed. Section 1292(a), on the other hand, does not. It is recognized that the district court can continue to manage the case while an appeal is taken from its action on an interlocutory injunction request, including authority to decide the action on the merits. And appeals taken under the collateral-order expansion of "final decision" appeal jurisdiction are left completely adrift. Some courts, for example, have adopted a rule for official-immunity appeals analogous to the approach taken to double-jeopardy appeals in criminal cases: the purpose of the appeal is to protect against the burdens of further trial-court proceedings, so ordinarily all proceedings should be suspended, but the district court can press ahead on "certifying" that the appeal is frivolous. Other collateral-order appeals, however, generally should not interfere with continued trial-court proceedings.

If a general rule is to be adopted, it is likely better to craft a new rule rather than attempt to address all of these questions within the limits of Rule 60. The difficulty of framing a new rule is illustrated by the sketch of a Rule "62.1" in the agenda materials. A first question is whether to

define the rule in terms of acting on a "judgment" on the theory that any order that can be appealed is defined as a judgment by Rule 54(a). This focus might help to avoid unintended consequences of referring to an "order," but it invites the uncertainties that grow out of Rule 54(a). A second and more important question is how to define the circumstances that require resort to an indicative ruling procedure. The draft refers to an order "that is pending on appeal and that cannot be altered, amended, or vacated without permission of the appellate court." The drafting seems awkward. It might be better to begin the rule by focusing on the need for appellate permission: "If the appellate court's permission is necessary to authorize the district court to grant a[n otherwise timely] motion [under these rules] to alter, amend, or vacate a judgment, the district court may consider the motion and * * *."

Discussion began with an expression of uncertainty as to the means of addressing motions apart from Rule 60 motions. Should the subject of the motion indeed be characterized as a "judgment," or will that misdirect practice when the appeal is from an order that few would recognize is made a judgment solely by operation of Rule 54(a) — and then is a "judgment" only if in fact it is appealable? The Third Circuit, for example, has a broad approach to permitting collateral-order appeal from an order that denies a claim that privilege defeats discovery. Who would think of the discovery order as a "judgment"?

It was noted that the Tenth Circuit practice is to remand in response to an indicative ruling only if the district judge indicates that relief will be granted on remand. A remand to support further exploration before deciding whether to grant relief is not available.

Enthusiasm was expressed for pursuing this project. It would have practical utility, reducing the remaining variations in practice. It helps to "codify what the market has done." The practice, further, has an additional virtue that has not been noted in the discussion. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 1994, 513 U.S. 18, the Supreme Court ruled that parties lack power to settle on appeal on terms that require that the district-court judgment be vacated. "[M]ootness by reason of settlement does not justify vacatur of a judgment under review." Although exceptional circumstances may justify vacatur, mere party agreement to vacate is not of itself an exceptional circumstance. But the Court also noted that even absent extraordinary circumstances, a court of appeals "may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." Parties fearful of the precedential impact of the district-court opinion, and uncertain as to possible nonmutual preclusion effects, may be able to settle only if they are confident that the district-court judgment will be vacated. Settlements may be advanced by adding to the rules an explicit provision for this course.

It was noted that class actions present a special variation on the question of settlement pending appeal. Remand is necessary since district-court approval of the settlement is required under Rule 23(e).

Some reluctance was expressed by observing that an indicative ruling procedure "looks like a glorified motion to reconsider" that should not be encouraged by an express rule. Recognizing that an indicative ruling procedure will make more work for district courts, it was urged that the district court nonetheless is in the best position to consider the issues and in any event is required to do so under present procedure so long as the court is aware of it.

It was concluded that this topic should remain on the agenda, to be pursued at the spring meeting on the basis of drafts that develop both a Rule 60-only provision and also a more general provision.

*Summary Judgment — Rule 56*

Judge Rosenthal introduced the discussion of summary judgment by noting that there are well-known problems with the language of Rule 56. The problems proved frustrating in the Style Project. Every struggle with the language revealed ambiguities and flaws. Present Rule 56 does not describe what parties and courts do in pursuing summary judgment.

The timing provisions are clearly inadequate and divorced from the practice. Everyone ignores them. "Partial summary judgment" is a well-known practice, but it is not mentioned in the rule. There may be many other opportunities for improvement, whether to make the rule express what happens in practice or to alleviate problems it causes in practice.

The Time Project will require consideration of the time periods in Rule 56. That may be an added incentive to take on other parts of the rule as well. But the project will be very difficult.

The Reporter provided an introduction summarizing half a dozen of the more important questions raised by the failed 1991 proposals to revise Rule 56. The description was assisted by distribution of the 1991 rule text and Committee Note.

The first question is raised by the first paragraph of the 1991 Committee Note. The purpose of the revision appears to have been to encourage greater use of summary judgment — "to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that * * * can have but one outcome." The Note, however, also continues with a cautionary note: "while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters." This caution suggests a different possible purpose — to rein in unwarranted overuse of summary judgment. A third possible purpose might be to combine the first two, reflecting a determination that the actual implementation of summary-judgment procedures varies among different courts and that it would be good to encourage greater use by reluctant courts while discouraging overuse by over-eager courts.

A second question would address the standard for granting summary judgment. Long before the 1991 amendment of Rule 50, the standard for summary judgment called for a determination whether the moving party was entitled to judgment as a matter of law. The 1991 Rule 50 amendments discarded the traditional references to directed verdicts and judgments notwithstanding the verdict in favor of judgment as a matter of law and renewed motions for judgment as a matter of law. The change of vocabulary was intended to emphasize the continuity of a single standard for measuring the sufficiency of the evidence. The same standard applies whether the eventual trial would be to a jury or to the court. The 1991 version of Rule 56 discarded the familiar "genuine issue of material fact" language in favor of determining whether summary adjudication is warranted "because of facts not genuinely in dispute," so that "a party would be entitled at trial to a favorable judgment or determination * * * as a matter of law under Rule 50." Some such approach might make more clear than the rule now does that the directed verdict standard controls. It would be possible to go further in at least two directions. One would be to emphasize the efficiency advantages of summary judgment to argue that summary judgment might be governed by a standard less demanding than the directed verdict standard at trial. A closely related change would be to adopt a less demanding standard for cases to be tried without a jury. But neither of those changes seems likely to deserve serious consideration. Obvious Seventh Amendment concerns would arise from any attempt to defeat the right to jury trial on a fact record that — if duplicated at trial — would require submission to the jury. And even for bench trials, it seems better to require the judge to hear live witnesses if any party is unwilling to submit to trial on a paper record; it might prove too

tempting to allow avoidance of trial on a lesser standard than applies in jury cases.

A third question is whether Rule 56 should be rewritten to express the practices established by the decisions in *Celotex Corp. v. Catrett*, 1986, 477 U.S. 317, and *Anderson v. Liberty Lobby, Inc.*, 1986, 477 U.S. 242. The *Celotex* decision defined the summary-judgment burden for a movant who would not have the burden of production at trial. The movant can carry the burden in either of two ways — it can undertake to disprove an essential element of the nonmoving party's case, or it can "show" by reference to affidavits and discovery materials that the nonmoving party cannot produce evidence sufficient to carry the trial burden. The *Liberty Lobby* decision ruled that when the standard of persuasion requires clear and convincing evidence the directed-verdict standard — and by reflection the summary-judgment standard — requires more proof to defeat judgment as a matter of law than when the standard requires only a preponderance of the evidence. The 1991 draft sought to incorporate both rulings by providing that "A fact is not genuinely in dispute * * * if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50." This draft illustrates the challenge that any draft must face: it is intelligible to someone who understands the *Celotex* and *Liberty Lobby* decisions, but must prove challenging to anyone who does not. It also illustrates the question whether at least the *Celotex* decision should be enshrined in the rule. The lore of 1991 is that the Rule 56 proposal was rejected on two divergent responses to the proposition that it expressed current practice. One response was that there is no need to amend a rule simply to reflect what everyone understands in any event. The other response was that it is undesirable to amend a rule to freeze undesirable current practices. It would be possible to remain faithful to the directed-verdict analogy, and in some ways to perfect it, while rejecting the *Celotex* decision. At trial the party with the burden of production loses unless it produces sufficient evidence to carry the burden. The same approach could be taken on summary judgment — a party who does not have the trial burden of production is entitled to summary judgment on request unless the nonmoving party comes forward with sufficient evidence to carry the trial burden. Or, perhaps more plausibly, it could be argued that the *Celotex* approach makes it too easy to win summary judgment. Before 1986, many courts and lawyers had believed that a party who does not have the trial burden of production could win summary judgment only by offering evidence to negate the nonmoving party's case. That approach could be restored.

A fourth question reflects on the imminent need to reconsider Rule 56's timing provisions in conjunction with the time-computing project. Rather than adopt time limits expressed in days, the 1991 draft allowed a motion to be made "at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control." A functional approach such as this has an obvious charm, but it might generate numerous disputes over what is a "reasonable opportunity" in a way that application of present Rule 56(f) does not so much encourage. It also seems to foreclose consideration of a procedure that would enable a motion for summary judgment — perhaps under a different name — to be filed with the complaint in actions to collect a "sum certain." Federal courts regularly encounter actions to recover overpayments of government benefits or defaulted government loans, and also encounter similar private actions. Modern summary judgment has roots in summary collection procedures that might well be restored by crafting a special timing provision in Rule 56.

A fifth set of questions has held a place on the agenda since a time only a few years after rejection of the 1991 attempt. Many districts have local rules that establish detailed requirements for summary-judgment practice. The common thread is a requirement that the moving party specify

the facts that appear beyond genuine issue and point to materials on file that support its position. The nonmoving party must state whether it accepts any of the asserted facts, identify other facts as to which it asserts a genuine issue, and likewise support its positions by pointing to specific record materials. Such widespread elaboration of Rule 56 suggests that it may be useful to synthesize a uniform procedure from the best developed local procedures.

A sixth major set of issues relates to the fifth. In two different places the 1991 draft seemed to authorize summary judgment for default of response by the nonmoving party. The provision requiring a nonmoving party to respond by citing record support for its position concluded by providing that failure to timely comply "in challenging an asserted fact" "may be treated as having admitted that fact," draft Rule 56(c)(2). And draft 56(e) on "matters to be considered" provided that "the court is required to consider only those evidentiary materials called to its attention" by the moving and nonmoving parties. This provision spares the court any obligation to search the record for relevant information omitted by the parties' submissions. But, as compared to the "may be treated as having admitted" provision, it may imply that the court is required to consider the matters pointed to by the moving party. This possible internal tension reflects a tension in reported cases. At least some circuits have clearly ruled that a court cannot grant a motion for want of response without examining the materials submitted by the movant to determine whether the movant has carried the summary-judgment burden. This question goes to the core of what summary-judgment practice should be. As compared to failure to answer a claim, it may be argued that summary judgment is a shortcut that cannot be taken to defeat a right to trial without examining the moving party's showing. There is an analogy to failure to appear for trial — a defendant who has answered, denying the allegations, may (at least in some courts) be entitled to a requirement that the plaintiff put on a case. Even apart from that analogy, summary judgment may be disfavored as an expedient that should defeat the right to trial only if the court accepts the responsibility of examining the summary-judgment showing.

Discussion began with the observation that there is a large body of learning on summary judgment. Many are skeptical of change. They argue that change will put a thumb on the scale, to make it either easier or more difficult to win summary judgment. But that seems wrong. It should be possible to reform the procedure of summary judgment without changing the standards.

The next two voices differed. The first thought the project of revising Rule 56 an excellent idea. The second thought the project should not be attempted. In a practical sense, there are no problems. The problem with the timing provisions is met by routine extensions. The practicing bar has a good grasp of current practice. Even if a motion is unopposed, trial judges review the supporting materials to determine whether the motion should be granted.

As to the timing provisions, it was noted that they must in any event be considered as part of the time-counting project.

A third view, from a practicing lawyer's perspective, was that "the rule is a wreck." It is unusual that the text of a rule that plays so dominant a role in the administration of cases is so far divorced from practice. The rule is very important. Practice in federal courts, moreover, is increasingly national; it would help national practitioners to have a uniform approach expressed in the national rule. The project is worth taking on.

Further support came with the observation that this is a good project, but it should be divided into separate parts. One part is the procedure of Rule 56. Here there is room for some reservations about the level of detail reflected in the draft Rule 56(c) that spells out the detailed obligations of moving and responding parties. A more fundamental question is whether the rule text should

attempt to reflect the *Celotex* and *Liberty Lobby* rules.

Similar comments further supported some form of Rule 56 revision. The local rules are an important help for practitioners — those who look only to Rule 56 do the job poorly. If indeed there is a substantial gap between the rule text and actual practice, so that those who are experienced in local lore have an advantage over the inexperienced, the project is worthwhile even though it will be challenging. Rule 56 is a trap for the unwary; practitioners accustomed to state practice in Texas, for example, may fail to oppose a summary-judgment motion in federal court because they expect there will be a live hearing. The proliferation of local rules shows there is a need to consider the procedures that surround summary judgment; it may be better to avoid the standards that control the decision.

A different thought was expressed by observing that summary-judgment procedure imposes costs that may drive out smaller claims. A claim for less than perhaps $100,000 may not be sufficient to sustain the costs both of opposing summary judgment and also of actually trying the case. Perhaps there should be a simplified practice for some types of cases that omits summary judgment. At the same time, another participant recalled the suggestion that perhaps summary disposition is particularly useful in some categories of low-dollar cases, especially simple collection cases. At the same time, the question of simplified procedure has never disappeared from the agenda; development of any simplified system will include consideration of the proper role of summary procedures.

It was suggested that it would be a useful preliminary project to compile a set of local rules to illuminate the approaches that might be taken and to facilitate development of a uniform procedure that will be familiar to many courts and lawyers. It also would be useful to gather at least a few standing orders from districts that do not have local rules.

Yet another member suggested that developing a national rule that conforms to practice in procedural matters is a worthy goal, while it may be better to avoid attempts to define summary-judgment standards.

Another brief statement about standards was that reasonably uniform pronouncements may mask substantial differences in application. Many lawyers and judges believe that some courts are more receptive to summary judgments than are other courts. The Fifth Circuit, for example, seems receptive.

It was noted that Joe Cecil at the Federal Judicial Center has collected a lot of empirical data on the working of summary judgment and is working on it. This work may be useful in determining whether there is any reason to pursue the standards question.

A particular issue of standards was noted. Many courts have ruled that a trial judge may refuse to allow an interested person to defeat summary judgment by submitting a "self-serving, self-contradicting" affidavit that seeks to retract damaging testimony at an earlier deposition. The underlying purpose is clear. It would be all too easy to defeat the purposes of summary judgment if a party need do no more than this. But the conceptual foundation for the practice is shaky. A party may, at trial, avert judgment as a matter of law by retracting unfavorable trial testimony. If summary judgment is controlled by directed-verdict standards, it is difficult to understand why a similar practice should not apply. To be sure, the district court has discretion to accept the affidavit and deny summary judgment; the most common formulation seeks a plausible explanation for the changed testimony. This approach might be refined into a rule that a self-serving affidavit need not be accepted to defeat summary judgment because an affidavit is too far removed from the nature of testimony in open court, while retraction at a new deposition following proper notice will defeat

summary judgment because the moving party has a better opportunity to test the retraction. But there was no apparent interest in attempting to transform any such approach into Rule 56 text.

The theme of discretion was noted from the more general proposition that, unlike judgment as a matter of law at or after trial, a district judge has discretion to deny summary judgment even though a verdict would have to be directed if the trial produced the same record as is presented on summary judgment. This practice is supported by a variety of concerns. The most obvious is the prospect that even though no sufficient Rule 56(f) showing of a need for further discovery can be made, a better record may emerge at trial. In related fashion, it may prove more efficient simply to try the case than to agonize over the often diffuse summary-judgment record. And it is proper to seek the reassurance of an actual trial record when a case presents issues of general public importance or a need to develop the law in light of the inspiration provided by a sure grasp of particular facts.

These comments renewed the question whether it is appropriate to define a project that seeks to clarify and improve the procedures that govern summary judgment without attempting to express Rule 56 standards in new language. Any form of Rule 56 project will be "interesting" in the senses of importance, difficulty, and potential controversy. But, this comment suggested, it remains worthwhile.

The bar groups that suggest many procedure reforms have not sought Rule 56 amendments. But no one has asked for advice, and committee members believe that the American College of Trial Lawyers would be interested.

Reluctance was expressed with the thought that any Rule 56 project, however defined, will "elicit neurotic responses from the bar." All of the sensitive issues will be raised despite careful efforts to address only more narrowly "procedural" problems. Any project must be long-term. Absent any emergent concern in the bar, it may not be worth it.

Discussion turned to Rule 56(f) with the observation that this part of the practice is very important. What is so important is that Rule 56(f) orders become the focus of regulating and narrowing further discovery. It may be desirable to consider changes here. This suggestion was echoed with agreement that the practice is very important, yet many lawyers do not seem to be aware of it while those who are aware do not know how to use it well. One of the suggestions made with the 1991 draft was that it would be useful to regularize an "offer of proof" procedure that requires a party to justify the need for further discovery by describing the facts it hopes to support by admissible evidence and — if possible — by pointing to inadmissible information that supports the hope that admissible evidence can be found.

Rule 56(d) also was noted with the thought that it is little used, but perhaps should be encouraged because taking issues off the table by "partial summary judgment" can simplify the remaining litigation and make it more affordable. The 1991 draft seemed to encourage this, in part by splitting a general concept of "summary adjudication" into separate categories of "summary judgment" disposing of a claim and "summary determination" that resolves important issues or defenses.

The conclusion was that the next step will be to gather local rules and a few illustrative standing orders. The Federal Judicial Center will be asked to lend such support as it can within the many competing demands on its resources. The spring meeting will afford an opportunity to decide how to go forward "without sinking into a morass of substantive issues."

*Rule 8: Notice Pleading*

Judge Rosenthal introduced the notice-pleading topic as one of the fundamental long-range characteristics of the Civil Rules that merits periodic evaluation to determine how well the present system serves the goals articulated in Rule 1. Do we continue to have the best approach toward accomplishing the just, speedy, and inexpensive determination of litigation? A few years ago the Committee took up the question whether simplified procedures might be adopted to address cost and delay for at least some subset of civil actions. After finding the questions difficult the Committee postponed further action on that project. It is appropriate to ask whether the project might be taken up again, or whether it might be transformed into a general investigation of systems that might elevate the role of pleading and, by diminishing the role of discovery, reduce cost and delay. The 1938 rules focused on individual litigation in a setting that provided a very different mix of cases than we know now. Changes in the nature of litigation may justify reexamination of the basic system. At the same time, it must be recognized that notice pleading is a sensitive topic. To take on the topic is to invite charges that the purpose is to raise barriers, to limit access to court for disfavored types of litigation. That is not the purpose. But the topic is one to be approached with great care, if at all.

Discussion of notice pleading must always begin with recognition of the great changes made by the Civil Rules in 1938. Notice pleading and discovery were combined into a new package that heavily discounted the possible value of pleading as a device to screen unfounded claims or to help prepare for trial. Pleading instead was designed to set the stage for other pretrial devices that would bear the primary responsibility for exchanging fact information and contentions between the parties. Discovery has expanded enormously since 1938, and has been supplemented by the prediscovery Rule 26(f) conference, disclosure, and proliferating uses of Rule 16 pretrial practice. The result has been to transform the real meaning of established legal principles and also — in reaction to facts disclosed by discovery that often would never have emerged in any other fashion — to accelerate the development of new legal principles. Rule 11(b)(3) reflects the interdependence of pleading with discovery and the continually increasing reliance on discovery: it is proper to advance fact contentions without evidentiary support so long as the allegation is "likely to have evidentiary support after a reasonable opportunity for further investigation and discovery." Civil litigation is a far more powerful instrument of social regulation than it would have been under earlier pleading and discovery systems.

These changes have not come free. The Committee has struggled with calls to control the burdens of discovery almost continually since the 1970 amendments that broadened the scope of discovery. Discovery questions continue to press, not only in the relatively confined topics addressed at this meeting but also in pervasively difficult and ever-changing subjects such as discovery of electronically stored information. It is possible to reconsider the decision that the procedural system should support and even encourage litigation based on the hope that discovery will produce support for contentions hoped for but not capable of support at the time of the complaint. More rigorous pleading standards could be imposed, at least in some cases.

The nature of any inquiry into notice pleading must be tempered by asking what notice pleading means in actual practice. The Supreme Court has twice ruled clearly that "heightened pleading" can be required only when specifically provided by statute or by a Civil Rule, such as the Rule 9(b) provision for pleading fraud or mistake. Those opinions also suggest that any change should be made in the orderly course of the Rules Enabling Act process. But other Supreme Court decisions contemporary with these decisions seem to approve heightened pleading requirements. And the lower federal courts, although directed in part by the statements that heightened pleading

can be required only under a specific rule or statute, continue at times to demand pleading details that go beyond mere notice of the events that give rise to the plaintiff's demand for relief. These practices, persisting over many years in the face of explicit discouraging words, suggest that bare minimum notice pleading may not be the best answer for all cases. It may be appropriate to ask greater detail in some cases.

One obvious approach would be to develop specific pleading rules for specific types of claims, building on the models provided by Civil Rule 9 and by the Private Securities Litigation Reform Act. This approach, however, has manifest substantive overtones and might augment concerns that heightened pleading requirements spring from distaste for some varieties of legal rights. It also might prove too confining, imposing demanding standards across entire categories of cases that include many actions that should not be subjected to heightened pleading.

Another approach would be to move back toward fact pleading as a general requirement. The original idea of "Code" pleading may not have been a bad idea; it may have been the implementation by lawyers and judges caught up in the spirit of petty legalism that led to the practices rejected by the move to notice pleading. Even if that is so, the question would remain whether the same spirit — exacerbated by possible tendencies toward hyper-zealous advocacy — might not lead to equally undesirable results today and tomorrow.

Yet another approach would be to make some modest change in Rule 8(a)(2) to emphasize the often forgotten words: "showing that the pleader is entitled to relief." These words could, if revived, be a strong statement of what notice pleading should be — not a mere identification of an event but a statement that if proved would establish a right to relief. On this view, they knew what they were saying in 1938, but we have wandered from the intended path.

The final suggestion in the agenda materials is that case-specific flexibility might best be achieved by accepting Rule 8(a)(2) as it is and restoring something akin to the bill of particulars practice that was abandoned in 1946. The Rule 12(e) motion for a more definite statement might be expanded from a device to improve pleadings too incomprehensible to support meaningful response into a device that requires statement sufficient to support informed decision of Rule 12 motions for disposition on the pleadings.

Discussion began with the observation that a common-law process of evolution toward more demanding pleading requirements in some situations, to the extent that it happens, is not a bad thing. A requirement that a pleading actually "show" a right to relief is desirable and "policeable." This tendency could be enforced by considering further active integration of Rule 8 pleading standards, Rule 16 scheduling and pretrial orders, and Rule 56 summary-judgment practice, encouraging judges to take an active interest in ferreting out the cases that demand more than barebones "Form 9" pleading. The system seems to work well as it is now. And even a modest change, such as the draft that would require "a short and plain statement of the claim in sufficient detail to show that the pleader is entitled to relief," would excite vigorous and possibly disturbing reactions. Although pleading might seem the last best chance to avoid unnecessary pretrial burdens, it might be better to keep the pleading barriers low and reinvigorate summary judgment.

The next observation was that these possibilities, and the variations that seem to emerge from the cases, are fascinating. But it is important to know whether there is a problem. If lower courts in fact are pretty much doing what a good rule text would have them do, there is little reason to muddy the waters by attempting to ensure that they keep on doing what they are doing anyway. The law of unintended consequences is real.

The Private Securities Litigation Reform Act pleading requirements were noted. The statute

emerged from experience that seemed to suggest that too many cases survived for too long because pleading requirements were inadequate and because there were too many tempting targets in corporate balance sheets. Some data on the possible impact of the pleading requirements are available. Information on such matters as the numbers and resolutions of pleading motions are available at Stanford. It would be useful to find out what can be learned from this experience.

It was noted that the PSLRA requirements "frontload the process." A tremendous amount of prefiling investigation is required. A 200-page complaint is not uncommon. But once a motion to dismiss is denied "a case is presumed to have merit." Settlement is discussed after denial of a Rule 12(b)(6) motion, not deferred until after denial of a summary-judgment motion. Settlement values have increased dramatically, in part because institutional investors are coming in as plaintiffs. At the same time, there remains a cottage industry of lawyers who bring "stock drop" cases that settle for $5,000,000 to $10,000,000. Enough of these cases survive motions to dismiss to warrant filing. The result may be that the number of actions filed has not been much reduced by the heightened pleading requirements.

The question whether trial judges think it would help to change Rule 8 was answered by the information that the Standing Committee has begun to consider these questions. Less than a year ago it convened a panel to discuss the possibility of learning from the American Law Institute project on Principles of Transnational Procedure. Professor Hazard and eminent practitioners addressed fact pleading. The panelists agreed that fact pleading is used now, to educate the judge and to respond to the increasing need to front-load the litigation. The bar would not resist formal adoption of heightened pleading requirements for some types of cases. And courts do want heightened pleading in pro se and prisoner cases. A claim of "conspiracy," for example, may meet a demand for more detailed pleading even though "conspiracy" seems as much a sufficient legal label as the "negligently" label accepted by Form 9.

It was noted that beyond telling a persuasive story, practitioners plead more than notice requires to control the definition of issues and to facilitate discovery within the "lawyer-controlled" sphere of Rule 26(b)(1). The need to show that discovery is aimed at a matter "relevant to the claim or defense of any party" should encourage expanded pleading at two levels — once in detail to establish clearly defined claims and again in broad outline to establish expanded claims that support what otherwise might seem "subject matter" discovery.

This suggestion led to the further observation that there are many cases in which the pleadings are not short, but the length results from pleading too much information. The welter of detail interferes with deciding motions to dismiss and with controlling discovery. A big share of most district-court dockets is filled by pro se plaintiffs — prisoners, employment discrimination plaintiffs, people who are generally dissatisfied and have nowhere else to go. In some ways pro se litigants are held to lower, more forgiving initial standards. But in many ways courts have effectively developed separate procedures for handling these cases, often with the help of staff attorneys. The Prison Litigation Reform Act requires the court to take an early look at a large number of cases, and in effect leads to pleading standards not set out in Rule 8. More definite statements are often required — courts use Rule 12(e) essentially to address interrogatories to the plaintiff to flesh out the complaint, even though that is not the intended purpose of Rule 12(e). And the Fifth Circuit has a "Spears" hearing practice under which a magistrate judge simply asks the prisoner to tell the story. If the system is working, perhaps there is no need to struggle with rules that might articulate flexible principles that correspond to what works best.

Later discussion of prisoner and forma pauperis litigation was similar. Many cases are screened and dismissed without even directing service on the defendant. (It was noted that service

in forma pauperis actions can be a problem because it is the marshal's responsibility and often the marshals lack sufficient resources for efficient service.) Prisoner cases are not the source of problems with the pleading rules.

It was noted that one hope for the broad scope of initial disclosures adopted in 1993 Rule 26(a)(1) was that parties would be stimulated to allege facts with particularity in order to expand the adversary's disclosure obligations. The practice endured only for a few years, and only in some districts, but it would be difficult to say whether it actually succeeded in prompting more detailed pleading. The retrenchment of initial disclosure obligations in the 2000 rules was not shaped by any judgment on this issue.

Continuing discussion observed that more definite statements are often required in official immunity cases.

And it was suggested that there are few real problems in cases with lawyers, while pro se litigation "is a world unto itself." But there are lawyer-represented cases that do not yield to a desire for prefiling investigation. Civil rights lawyers, for example, would complain that they cannot realistically uncover needed evidence without discovery. The federal docket does include automobile collisions, slip-and-falls, small business transactions gone bad. Notice pleading may work well in these cases.

Another observation was that much motion practice is not under Rule 12(e) for a more definite statement. Defendants do not want to prompt a more detailed statement of their wrong acts. They use motions to delay the start of discovery, perhaps also with the hope of winning when the plaintiff does not do its job well. But in complex litigation the complaints are not short and plain; they are "long and fancy." These complaints move well beyond the function of simple notice of the claim.

It was suggested that relying on the combination of notice pleading and discovery may raise problems if there is reason to worry about the cost of discovery. And pointed out that one recent action settled for $3,000,000,000 without discovery after denial of a motion to dismiss, and responded that in securities and like litigation there may be less need for discovery because public filings supply much useful information.

Rule 11 was brought back to the discussion, noting that it encourages filing before investigating and wondering why defendants should be made to bear discovery costs when the plaintiff can point to no more than a reasonable hope that its allegations will have evidentiary support after discovery. Toxic tort litigation provides frequent examples of filings that are "way out ahead of the science." The result is five or six years of mostly one-way discovery in which the plaintiffs seek to build from the fact that a contaminant has been released to some evidence of actual harm.

These discussions of complex litigation led to the observation that the Manual for Complex Litigation illustrates methods of management. The spectrum runs from that end to "the most oblique prisoner complaint." Revising Rule 8 is not a likely path of change. A more likely useful idea would be to expand Rule 12(e), establishing greater discretion to demand added detail on a case-by-case basis. This suggestion drew added support. The illustrative draft in the agenda is useful. The cases now say that Rule 12(e) is available only when the responding party cannot reasonably be required to frame a responsive pleading; it is not to be used to elicit greater detail to help determine whether the plaintiff can allege facts sufficient, if eventually proved, to establish a claim. Revision might help. This flexibility would not be used to demand greater detail in every case — there would be little point in attempting to require such detailed pleading of a negligence claim as to support decision on the pleadings. But it could be useful in other areas. Something like this occurs

frequently now in official-immunity cases.

Complex litigation came back with the suggestion that the motion to dismiss is attractive to defendants not because complaints fail to state the elements of a claim but because in some areas of the law we have Code pleading in practice. The Dura Pharmaceuticals decision in the Supreme Court this year is an illustration of imposing demands of particularized pleading that are difficult to satisfy.

The immediate question was put: are any of the proposals sketched in the agenda materials, or still others, sufficiently attractive that more information should be sought? Or even to move directly toward shaping a specific proposal? Or should the broad notice-pleading topic simply be held open for possible eventual consideration?

One answer was suggested — the place to look for reform is not Rule 8 but Rule 56 summary judgment. This meeting has shown a live possibility that Rule 56 should become the focus of a major project in any event. But another answer might be that pleading motions really do serve good purposes and should be encouraged by ratcheting up pleading requirements. Yet another may be simply to let things keep "cranking along," reasoning that discovery costs are not disproportionate in most federal-court actions.

Another suggestion was that it would be helpful to learn what district judges around the country think. Do they think they need greater authority to demand more particularity? That they could do more productive things by other means?

One judge suggested that different cases require different things. A direct attack on notice pleading will start a long battle. It is not clear that there is a problem. There are better things to do.

A new thought emerged in the suggestion that a very important practice has developed in the use of "extraneous documents" on motions to dismiss. The practice seems to vary. Much turns on whether a complaint somehow "incorporates" a document, but the test is unclear. Consideration of the document is available on the face of the pleadings if it is incorporated; otherwise it can be considered only by treating the motion as one for summary judgment. It would be useful to find clear and consistent answers.

Another suggestion was that deferral is better. The problem is not notice pleading. It lies instead in a culture of lawyers who are good at discovery, but do not know much about trial. Notice pleading is the heart of the system.

Practice probably varies among different judges. Some judges "go for the jugular," pressing the parties to bring cases on for trial within 12 months. Others are more relaxed, waiting to see what the parties bring to them. The pleading rules should be revised to give the judge greater authority to require details that cut through the fog generated by some cases. Revision of Rule 12(e) may work better than changing Rule 8.

The question was asked directly: "To what end"? If not a change in notice pleading standards, would increased use of Rule 12(e) increase dismissals? We do not now seem to have a fact pleading practice that applies comprehensively to all cases, ordinary and complex alike.

A similar caution was voiced by expressing reluctance to build in a third layer of delay. Motion practice in federal courts often resembles local state practice. Increased use of Rule 12(e) motions would lead to a routine presentation of three motions before trial: a 12(e) motion for a more definite statement, followed by a motion to dismiss, followed by a motion for summary judgment. Each motion builds in delay. And there may be repeated motions for summary judgment, although

some courts require that a party seek permission to file more than one.

It was suggested that Rule 12(g) requires consolidation of motions, reducing the risk of multiple motions. But it was responded that often the motions must be considered separately — consideration of a motion to dismiss for failure to state a claim is not likely to be sensible before the court decides whether to require a more definite statement of the claim.

A tentative consensus seemed to be that no one had suggested serious study of the possibility that Rule 8 might be changed to require fact pleading as the basic starting point. That leaves the question whether some less sweeping changes should be studied. The Committee is charged with the task of ensuring that the rules fit evolving needs. These questions might be approached generally, or perhaps as part of a simplified procedure project.

The first recommendation was to do nothing now.

A different recommendation was that it might help to get a better sense of what judges are doing now. Thomas Willging noted that it is relatively easy to undertake a survey that asks the opinions of district judges, but that it is tricky to frame "opinion" questions that will yield actually useful information. A different approach might be to do an electronic survey in a few districts to see what kinds of motions and orders related to pleading are being made. It also might be possible to look for local rules addressing specific categories of cases; some districts, for example, have local rules for patent cases. Standing orders also may address these issues, such as the orders in some districts that require a detailed case statement in actions under the Racketeer Influenced and Corrupt Organizations Act. These possibilities will be pursued further with the Federal Judicial Center, recognizing that requests for its valuable help are constantly at risk of outstripping available resources.

The proposal to seek FJC help was met by asking whether there are identifiable problems that warrant the expenditure of resources. A response was that there has long been a demand for better tools for early management of lots of cases that survive for longer, and at greater expense, than they should. It is difficult to know whether there really is a problem and an opportunity here. It would be useful to find out. But it was rejoined that this Committee represents a good cross-section of experience and perspectives, and has not identified any clear problems. It has been agreed that pro se cases present separate issues. Apart from that, is there a problem? The toxic tort example may not be a pleading problem, but instead a problem of ambitious law and still inadequate science.

An observer suggested that for at least 25 years the Committee has worked toward focusing litigation on the merits. The remaining links to study are notice pleading and summary judgment. Defense lawyers and litigants think it would be useful to study these practices in addition to the ongoing concerns with discovery.

A responding question asked whether there are data showing how cases against corporate defendants get knocked out of the system — does it happen at pleading? On summary judgment? At trial? The answer was that no helpful studies are known.

A tentative summary of the discussion was offered by suggesting that the desirability of enlisting FJC help depends on how great are the strains on their resources. There may be something valuable to be done with pleading, but the level of interest seems to be "cool, not frozen."

So which might come first, pleading or summary judgment? Or might they be done together? With Rule 56 the greatest interest seems directed to the procedures rather than the standards; a collection of local rules could provide real help in suggesting desirable procedures. This is a well-

defined project. It is more difficult to articulate the dimensions of a pleading project, particularly if there indeed is consensus that Rule 8 should not be amended.

Perhaps it will turn out that a Rule 56 project could be coupled with some elements of a Rule 8 project. A search of local rules and standing orders could consider both summary-judgment practices and also any identifiable pleading practice rules or standing orders. An electronic docket search also might give a better sense of what courts are doing with asserted pleading deficiencies. It was agreed that this would be a sensible starting point if the FJC is able to undertake it.

It will be more difficult to find a way to identify cases that cannot be dismissed under present pleading practice but that should be dismissed. Perhaps, after the first phase, it will be useful to go to bar groups to ask for advice.

It was observed that the Standing Committee, having already started down the road on this subject, might be interested in considering the question whether there are pleading problems that warrant the arduous work that would be needed to develop proposals for significant change.

Respectfully submitted,

Edward H. Cooper
Reporter

## Proposed Rule on "Indicative Rulings"

*Introduction*

As a general matter, an appeal transfers jurisdiction from the lower court to the appellate court. Only one court should be in charge at any point. This rule is particularly strong with respect to the very judgment that is the subject of the appeal. Action by the trial court to amend or vacate the judgment could disrupt orderly deliberation by the appellate court and — still worse — thwart effective appellate control of trial-court proceedings.

Primary appellate control, however, runs up against circumstances in which post-appeal events raise questions about the correctness of the judgment that are better considered by the trial court. An easy illustration is a Rule 60(b)(2) motion to vacate on the basis of newly discovered evidence. The trial judge is in a much better position than the appellate court to determine whether the new evidence should have been (and perhaps was) discovered earlier, and whether the new evidence is sufficiently important to warrant relief. The advantages of trial-court consideration are supplemented by the doctrine that a pending appeal does not suspend the time for seeking Rule 60(b) relief. The motion must be made within a reasonable time, and there is an absolute one-year limit for seeking relief under Rules 60(b)(1), (2), or (3). The motion must be made in the district court even if the district court lacks authority to grant it because of the pending appeal.

The tension between the need for appellate control and the importance of trial-court consideration has been resolved by a clear and satisfactory procedure recognized in most circuits for Rule 60(b) motions. This procedure is the inspiration of a proposal by the Solicitor General that this procedure should be adopted in explicit rule text and also should be extended beyond Rule 60(b) motions.

These questions were considered at the October 2005 meeting, as reflected in the draft Minutes. The conclusion was that the early drafts should be revised for further consideration. This memorandum provides draft rule texts that illustrate both possibilities. The first, more conservatively, amends Rule 60 by adopting a procedure that governs only Rule 60 motions. The second, more ambitiously, adopts a new rule that would govern not only Rule 60 motions but also every other situation in which the district court, absent appellate-court permission, lacks authority to act with respect to an order that is pending on appeal.

*The Rule 60(b) Drill*

Most of the circuits have converged on a common answer with respect to Rule 60(b) motions to vacate a judgment that is pending on appeal. The district court may consider the Rule 60(b) motion notwithstanding a pending appeal. This makes sense. One concern is that the pending appeal does not toll the time fixed by Rule 60(b) for making the motion. The motion must be filed within a reasonable time, and for the grounds specified in paragraphs (1), (2), and (3) no more than one year after entry of judgment. This rule in turn reflects the fact that the issues may be better resolved if they are explored promptly. And if the district court believes that the judgment should be vacated, further appellate proceedings may prove pointless. At the same time, the district court may be wrong in thinking that relief should be granted, or — although right — may not be in a good position to proceed further without disposition of the issues that remain open on appeal. Once the district court has considered the motion, it may do one of two things. It can deny the motion; the denial is a separate final decision that can be appealed by filing a new notice of appeal. Or the district court can "indicate" that it would grant the motion (or perhaps that it would want to explore the question further) if the case were remanded from the court of appeals. The court of appeals, once informed that the district court believes that relief should be granted or at least explored further, then decides whether to remand for that purpose. Appellate control is ensured, but an efficient and effective procedure is provided to inform the court"s exercise of discretion.

This well-developed procedure does not derogate from the principle that appeal from a final judgment transfers "jurisdiction" to the court of appeals. The action lies within federal subject-matter jurisdiction. The question is one of appeal jurisdiction, which in turn involves the allocation of authority between the district court and the circuit court. The district court can refuse to consider the motion when that serves its own interests or the circuit court's interests. Consideration and denial may often serve the interests of both courts and the parties — the issues may be better resolved if heard promptly, and in any event proceedings in all courts will be finished earlier. Consideration and an indication that the motion would be granted enables the circuit court to exercise its jurisdiction by determining whether it is better to remand or instead to dispose of the appeal before remanding.

If there is indeed a workable procedure, why consider a Civil Rules amendment? One reason is that the courts of appeals are not unanimous on the details of this procedure. The Ninth Circuit follows a variant approach that insists the district court lacks jurisdiction either to grant or deny the motion; it can consider the motion and indicate what it would or might do if it had jurisdiction, but no more. *See, e.g., Katzir's Floor & Home Design, Inc. v. M-MLS.com,* 9th Cir.2004, 394 F.3d 1143, 1147-1148, reversing the district court's denial of a motion to vacate a default judgment pending on appeal because the appeal stripped the district court of its jurisdiction. The Ninth Circuit has not given any sign of distress with this approach, however, and standing alone the variation does not suggest a pressing need for revision. In addition the Second Circuit at times follows a variant form that recognizes indicative rulings, but that responds to an indication that the district court would grant relief not by remand but by allowing the moving party to win dismissal of the appeal without prejudice to reinstatement. *See U.S. v. Camacho,* 2d Cir.2002, 302 F.3d 35, 36, 37, referring alternatively to remand and to "withdraw[ing] the appeal." Lawyers who practice on a national scale — including the Department of Justice — would benefit from a uniform national approach, but the practical need may not be great.

A more pressing reason for considering a new rule provision is that although a clear practice is rather well established, many lawyers and not a few district judges do not know of it. Nor, apparently, do they always think to consult a treatise or practice manual for advice. Cases continue to appear in which a district court either believes that it cannot consider a Rule 60(b) motion while an appeal is pending or undertakes to grant relief when it cannot. An explicit rule provision can bring attention to the proper practice.

An explicit rule also can provide a clear procedure for coordinating proceedings in both courts. It can require that the court of appeals be notified when a motion is filed in the district court, providing an opportunity to defer consideration of the appeal or — although it seems less likely — to direct that consideration of the motion be stayed while the court of appeals concludes its own proceedings. The court of appeals also should be notified when the district court has either denied the motion or indicated that it would like to have the case remanded so that it can proceed further; an explicit procedure will expedite this step, and again ensure the court of appeals's coordinating control.

Similar questions arise outside the Rule 60(b) context. District courts retain authority to do many things while an interlocutory appeal is pending, but ordinarily the appeal defeats authority to modify the very order that is the appeal subject. The approach to possible revisions will depend on whether it seems desirable to expand the new rule to include such settings. For example, it has been ruled that a district court cannot vacate a preliminary injunction that is pending on appeal — as with a final judgment and a Rule 60(b) motion, it can only indicate that it would do so if the case were remanded. *N.W. Enterprises Inc. v. City of Houston,* 5th Cir. 2004, 372 F.3d 333, 338. A decision to draft a rule that reaches these settings might lead to a new rule — tentatively dubbed Rule "62.1" — rather than an addition to Rule 60.

*Solicitor General Proposal*

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules to embrace the "indicative ruling" practice. The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

*A Rule 60-Only Proposal*

The draft rule submitted by the Solicitor General is long; the draft Committee Note is even longer. It is framed as a new Appellate Rule. In drafting Civil Rules alternatives it has seemed better to absorb the central ideas without attempting direct adaptation of the specific Appellate Rule proposal to the Civil Rules context. The simplest alternative is to frame a procedure only for Rule 60 motions.

Present rules provide some models for consideration. The closest is Civil Rule 60(a), which allows correction of clerical mistakes and mistakes arising from oversight or omission. The relevant part, as expressed by the Style Project, says: "But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave." Although there have been no suggestions to revise this provision, it may be desirable to modify it to conform to whatever "indicative ruling" model is adopted for more general purposes.

The other model is Criminal Rule 33(b)(1), which sets a three-year limit on a motion for a new trial grounded on newly discovered evidence, and adds: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case." At least one court has adopted an indicative ruling procedure for this rule that parallels the most common practice for Civil Rule 60(b) motions: the district court can entertain and deny the new-trial motion while an appeal is pending, or indicate that it is inclined to grant the motion so that the movant can seek remand from the court of appeals. *U.S. v. Camacho*, 2d Cir.2002, 302 F.3d 35. (There is no apparent need to draft a Civil Rule specifically for new trial motions. A timely new-trial motion suspends appeal time and also suspends a notice of appeal filed before the motion. It is difficult to imagine a timely new trial motion made while an appeal is pending from the judgment that would be affected by the motion. The most likely event that might counsel remand from the appellate court would be an appeal from a partial final judgment under Rule 54(b), followed by a new trial motion that involves different claims or parties but that also calls into question the judgment that is pending on appeal. That situation seems best addressed by a Rule 60 motion addressed to the judgment pending on appeal. Quite different questions are presented by motions to alter or amend rather than for a new trial. But this issue is part of the question whether to adopt a general rule that extends beyond Rule 60(b) in more general terms.)

Both Civil Rule 60(a) and Criminal Rule 33(b)(1) are rule-specific. The most modest approach would be to add something similar to Civil Rule 60(b), perhaps combining a modified version of present Rule 60(a) in a provision that governs all Rule 60 motions. For example, a new paragraph (3) could be added to Style Rule 60(c), deleting the somewhat similar provision now in Rule 60(a). The simplest version would mimic Criminal Rule 33(b)(1):

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

**Rule 60. Relief from a Judgment or Order**

* * * * *

**(c) Timing and Effect of the Motion.**

**(1)** ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

**(2)** ***Effect on Finality.*** ~~The~~ A motion under Rule 60(b) does not affect the judgment's finality or suspend its operation.

**(3)** ***Appeal Pending.*** If an appeal [has been docketed and] is pending,[1] the court may deny a motion under Rule 60, but it may not grant the motion until the appellate court remands the action.

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[1] "[H]as been docketed and is pending" is taken from Style Rule 60(a), which uses many more words — "But after an appeal has been docketed in the appellate court and while it is pending * * *." Apparently "has been docketed" is used to make it clear that at all times there is a court with authority to act — the district court does not lose its authority with the filing of the notice of appeal, but only after the appeal is docketed so the court of appeals can effectively act. "Is pending" makes it clear that district-court authority is restored after the appeal concludes, apparently by remand.

A lengthier alternative would spell out the indicative ruling procedure in slightly greater detail:

> (3) ***Appeal Pending.*** If an appeal [has been docketed and] is pending, the court may entertain an otherwise timely motion under Rule 60 and deny the motion or indicate that it [might][would][2] grant the motion if the appellate court remands for that purpose.[3]

A still lengthier alternative would come closer to the Solicitor General's all-purpose model, describing notice to the court of appeals and a remand procedure:

> (3) ***Appeal Pending.*** If a motion under Rule 60 is made [after an appeal has been docketed and] while [it] {an appeal} is pending:

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[2] The choice between "might" and "would" is important. At least some courts of appeals are willing to remand only if the district court indicates that it will grant the motion if the case is remanded. But that approach means that the district court may be required to engage in difficult and protracted proceedings that will prove for naught if the court of appeals refuses to remand. There is an argument that it would be better to allow the district court to indicate that it believes there are complex issues that warrant further inquiry without binding itself to grant relief if the case is remanded. On the other hand, a court of appeals may be reluctant to disrupt orderly appeal processes in face of an uncertain prospect whether a remand will simply bring the same appeal back after the delay required to sort through complex issues and deny the motion. Each court is in a better position to evaluate one element of the equation. Perhaps a thoughtful statement by the district court that there are serious issues that will require careful inquiry should suffice to enable the court of appeals to strike a balance against the prospect that it is better to resolve the appeal issues before confronting the motion to vacate.

[3] "for that purpose" is a matter of caution — we may not want a rule that seems to say the district court may indicate that it will grant the motion, if not now then when the case is remanded after final appellate disposition, no matter what the appellate disposition may be.

(A) the movant must notify the clerk of the appellate court[4] when the motion is filed and when the district court acts[5] on the motion;

(B) the district court may defer consideration of the motion,[6] deny the motion, or indicate that it [might][would] grant the motion if the appellate court should remand for that purpose; and

(C) if the district court indicates that it [might][would] grant the motion, the movant may

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[4] In the Style Rules we say "circuit clerk," a term also used in the Appellate Rules. It has met some resistance, but might be used here for the sake of uniformity. On the other hand, review may be pending in the Supreme Court. ("appeal" seems loose enough to include certiorari — it is the word used Rule 60(a), and also in Criminal Rule 33(b)(1).)

[5] "acts" seems clearly better than "rules" if we allow the district court to indicate that it would like a remand before it proceeds to develop a full record on the motion. If we limit the "indicative" process to denial or conditional grant, we might characterize the conditional grant as "rules." On the other hand, if we include the language at footnote 6 that expressly recognizes deferral by the district court, "acts" again seems better than "rules."

[6] Explicit permission to defer action may not be necessary, but it removes doubt on an important point. The district court should not be forced to act before resolution of the appeal. District-court proceedings might disrupt orderly resolution of the appeal. The decision on appeal, moreover, might moot the questions raised by the motion to vacate. As but one example, a losing defendant who moves to vacate because of newly discovered evidence might win judgment as a matter of law on appeal. (May simple permission to defer consideration imply a duty to make an explicit determination? If it seems better to permit simple inaction, should the rule text or Committee Note be more explicit?)

ask the appellate court [in its discretion][7] to remand the action to the district court.

* * * * *

**Committee Note**

Paragraph 60(c)(3) is added to make uniform the practice followed by most courts of appeals. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60 motion. But it can entertain the motion and either deny it or indicate that it might grant the motion if the action is remanded.

Authority to consider the motion does not mean that the district court must do so. It must balance at least two central concerns. The appeal may be in early stages that will not be much disrupted by the district court's action; it may have progressed to a point where delay would be a costly disruption. The apparent cogency of the motion may make the calculation easy or difficult; disruption of the appeal is more readily justified if initial examination suggests that the motion raises important issues that can be persuasively supported on the facts. Beyond these concerns, the grounds for the motion may be affected or mooted by the impending decision on appeal. The district court has broad discretion to defer action until the appeal has been decided.

[To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can

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[7] Probably it would be better to omit the reference to appellate discretion. Discretion may go without saying; the reference then becomes a Style-disapproved "intensifier."

make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal if any party wishes to proceed after the district court rules. The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

*A Proposal Reaching Beyond Rule 60 Motions*

The Solicitor General's proposal deliberately reached beyond the Rule 60 setting. There are many other circumstances in which a pending appeal casts doubt on the trial court's authority to act in a case. These matters commonly arise in a actions that remain pending in the district court while an interlocutory appeal is pending. The permissive interlocutory appeal statute, § 1292(b), and the similar class-action appeal provision in Rule 23(f), expressly provide that an appeal does not stay district-court proceedings unless a stay is ordered by the district court, the appellate court, or — in § 1292(b) — a judge of the appellate court. Those provisions seem to obviate the need for an indicative ruling rule. But there are no similar provisions for interlocutory appeals under § 1292(a), much less for the elaborations that permit final-decision appeals under § 1291 before final judgment. District courts do retain authority to act in the case, and there is no apparent reason to limit these existing district-court authorities. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. But collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. Drawing by analogy on the procedures crafted to permit continuing proceedings in a criminal prosecution pending a frivolous pretrial double-jeopardy appeal, at least some courts permit continued district-court proceedings if the district court "certifies" that the immunity appeal is frivolous. It does not seem feasible to draft a rule that comprehensively and accurately restates district-court authority to act while some aspect of a case is pending on appeal. It is important to draft in a way that does not interfere with this authority by implication. The best approach may be to refer in general terms to principles that exist outside the rules.

The following draft illustrates the form a comprehensive rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

**Rule 62.1 Indicative Rulings**

**(a)** If a party timely moves [under these rules][8] for relief from an order[9] that the court lacks authority to alter, amend, or vacate because the order is the subject of an appeal[10] that has been docketed and is pending,[11] the court may:

**(1)** deny the motion, or

**(2)** indicate that it [might][would] grant the motion if

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[8] These words attempt to foreclose the risk that Rule 62.1 might be read to imply a new and independent authority to challenge an order. Is there a better way?

[9] It may be better to refer to an "order." If the order was properly appealed, it is a"judgment" by virtue of Rule 54(a), which in the Style version says: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." If the district court's action is pending on appeal, it is a judgment unless the appeal should be dismissed for lack of appeal jurisdiction.

[10] Although these words may seem redundant, they are designed to do at least three things. First, they establish that this rule does not interfere with district-court action when independent rules allow it to act without appellate permission. Second, they leave open the way for district-court action when the claim of appeal jurisdiction is patently wrong. Third, they leave the way open to act in the somewhat different setting in which appeal jurisdiction is intertwined with the merits of the appeal. At least some courts have concluded that an official-immunity appeal does not oust district-court authority to continue proceedings if the immunity claim is frivolous. The result is to say that the indicative grant is available if the district court lacks authority to grant, but that Rule 62.1 does not attempt to define the rules that determine authority to grant relief.

[11] This might instead be:

> If a court lacks authority to alter, amend, or vacate {an order}[a judgment] that is {the subject of a pending appeal}[pending on appeal], the court may:
> **(1)** deny a motion for relief, or
> **(2)** indicate that it [might][would] grant the motion if the appellate court should remand [for that purpose].

the appellate court should remand [for that purpose].

**(b)** The movant must notify the [circuit] clerk [of the appellate court] when the motion is filed and when the district court rules on the motion.

**(c)** If the district court indicates that it [might][would] grant the motion, the movant may ask the appellate court [in its discretion] to remand the action to the district court.

**Committee Note**

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it or indicate that it might grant the motion if the action is remanded. [Rule 60(a) has embodied a similar procedure that has been rescinded because it is made redundant by Rule 62.1.][12]

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be

[12] If we decide to bring Rule 60(a) into Rule 62.1, we would repeal the final sentence of Style Rule 60(a): "~~But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.~~"

complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

[To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed. The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

## Rule 5.2 — E-Government Act

### Introduction and Questions

Rule 5.2, published for comment last August, is one of a set of four rules proposed to implement the E-Government Act. The process of coordinating the four rules has been directed by a subcommittee of the Standing Committee, chaired by Judge Fitzwater and assisted by Professor Capra as Reporter. The Bankruptcy Rules and Criminal Rules Committees have already met and agreed on a uniform set of revisions to respond to public comments. The Appellate Rule essentially carries over on appeal whichever rule applied in the lower court. Given the challenges of coordinating all of the committees involved in this work, it seems fair to recognize a strong presumption in favor of adopting the changes already adopted and abandoning proposals that have been twice rejected. Subdivision (a) and (b) are the same in each rule's version of Civil Rule 5.2; subdivision (c), which provides a special procedure for social-security-benefit cases and for many forms of immigration cases, is unique to Civil Rule 5.2. Thus subdivision (c) is eligible for the usual full review accorded any published proposal after the comment period closes.

Part I sets out draft Rule 5.2 incorporating the changes approved by the Bankruptcy and Criminal Rules Committees. Part II discusses some of the changes in subdivisions (a) and (b), which appear in the Bankruptcy, Civil, and Criminal versions of the rule, from earlier versions the Civil Rules Committee discussed. Subdivision (c), which is unique to Civil Rule 5.2, is discussed in Part III.

*I. The Proposed Rule*

## PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE*

### Rule 5.2. Privacy Protection For Filings Made with the Court

**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing ~~made~~ with the court that ~~includes~~ contains a social-security number or an individual's tax-identification number, a name of an individual ~~person~~ known to be a minor, an individual's ~~person's~~ birth date, or a financial-account number, a party or non-party making a [the?] filing may include only:

**(1)** the last four digits of the social-security number and tax-identification number;

**(2)** the ~~minor's~~ initials of a minor;

**(3)** the year of an individual's birth; and

**(4)** the last four digits of the financial-account number.

**(b) Exemptions from the Redaction Requirement.** The redaction requirement ~~of Rule 5.2(a)~~ does not apply to the following:

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

**(1)** ~~in a forfeiture proceeding,~~ a financial-account number that identifies the property allegedly ~~to be~~ subject to forfeiture in a forfeiture proceeding;

**(2)** the record of an administrative or agency proceeding;

**(3)** the official record of a state-court proceeding;

**(4)** the record of a court or tribunal ~~whose decision is being reviewed~~, if that record was not subject to ~~Rule 5.2(a)~~ the redaction requirement when originally filed;

**(5)** a filing covered by Rule 5.2(c) or (d); and

**(6)** a pro se filing made in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

**(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:

**(1)** the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

**(2)** any other person [*"individual" does not seem to work here*] may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

**(A)** the docket maintained by the court; and

**(B)** an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person [*again, "individual" does not seem to work here*] who made the filing to file a redacted version for the public record.

**(e) Protective Orders.** ~~If necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a), a~~ For good cause shown, the court may by order in a case

(1) require redaction of additional information; or

(2) limit or prohibit a non-party's remote electronic access ~~by a nonparty~~ to a document filed with the court.

**(f) Option for Additional Unredacted Filing Under Seal.** A party making a redacted filing ~~under Rule 5.2(a)~~ may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

**(g) Option for Filing a Reference List.** A filing that contains redacted information ~~redacted under Rule 5.2(a)~~ may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item ~~of redacted information~~ listed. The ~~reference~~ list must be filed under seal and may be amended as of right. Any reference in the case to an listed identifier ~~in the reference list~~ will be construed to refer to the corresponding item of information.

**(h) Waiver of Protection of Identifiers.** A party waives the protection of ~~Rule 5.2~~(a) as to the party's own information ~~to the extent that the party files such information~~ by filing it without redaction and not under seal ~~and without redaction~~.

**Committee Note**

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available

over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

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 parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule, ~~where necessary to protect against disclosure to non-parties of sensitive or private information~~. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv)of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

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*II. Discussion of Subdivisions (a) and (b)*

(b)(5): Criminal Rule 49.1(b)(5) omits the equivalent of "by ~~Rule 5.2~~(c) * * *." The full Rule 5.2 internal cross-reference style has been used throughout the Style Rules.

(b)(6): Criminal Rule 49.1(b)(6) added "pro se," so that redaction is required by a represented petitioner and by the respondent in habeas corpus proceedings. This decision may have been influenced by the comment of the National Association of Criminal Defense Lawyers, 05-CV-033, noted in the summary of comments.

(e) Criminal Rule 49.1(d), the analogue of Civil Rule 5.2(e), substituted "good cause shown" as the basis for a protective order. This was thought to increase discretion as compared to the published "if necessary to protect private or sensitive information," and to fit better with the test generally used for protective orders. [Whether to include "shown" is a style question. The Global resolution for the Civil Rules is to use "good cause" in all places.]

(g) Criminal Rule 49.1(f), the analogue of Civil Rule 5.2(g), broadens the opportunity to file a reference list. As published, a reference list could be filed only with a filing redacted under Rule 5.2. As revised, a reference can be filed with any filing that includes redacted information. The purpose of this change is not clear. The authority for redacting a filing outside Rule 5.2 is unclear. But the Committee Note as published stated in general terms that "[s]ubdivision (g) allows parties to file a register of redacted information." Nothing in the Note invoked Rule 5.2 as a limit.

no subdivision: Exhibits. The treatment of exhibits has generated constant perplexity. The published rules did not address the question in rule text, but did include a final paragraph in the Committee Note. The Note states that trial exhibits are subject to redaction "to the extent they are filed with the court." That statement draws directly from subdivision (a), which states redaction requirements for "an electronic or paper filing with the court." The Note adds that an exhibit not filed initially with the court must be redacted if it is filed "as part of an appeal or for other reasons." The Department of Justice, 05-CV-031, expressed concern that some confusion might arise from subdivision (b)(4), which (in the revised Criminal Rule 49.1 form) exempts from redaction "the record of a court * * * if that record was not subject to the redaction requirement when originally filed." Apart from a real question whether (b)(4) could be read to refer to an unfiled part of a record that is generally filed, this comment raises a fact question. If trial exhibits are at times made part of the record on appeal — perhaps in a joint appendix — without formal filing in the district court, there may be a loophole. Or at least there may be confusion.

It remains difficult to know how to address the possibility that an exhibit might be taken to an appellate court without having been filed in the district court and thus without being subject to Rule 5.2(a). No other committee has proposed a solution. The logistical obstacles to doing anything complicated now may counsel leaving the matter where it lies.

*III. Discussion of Subdivision (c)*

Subdivision (c) provoked extensive comments. The arguments run in all directions.

The first comment to be noted is from the Committee on Court Administration and Case Management. The Committee notes that Judicial Conference policy is to limit remote electronic access in Social-Security benefit cases. It goes on to approve limited remote electronic access "to the bulk of documents in immigration cases as long as the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) and orders and opinions remain remotely electronically available to the public."

Some comments urge that nonparties should not be allowed electronic access even at the courthouse lest commercial enterprises systematically gather the personal information that subdivision (b)(5) exempts from redaction in reliance on the limits (c) places on remote electronic access. It is urged on the other hand that remote electronic access should be expanded, pointing particularly to the public interest in information about immigration proceedings (and suggesting that the recent history of immigration proceedings suggests special need for public access).

In many settings such divergent reactions may suggest that the initial proposal pretty much struck the right balance. Existing Judicial Conference policy for Social-Security benefit cases and CACM's support for immigration case limits further strengthens the case for subdivision (c). This particular problem, however, depends in part on practical judgments that cannot be made with much confidence.

The comments that warn against electronic access at the courthouse make disturbing observations about the prospect that commercial data-gathering firms will use electronic courthouse access to acquire and market information from unredacted files. Peter A. Winn, 05-CV-027, recommends that nonparties be denied electronic access, subject to a procedure for requesting access. The procedure would begin with exploitation of the PACER system's ability to transmit electronic notices to all parties. A nonparty desiring access would give notice to the parties. If no party objects, access is permitted. If a party objects, the court decides. The Electronic Privacy Information Center, 05-CV-030, recommends that data aggregators should be denied access to either electronic or paper records, and that the PACER system should limit "bulk downloads."

If in fact there is a risk that commercial data aggregators would find it profitable to amass personal identifiers from social-security and immigration case files, there may be room for compromise. Electronic (and perhaps even paper) access to the administrative records could be denied. Public Citizen Litigation Group, 05-CV-029, urges that administrative records are protected during the administrative process and could carry that protection forward after filing in court. They also urge that the burden of redacting papers prepared for the court proceedings should not be heavy.

These reactions could be combined in a compromise that simplifies subdivision (c) quite a bit. Because ordinary redaction requirements would apply to everything but the administrative record, both parties and nonparties would have the same electronic access as in other cases, leaving the rule to deal only with nonparty access to the administrative record:

> **(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, a nonparty may not have electronic access to the administrative record.

On this approach, (b)(5) also should be revised. (b)(3) exempts administrative records from redaction. The determination that all other filings should be redacted means that subdivision (c) should be removed from the exemption in (b)(5):

**(5)** A filing covered by Rule 5.2~~(c) or~~(d); and

The other side, urging greater access, might well be satisfied with this provision, except for those who might wish electronic access to the administrative record. But access to the administrative record could be had under the court's authority to "order otherwise." Academic and other serious researchers should be able to gain permission for remote electronic access without much difficulty.

It is difficult to be as confident in making predictions about court-ordered access for representatives of the "media" — an increasingly diffuse group that extends well beyond the traditional and well-known enterprises.

What is called for is a pragmatic judgment. If social-security or immigration cases present peculiar difficulties in redacting filings outside the administrative record, the proposed compromise may not work. Perhaps there is something about those proceedings apart from the burden of redaction that justifies special rules. Existing Judicial Conference policy for Social-Security benefit cases and the Department of Justice concerns about immigration cases provide additional grounds for caution. But the question deserves consideration.

## SUMMARY OF COMMENTS: CIVIL RULE 5.2

Jack E. Horsley, Esq., 05-CV-006: Suggests adding a new paragraph (5) to Rule 5.2(a) to require redaction of "the employee number if the person is a state or federal employee." [This could be made parallel to other identification numbers by adding "the last four digits of the employee number"; that formulation might suggest including this element as part of paragraph (1).]

Federal Magistrate Judges Assn., 05-CV-024: Supports the published draft, but urges incorporation in rule text of two sentences from the Committee Note: "The responsibility to redact filings rests with counsel and the parties. The clerk is not required to review each filing for compliance with this rule." Experience shows that if this warning is buried in the Committee Note "an expectation may arise that the court, through the clerk, will review documents for compliance with this rule."

Judicial Conference Committee on Court Administration and Case Management, 05-CV-025: **(1)** Rule 5.2(b)(4) should be amended to exempt from redaction: "the record of a court or tribunal whose decision ~~is being reviewed~~ becomes part of the record * * *." The discussion focuses on the parallel language in the Bankruptcy Rule. A Bankruptcy Court does not "review" any other court, but frequently has occasion to consider a record of proceedings in another court. The same thing is true of district courts.

**(2)** Supports the limit on public remote electronic access "to the bulk of documents in immigration cases." But the Rule 5.2(c) limit on remote public access to records in immigration proceedings should be relaxed to permit "all other persons" to have remote electronic access to "the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) * * *." The party filing the appeal from the prior decision should be required to redact the initiating document. (Under 5.2(b)(4) these things are not redacted. The comment does not reveal whether the general public has remote electronic access to the originals.)

David J. Piell, Esq., 05-CV-026: Simply deleting the first five digits of social-security and tax-identification numbers provides little protection; most large organizations use the last four digits to identify individuals, and many public records data warehousers provide the first five digits in their reports. (The idea seems to be that a court filing that identifies a person by name and also provides the last four digits leads down an easy path to getting the first five digits.) The answer is to enhance the CM/ECF system to generate an automatic reference list. Each case file would have a protected page that sets out each protected item and assigns it a reference number. Only attorneys of record and the judge assigned to the case would have access to the protected page, and the system would identify each person who had access to enable identification of anyone who misuses the information.

Peter A. Winn, Esq., 05-CV-027: This long comment is made by an Assistant United States Attorney who teaches privacy law and has written on access to online court records, 79 Wash.L.Rev. 307 (2004). There is high praise for the proposed rules as implementing the E-Government Act's mandate in light of the capabilities of the PACER system. The PACER system "was not designed with the competing goals of facilitating access and protecting privacy in mind. * * * [I]t contains very few privacy enhancing technologies — e.g., software programs which can automatically identify and flag sensitive information such as social security numbers, or programs which permit the easy and effective redaction of sensitive information in pleadings." "To make up for the lack of privacy enhancing technologies, the proposed rules make attorneys the front line in the protection of sensitive information in judicial filings. * * * Unfortunately, while attorneys may be in a good position to decide what information of their clients is in need of protection, they may not be quite as attuned to the need to protect the sensitive personal information of others * * *. [G]iven the PACER technology, there appears to be little choice in the matter."

It is important that the rule recognizes the opportunity to redact information in addition to that listed. Examples include not only driver's license and alien registration numbers, but such matters as individual health identification numbers and physician identification numbers.

There are good reasons to attempt to create an intermediate form of "online" access to court records in some circumstances, such as the social-security and immigration cases identified in Rule

5.2(c). Administrative appeals in Medicare claims and personal injury actions with large amounts of health records also are suitable for this treatment. But it is misguided to provide for full electronic access "at the courthouse" as Rule 5.2(c) would do. This "merely imposes a system of 'contrived inconvenience.' The proposed rule does not protect sensitive information in court records from a 'cottage' industry of copyists, who travel from courthouse to courthouse, selling the information from court files to third parties without restriction — a cottage industry that already appears to be thriving. The 'at the courthouse' rule also discriminates against people who may reside farther away from the courthouse * * *." There is a much simpler way to create an intermediate level of access. Existing PACER technology would support a rule that allows remote electronic access by any interested member of the public "upon request, after notice to the parties." PACER can automatically send notice to the parties. There would be a protected interval during which any party could object. If no party objects, full remote access would be allowed. If a party objects, the matter could be briefed and decided. As compared to access at the courthouse without notice, the parties would know the identity of anyone requesting access, and could respond accordingly — requests from researchers, for example, might not be opposed, while a request from a potential stalker would be.

This change could be accomplished by rewriting Rule 5.2(c) to authorize access to an electronic file: "all other persons may have electronic access to the full record ~~at the courthouse~~ as ordered by the court or as provided by local rule, ~~but~~ and also may have remote electronic access ~~only~~ to: * * *."

National Court Reporters Assn., 05-CV-028: This comment "seeks to ensure that members of the court family will not be adversely affected by these new requirements to redact information." The Committee Note statement that the responsibility for redaction rests on counsel and the parties should be expanded and incorporated in rule language:

> (b) *Responsibility for Redacted Filings.* The responsibility for identifying the personal information to be redacted in filings made with the courts rests solely with counsel and the parties. Clerks are not required to review documents filed with the courts for compliance with this rule. Nothing in this rule is intended to create a private right of action against court reporters or transcribers for any failure to redact the required information or for any errors associated with such redaction.

Public Citizen Litigation Group, 05-CV-029: This extensive comment is difficult to summarize briefly. This attempt is designed to help recall the major points, not all of the supporting arguments.

*Subdivision (c).* The central suggestion at the end is that remote nonparty access should be permitted as to all but the administrative record in social security cases; there is some ambiguity, but the suggestion may be that even the administrative record should be available for remote nonparty access in immigration cases.

At the end of the comment another suggestion is made. Rule 5.2(c) should not apply to "filings in the court of appeals." Apparently this means materials created for the court of appeals, not things filed in the district court. These materials, even the appendix, are less likely to contain private information, and public access is critical to support public understanding of the appellate disposition. At a minimum, appellate briefs and potentially dispositive motions should be available to the world by remote electronic access.

Beginning with social security cases, it is recognized that the administrative files generally are kept confidential at the agency level. Continued restriction on electronic access after filing in court is appropriate, and will not change present practice under Judicial Conference policy on public access to electronic case files. Redaction in other court papers — or a case-specific limit on remote nonparty access — can be accomplished by court order for information not already subject to subdivision (a); requiring a court order protects the public and enables parties to protect against identity theft and invasions of privacy "in cases that truly raise such concerns."

Immigration cases are different. Current policy provides no limit on remote nonparty access. The files "often do not involve the detailed financial and health documentation that is regularly part

of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection." Barring access "would shield problems at the agency level from the public eye * * *. Courts have recognized serious problems in the agency adjudication of immigration cases * * *." Remote public access will serve interests of reporters based in distant cities, of academics conducting research, and lawyers and pro se litigants who use filings in other cases as models in their own. Access to the filings, further, is often necessary to understand the court disposition that is available for nonparty remote access.

The broad reach of subdivision (c) as proposed cannot be justified by the volume of filings. The rule contemplates public electronic access at the courthouse; availability over the internet will not impose significant added burdens. The government would have to redact subdivision (a) information from its filings, but the burden would not be great in light of subdivision (b)'s exemption of administrative records from redaction.

It is pointed out that proposed Rule 5.2(b)(5) exempts from redaction all filings covered by 5.2(c) — the result is that the private information in social security and immigration proceedings would be fully available from paper files and electronic access at the courthouse. Apart from the direct irony, the result would be that data brokers have an added incentive to retrieve the information at the courthouse — the resale price will increase because of the disadvantage of individual inquiry at the courthouse.

Finally, the provision in subdivision (c)(2) that the public may have electronic access to the full record at the courthouse may imply that there is no public access to the paper record. This would bar all public access to information that is held only in paper form.

*Subdivision (d).* This subdivision "appears to grant the courts a general authority to seal any filing for any reason." That is contrary to the carefully developed rules that govern sealing practice. The Committee Note disclaiming this result "does not have the force of law, * * * and the text of the rule itself appears to suggest the opposite." Subdivision (d) "is unnecessary and should be stricken." If not stricken, it should open: "When authorized by law * * *."

*Subdivision (e).* In general, "We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings." But it goes too far to protect "sensitive" information. Public access should be restricted only to protect a legitimate trade secret, a recognized privilege, or matter required by statute to be maintained in confidence. The rule also "should specify that the court is required to consider the public interest prior to restricting access to filings." Rule 5.2(e) should be revised:

> If necessary to protect private ~~or sensitive~~ information that is not otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a the court may by order in a case limit or prohibit * * * ."

Electronic Privacy Information Center, 05-CV-030: "Instead of being citizens' window into government activities, public records are giving the government, law enforcement, and data brokers a window into our daily lives." Data companies are seeking legislative exemptions that would free them from consumer protections so long as the information they sell is in a public record; they "are banking on the courts to pour information into the public record so that it can be sold without privacy safeguards." **(1)** Courts first should minimize the private information they collect. **(2)** Paper records must be protected in addition to electronic records; Rule 5.2(c) should be revised to prevent data aggregators from gathering electronic records at the courthouse or scanning paper records. Indeed, commercial data brokers employ hundreds of stringers who hand-copy sensitive personal information. **(3)** The Committee should consider adopting limits on the uses that can be made of information obtained from court records. **(4)** "Unique identifiers" should be reduced beyond the redactions required by 5.2(a). Different institutions follow different redaction policies. Some, for example, delete the last four digits of social security numbers; data from such a source can be combined with the last four digits in a court record to reconstruct the full number. Home addresses, telephone numbers, and mother's maiden names also should be redacted; the credit industry is using

these numbers to authenticate individuals for new accounts, creating a risk of identity theft. **(5)** The PACER system should limit bulk downloads.

United States Department of Justice, 05-CV-031: The Committee should continue to monitor implementation of Rule 5.2 for several reasons. Subsections (d) through (g) provide flexibility to protect information not specifically addressed; it will be important to determine whether this is the most effective means of protecting such information as medical records or confidential business plans. Additional exemptions may be needed for money laundering cases that require that proceeds be traced through a complex chain of transactions.

Trial exhibits not filed in the district court present a problem. Rule 5.2(b)(4) could be read to mean that because the unfiled exhibit was not subject to redaction in the district court, it is not subject to redaction when included in an appellate appendix. But the Committee Note states redaction is required. "The Rule should be made clear as to the treatment of such materials. Further, differing redaction requirements at two levels of court review have the potential to cause confusion and mistake." At the least, continuing monitoring is required.

The language of Rule 5.2(b)(1) should be rearranged: "~~in a forfeiture proceeding,~~ a financial account number that identifies the property alleged to be subject to forfeiture in a forfeiture proceeding." This will clarify that redaction is not required when issues relating to property subject to forfeiture arise "in related cases that may implicate the identified assets. In addition, the changes would clarify that the exemptions apply to forfeiture seizure warrant applications and warrants, which often are used to take forfeitable property into custody before the commencement of any 'forfeiture proceeding.'"

Reporters Committee for Freedom of the Press, 05-CV-032:"Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic needs." (Examples are given of major stories based on computer analysis of massive volumes of court records — 800,000 criminal cases were examined for an article that found, for example, that white defendants had a 50% better chance than blacks to receive a plea agreement that erases felony convictions from their records; 3,000,000 state and federal computer records, including court records, were analyzed to show that more than 1,700 people had been killed accidentally due to mistakes by nurses burdened by cost-cutting measures; and so on.) Remote access also improves accuracy.

*Rule 5.2(a).* Years of birth and minors' names should not be redacted. This information is used to correctly identify the subjects of news stories. In addition, there should be a provision recognizing that members of the public may move to unseal the unredacted version of a pleading; the standard should be stated — for example, that the public interest in access outweighs the asserted privacy interest.

*Rule 5.2(c).* Remote electronic access should be as extensive as that available at the courthouse. The purpose for seeking access does not matter. This best accommodates established First Amendment and common-law rights of access. The public's capacity to monitor the justice system is enhanced. The proposed rule seems to reflect the theory of "practical obscurity" that values the impediments to access that arise from time, cost, and distance. But this theory is inapposite. The practically obscure information will be gathered by private companies, used by businesses, and even compiled in commercial electronic databases. Any real need to protect truly sensitive information can be served by a protective order. Immigration cases illustrate the value of public access — analysis of electronic court records to monitor immigration decisions is particularly important because immigration courts rarely issue published opinions explaining their decisions. Social security appeals are a like example. New York and Maryland have liberal electronic access policies and "have not suffered any adverse results." "The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft."

*Rule 5.2(d).* This provision for sealed filings should specify the standards for sealing, "for example, by requiring specific findings on the record and giving the public an opportunity to be

heard on the issue and by requiring a showing of good cause that the party would otherwise suffer an undue burden." There also should be a provision recognizing public standing to move to unseal or dissolve a protective order "when the public's interest in the information outweighs the asserted interest in privacy."

National Association of Criminal Defense Lawyers, 05-CV-033: The comment on Criminal Rule 49.1 is extended to Civil Rule 5.2(b)(6). There should not be an exemption from "the salutary operation of" the rule for habeas corpus or § 2255 proceedings. The argument that many petitioners proceed pro se and should not face redaction burdens is offset by the fact that many petitioners are represented. Conversely, some criminal defendants are not represented and must comply with redaction requirements. Instead of an exemption, there should be a statement that pro se petitioners are encouraged to abide by redaction requirements but are not required to do so.

Hon. William G. Young, 05-CV-034: Several observations:

**(1)** Residential street addresses "ought to be eliminated in all cases unless the presiding judge otherwise orders." To have different rules for civil and criminal cases will confuse court personnel and the bar. The criminal defendant addresses will appear in the inevitable post-conviction proceedings anyway (this observation seems to overlook the 5.2(b)(6) exemption). The fear of identity theft applies in both civil and criminal actions; do we want to admit, by distinguishing criminal actions, that they involve special fears of violence against witnesses and jurors?

**(2)** The Committee Note observation about trial exhibits has "the potential for a great deal of mischief." In D.Mass. trial exhibits "are never docketed and only the list of exhibits appear[s] in the district court records." To require redaction of exhibits that are in the custody of the deputy courtroom clerk and not available to the public would slow the trial and introduce confusion to jury deliberations. The lawyers will not want to do the redaction — but who else could? Above all, the Committee Note should not suggest that the public has some sort of entitlement to every trial exhibit. The Committee Note should be revised to say that trial exhibits should be redacted "whenever docketed as part of the court record."

**(3)** The Rule 5.2(f) option for additional unredacted filing under seal is mandated by a statute secured by the Department of Justice, but it "is a disaster for the courts." Litigants routinely seek confidentiality for things that should not be confidential, such as sealed settlement agreements. They can achieve confidentiality under the rule by including some scrap of redactable information in a filing and then "exercise the 'option' to make [the] entire filing under seal." (This comment reads the rule to mean that the redacted version placed in the public file can not only exclude the information that must be redacted but can also exclude anything the filing party regards as "confidential." The recommendation is that the rule should provide that the court "need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a)." The recommendation reflects the intended operation of the rule: a party can redact information that Rule 5.2(a) does not require to be redacted only by obtaining a court order for additional redaction. A party can file under seal only by obtaining a court order — and Rule 5.2 does not expand the grounds for ordering a seal.)

*Comments on Other E-Government Rules*

05-CR-001, Bruce Berg: Mr. Berg is a consultant to the screening industry. He recommends that the Judicial Conference Policy should be changed to read: "Because the basic method for differentiating people with the same name is the Date of Birth and/or the SSN, the electronic record shall include these elements (at a minimum in the abbreviated form), and will be displayed in the electronic access (Pacer)."

05-CR-008 (also 05-BK-003, 05-AP-001), National Assn. of Professional Background Screeners: (This comment includes a submission by Shay D. Stautz, and the written form of testimony

presented at a hearing before the Standing Committee by Mike Sankey): Background screening companies protect the interests of employers and applicants for employment, as well as landlords and prospective tenants, by searching for criminal records. Many people with the same or similar names are born in the same year. The full date of birth is needed to save extensive alternative inquiries into court records that will impose heavy burdens on court clerks. Criminal Rule 49.1(a)(3) should be revised to provide that the filing "may include only * * * (3) the year of birth for minors; and the day, month, and year of birth for adults * * *."

## Rule 48: Polling the Jury

The Standing Committee has suggested that the Civil Rules Committee consider adding a jury-polling provision to Civil Rule 48. Criminal Rule 31(d) provides a model.

Discussion of this question at the October 2005 meeting concluded that a proposal for publication should be considered at the present meeting. The Criminal Rule 31(d) model allows the court to poll the jury on its own, and requires a poll if requested by any party. Polling both ensures that the verdict is indeed the verdict of all jurors and may reveal problems while there still is an opportunity to solve them without need for a new trial.

Polling has been resisted by some observers for fear that it will require frequent retrials by producing hung juries. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

On informal inquiry, the Council of the ABA Litigation Section indicated that this approach is desirable. They seem to approve the Criminal Rule model that permits the court to poll the jury on its own but requires a poll if any party requests it.

A few drafting questions are identified by footnotes in the rule text:

## PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

**Rule 48. Number of Jurors; Verdict; Polling**

**(a) Number of Jurors.** A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

**(b) Verdict.** Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

**(c) Polling.** After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually.[1] If the poll reveals a lack of unanimity [or assent by the number of jurors required by the

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[1] An argument has been made that "individually" means that the court must poll the jurors separately, out of the presence of the other jurors. The argument seems out of keeping with routine practice. Polling in the presence of the entire jury raises the psychological cost of disclaiming the verdict; this traditional practice seems useful. But unless some court makes a surprising interpretation of "individually," it seems better to adhere to the text of Criminal Rule 31(d). If different rule language is to be used, it might be: "poll each juror"; "poll the jurors"; "poll the jurors individually in open court"; "poll the jurors individually in each others' presence"; or "poll the jurors one-by-one."

parties' stipulation for a nonunanimous verdict],[2] the court may direct the jury to deliberate further or may [declare a mistrial and discharge the jury][order a new trial].[3]

**Committee Note**

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) [with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict].

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[2] The bracketed language recognizes cases in which the parties have stipulated to a less-than-unanimous verdict.

[3] The "mistrial" words are used in Criminal Rule 31(d). Civil Rule 49(b), next in line, uses "new trial," the term commonly used in the Civil Rules. It seems likely that the Criminal Rule refers to "mistrial" to honor the double-jeopardy principles that limit the occasions for a "new trial" in a criminal prosecution. Retrial is permissible after a mistrial for a hung jury if there is no other impediment.

April 26, 2006

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

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

# MEMORANDUM

**TO:** **Civil Rules Committee Members**

**FROM:** **Lee H. Rosenthal**

**DATE:** **May 1, 2006**

**SUBJECT:** **Time-Counting Project**

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As you know, the Time-Counting Project has two parts. The intercommittee part of the work is to make the time-calculation rules consistent across the Civil, Bankruptcy, Criminal, and Appellate Rules by approving a "template" rule. That template is before us this meeting and is described in the materials submitted by Judge Kravitz and Judge Schiltz that appear in this section of the Agenda Book. The second part of the Project is an intracommittee effort. Each of the Advisory Rules Committees is reviewing the deadlines and time periods within its own set of rules for consistency with the template and to ensure that they are reasonable and clear. The most efficient way to approach the Civil Rules part of the intracommittee work appears to be through the subcommittee structure we successfully used for the Style Project. This memorandum sets out the subcommittees for the Time-Counting Project, allocates the rules between those subcommittees, and provides a timetable for their work. A separate memorandum from Prof. Cooper included in these materials discusses some general issues for the entire Committee to consider in the May meeting, in preparation for the subcommittees' work over the late spring and summer.

As you can see, we have divided the rules and assigned them to the two subcommittees, A and B, making an effort to balance the number of time provisions each committee member will consider. The number in parentheses after some of the rules indicates the number of separate time provisions in that rule. If there are no parentheses, there is no specific time provision in that rule. All of the rules need to be reviewed, however, for implicit time provisions such as events that start or conclude a time period, or for effects of time deadlines set in other rules. We also tried to keep together rules that are helpfully considered together. For example, the discovery rules are assigned to one subcommittee and Rules 50, 52, 54, 58, 59, and 60 are assigned to a two-person team. As in the Style Project, each subcommittee member will be responsible for studying the rules assigned and making

recommendations to the subcommittee, which will in turn convey recommendations to the full Committee.

Judge Kelly and Judge Russell did yeoman service as chairs of the Style Subcommittees. They should not be asked to assume this similar (although much less time-consuming, we hope) task. Accordingly, Judge Campbell will chair Subcommittee A and Judge Baylson will chair Subcommittee B. We thank them, and you, for the work that this involves. It is already clear that to the lawyers, few projects are as useful or helpful.

As noted, the timetable for the Time-Counting Project calls for coordination between approval of the time-calculation template and the approval of adjustments to specific rules after each Advisory Committee's review. The proposed timetable for the Civil Rules work is as follows:

| | |
|---|---|
| Spring 2006 | Template reviewed by Civil Rules Committee. |
| June 2006 | Standing Committee approves final template. |
| Fall 2006 | Civil Rules Committee considers proposals from Subcommittees A and B to revise deadlines and time periods within the Civil Rules for consistency with the template and for reasonableness. (This will require summer work by each subcommittee to maintain the coordinated schedule.) |
| Spring 2007 | Civil Rules Committee approves proposed amendments revising deadlines and time periods for publication. |
| June 2007 | Standing Committee approves amendments revising deadlines and time periods from Advisory Committees for publication. |
| August 2007 | Amendments published for comment. |
| Fall 2007 | Civil Rules Committee considers comments on published rules. |
| Spring 2008 | Civil Rules Committee approves changes to published rules and recommends them to Standing Committee for approval. |
| Fall 2008 to | Judicial Conference, Supreme Court, Congress |

December 2009

The subcommittee assignments are set out below.
SUBCOMMITTEE A

Judge Campbell, chair

| | |
|---|---|
| Rules | 1, 2, 3, 4.1, 4 (2), 5, 5.1, 30 (6), 31, 35 |
| Rules | 6 (11), 7, 7.1, 8, 9, 10, 13 |
| Rules | 12 (11), 15, 16, 17, 24, 25 (2) |
| Rules | 15 (6), 18, 19, 20, 21, 22, 23 (3), 23.1, 23.2 |
| Rules | 26 (8), 27, 28, 29, 45 (3) |
| Rules | 32 (7), 33, 34 (2), 36 (2), 37, 38 (2), 39, 40 |

SUBCOMMITTEE B

Judge Baylson, chair

| | |
|---|---|
| Rules | 11, 14, 41 (2), 42, 43, 44, 44.1, 46, 47, 48, 49 |
| Rules | 50 (2), 54(3), 58 (2), 59 (3), 60 (2) (for two members to work on together) |
| Rules | 51, 52, 57, 53 (7), 55, 61, 62 (2), 70, 71, 71.A |
| Rules | 56 (3), 63, 64, 65 (3), 65.1, 66, 67, 68, 69, 72, 73 |
| Rules | 77, 78, 79, 80, 81 (4), 82, 83, 84, 85, 86 |

The subcommittee members are as follows:

SUBCOMMITTEE A

Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Frank Cicero, Jr., Esquire
Honorable Peter D. Keisler

SUBCOMMITTEE B

Judge Michael M. Baylson, Chair
Judge Jose A. Cabranes
Justice Nathan L. Hecht
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

## Time-Counting Perspectives and General Issues

Much of the Time-Counting Project work in the Civil Rules will involve reconsideration of specific time periods, rule-by-rule. These questions can be approached effectively by each subcommittee working independently. Independent consideration seems workable even for the common question of adjusting periods of less than 11 days to accommodate the Rule 6 revision that counts all days, including intervening Saturdays, Sundays, and legal holidays. But independent consideration will be advanced by joint discussion of the general perspective on time periods and a few general issues.

The general perspective on this project depends on intensely practical judgments. The slow pace of litigation is often lamented. But that does not tell much about the causes of delay or about the effect of rules time periods. One perspective might be that any general increase in permitted periods will only exacerbate delay. On this view it is better to avoid any increases in time periods measured forward from a triggering point, apart from those needed to preserve the actual effect of periods now set at 10 days or less. Periods measured backward from a designated event would be more complicated — shortening the period before trial allowed for a Rule 68 offer of judgment, for example, might increase the number of offers made and accepted or might, by decreasing the time for evaluation, reduce the number of acceptances. A different perspective might be that many time periods are unrealistically short and are routinely revised in practice, perhaps by explicit agreement, perhaps by mutually accepted disregard, perhaps — as with Rule 56 — by superseding local rules. On this perspective it might seem sensible to expand present time periods. Or it might instead seem sensible to retain present periods on the theory that longer periods would encourage still greater delay. A third perspective might be that scheduling orders and other controls have made many of the pretrial time periods largely irrelevant.

Only practical experience can determine which of these perspectives is most persuasive. Experience may show that each perspective is valid for some rules, or for practice in some courts but not for others. It is nonetheless useful to have some preliminary discussion so both subcommittees begin at the same point, even if it is the point of uncertainty.

Beyond these perspectives lie a few general issues that cut across the subcommittee assignments.

Rule 6(b) establishes authority to extend most time periods, but prohibits extension of the periods allowed by Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), "except to the extent and under the conditions stated in them." The prohibitions clearly fit together. They serve manifest interests in expediting disposition of post-judgment motions, even though the tie to appeal time means that they also defeat the right to appeal when counsel make a mistake. The general authority to extend time periods, even on motion first made after the period expires, presents a more general question. It seems likely that it should persist unchanged, but it will be helpful to have that conclusion in mind as specific periods are considered.

Rule 6(e) establishes the notorious "3-day" rule that extends time periods to act after service when service is made by any means other than delivering a copy to the person served under Rule 5(b)(2)(A). The Time-Computation Subcommittee decided to retain this provision and the parallel provisions in the Appellate, Bankruptcy, and Criminal Rules. But it has asked for advice from the advisory committees, identifying several concerns. One concern is that if 3 extra days are allowed only for mail service, choice of the means of service will be distorted. A second concern is that most federal courts will soon require electronic service, alleviating the concern that party choices will be distorted but enhancing concern about the rule that electronic service is effective on transmission. The Subcommittee observes that worries about transmission problems would be alleviated if service were made effective on receipt rather than transmission. And it concludes that if there is strong sentiment for change, the Subcommittee on Technology or some other subcommittee might be asked to coordinate consideration.

Electronic service raises a separate question that the Time-Computation Committee has referred to the Subcommittee on Technology. Civil Rule 6(a), and parallel provisions in other sets of rules, extends the time to file when "weather or other conditions have made the office of the clerk of the district court inaccessible." Should the time be extended if electronic filing remains possible — particularly if electronic filing is required? Breakdowns in electronic communication to the court present the opposite problem — a party may rely on electronic filing in circumstances that make the alternative of physical filing difficult or impossible. If extension is permitted, for how long? Does it depend on whether the breakdown occurs in the court's system, the party's system, or transmission lines beyond the control of either? These questions are obviously important, but may not affect consideration of individual time periods. Joint consideration may well be deferred until Subcommittee A has made a recommendation.

A final common question is easily identified. The template rule carries forward the rule that time is extended when the last day of the period is a Saturday, Sunday, or legal holiday. The need to invoke this provision would be greatly reduced if time periods are generally set in multiples of 7 days. The many 10-day periods now in the rules, for example, could be set at 14 days. (These 10-day rules now allow at least 14 days, and sometimes more — the right combination of intervening Saturdays, etc., can extend the period to as much as 18 days.) Acceptance or rejection of a preference for 7-day multiples should be resolved at the outset.

**MEMORANDUM**

**DATE:** January 20, 2006

**TO:** Advisory Committees

**FROM:** Judge Mark R. Kravitz, Chair
Time-Computation Subcommittee

**RE:** Time-Computation Template

Last year, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge David Levi asked me to chair the Subcommittee, and he asked Prof. Patrick Schiltz, the reporter to the Appellate Rules Committee, to serve as the Subcommittee's reporter. The Subcommittee's main task is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within eight days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than seven days to move for a judgment of

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[1]*See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. The Subcommittee has spent the past four months working toward that goal. In early September, I circulated to the advisory committee chairs and reporters and then to the Subcommittee members a report drafted by Prof. Schiltz that listed all of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit attention. A copy of Prof. Schiltz's report is attached.

On October 4, the Subcommittee met via conference call, reviewed all of the issues identified by Prof. Schiltz, and made tentative decisions about what should be included in the template. In November, Prof. Schiltz circulated a draft template that attempted to implement the Subcommittee's decisions. On December 14, the Subcommittee met again via conference call (the advisory committee reporters joined us), reviewed the draft template, and decided on a number of changes. Prof. Schiltz then drafted a revised template that incorporated all of those changes. That template was favorably reviewed by the Standing Committee at its meeting earlier this month.

The template is attached. At this point, we are asking that the advisory committees review the template and share any concerns or suggestions that they have. That input can be communicated through the advisory committee reporters or directly to Prof. Schiltz (pjschiltz@stthomas.edu) or me (Mark_Kravitz@ctd.uscourts.gov). Following the spring advisory committee meetings, the Subcommittee will review any comments that we receive and prepare a final template. We hope to present that final template to the Standing Committee at its June 2006 meeting.

Assuming that the template is approved by the Standing Committee, the advisory committees will then have to draft amendments to their respective time-computation rules. The advisory committees will also have to review their deadlines and decide whether to propose changes to those deadlines in light of the new time-computation rules. Our hope is to publish both the proposed changes to the time-computation rules and the proposed changes to the deadlines in August 2007, so that the bench and bar can consider them as a package. The tentative schedule for the time-computation project is thus as follows:

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[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

| | |
|---|---|
| Fall 2005 | Time-Computation Subcommittee drafts template |
| January 2006 | Template reviewed by Standing Committee |
| Spring 2006 | Template reviewed by advisory committees |
| Late Spring 2006 | Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves final template |
| June 2006 | Standing Committee approves final template |
| Fall 2006 | Advisory committees consider amendments to time-computation rules to reflect final template and begin work on revising deadlines |
| Spring 2007 | Advisory committees approve amendments to time-computation rules and deadlines for publication |
| June 2007 | Standing Committee approves amendments to time-computation rules and deadlines for publication |
| August 2007 | Amendments to time-computation rules and deadlines published for comment |

I wish to draw your attention to two additional issues. Both of these issues are identified in Prof. Schiltz's report, and both were discussed by the Subcommittee. For reasons that I will describe, though, the Subcommittee ultimately decided — and the Standing Committee agreed — that the issues should be addressed by other committees. At its January meeting, the Standing Committee indicated that it would appreciate guidance from the advisory committees on both of these issues.

1. *Accessibility of Clerk's Office.* Under both the template and the existing rules, "a day on which weather or other conditions make the clerk's office inaccessible" is treated like a Saturday, Sunday, or legal holiday for time-computation purposes. The question is whether the concept of "inaccessibility" should be rethought in light of the emergence of electronic service and filing. Should a clerk's office be deemed "inaccessible" if inclement weather closes the office, but the clerk's servers continue to operate, and thus electronic filing is possible? Alternatively, should a clerk's office be deemed "inaccessible" if the weather is fine but the clerk's servers go down and thus electronic filing is not possible? What if the servers go down for only an hour? Four hours? Eight hours?

This is a thorny problem raising important policy issues that will need to be discussed at length. This is also a problem that will benefit from the expertise of the members of the Subcommittee on Technology — the same Subcommittee that has in the past proposed rules governing electronic service and filing. For those reasons, this problem has been referred to that Subcommittee. It is likely, though, that this issue will eventually end up before the advisory committees, and, as I noted, the Standing Committee and the Subcommittee on Technology are now looking for guidance from the advisory committees on how to proceed.

2. *The "Three-Day Rule."* The "three-day rule" is found in Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c). It provides that, when a party is required to act within a prescribed period after a paper is served on that party, and the paper is served by any means except personal service, three days are added to the prescribed period.

Some have suggested that the three-day rule should be abolished. It complicates time computation by forcing parties to figure out whether they get three extra days to respond to a paper. In the past, parties have had difficulty grasping the fact that the three-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order. This difficulty, in turn, has caused parties to miss deadlines.

Another problem with the current version of the three-day rule is that it creates an incentive for parties to use mail service and to avoid other means of service. For example, when a party serves an opponent electronically, the opponent gets three extra days, even though, in the vast majority of cases, the opponent will receive the paper instantaneously. If the deadline is 10 days, the opponent will, as a practical matter, have 13 days to work on its response. If the party instead serves the opponent by U.S. mail, the paper will not be delivered for at least two or three days, giving the opponent only 10 or 11 days to work on its response.

The Subcommittee discussed the three-day rule and decided that it should not be abolished. The Subcommittee feared that, if it was abolished, parties would avoid personal service, electronic service, and service by commercial carrier, and opt instead for U.S. mail. The Subcommittee thought that it might make sense to apply the three-day rule only to service by U.S. mail, but the rules of practice and procedure were just amended in 2002 to extend the three-day rule to electronic service, reflecting a decision that the Standing Committee made on the recommendation of the Subcommittee on Technology. Our Subcommittee did not feel comfortable revisiting such a recent decision of the Standing Committee. However, at its January meeting, the Standing Committee indicated that it would like guidance from the advisory committees regarding whether its decision should be revisited.

Our Subcommittee was also reluctant to address the question of whether to modify the three-day rule because the question implicates several other issues. In many courts, electronic service and filing is now mandatory for most parties. Those parties will file and serve

electronically no matter what the three-day rule provides. The fact that mandatory electronic filing and service is likely to become pervasive within the next decade may have implications for whether the three-day rule should maintained. In addition, the three-day rule is necessary only because, under the rules of practice and procedure, service by U.S. mail is effective on mailing, service by commercial carrier is effective on delivery to the carrier, and service by electronic means is effective on transmission. If service were effective on some other event — such as *receipt* — then the justification for the three-day rule would disappear. The problems with the three-day rule may justify a reexamination of the rules regarding the effectiveness of service.

The Subcommittee determined, and the Standing Committee agreed, that this issue is best addressed, at least as an initial matter, by the advisory committees. If there is strong sentiment for change among the advisory committees, then either the Subcommittee on Technology or another subcommittee will likely be asked to coordinate work on this issue, as it is obviously important to maintain consistency among the rules of practice and procedure.

Thank you for your assistance with these matters.

## I. SCOPE OF TIME-COMPUTATION RULES

### A. Appellate Rule

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute . . . .

### B. Bankruptcy Rule

**Rule 9006. Time**

**(a) Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

### C. Civil Rule

**Rule 6. Time**

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

### D. Criminal Rule

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order . . . .

### E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

## II. EXCLUDING DAY OF EVENT

### A. Appellate Rule

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

### B. Bankruptcy Rule

**Rule 9006. Time**

**(a) Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

### C. Civil Rule

**Rule 6. Time**

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

### D. Criminal Rule

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

**(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

### E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

## III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

### A. Appellate Rule

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

### B. Bankruptcy Rule

**Rule 9006. Time**

**(a) Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

### C. Civil Rule

**Rule 6. Time**

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

**D. Criminal Rule**

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

**(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

**E. Comment**

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

## IV. CALENDAR DAYS

### A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

### B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

### C. Civil Rule

The Civil Rules do not refer to calendar days.

### D. Criminal Rule

The Criminal Rules do not refer to calendar days.

### E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

## V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

### A. Appellate Rule

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

### B. Bankruptcy Rule

**Rule 9006. Time**

**(a) Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

### C. Civil Rule

**Rule 6. Time**

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

### D. Criminal Rule

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

**(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

### E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

## VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

### A. Appellate Rule

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

**B. Bankruptcy Rule**

**Rule 9006. Time**

**(a) Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

**C. Civil Rule**

**Rule 6. Time**

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

**D. Criminal Rule**

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

**E. Comment**

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

## VII. DEFINITION OF "LEGAL HOLIDAY"

**A. Appellate Rule**

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

**B. Bankruptcy Rule**

**Rule 9006. Time**

**(a) Computation.** . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

**C. Civil Rule**

**Rule 6. Time**

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

**D. Criminal Rule**

**Rule 45. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

**(4)** ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(I) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

**E. Comment**

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

## VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

**A. Appellate Rule**

**Rule 26. Computing and Extending Time**

* * * * *

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

**B. Bankruptcy Rule**

**Rule 9006. Time**

* * * * *

(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

**C. Civil Rule**

**Rule 6. Time**

* * * * *

(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

**D. Criminal Rule**

**Rule 45. Computing and Extending Time**

* * * * *

(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

## E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4]*See* FED. R. BANKR. P. 7005.

[5]*See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

## IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

### A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

### B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

## C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

## Rule 6. Computing and Extending Time

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

**(1)** ***Period Stated in Days.*** When the period is stated in days,

**(A)** exclude the day of the act, event, or default that triggers the period;

**(B)** count every day, including intermediate Saturdays, Sundays, and legal holidays; and

**(C)** include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

**(2)** ***Period Stated in Hours.*** When the period is stated in hours,

**(A)** begin counting immediately on the occurrence of the act, event, or default that triggers the period;

**(B)** count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

**(C)** if the period would end at a time on a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

**(3)** ***"Legal Holiday" Defined.*** "Legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.

## Committee Note

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. They do not apply when a fixed time to act is set. If, for example, a rule or order requires that a paper be filed "no later than November 1, 2007," then the paper is due on November 1, 2007. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to the rare time periods that are stated in weeks, months, or years. See, e.g., Fed. R. Evid. 901(b)(8).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is

treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 21, 2007, is due on Friday, August 31, 2007. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 22, 2007, is not due until Tuesday, September 4, 2007, because the tenth day (September 1) is a Saturday and Monday (September 3) is Labor Day.

The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a paper is due within 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time

expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

**Subdivision (a)(3).** New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

MEMORANDUM ON CIVIL RULE 30(B)(6) (MAY 2006)

NOTES ON RULE 30(B)(6) SUBCOMMITTEE CONFERENCE CALL - APRIL 4, 2006

MEMORANDUM FROM PROFESSOR RICHARD MARCUS TO RULE 30(B)(6) SUBCOMMITTEE - DECEMBER 28, 2005

COVER LETTER FROM JUDGES ROSENTHAL AND CAMPBELL SOLICITING COMMENTS - JANUARY 10, 2006

MEMORANDUM FROM PROFESSOR RICHARD MARCUS, *CONCERNS ABOUT RULE 30(B)(6) AND POSSIBLE AMENDMENT IDEAS* (JANUARY 2006)

SUMMARY OF RESPONSES (MARCH 2006)

**Rule 30(b)(6) Issues**

May, 2006

At its October, 2005, meeting, the Committee discussed a number of issues concerning the operation of Rule 30(b)(6), including receiving a presentation from David Bernick, a past member of the Standing Committee. Thereafter a Rule 30(b)(6) Subcommittee was formed, and it has probed further into these issues. The question now before the Committee is whether the Subcommittee should attempt to draft amendment language to deal with the issues identified. This memorandum will introduce the work done since last October and the issues that emerged.

*Survey of Bar Groups*
*and Subcommittee Reaction*

The questions discussed last October were brought to the Committee's attention by a submission from the New York State Bar Association that was included in the agenda materials for the October meeting. After the meeting, the Subcommittee determined that additional input would be extremely useful and decided to send an inquiry about Rule 30(b)(6) practice to a number of bar groups. A copy of the inquiry is included with these agenda materials. It was sent to all bar groups that had submitted commentary on the E-Discovery amendment proposals. Thirteen comments were received in response. Many were obviously based on considerable work and surveying of bar group members. A summary of those comments was prepared and is included with these agenda materials. Any member who wishes to see individual comments, or all the comments, can obtain them from James Ishida of the Rules Committee Support Office ([202] 502-1820 or James_Ishida @ao.uscourts.gov).

After the survey was completed and the summary of the comments had been prepared, the Subcommittee met by conference call to consider next steps. A copy of the notes of that conference call is included in these agenda materials. This memorandum introduces the issues emerging from that discussion, and also mentions some topics that the Subcommittee decided need not be brought forward for discussion.

*Objectives of Rule 30(b)(6)*

A reminder of the objectives of Rule 30(b)(6) seems in order at the outset, before turning to present issues. Prior to 1970, there was much concern with "bandying," a label attached to the reported practice of some organizational litigants that imposed on their opponents the considerable

task of locating a person who could actually speak about the issues of the case on behalf of the organization. That difficulty was portrayed as resulting sometimes from gamesmanship of the organization, but it is important to recognize that locating a person with knowledge could be quite difficult for the organization as well. Particularly with regard to events occurring in the distant past, the organization could find it extremely challenging to dredge up reliable information about what had happened. Corporate combinations, layoffs, etc., could present a similar problem even if the events had occurred somewhat recently.

One view of the rule, then, is that it presents a zero/sum situation in which there is an unavoidable clash of interests between the party seeking discovery and the party asked to provide it. The greater the reduction in the burden on the party seeking discovery, the greater the corresponding imposition of burden on the responding party. When the rule was introduced in 1970, the Advisory Committee seemed to regard the burden on the responding party as much less significant, for the Advisory Committee Note says that "[t]his burden is not essentially different form that of answering interrogatories under Rule 33, and is in any case lighter than that on the examining party ignorant of who in the corporation has knowledge." Given the free-ranging and spontaneous nature of a deposition, compared with answering an interrogatory, one could debate this proposition. But as recently three years ago, a magistrate judge wrote that "the underlying principle of the rule is to shift the burden of determine who is able to provide information from the requesting party to the corporation." Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), 29 Litigation 20, 22 (Winter 2003).

The salience of this background is that an undercurrent of the following discussion is the concern among some bar groups that revisions of the rule might inappropriately shift the burden of obtaining information back onto the discovering party and revive a version of bandying.

*Values of Rule 30(b)(6) practice*
*and concerns about changes to the rule*

Many of the respondents emphasized the importance of Rule 30(b)(6) in providing needed information, and several were quite concerned about changes that might hobble it. Several of the groups submitting comments are made up of members who regularly use the rule, and they reported that their main difficulty had been in obtaining compliance with the rule's expectation (and the caselaw's requirement) that the responding party adequately prepare the designated person to testify. At the same time, among those lawyers who had to prepare witnesses for such depositions, there was

recognition that this could involve a very considerable effort. Some who emphasized the burden of preparation also urged that sanctions be used vigorously when there is a failure to prepare adequately.

Some groups were rather vehement about their view that the rule should not be changed. See, e.g., Calif. Employ. Lawyers' Ass'n (saying that there does not appear to be any showing of problems that justify amendments); Consumer Att'ys of Calif. (urging the committee to reject proposals to amend the rule).[1] Other groups cited the need to amend the rule to address or provide guidance on specific matters. See, e.g., Amer. Coll. of Trial Lawyers (favoring a clarification whether questioning beyond the topics identified in the notice is allowed); N.Y. State Bar Ass'n (favoring an amendment forbidding preclusive effect for testimony of 30(b)(6)witnesses, another directing that only one 30(b)(6) deposition of a party be allowed unless there is a stipulation or court order for additional such depositions, and another limiting such depositions -- no matter how many representatives are designated -- to one day of seven hours).

*Limiting the scope of Rule 30(b)(6) depositions to locating sources of proof*

One idea that was discussed during the October meeting was to refocus the rule so that it would require a responding party only to identify sources of information. Such a change would permit the party seeking discovery then to use conventional discovery devices to obtain the information, and would excuse the organization from providing answers to "substantive" questions about the events underlying the case. This narrowing, in turn, could reduce the burden of preparing for a deposition and the risk of inappropriate foreclosure of proof by the organization regarding topics covered in the deposition.

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[1] The Federal Courts Committee of the Assoc. of the Bar of the City of New York observed as follows:

> While our members understand that Rule 30(b)(6) offers the potential for abuse, their experience suggests that abuse of this Rule is no more likely than that accompanying any other discovery device, and that the potential for abuse is suitably managed by the district court's supervision of the process. In addition, existing case law surrounding the Rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. With this context, the Association does not believe an amendment would improve the effectiveness of Rule 30(b)(6) or provide any greater protection against attempted abuse.

One question raised by this possibility was the degree to which it corresponded to what the Committee was trying to accomplish with the 1970 addition of Rule 30(b)(6). Research into the deliberations of the Committee during the 1960s indicated that the goal then was broader than requiring designation of sources of proof. A copy of the report on that research is included in the agenda book.

The inquiry to bar groups nonetheless asked about whether this sort of change would have a positive effect. Of the groups that discussed the idea, none supported it, and several criticized it vigorously. The Subcommittee decided not to proceed further with this idea. As explained in the notes to the Subcommittee's April 4 conference call, however, it did decide to bring forward six topics for discussion. These numbered topics are discussed below.

*(1) Treating answers in a 30(b)(6) deposition as judicial admissions*

The first issue that the Subcommittee decided to bring forward is the judicial admission concern. The issue is whether an answer given by the 30(b)(6) witness -- including "I don't know" -- is a "judicial admission" in the sense that the organization is forbidden to offer evidence at trial that contradicts the answer. It seemed to the Subcommittee that this issue devolved into two distinct topics -- whether the courts have been so treating such deposition answers, and if so whether and how that should be changed. This memorandum therefore turns first to the state of the caselaw on judicial admission treatment of Rule 30(b)(6) deposition responses.

Caselaw on judicial admissions

Several bar groups said that some courts have held that answers during 30(b)(6) depositions are judicial admissions, or that there is a split of authority on the subject. These discussions are covered in more detail in the attached summary of comments. See, e.g., ABA Section of Litigation (reporting that counsel who regularly represent corporations said that they had faced arguments for the preclusive effect of 30(b)(6) testimony, and that the risk of preclusion increased the burden of preparation); Amer. Coll. of Trial Lawyers (reporting that the rule can be, and has been, interpreted to provide for a binding effect); Federation of Def. & Corp. Counsel (reporting that "[m]any courts prohibit a party from submitting evidence that contradicts its deposition testimony"). Compare Assoc. of the Bar of the City of New York (reporting that none of the members of its Committee on

Federal Courts said that the issue had played an important role in one of their cases, but noting that this could be due to the fact so few cases reach trial).

Some groups applauded giving binding effect to answers during a 30(b)(6) deposition. See, e.g., ATLA (asserting that a corporation should be bound because the buck must stop somewhere); Calif. Employ. Lawyers' Ass'n (asserting that if the answers did not bind the entity, the deposition would be of very little value). Other groups that seemingly wanted such answers to be preclusive, but reported that the courts did not so order. See, e.g., Nat. Employ Lawyers Ass'n (reporting that 30(b)(6) depositions are generally not given binding effect, but only used to impeach trial testimony).

We invited the groups to offer caselaw examples, and some of them did. A review of those examples does not show that reported decisions often result in judicial admission treatment of 30(b)(6) testimony in ways that are troubling. Our initial research indicated that it was unclear whether courts often treat the "binding" effect of Rule 30(b)(6) testimony to foreclose evidence from outside the organization supporting a different version. Decisions that appear to do so may at heart reflect the view that the organization did not adequately prepare its Rule 30(b)(6) witness, and that information available to the organization was not presented as a result. In these circumstances, courts may order that information not presented during the 30(b)(6) deposition, when it should have been presented, cannot be presented later either. This view consistent with Rule 37(c)(1).

Except as a sanction for failure to do proper preparation, however, it seems flatly wrong to say that the testimony of any party witness "binds" that party at trial and precludes it from offering otherwise admissible evidence that supports competing conclusions. See e.g., Guenther v. Armstrong Rubber Co., 406 F.2d 1315 (3d Cir. 1969) (even though plaintiff testified at trial that he was injured by the explosion of a "black wall" tire, he could introduce evidence from other witnesses that he was actually injured by the "white wall" tire that plaintiffs produced at trial as the offending item).

The magistrate judge's decision that is regularly cited as emblematic of overly broad application of preclusion under the rule stops short of treating the testimony as a judicial admission. See United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("answers given at a Rule 30(b)(6) deposition are not judicial admissions"). And the district court's affirmance of the magistrate judge's decision appears to regard it as premised on the preparation obligation:

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

United States v. Taylor, 166 F.R.D. 367, 367-68 (M.D.N.C. 1996). Thus, this case is one of those later cited by the Seventh Circuit (which refused to follow the only aggressive decision favoring a judicial admissions treatment) as rejecting the judicial admissions approach.

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

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

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

Nonetheless, enthusiasts for use of 30(b)(6) remark that "The whole point of Rule 30(b)(6) is that it creates testimony that binds the corporate entity. * * * It is extraordinary that there is so little case law on developing Rule 30(b)(6) as an offensive weapon to bind entities to their deposition testimony and bar contrary trial testimony." Solovy & Byman, Rule 30(b)(6), Nat.L.J., Oct. 28, 1998, at B13. A similar notion is found in a leading treatise: "It should be kept in mind that a Rule 30(b)(6) designee testifies on behalf of the corporation, and binds the entity with its testimony." 7 Moore's Federal Practice § 30.25[3] at 30-56.3.

The caselaw cited by the responding bar groups provides some support for the judicial admission view. The strongest example is Rainey v. American Forest & Paper Ass'n, Inc., 26

F.Supp.2d 83 (D.D.C. 1998), and it bears description in some detail as the sole reported case strongly endorsing a judicial admission attitude. The court refused to permit defendant to rely in response to plaintiff's summary judgment motion on an affidavit from a former employee because the affidavit differed from the testimony given by defendant's 30(b)(6) witness. In this Fair Labor Standards Act case, plaintiff's 30(b)(6) notice specified that her duties while employed by defendant were a topic to be covered in the deposition. Despite that, the 30(b)(6) witness made no suggestion that plaintiff was exempt from the protections of that statute on the ground that she spent at least 50% of her time on managerial tasks. More generally, the court later found, this witness's testimony was deficient in details. See id. at 92-93. After plaintiff moved for summary judgment, defendant obtained and submitted an affidavit from plaintiff's former supervisor, who was one of its former employees. The affidavit said that the former employee had personal knowledge of plaintiff's day-to-day responsibilities, and that plaintiff had spent most of her time on managerial tasks.

The court held that the affidavit could not be considered. It emphasized that the corporation had a duty to prepare its designee "'to be able to give binding answers' on its behalf." Id. at 94.[2] "Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." Id. Even though defendant had identified the affiant (Kurtz) as plaintiff's supervisor in other discovery. the court found that preclusion was required by the rule (id. at 95):

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[2] The court quoted from Ierardi v. Lorillard, Inc., 1991 WL 158911 (E.D.Pa., Aug. 13, 1991). In that case, the court refused to grant defendant Hollingsworth & Vose Co. a protective order against having to prepare a witness to testify about its practices with regard to asbestos activities decades in the past, when it had manufactured the "Micronite" cigarette filter containing asbestos in the 1950s and 1960s. Defendant argued it would face an undue burden if required to prepare a witness. The judge disagreed: "Although this task may be somewhat difficult, it is clear that if a corporate employee familiar with the structure and organization of the corporation would find this task difficult, plaintiffs, who have no such familiarity, likely would find it impossible." Id. at *1. The court added:

> Defendant's suggested interpretation would permit defendants to profess ignorance of information the plaintiffs request during a 30(b)(6) deposition, but then allow H & V to present evidence on the same subject at trial. Defendant's interpretation, however, subverts the purpose of Rule 30(b)(6). Under Rule 30(b)(6), a defendant has an obligation to prepare its designee to be able to give binding answers on behalf of H & V. If the designee testifies that H & V does not know the answer to plaintiffs' questions, H & V will not be allowed effectively to change its answer by introducing evidence during trial. The very purpose of discovery is "to avoid trial by ambush."

Id. at *3.

> This result is supported not just by the text of Rule 30(b)(6) but by the purposes underlying its promulgation. Foremost among those purposes, according to the Advisory Committee Notes, is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." In other words, the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case. * * * [I]t is clear that allowing it to introduce the Kurtz affidavit at this juncture would produce the very result that the Rule aims to forestall. If Ms. Kurtz was -- as her affidavit suggests -- so closely involved with the human resources department while plaintiff worked there, surely the information she has come forward with was equally well-known at the time plaintiff sought to depose as corporate representative. Defendant's failure to produce it then -- either by designated Ms. Kurtz as its representative or by preparing its designees to represent what Kurtz knew -- clearly violated Rule 30(b)(6).

It might be noted that this case seems to have involved a central and relatively simple issue -- whether plaintiff should be viewed as a managerial employee under the Act. But the court's reasoning is very broad. It has not, however, been broadly accepted. To the contrary, the Seventh Circuit had this to say about the Rainey decision while holding (as noted above) that 30(b)(6) answers are not judicial admissions:

> McPherson cites Rainey v. American Forest & Paper Ass'n, Inc., 26 F.Supp.2d 82, 94 (D.D.C. 1998), in support, but two other district courts have reached different conclusions and we think theirs is the sounder view. See Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F.Supp.2d 786, 791 (N.D. Ill.) ("testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes"); United States v. Taylor, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996 (testimony of Rule 30(b)(6) designee does not bind corporation in sense of judicial admission).

A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001). In 2005, an Indiana appellate court, interpreting the analogous Indiana rule, quoted the Seventh Circuit view and concluded that "[w]e agree with the Seventh Circuit and conclude that the testimony of an Ind. Trial Rule 30(B)(6) designee does not bind a corporation in the sense of a judicial admission." Everage

v. Northern Ind. Pub. Serv. Co., 825 N..E.2d 941, 950 (Ind.App. 2005).[3] Note also, as quoted above, that the Eighth Circuit ruled against the judicial admission approach in 2001. See R & B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001).

The remainder of the cases cited in bar group submissions do not seem to raise significant concerns. The leading example is Hyde v. Stanley Tools, 107 F.R.D. 992 (E.D. La. 2000). This is the only case cited by the Moore treatise in support of the proposition that answers in a 30(b)(6) deposition are "binding," and was cited by two of the bar groups that submitted comments. In that case, defendant's 30(b)(6) witness testified in "no uncertain terms" that the hammer that caused plaintiff's injury was manufactured by defendant. He said that he reached this conclusion "after close inspection of the hammer, including microscopic inspection, and comparing the hammer to Stanley drawings and specifications. [The witness] further determined that the hammer was manufactured by Stanley between 1983 and 1986." Id. at 992. Plaintiff then moved for partial summary judgment on the basis of this identification testimony about six months after the 30(b)(6) deposition.

Defendant responded to the summary judgment motion with an affidavit from one of its engineers asserting that the hammer was not one of its products. This engineer had been present during the entire 30(b)(6) deposition but had not said anything when the designee gave his unequivocal testimony identifying the hammer as defendant's product. The court refused to allow the affidavit to be considered, citing sham affidavit cases. See id. at 993, citing Perma Research & Devel. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."). Thus, the court was treating the 30(b)(6) deposition just like any party deposition. The court also recognized leeway for the corporate party (id. at 993):

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[3] As noted by the Seventh Circuit, another district court decision rejects the judicial admission idea:

> While Hestran and Global are bound by the testimony given by their designated representative during the Rule 30(b)(6) deposition, such testimony is not a judicial admission that ultimately decides an issue. The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.

Industrial Hard Chrome, Ltd. v. Hetran Inc., 92 F.Supp.2d 786, 791 (N.D. Ill. 2000).

[C]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation. [But this is not available because there is no indication] that the expert report was based on newly discovered evidence or that [the 30(b)(6) witness] was somehow confused or made an honest mistake.

Other cases in bar group submissions also involve the sham affidavit doctrine.[4] In addition, several involve a failure to produce a witness prepared in the manner required by the rule.[5] It does not seem

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[4] The following are the additional cases of this sort cited by the groups that submitted citations:

International Gateway Exchange, LLC v. Western Union Finan. Serv., Inc., 335 F.Supp.2d 131 (S.D.N.Y. 2004): The issue was whether defendant's delay in processing credit card transactions breached the parties' agreement. Defendant took plaintiff's deposition pursuant to Rule 30(b)(6), and plaintiff's representative admitted during the deposition that plaintiff was not contending that certain delays constituted a breach of the agreement. After defendant moved for summary judgment, plaintiff tried to retract this admission. The court said that "IGE cannot retract that testimony in opposing Western Union's motion," but added that plaintiff submitted no evidence to support its assertion, and that its submissions also violated the court's local rules on submission of material on a summary judgment motion. See id. at 144-45.

Newport Electronics, Inc. v. Newport Corp., 157 F.Supp.2d 202 (D. Conn. 2001): In a service mark infringement action, plaintiff took defendant's deposition using Rule 30(b)(6) and then moved for summary judgment. In response to the motion, defendant submitted an affidavit conflicting with the deposition testimony. Plaintiff argued that the court should strike the affidavit because the rule does not permit a party to contradict or alter his 30(b)(6) testimony. Id. at 219. Defendant responded that the rule "does not require a witness to be omniscient." The court granted the motion to strike the affidavit, invoking the sham affidavit doctrine and also finding a violation of the rule's requirement to prepare the witness (id. at 220):

> The settled law in the Second Circuit is that "a party may not create a material issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." Rasking v. Wyatt Co., 125 F.3d 55, 63 (2d Cir. 1997). Here, Blake's affidavit contradicts statements in his deposition. Newport Corporation received notice of the topics on which Newport Electronics wished to depose a 30(b)(6) witness; Blake was not at liberty, therefore, to delay reviewing information on those topics until after the deposition and, thereby, submitting information in his affidavit which contradicts statements in his deposition regarding his lack of knowledge on various topics.

Also cited was Mack v. United States, 814 F.2d 120 (2d Cir. 1987): This case does not involve a 30(b)(6) deposition. Plaintiff sued after being terminated by the FBI for cocaine use. Among other things, he claimed that the FBI had violated the Fourth Amendment by asking him to submit to a urinalysis. He has signed a consent form acknowledging that he had no obligation to submit to the test, and during his deposition had said that he had not been forced to give a sample and had been "totally cooperative." But after defendants moved for summary judgment on this ground, plaintiff submitted an affidavit in opposition asserting that he had submitted to the test in fear of loss of his job, and that he was coerced. The appellate court held that it was proper to grant defendants' motion for summary judgment despite the filing of plaintiff's affidavit: "It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." Id. at 124.

[5] As noted in the previous footnote, failure to prepare issues were present in some of the sham affidavit cases. Other cited cases seem principally to depend on failure to prepare:

Reilly v. Natwest Markets Group, Inc., 181 F.3d 253 (2d Cir. 1999): The court ruled that defendant violated Rule 30(b)(6) by failing to produce two proposed witnesses as its representatives for the deposition, and that the trial court therefore properly barred them from testifying at trial. Although this might be at tension with the rule, which does not require the designation of any particular witness, the point for present purposes is that the decision was based on a violation of the rule. See id. at 268-69.

that, except for the special preparation requirement in Rule 30(b)(6), these cases impose distinctive requirements.

In sum, a considerable effort to identify caselaw support for the reported problem produced limited grounds for uneasiness about courts treating 30(b)(6) answers as judicial admissions.

Possible amendment to address judicial admissions issue

Whatever the state of the caselaw, there remains some concern about inappropriate preclusion of evidence based on a judicial admission theory. It does not seem that any bar groups question the basic idea that if a corporation properly prepares a witness it should not be held to the answers given no matter what they are. At the same time, it also seems that orders foreclosing contradictory evidence have on a number of instances been used by courts that concluded they were appropriate to redress failure to comply with the rule's preparation requirement. Therefore, even though there seems little reason to amend the rule solely to put into it the accepted idea that there is a duty to prepare, it may well be important to add that statement as a predicate to any limitation on the court's authority to make preclusion orders. For purposes of discussion only, it may be useful to indicate how such an amendment might look:

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

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Audiotext Commun. Network v. US Telecom, 1995 WL 625962 (D. Kan., Oct. 5, 1995): This case is not about preclusion, but rather about requiring further testimony from plaintiff, who proffered a witness not able to answer questions during a 30(b)(6) deposition. Although the questions were within the scope of the deposition, the representative said that he could not answer them. The court emphasized that the corporation must "prepare [the 30(b)(6) witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation." Id. at *13, quoting Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989). Concluding that this was a refusal or failure to answer deposition questions, the court ordered plaintiff to produce knowledgeable, prepared corporate representatives for a further deposition at plaintiff's expense.

so that they can testify as to the information known or reasonably available to the organization. If such preparation is adequately done, the court may not treat answers given during the deposition as judicial admissions. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Undoubtedly improvements can be made in the language regarding both the duty to prepare the witness and the restriction on the court's use of judicial admission treatment. It should also be noted that both ideas could be explored in greater detail in an accompanying Committee Note.

Whether such an amendment would be wise can certainly be debated. For one thing, the caselaw does not show a great need in reported cases for making such a change. But making the change could accomplish objectives favored by bar groups who submitted comments. Some favored adding an express requirement to prepare to the rule even though they acknowledged that it is well-recognized in the caselaw. But as the National Ass'n of Consumer Advocates points out, something of the sort is probably implicit in the rule already as it says that the organization must send a person to "testify" "on its behalf." And those worried about overuse of the rule might become uneasy about fortifying the statement of the duty to prepare.'

Adding a limitation on judicial admission treatment seems contrary to the views of several surveyed groups, although they don't appear to expect that the testimony will be more "binding" than with any other litigant. Some ask why anyone would conduct the depositions at all if the answers are not binding. See Calif. Employ. Lawyers' Ass'n. As compared with a supplementation approach (no. 2 below), this provision might be superior for responding parties because it would not carry with it the directive of Rule 37(c)(1) that material not provided through supplementation usually may not be used in the case. To the contrary, the thrust of this possible change is that -- so long as the witness is adequately prepared -- the material may be used. Nonetheless, it is also possible that the change might promote use of judicial admission sanctions when the court does find a failure to prepare.

It might also be objected that the adequate preparation predicate could impose on the court and the parties an onerous burden of determining whether such preparation has been adequate. But in all likelihood that would be an issue whether or not the rule were thus changed. As the caselaw review above noted, courts presently invoke their attitudes toward adequate preparation as a criterion in deciding whether to preclude organizational litigants from later submitting contradictory or inconsistent material.

*2. Supplementation*

If the goal of the rule is to get requested information to the party seeking it, a supplementation approach might be preferred to a judicial admission or preclusion approach. Supplementation would provide a recognized avenue for a party to provide additional information when it was not provided in the 30(b)(6) deposition. It would thus treat 30(b)(6) depositions differently from all other depositions (except depositions of expert witnesses).

An obvious starting concern is whether such a change might undercut the duty to prepare. As the American College of Trial Lawyers put it, "[a] supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation; otherwise a 30(b)(6) deposition would become an exercise in which the answer to every question would be 'I will get back to you on that.' The right and duty to supplement should be just that -- a supplement." Other groups caution that such an addition would reduce incentives to prepare witnesses adequately. See, e.g., ATLA. Some say that it would have dramatic consequences. See, e.g., Calif. Employ. Lawyers' Ass'n (making such a change would result in trial by ambush); Nat. Employ. Lawyers' Ass'n (permitting supplementation would require retaking the 30(b)(6) deposition). To a considerable extent, Committee Note material on the duty to prepare the witness adequately could ameliorate such problems. In addition, it might be that adding an express requirement of preparation (as under no. 1 above) would be important in connection with this possible change as well.

Whether the "right" to supplement would promote deficient preparation could be debated. Actually, a strong supplementation requirement was not inserted in the rules until 1993, and before then supplementation was required only in limited circumstances. So treating supplementation as a right that provides an escape hatch for the responding party, rather than as a duty imposed on the responding party, is not entirely in keeping with the way in which it has emerged. And in 1993 supplementation was linked to the new provisions of Rule 37(c)(1), which direct the court to deny parties that fail to supplement to use the material they should have provided through supplementation. Thus, adding supplementation could mandate preclusion in instances where it is not available today. Such an outcome would seem consistent with the concerns of bar groups (e.g., Nat. Employ. Lawyers' Ass'n) that lament that courts are not binding parties by their 30(b)(6) answers. In an important way, 37(c)(1) treatment would do so.

Among those favoring adding a supplementation provision, some bar groups are notably cautious about what it should include. The ABA Section of Litigation, for example, offered the following thoughts about the problem of "binding" effect:

> One possible idea would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to be believe that a previous 30(b)(6) piece of testimony needs to be modified. The court should retain the option of denying the "notice of change of testimony" if, for example, the notice was given after the discovery cut-off date or too close to trial or would require a continuance of the trial date. The burden of proving good faith preparation of the corporate representative would be on the party seeking the change, with the opposing party permitted reasonable discovery to test the good faith assertion and the resulting expenses paid by the party seeking the change in testimony. If a "notice of change of testimony" is permitted and depending on the circumstances, the party giving this notice may then be required to pay the additional expenses, including attorneys' fees, of the opposing side in proffering the corrected testimony. This would seem to even the playing field and prevent either side from taking unfair advantage of the 30(b)(6) mechanism. Another possibility (not mutually exclusive) would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Against that background, at least a starting point could be provided by the following possible amendment ideas, which are offered only for purposes of facilitating discussion of the issue whether this is a course to be pursued. The sensible place for such an amendment seems to be Rule 26(e), which has the other supplementation provisions, and which directly links to Rule 37(c)(1):

> **(e) Supplementing Disclosures and Responses**
>
> **(1) In General.** A party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission[, or Rule 30(b)(6) deposition notice] -- must supplement or correct its disclosure or response to include later-acquired information.[6] The party must do so:

[6] Note that, in connection with the Style Project, there remains an open question about whether to include this phrase -- "later acquired information" -- in the restyled rule.

**(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

**(B)** as ordered by the court.

**(2) Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

{**(3) Rule 30(b)(6) Depositions.** A party that has produced a representative to testify under Rule 30(b)(6) must supplement or correct the testimony given [within --- days of the conclusion of the deposition] {no later than the time when the party's pretrial disclosures under Rule 26(a)(3) are due}. [The party that took the deposition may then retake the deposition of the representative with regard to the supplemental information {at the expense of the supplementing party}.]}

The foregoing obviously offers two alternative approaches to providing a supplementation provision for Rule 30(b)(6) depositions. Surely there are others as well.[7] And the proposals raise many issues, including those introduced above.

One issue is whether to provide a special supplementation provision for Rule 30(b)(6) depositions, as with expert witness evidence. That is distinctive in the current rules because it is the only occasion on which there is a requirement to supplement deposition testimony. A new and

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[7] A more demanding one, along the lines suggested by the ABA Section of Litigation, might look like this:

> **(3) Rule 30(b)(6) Depositions.** A party that has produced a representative to testify under Rule 30(b)(6) may supplement the testimony only on demonstrating that it made a good faith effort to prepare its representative to testify during the deposition. If the court grants leave to supplement, the opposing party may retake the deposition of the representative at the expense of the supplementing party.

separate (3) might therefore be more in keeping with the format of the treatment. In addition, using the 26(e)(2) approach seems well suited to providing specifics about timing and (if thought desirable) cost consequences.

Another issue is whether allowing supplementation of deposition testimony in this instance is inconsistent with the overall thrust of the rules. Rule 30 permits a witness to request the opportunity to read and correct deposition testimony. Presumably that applies to Rule 30(b)(6) depositions as to any others. So this opportunity might be viewed as "second" chance, and thus to provide a special opportunity to corporate parties. The time limitation suggested above might be a way of addressing that concern, but might also create difficulties that would undercut the value of supplementation. And it is worth noting again that the addition of such a provision would seem to magnify the likelihood of preclusion orders due to the role of Rule 37(c)(1).

### *3. Scope of Rule 30(b)(6) Depositions*

Limiting questioning to topics specified in notice

The fundamental starting point for a Rule 30(b)(6) deposition is the listing of topics in the notice. The selection of a representative may depend heavily on what is on that list. The responding party can designate different representatives to address different topics on that list. The preparation obligation applies to what is on that list. And the questioning should be about the topics on that list.

Sometimes the representative may have no knowledge about anything except the topics on that list.[8] But with considerable frequency, the person designated has personal knowledge about other issues involved in the lawsuit besides those topics listed in the notice. Should this be permitted in the 30(b)(6) context? Here is the reaction of the American College of Trial Lawyers submission, which raises a number of issues:

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[8] For example, the Trial Lawyers for Public Justice comment includes the following:

> [O]ver the past decade, it has increasingly become the practice for organizations not to produce an officer, director or managing agent as its Rule 30(b)(6) deponent. More commonly, organizations choose wholesome looking, young people who, prior to receipt of the Rule 30(b)(6) deposition notice, had little, if any involvement in or knowledge of the issues which are the subject matter of the deposition. One corporate defendant even produced a document about this practice, referring to its designee -- who was chosen to testify precisely because he had no knowledge of the noticed topics -- as "the fall guy."

> We believe that a clarification on this issue would be helpful. There are many instances with questioning that goes beyond the designated topics. What is the effect of an answer that is not within the proper scope? Is it an admission at all? It is a binding admission? Does it convert the 30(b)(6) deposition into an individual deposition under Rule 30(b)(1), counting as two depositions under the 10 deposition rule? What should be the process for objecting to questioning that exceeds the topics? While the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

See also comments of Fed. of Defense & Corp. Counsel (urging that questioning be limited to topics listed).

Other groups oppose such a rule change. Some say that the courts are imposing such a limit already. See ATLA; Nat. Employ. Lawyers' Ass'n. Others point out that the matter is often easily resolved among counsel. If the choice is between having the witness answer the additional questions at the same time, or requiring that the witness return on a different occasion to answer in an individual capacity on other topics, it may be much more expedient to proceed with all relevant information. Whether parties address the problem of counting depositions for purposes of the ten-deposition limitation in not clear. But it surely might happen that on occasion the responding party would take the position that the witness was only prepared for certain questions and that he or she is therefore not prepared to answer questions on other subjects. In the same vein, the questioning lawyer might insist on grounds of lack of preparation for other topics that questioning be limited to the listed topics even if the witness wanted to cover all at the same time.

For purposes of discussion, here is a possible way to implement such a rule provision:

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

designated to testify. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Adding "factual" to limit the ambit of questioning

The New York State Bar Association, whose comments spurred the initial inquiry into this rule, urges that the rule be amended as follows:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about factual information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The objective of this change would be to confine the questioning and protect against overreaching concerning contentions or legal positions. At least the most obvious efforts to inquire into legal contentions could be curtailed by this amendment.

As set out in the materials circulated for the October 2005 meeting, the effectiveness of this change is uncertain. The change might do little to curtail many activities to which objection has been made. It could also re-introduce some difficult questions that were deliberately avoided in drafting the pleading rules in the original Civil Rules. By the early twentieth century, the dividing line between "facts" and "conclusions" was a hotly debated and litigated focus of pleading decisions. For example, it was long debated whether the allegation that defendant drove "negligently" was an allegation of fact or a mere conclusion. The framers of the rules intentionally defined the sufficiency of a claim without using the word "facts" to bury this past. See Form 9 (stating that an allegation that defendant drove "negligently" is sufficient). Restoring this distinction, but putting it into the discovery rules, is a dubious undertaking.

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

### *4. Number/time limitations as applied to Rule 30(b)(6) depositions*

Numerical and time limitations on discovery events inevitably raise strategic issues. All can be changed by agreement of the parties or court order (perhaps under Rule 16(b) based on the parties' Rule 26(f) discovery plan. Essentially there are three possible foci with regard to 30(b)(6) depositions. Two of them have received attention in the Committee Notes, and the third is the subject of some conflicting caselaw:

Ten-deposition limit: When the ten-deposition limit was added to Rule 30(a) in 1993, the Committee Note observed: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify."

One-day duration limit: When the "one day of seven hours" limit was added to Rule 30(d) in 2000, the Committee Note said: "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition."

Requirement of stipulation or leave of court for second deposition: When Rule 30(a)(2) was amended in 1993 to permit a person's deposition to be taken a second time only by stipulation or with leave of court, there was no reference to whether that rule would apply to a 30(b)(6) deposition. There seems to be little law on this question. A First Circuit decision takes the view that the prohibition on a second deposition applies to Rule 30(b)(6) depositions, as does one district court

decision and the Moore's treatise;[9] one district court, declaring that "Rule 30(b)(6) depositions are different from depositions of individuals," had said that the limitation does not apply.[10]

Whatever the resolution of these issues, there seem to be strategic reactions that could be employed. Providing that the seven-hour limitation applies to each designated representative, for example, may deter corporations from designating more than one person. But a reverse rule could

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[9] In Ameristar Jet Charter, Inc. v. Signal Compositers, Inc., 244 F.3d 189 (1st Cir. 2001), the court upheld an order quashing subpoenas for a second 30(b)(6) deposition of a nonparty corporation and also quashed subpoenas for the depositions of three individuals associated with that corporation. Regarding the 30(b)(6) notice, the court said that "[b]ecause this second Rule 30(b)(6) subpoena was issued . . . without leave of court, it was invalid." Id. at 192. The court emphasized, however, the narrowness of its review of a discovery order.

In In re Sulfuric Acid Antitrust Litigation, 2005 WL 1994105, 2005 U.S. Dist LEXIS 17420 (N.D. Ill., Aug. 19, 2005), the court followed the First Circuit decision on the ground that the plain meaning of Rule 30(a) forbids a second 30(b)(6) deposition without leave of court. Citing the 1993 Committee Note provision that, for purposes of the ten-deposition limit, the court found no ground for excluding 30(b)(6) depositions from the requirement imposed at the same time that there be court permission for a second deposition:

> The Advisory Committee's explanation of why Rule 30(b)(6) depositions were to be treated differently from individual depositions for "purposes of" the ten-deposition rule, is readily apparent. As the instant case demonstrates, Rule 30(b)(6) deposition notices routinely specify a number of topics of inquiry, which often necessitate the designation of multiple witnesses. The more complex the case, the greater the number of topics to be explored during the deposition and the greater number of witnesses. If each witness were counted separately, a party could easily exhaust the number of allowable depositions in one or two Rule 30(b)(6) depositions. The Advisory Committee Notes make clear that the drafters intended to avoid that problem by counting a 30(b)(6) deposition as a single deposition, regardless of how many individuals were required to be designated to comply with a 30(b)(6) notice.
>
> There is nothing in the text, history, or purpose of Rule 30 that supports the conclusion that "for purposes of" the prior judicial approval requirement for successive depositions, Rule 30(b)(6) depositions should be treated differently form depositions of individuals.

See also 7 Moore's Federal Practice § 30.05[1][c] at 30-30.3 ("Even though a party may be deposing a different corporate representative, it is still seeking a 'second' deposition of the entity"); Sunny Isle Shopping Center, Inc. v. Xtra Super food Centers, Inc., 2002 WL 32349792 (D.V.I., July 24, 2002) (stating that the Rule 30(a)(2) limitation "has been held applicable to corporate depositions noticed pursuant to Rule 30(b)(6)").

[10] Quality Aero Technology, Inc. v. Telemetrie Elecktronik, GMBH, 212 F.R.D. 313 (E.D.N.C. 2002). The court's reasoning was as follows (id. at 319):

> Rule 30(b)(6) depositions are different from depositions of individuals. That difference is confirmed by the Advisory Committee Notes to the 1993 amendments to the Federal Rules, which expressly state that for purposes of calculating the number of depositions in a case, a 30(b)(6) deposition is separately counted as a single deposition, regardless off the number of witnesses designated. Further, there is no aspect of the Rules which either restricts a party to a single 30(b)(6) deposition or restricts the allotted time for the taking of a 30(b)(6) deposition.

prompt them to designate many. Similarly, the ten-deposition rule could, if applied to each designated representative, similarly provide an incentive for an entity to designate many. The Committee Note admonitions quoted above prevent that sort of behavior, but they may undercut efficient designation of representatives if they unduly encourage that entities use only one.

The "second deposition" problem is more difficult to assess, and was not addressed in the Committee Note when that limitation was adopted. On the one hand, the burden of preparing a 30(b)(6) witness is considerable, and having to do it more than once may be worthy of the protection afforded by the rule. On the other hand, to say that all topics must be examined at this one deposition may place additional stress on the corporate party (and require designation of additional representatives), as well as taxing the corporation's adversary. In addition, the notion (in the background, at least, with regard to the E-Discovery amendments) that an early 30(b)(6) deposition of IT people may be important to facilitate discovery of electronically stored information) could be undercut if that were the one and only opportunity for a 30(b)(6) deposition absent court approval of another one. As noted above, a related question arises if questioning of the representative goes beyond the scope of the topics listed in the notice -- should that be considered a "second" deposition, of the individual rather than the organization.

It may be that the best the Committee can do is to leave things as they are. Presently, the majority view on one of these three subjects (the one-deposition rule) favors the organizational litigant, while the resolution on the other two favors the organization's adversary. Reasonable litigants should be able to resolve such matters without the need for court intervention, and it may make sense to have a situation in which the onus is on each side with regard to certain matters to seek court intervention when agreement is not reached. If that is so, however, the question may remain whether the present burden of proceeding is in the right place.

The bar group comments include differing reactions to these issues. The New York State Bar Ass'n favored applying the one-day limit to a 30(b)(6) deposition, no matter how many representatives were designated. The American College of Trial Lawyers Federal Courts Committee saw no problem with the Committee's position that all designees be treated as a single deposition for the ten-deposition rule, and favored using the one-deposition rule to protect the corporation so that "litigants would be required to exhaust all possible topics in their first (and perhaps only) 30(b)(6) deposition of an entity." Proponents of Rule 30(b)(6) depositions urge that limits on taking them be avoided. See, e.g., Consumer Att'ys of California (urging that limitations on the number of 30(b)(6) depositions would be counterproductive, and that one cannot properly limit the number

of representatives designated); Nat. Employment Lawyers' Ass'n (asserting that limiting the number of 30(b)(6) depositions will only lead to motions for additional depositions); W. Va. Trial Lawyers Ass'n (contending that limiting the number of such depositions is not warranted).

It may be that there is no perfect solution, and that any default will afford some opportunities for gamesmanship. But some might wisely be avoided. For example, it would be passing strange to provide that an organizational litigant that had to supply numerous representatives because the first several were inadequately prepared thereby curtailed its opponent's ability to take non-30(b)(6) depositions under the ten-deposition rule. Nonetheless, for purposes of discussion, the following amendment ideas may be helpful. First, to deal with the number of depositions in the most restrictive way, one could make amendments to Rule 30(a)(2):

> **(2) With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2);
>
> > **(A)** if the parties have not stipulated to the deposition and:
> >
> > > **(i)** the deposition would result in more than 10 depositions, including each person designated to testify under Rule 30(b)(6), being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
> > >
> > > **(ii)** the deponent, [including a person deposed under Rule 30(b)(6)] {except a person deposed under Rule 30(b)(6)}, has already been deposed in the case; or * * *

Second, to deal with the durational limitation, one could amend Rule 30(d)(1) as follows:

> **(1) Duration.** Unless otherwise stipulated or ordered by the court, a deposition, including a Rule 30(b)(6) deposition, is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

*5. Timing of Rule 30(b)(6) depositions*

The question of timing is important in significant measure because of the bearing it has on other issues. Thus, the earlier in the litigation a 30(b)(6) deposition occurs, the greater the preparation burden for the responding party, particularly if there is a significant risk of judicial admission treatment, or if there is a supplementation requirement that requires that all additional responsive information be provided in a specified (and relatively short) period of time.

A number of bar groups opposed limitations on the timing of 30(b)(6) depositions. ATLA, for example, says that "30(b)(6) depositions should be taken when they need to be taken." It adds that generally this will be relatively early in the litigation, because delaying this foundational discovery would impede plaintiffs' ability to learn the corporate position. The Consumer Att'ys of Calif. says that usually its members take such depositions early, but that they need flexibility to take them at any time during the litigation. The Nat. Ass'n of Consumer Advocates says that the timing of such depositions depends on the condition of the circumstances of the individual case, but that it should occur early enough to allow time for follow-up discovery before dispositive motions or trial preparation. The Nat. Employ Lawyers' Ass'n says that 30(b)(6) depositions should be taken early to assist the parties to move efficiently to the central issues in the case.

It may be that developing suitable methods for addressing concerns about preparation burden, preclusion, and inquiry beyond the listed topics would alleviate concerns about timing of 30(b)(6) depositions. Moving beyond those concerns and addressing the timing of such depositions directly in the rules might present drafting difficulties. For purposes of discussion, the following are some ideas about how such drafting might be attempted.

One approach would be add to the specific listing of topics in the discovery plan provisions of Rule 26(f)(3):[11]

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

[11] The following includes the restyled additions for the E-Discovery amendments that are before the Committee during the May meeting.

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

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

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

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;

**(E)** any issues about Rule 30(b)(6) depositions, including the timing of any such depositions;

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

**(GF)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

This approach may unduly emphasize 30(b)(6) depositions. One objection made to adding reference to discovery of electronically stored information and to privilege waiver to Rule 26(f) was that it unduly focused on these topics. It could well be that a more forceful objection of that sort would be made to an approach like the one above. Beyond that, it does not provide any specifics on when such depositions may be taken, but only tells the parties to discuss the topic. An additional provision could be added to Rule 16(b) to call the court's attention to the issue, but one could still object that it was be amorphous there as well.

A more direct approach might be added to Rule 26(d)(1):

**(1) Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. A party may notice a Rule 30(b)(6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order.

Alternatively, one might add a timing provision to Rule 30(b)(6) itself:

**(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. A party may notice a Rule 30(b)(6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Given the need in some cases to take an early 30(b)(6) deposition regarding a party's electronic information systems, this approach might be seen as too restrictive for some cases. But it could be that such a default provision would have a positive effect in prompting the parties to work out a schedule to accommodate such features of individual cases. Perhaps that effect would be amplified if a Rule 26(f) amendment like that mentioned above were also added. Again, however, it may be objected that 30(b)(6) depositions are not such important topics that they warrant such prominent treatment in the rules.

*6. Witness preparation*

Through much of the above discussion, the burden of witness preparation has been a regular concern. Several bar group comments stressed the burdens of preparing witnesses for Rule 30(b)(6) depositions. See, e.g., ABA Section of Litigation (reporting that the burden of preparing witnesses is substantial, particularly regarding events that occurred long in the past, and particularly when the

30(b)(6) deposition is taken early in the litigation); Assoc. of the Bar of the City of N.Y. (reporting that preparing a 30(b)(6) witness requires unusually extensive time from both the witness and the attorney, in part because the attorney must assure that organization gathers all responsive information from any sources); N.Y. State Bar Ass'n (saying that the caselaw is not clear on the extent of the preparation burden).

Other bar groups questioned the extent of the burden, or urged that it would have to be shouldered at some point in the litigation anyway. See, e.g., Consumer Atty's of California (stating that there is some burden on the corporation, but noting that the corporation knows best how to find the needed information and has the option to select the person to respond); Nat. Employ Lawyer's Ass'n (asserting that the entity will have to identify the relevant witnesses eventually, and that 30(b)(6) simply moves this process to an earlier stage); Trial Lawyers for Public Justice (asserting that the burden on the corporation is not great because the basis for the corporation's testimony is contained in the corporation's records and the lawyer for the entity will have to become familiar with those records, so that counsel will be well situated to direct the representative to the needed records).

Many of those groups who contend that preparation of witnesses is not unduly taxing also contend that witnesses are often underprepared. Thus, several urge that the rule be amended to specify that there is such a duty to prepare. See, e.g., Nat. Ass'n of Consumer Advocates; Trial Lawyers for Public Justice. But there is no shortage of caselaw on the need to prepare the witness adequately. And adding an affirmative statement of the duty to prepare to the rule (as suggested in relation to item no. 1 above) might actually worsen the problem of preparation for responding parties. To facilitate discussion, it is perhaps worth noting that one possibility of a rule change would be to alter the "known or reasonably available" language of the current rule:

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

> This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

It is doubtful whether this modification of the current rule would improve matters. The current phrase seems to have sufficient flexibility to permit reasonable calibration for individual circumstances. Taking out "known or reasonably" without a substitute could heighten the exposure of the organization to criticism for failure to provide information. Substituting the word "readily" or some similar word would seem to weaken the obligation of the responding party very significantly. It might be seen as inconsistent with the obligation of the organization to provide in response to a Rule 34 request all materials within its "possession, custody, or control," not only those readily available.

*Other amendment ideas*

Bar groups that submitted comments also suggested other amendments, but the Subcommittee did not decide to bring them forward for consideration by the full Committee. Mention of some of them in this memorandum may nonetheless be useful

Requiring that the organization designate the "most knowledgeable" person: California requires that the "most knowledgeable" person be designated. Some bar groups suggested that Rule 30(b)(6) should also. This might reduce the problem of lack of preparation of witnesses proffered under the rule. Nonetheless, it could generate significant problems. It may often not be clear which person is most knowledgeable, and disputes or litigation about that subject often would serve no useful purpose. In the first place, it would seem to override the requirement now in the rule that a representative other than an officer, director, or managing agent may be designated only with the representative's consent. With notices that designate many topics, moreover, inserting such a requirement would likely mean that multiple representatives would have to be designated. As to events that occurred in the distant past, there may be nobody with significant personal knowledge currently in the organization's employ. And those most knowledgeable on one topic may have personal knowledge on other topics, thereby heightening the problem of whether examination is permitted on subjects beyond those specified in the notice. The current rule permits the responding party great latitude to make its choice; so long as it is responsible for producing a properly prepared witness this additional requirement is not likely to be helpful and may provoke problems.

Requiring the responding party to specify in advance the identity of the person or persons will be testifying on its behalf: Frequently the interrogating lawyer may have no idea what individual will appear for the deposition until it begins. It was suggested that a requirement of advance notice should built into the rule. Yet it is not clear what use could be made of that advance notice. Absent a requirement that the person designated be the "most knowledgeable," it is unclear why a party would have a ground for objecting in advance to such a designation. Even if organizations select fresh-faced young innocents who are to act on their behalf, the sufficiency of the designation is measured by the person's actual performance as a 30(b)(6) witness. The notion that the interrogating party could insist that the organization designate a specific spokesperson was rejected in the drafting of the rule in the 1960s, and the rule now requires that when the organization selects somebody who is not an officer, director, or managing agent that person must consent to do the job. Allowing the interrogating party an advance opportunity to object to a designation seems contrary to the thrust of the rule.

Mandatory sanctions: Some urged that there be a requirement that the court impose sanctions for failure to prepare, perhaps somewhat on the model of Rule 37(a)(4) regarding costs of discovery motions. But mandatory sanctions are a blunt instrument at best, and Rule 37(a)(4) has not proved particularly useful. And in this context there is considerable room for debate on what is sufficient preparation of a witness and a wide range of sanctions that a court might employ, making the mandatory" nature of the sanctions potentially illusory.

Numerical limit on topics: It was also suggested that parties be limited to a specified number of topics in a Rule 30(b)(6) notice. Such a limit seemingly could not work if the rules require also that there be only one 30(b)(6) deposition per party. Beyond that, it would seem to suffer from the same sort of flaw that was true of the proposal some years ago that Rule 34 be amended to limit the number of document requests a party could make -- that would provide an incentive for broad rather than rifle shot requests. Rule 30(b)(6) provides that the matters for examination be specified with reasonable particularity. Placing a numerical limit on them could undermine that goal.

Notes of Conference Call
Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
April 4, 2006

On April 4, 2006, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules met by conference call. Participating were Judge David Campbell (Subcommittee Chair), Chilton Varner, and Daniel Girard. Also participating were Judge Lee Rosenthal (Advisory Committee Chair), Prof. Edward Cooper (Reporter of the Advisory Committee), John Rabiej (Chief, Rules Committee Support Office) and Prof. Richard Marcus (Special Reporter supporting the Subcommittee).

The beginning point for further consideration of Rule 30(b)(6) issues was that the request for commentary on experience under the rule had produced many thoughtful responses that clearly reflected considerable work by the various bar groups that submitted them. The Committee should recognize this contribution to its work and thank the bar groups. Professor Marcus should draft a letter to that effect, to come from Judge Rosenthal and Campbell.

The goal of the conference call was to talk generally about what has been learned by the comments and what additional work needs to be done to present these issues to the full Advisory Committee during its May meeting. The basic goal is to provide the full Committee with a memorandum identifying the issues that currently seem salient and, in light of the additional intelligence generated during the May Committee meeting, to proceed to try to draft language for amendments to the rule.

It was noted that, for discussion purposes, a sketch of possible rule language might sharpen discussion. It was agreed that, if possible, some such sketches could be included in a memorandum for the May meeting, but on the express understanding that they were included solely for discussion proposes and were not current proposals of the Subcommittee.

Initially, the discussion focused on the issues identified in the memorandum sent in January, 2006, to bar groups invited to provide information on the functioning of the rule. The first idea in the memorandum was that the rule be limited to identifying the location of discoverable information within the custody or control of the organization. This idea had prompted almost universally negative reactions from those who commented. It was agreed that this avenue did not seem promising and that it should be dropped.

The second issue related to whether testimony at a Rule 30(b)(6) should be regarded as a judicial admission. The commentary indicated varying experiences and attitudes. There was some disagreement among respondents on whether courts actually do so hold, and also on whether they should so hold. Some respondents regard the risk of such judicial admission treatment as a serious one, while others believe that judges too rarely or never reach such a conclusion. There is also some question about whether there is a split of authority in the courts. It was noted that some cases that might be regarded as embracing the view that deposition answers constitute a judicial admission are actually imposing sanctions for failure to properly prepare a witness as required by the rule. It was also noted that the issue is closely related to the next question -- supplementation of Rule 30(b)(6) deposition responses.

For present purposes, the consensus was that the judicial admission issue should remain on the table for discussion with the Advisory Committee. The introduction of the issue should include two aspects. First, it would be useful to try to report on whether there is a clear split of authority on

this question between in reported cases. If so, that might be a reason to consider a rule amendment to resolve the conflict. Second, the introduction should present the competing positions on the issues. Finally, it may be important to be alert to the possibility that civil rules about the use at trial of 30(b)(6) depositions might be matters of concern to the Evidence Rules Committee. It may be that this question is similar to the preclusive effects that flow from other rules such as 8(d), 36, and 37(c)(1), but the Committee would have to be careful about where the proper preserve of the Civil Rules ends and the proper preserve of the Evidence Rules begins. It was noted, for example, that some comments raised issues under Fed. R. Evid. 602 concerning admissibility of 30(b)(6) depositions. For example, the problem of impeaching the corporation with the answers given during the deposition by witness *A*, whom the entity designated as its 30(b)(6) representative, when the corporation instead calls at trial witness *B*, might be addressed by requiring that it call *A* at trial, but that thus regulating who may testify at trial could be viewed as beyond the office of the Civil Rules (although Rule 26(a)(3) does something of the sort). Whatever its value in some senses, such a requirement in the Civil Rules would seem to intrude too far into the conduct of the trial. In addition, it could easily create problems in the administration of Rule 30(b)(6) by complicating further the selection of the person or persons to testify at the deposition.

The third issue was the possibility of supplementation of Rule 30(b)(6) testimony. Several respondents urged that this would undercut the purposes of the rule. Perhaps all the questions would prompt a uniform response -- "I'll get back to you on that." This entire topic ties in somewhat with the previous topic whether answers are binding judicial admissions, because supplementation would weaken, or provide an out from, the binding effect. At the same time, including an opportunity to supplement would also build in a duty to supplement, which would invoke the preclusive effects of Rule 37(c)(1) that themselves foreclose use of information not provided in the original deposition or by supplementation. And the commentators supporting the idea of supplementation suggested cautious versions of that opportunity -- the party seeking to supplement would need to make a showing, and might have to pay the additional costs of the other side that resulted from the change in testimony.

Discussion began with the question whether a supplementation provision could ever be properly confined. In a sense, Rule 30(b)(6) depositions are unique. Parties are obligated to produce a person fully prepared to address specified topics. They should not need to be supplemented. But it was objected that "you can't know every single question that will be asked." Gaps or misstatements are bound to happen, particularly if the depositions are taken early in the case. If so, however, the reasonable response under the current rule is to find somebody else who can answer the questions that the initial witness cannot, and to do that promptly. Adding a supplementation provision might undercut that feature of current law with the alternative of supplementing a good deal later.

It was suggested that this discussion highlighted the importance of the rule's requirement that the witness provide information "known or reasonably available to the organization." A core problem is to give effect to that language, particularly the reasonableness standard. That is particularly important with regard to corporate activities in the distant past. In such situations, supplementation makes sense. Treating the response "I don't know what happened in 1940" as a binding judicial admission of some sort is not sensible. This may be the crux of the problem with being bound. And what may be oppressive use of the 30(b)(6) procedure is tied to an interrogating party's refusal to acknowledge that information was not reasonably available. Perhaps some perimeters could be drawn, such as that the organization need not seek information from those outside the organization, or when the information is equally accessible to the other side (because in the possession of the government, for example). But it may often be that former employees remain readily accessible to the organization. Even in this age of ERISA and diminished pensions, for

example, some retirees are receiving regular payments from the organization, and some may be on contract to provide consulting services to the corporation.

It may be that the problem is that we have today results in part from the specialization of the bar. Too few lawyers have had substantial experience with both the difficulties of gathering the information needed to respond to a 30(b)(6) deposition from a large organization and also the difficulties for the party seeking to extract information from such an entity. "Now we have people who have never walked both sides of the aisle." In such a setting the "reasonably available" directive of the rule may be insufficiently directive.

It was quickly noted, however, that taking the "reasonably available" clause out that provision, and making the rule apply only information "known" by the organization might cause much greater difficulties. For the responding party, this might be as challenging a standard to apply as the current one. From the perspective of the party seeking information, the limited duty to respond could severely compromise the value of 30(b)(6) depositions and result in increased discovery by other means, particularly Rule 34 requests followed by depositions of corporate personnel. And rephrasing the "reasonably available" clause probably would not offer promise for improvements. It is unlikely that other words would better convey the point. The problem is that the operative meaning for the phrase must come from an individual judge in light of the facts of a given case.

It was suggested that, rather than trying to modify the rule's "reasonably available" language, a more promising approach to these issues might be to address these concerns in Committee Note language should other rule amendments go forward. For example, if rule amendments on the judicial admission or supplementation topics were go be presented, Committee Note language might tie the working of those to the "reasonably available" language and offer a gloss on how that should be interpreted. Although this might not be as forceful as a change in rule language, in light of the absence of alternative rule language and the link between preparation and the risk of preclusion, this approach seemed more promising.

Besides judicial admissions and supplementation, another area for possible amendment would be the number and duration of depositions. Presently, Rule 30(a)(2)(B) says that there is no right to a deposition when "the person to be examined already has been deposed in the case." If the 30(b)(6) deposition is considered the deposition of the entity, that rule would appear to forbid another deposition of the entity. One commentator cited a Magistrate Judge decision to this effect and endorsed the conclusion. But it was quickly noted that mandating a "do it all at once" requirement would have adverse effects on the desire to keep such depositions focused on a relatively finite number of topics. Moreover, the Committee's recent E-Discovery initiative suggests at least one situation in which it would be desirable to have an early 30(b)(6) deposition focused on a very discrete topic -- the functioning of a party's electronic information system. Making a party choose between taking such an early deposition and forgoing the right to pursue other issues later, or taking a "cover the earth" 30(b)(6) deposition at the outset of the case because that was when the inquiry about the electronic information system was necessary seemed dubious.

Similar questions are presented with the ten-deposition and one-day-of-seven-hours limitations now in Rule 30. Regarding the seven-hours limitation, the Committee Note accompanying that says that it applies for each individual designated a Rule 30(b)(6) representative. The question whether each such person should be counted against ten-deposition limit is not clearly dealt with in the current rules. The interaction of these provisions may prompt strategic behavior. Thus, an entity might be inclined to name only one representative instead of several to limit the deposition to seven hours. But if each individual designated counted as one of the ten depositions, it might have a competing temptation to designate a large number. And the question how to count

an additional designee made necessary because the first one lacked information on some topics would multiply the difficulties applying these limitations in this circumstance.

Discussion suggested that, in terms of these concerns, cases fall into essentially three categories. At either extreme there is no problem. In complex litigation, all parties recognize that the ten-deposition limit will be exceeded. In small scale litigation, the ten-deposition limit is not important. (Indeed, an FJC survey for the Committee in 1997 found that in the total number of depositions taken by all parties, at the 75th percentile, was seven.) The third in-between category, however, presents problems, for in this category it is not clear to all that the limit should be waived, and the limit may constrict the discovery opportunities of some parties. The problem may be particularly difficult in "one-way discovery" situations where one side has little information and the other has a great deal of information and a large supply of potential witnesses.

But the frequency of the problem is not clear, putting aside the 30(b)(6) twist. One judge reported that in several years on the bench, the ten-deposition had never been presented to the court for decision in any case. There was not a consensus to add the number of duration issue to the list of matters the Subcommittee would bring to the attention of the full Committee.

Another issue raised was the question of timing of the 30(b)(6) deposition. This can be quite important in regard to a number of other issues. If judicial admission treatment is allowed, for example, that is a reason to postpone the deposition. Yet a number of respondents emphasized that there was no way to devise a universal solution to such a problem. A 30(b)(6) deposition about a party's electronic information system would wisely be done early. A party that wants to get a basic picture of the corporation's operations and thus to focus later discovery would similarly act early. But in other instances, a party might reasonably want to take such a deposition late in the discovery process. It was also noted that, compared to some places, formal discovery in federal court is almost never "early" because Rule 26(d) says it can begin only after a discovery plan has been discussed during a Rule 26(f) conference. Devising a satisfactory rule to cover all situations would prove very difficult. Perhaps the most we could say would be "be reasonable." At the same time, particularly in conjunction with the binding effect problem, premature 30(b)(6) depositions can cause trouble. At least, the question of timing might properly be addressed in a Committee Note concerning an amendment directly addressed to a different issue, such as a rule on the binding effect. Nonetheless, it is likely to be very difficult to tie binding effect to timing in any firm way.

Some commentators urged that the rule be amended to specify that the organization was obligated to prepare the witness to answer questions adequately. That, of course, is the source of concerns about the burden of preparation. But some commentators pointed out that, although there is a great deal of caselaw recognizing this obligation and enforcing it, there is no explicit statement in the rule that there is such an obligation. All involved agreed, however, that the requirement is clearly supported in caselaw.

A question was raised about the rule's requirement that the notice specify the matters on which examination will proceed with "reasonable particularity." Could this be improved to reduce problems with inadequate specifications? Many commentators recognized that inadequate notices can hamper Rule 30(b)(6) depositions. Some plaintiff-side organizations emphasized that they instruct their members that it is important to take care to be specific, and that failure to do so can undermine their discovery. Many recognized that there is a need in many cases to negotiate about the breadth or terms of such a specification. Yet this seems more a problem of practice than of the rule. It is unlikely that we could come up with a better phrase, and the problem in any case is for the parties (or even the judge) to determine what is suitable to that case. The need for care in designating matters to be covered might be emphasized in a Committee Note, but it seemed unlikely that we could devise rule language that would do a better job than the current language.

A related issue that was raised was whether to amend the rule to limit questioning to the topics listed in the notice. Several commentators said this was not a problem. The questioning lawyer comes prepared to interrogate on the matters listed, and not on others. Moreover, the attorney defending the deposition might reasonably take the position that she has not prepared the witness to address other issues and object to questioning beyond the listed issues. And there would be the question whether this additional questioning involves the answers of the organization (with possible judicial admission consequences) or only the deposition of the witness in an individual capacity. If it's the latter, is this then a second deposition for the ten-deposition limit?

Reflecting on the discussion, it seemed that there were a number of themes that should be brought forward to the full Committee:

1. Judicial admissions: When and how should responses in a 30(b)(6) be "binding."

2. Supplementation: Should a party be permitted/required to supplement its 30(b)(6) deposition? What conditions should a rule authorizing supplementation attach to this opportunity? (This would involve some emphasis in Committee Note language about the continuing duty to prepare the witness adequately, the link between that duty and a clear listing of topics in notice, and the need to be alert to what is "reasonably available" to the party, particularly in light of the stage the litigation has reached at the time of the deposition).

3. Scope of 30(b)(6) depositions: This category includes the issue of questioning the witness about matters beyond the scope of the notice but within the witness's personal knowledge. It also addresses the possibility of adding the word "factual" to the rule to limit inquiry during the deposition, and the problem of contention questions.

4. Number/time limitations as applied to 30(b)(6) depositions. This could address such questions as (a) whether the one-deposition rule applies to a party deposed under 30(b)(6), (b) whether the seven hours rule should be applied to such a deposition, and (c) whether the deposition of each individual designated by the corporation should be counted separately toward the ten-deposition limit.

5. Timing of Rule 30(b)(6) depositions: This would focus on when depositions should be taken. It could be very important if judicial admission treatment is given to testimony during such depositions, but it may present difficulties prescribing a specific time in a rule given the multitude of factors that could bear on that in a given case. It may also be premised on the notion that there can be only one such deposition of each party to a case.

6. Witness preparation: The problem of witness preparation received considerable attention. Some commentators emphasized the difficulties of the task, although no specific suggestion was made for making the task less difficult. Several commentators urged, from a different perspective, that the rule be amended to specify that there is a duty to prepare the witness so that he or she can answer the questions. But the rule already says that the organization must name a person to "testify on its behalf" and that "[t]he persons so designated shall testify as to matters known or reasonably available to the organization." Together, those provisions may be seen to make it sufficiently clear that the proffered person is to be able to do what the rule requires. And the courts have regularly so held. But, particularly if the rule is to be amended to deal with the binding effect of answers during a 30(b)(6) deposition, it may be important to add a specific statement of the duty to prepare a witness and condition limitations on binding effect on satisfaction of that duty.

Another suggestion was to specify in the rule that the "most knowledgeable" person must be presented. Presently, the choice of person to designate is left entirely up to the entity. Commentators frequently stated that corporations do not designate the most knowledgeable person. Some regard this as a strategic choice by the corporation. But particularly with regard to older events (what happened in 1940) there may be no such person. And disputes about whether the person presented, however, adequate, is the most knowledgeable one might generate motion practice. Such a requirement might also mandate the designation of large numbers of people because there are different people who are "most knowledgeable" about different items on the notice. In California, which requires such a designation of the "most knowledgeable" person as a matter of state-court practice, there is sometimes collateral litigation about whether the person designated is the right one under this standard. One view was that the current rule is better, and another was that making this change would be a "big step backward."

After establishing this list of priorities for discussion at the May meeting, the discussion shifted to some particular and new suggestions from commentators.

One commentator suggested that it would be desirable for the responding party to be required to specify in advance of the deposition who is the person who will be testifying. The question was whether this would be useful and/or workable. One reason for wanting this sort of information relates to the binding effect of the answers. The greater the likelihood that the answers will not be treated as binding, the more important it may be to know who will be answering the questions. If the answers are not binding, the questioner will not want what one of the commentators called "the fall guy." But it is not clear what the questioner can do with the information about who is to testify. Without demonstrating that the designated witness is not actually capable of answering questions, the questioner would seemingly have a limited opportunity to seek relief of some sort from the court before the deposition begins. Perhaps the party would simply forgo the deposition and pursue other (more costly) methods of eliciting information from the organization.

Several commentators, concerned about adequacy of preparation of witnesses, urged that mandatory sanctions be written into the rule. On this point, it was noted that Rule 37(a)(4) calls for imposition of some sanctions on the losing party on all discovery motions. Shouldn't it apply here also? Yet Rule 37(a)(4) has not been applied with anything like the frequency intended by its drafters in 1970, which may caution against using that model elsewhere. Moreover, at least in Rule 37(a)(4) there was a clear metric for the sanctions to be imposed -- the cost of making or defending the discovery motion. The range of sanctions that might be appropriate for failure to prepare a witness is much larger. This is an area in which no rule can adequately supplant the court's discretion. It was agreed not to pursue this idea.

Another suggestion was to place a numerical limit on the designation of topics in a Rule 30(b)(6) notice. Such a requirement might be at odds with the rule's directive that the notice describe the topics with particularity because it could promote use of a vaguer description of topics. It would also be at tension with any move to require that there be only one 30(b)(6) deposition.

MEMORANDUM

To: Rule 30(b)(6) Subcommittee
From: Rick Marcus
Date: Dec. 28, 2005
Re: Advisory Committee consideration of Rule 30(b)(6) in preparation of 1970 amendments

Based on our discussions, it has become important to try to determine the attitude of the Advisory Committee of the 1960s that drafted present Rule 30(b)(6) toward the goal of the rule. Essentially, the question is whether it was intended as a method for getting a "road map" to find the people who have personal knowledge, or meant to provide more than that. John Rabiej has culled materials on the deliberations of the Committee during the 1960s. Based on that review, it seems relatively clear to me that the Committee was not then focusing on the more limited "road map" goal.

To put things in a beginning context, we might start with consideration of the one piece of commentary that the Committee cited in its Committee Note -- Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L. Rev. 1006 (1962). Although it can't be said that this student piece was the source of the proposal that became Rule 30(b)(6), it does endorse such a rule and convey the then-current dynamics and expectations about discovery from corporations. The Committee Note cites the entire 10-page discussion regarding deposition discovery from corporations.

The basic problem for those seeking such discovery was to find a person who could answer questions about the events involved in the case and who also fit the description of those whose testimony was admissible against the corporation. The deposition rule said that the person had to be an officer, director, or managing agent for the testimony to be admissible against the corporation. Id. at 1010. But such high-status employees often lacked personal knowledge of the relevant events, making the deposition a fruitless gesture. Id. at 1013. Should the opposing party choose, therefore, to designate someone who had knowledge, there would be a fight about whether this was a "managing agent," and three bodies of law had developed about how to satisfy that standard. Id. at 1009-12. At least, said the author, the opposing party should get "the benefit of the doubt" about whether an individual with knowledge was a managing agent. Id. at 1013.

But the author saw a better way (id. at 1014):

> The entire managing-agent problem could be avoided simply by requiring the corporation to choose one of its employees to answer a deposition addressed to the corporation. Such a procedure is followed in answering interrogatories addressed to corporations under Rule 33.

Evidently this sort of thing had been attempted under the existing rule, but courts had repeatedly held improper notices calling for the corporation to designate "its officers or agents having knowledge of the relevant facts." See id. at 1015 & n.48 (citing United States v. Gahagan Dredging Corp., 24 F.R.D. 328 (S.D.N.Y. 1958), later cited with disapproval in the Committee Note accompanying Rule 30(b)(6)).[1] The author regarded this as "rigid interpretation" of the existing rule. See id. at 1016. At the same time, there was no question about the possible burden of changing the rule (id. at 1006):

> [S]ince discovery can be used to compel a party to disgorge all factual knowledge relevant to the litigation, it is likely to be much more burdensome to a corporation than to an individual litigant. A corporation's "knowledge," being composed of the corporate records

[1] As noted below, I believe Prof. Charles Alan Wright was referring to these decisions during a critical discussion of the rule in the Advisory Committee's deliberations.

and the knowledge of its own officers and employees, is much more extensive than the knowledge of a natural person.

There is certainly a risk of reading too much into a student Note that the Advisory Committee chose to cite, but the focus here seems clearly to be on a deposition that calls for presentation of the corporation's information about the events in suit rather than only a road map identifying those who have it. The Advisory Committee's later discussions have the same cast.

The overall project on which the Committee had embarked in the mid 1960s (after completing work on revisions to the joinder rule, including the class action rule) was very large, including reorganization of much of the Rule 26-37 terrain and addition of many new provisions. For example, Rules 26(b)(3) on work product and 26(b)(4) on expert witnesses were added at this time, as was specific reference in Rule 33 to contention interrogatories.

Compared to all that, the Rule 30(b)(6) problem was small beer. Indeed, the earliest materials on Rule 30 turned up by John Rabiej (dating possibly from 1964) show no mention of this sort of thing in Rule 30, and it was not to added to the agenda until November 1965, when a proposal reading as follows was first brought forward for discussion:

> A party may in his notice name as the deponent a public or private corporation or a partnership or association, in which event the organization so named shall select one or more officers, directors, or agents to appear and give testimony on its behalf. The officers, directors, or agents so named shall furnish such information as is available to the corporation. (Agenda materials, Nov. 11-13, 1965, at 30-2)

From the outset, then, the idea was that the organization would provide information about the events in suit through its chosen representative, and that it should choose (or educate) one who could provide the requested information. The draft Committee Note accompanying this initial proposal included the following (which remained relatively the same into the final Committee Note):

> This provision is intended to put an end to the "bandying" by which organization officials or agents are each called in turn for taking of deposition and each disclaims knowledge of matters that are clearly known to persons in the organization and thereby to it. * * * The organization may name the persons who are to give information on its behalf; thus, its burden is no greater than now exists when it answers interrogatories under Rule 33. (Id. at 30-12)

This initial draft evolved through further meetings, and was the subject of some discussion reflected in minutes or transcriptions from tape recordings of those meetings. Overall, there is much discussion of the role of the witness (particularly an employee who is not an officer or director) as providing the information that the corporation has available.

For example, at the May 20-21, 1966, meeting Assoc. Reporter Albert Sacks introduced the provision by saying that it "goes beyond personal knowledge of [the] person, he is selected to give [the] opinion of the corporation." (Excerpts from the tape of the May 1966 meeting at 62) There was discussion "about employees being sent who have been brainwashed and this sentence could create that possibility that the individual designated could become just a messenger boy instead of a witness." (Id. at 63) There followed discussion of whether the corporation should be required to designate the person "most knowledgeable." That prompted (now judge) Louis Oberdorfer to interject "Do not limit it to his personal knowledge." (Id. at 64) Further discussion led to the following exchange (id. at 64-65):

> Prof. Maurice Rosenberg: I raise a question * * * where "officers, directors, employees or agents will appear and give testimony on behalf of the corporation." That is a big change in the deposition laws. Now when an employee shows up he doesn't give testimony on behalf of the corporation.
>
> Prof. Sacks: I take it since the questions that can be asked of the person relate to information the corporation has, the questions can go to what other employees know and facts they have so I would assume you do get the answer to the question of the corporation in the same way you get the interrogatory.
>
> Prof. Charles Alan Wright: Would you have the difficulty with this if employees were not involved? Particularly since the case law in the area has been on a much narrower question, i.e., whether or not we can designate the corporation and ask him to produce such responses in managing agents [who] have knowledge of the facts. The courts have said under existing rules: no, you cannot.[2] But I think a rule change to permit that result would not involve any difficulties we have heard about here and it would in many cases serve a useful purpose.

The upshot at that meeting was to remove "employees" from the list, whereupon Rosenberg said that he had no problem with having the officers or directors testify on the corporation's behalf and provide the information it possessed. (See id. at 66)

There followed (in August 1966) a revised draft with bracketed language again permitting the organization to designate ordinary employees to testify if they consent to do so. (Aug. 4, 1966, materials on discovery rules at 30-4 to 30-5) This inclusion was supported by Committee Note language as follows (id. at 30-18):

> The organization is not required to designate any ordinary employee or agent to speak on its behalf. There are instances -- not infrequent in personal injury litigation -- in which a corporation and its employee have independent and even conflicting interests. But there are other instances in which an ordinary employee is best qualified to speak for the corporation and his testimony will save the time of various officials and of the examining party. As noted, the procedure provided herein is intended as a useful facility, and its value is strengthened by affording the corporation an option to designate ordinary employees or agents with their consent. The subdivision authorizes this option. Since even when a designated employee or agent testifies, the deposition should be regarded as that of the organization, related changes are made in Rule 32(a)(2, 37(b), and 37(d).

At the September 12-13, 1966, meeting the restoration of the option of naming an ordinary employee was discussed. Prof. Sacks explained that the deletion of the ordinary employee option was undesirably narrow and a member of the Committee who had taken a strong interest in this rule (Brown Morton, Esq., of Washington, D.C.) came to the same conclusion. (Excerpts from the tape of the Sept. 1966 meeting at 90-92) There were competing drafts of language permitting the naming of an ordinary employee. Morton explained that "[t]his enables the party seeking the deposition to require the designant to name somebody who will give some answers." (Id. at 93) The drafts had limited such designations to employees who consented to testify, and some voiced uneasiness about making consent an element of the rule because it involved "pushing * * * into the domestic management of corporations." (Id. at 94) There was also further discussion of whether this would be unfair to the employee, whose interests might be adverse to those of the corporation. The

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[2] This appears to refer to the decisions rejecting notices calling for the designation of persons with knowledge of the relevant facts. See supra note 1 and accompanying text.

response was that if the employee does not consent, his testimony can be taken pursuant to a subpoena but it is not the testimony of the corporation. (Id. at 95) For our purposes, the point is that the entire focus of the discussion was on testimony about the underlying event, not just about who had information about the underlying event.

There was also discussion during the September, 1966, meeting of the proper way to describe the corporation's duty in relation to the knowledge to be provided by the person designated. The draft used "readily obtainable," and there was much discussion of whether another formulation should be used. Reporter Sacks explained that "the officer or agent answering on behalf of the corporation is to furnish such information as is available to the party. We have no proposals for changing that." (Id. at 97) Here again, the concern seemed to be about the burden on the organization of gathering together this information.

After the September, 1966, meeting, the rule was further revised and approved at the Committee's March, 1967 meeting to read as published for public comment in the Preliminary Draft of Nov., 1967:

> A party may in his notice name as the deponent a public or private corporation or a partnership or association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as the matters known or available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Thereafter, it seems that little change was made. The word "reasonably" was added before "available to the organization." But the idea that the organization had to designate somebody who would provide the information it had remained intact. A reading of the final Committee Note (which included much that had been in the draft Committee Notes throughout) is consistent with that view. In particular, it notes and rejects the view that this is too great a burden on the corporation:

> Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., United States v. Gahagan Dredging Corp., 24 F.R.D. 328, 329 (S.D.N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

* * * * *

The records of the Advisory Committee from the 1960s are somewhat fragmentary, but for our purposes all seem to point toward the view that the focus of the addition of Rule 30(b)(6) was broader than a road map. Instead, the concern was with who would speak for the corporation about the events in question in the suit, and about the extent of the corporation's duty to gather information and inform its representative about those events.

That inclination of four decades ago is not, of course, a limitation on the actions of the Committee now. Since 1970 much has been added to the rules to provide direction that was lacking then. Rule 26(a)(1) initial disclosure and the Rule 26(f) discovery conference could substantially improve the ability of a party to identify those who have information about events involved in the suit. More to the point, there is no indication in the records John Rabiej unearthed that any thought was given to the problems presented when "ancient" events are the subject of the suit, or about the use of "contention" inquiries to probe in ways that threaten work product protection.

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

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January 10, 2006

Jeffrey J. Greenbaum, Esq.
Sills Cummis Epstein & Gross P.C.
One Riverfront Plaza
Newark, NJ 07102-5400

Dear Mr. Greenbaum:

The Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has been asked to consider whether changes should be made to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Some commentators have suggested that the rule needs revision. A subcommittee has been appointed to investigate this issue. We are writing to you because you recently submitted comments to the advisory committee, on behalf of your organization, concerning proposed amendments on electronic discovery. We now seek comments from your organization on whether problems exist under Rule 30(b)(6), and, if so, whether those problems are best addressed through amendment or the development of case law. If you are not the correct person to respond to this request for your organization, we would appreciate your forwarding this inquiry to the right person.

Enclosed with this letter is a memorandum prepared by Professor Richard L. Marcus of the Hastings College of Law, a member of the subcommittee and a special reporter to the advisory committee, titled "Concerns about Rule 30(b)(6) and Possible Amendment Ideas, January, 2006." We would appreciate your comments on the issues raised in the memorandum. The memorandum does not purport to be exhaustive – comments on other concerns or possible amendments are welcome.

If possible, we like to receive your comments by **March 15, 2006**. Comments should be sent to:

Peter McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Responses can also be submitted by email at <Rules_Comments@ao.uscourts.gov>.

The subcommittee is at the beginning stages of this investigation. No conclusions have been reached on whether Rule 30(b)(6) is problematic or requires amendment. Any proposed changes to Rule 30(b)(6) will, of course, follow the normal procedure of full consideration by the rules committees and publication for a period of public comment.

Thank you for your response.

Lee H. Rosenthal
Judge Lee H. Rosenthal
Advisory Committee Chair

David G. Campbell
Judge David G. Campbell
Subcommittee Chair

## *Concerns about Rule 30(b)(6) and Possible Amendment Ideas*

January, 2006

The Advisory Committee on Civil Rules has been asked to consider whether there is a need for rule changes to solve problems that have arisen in practice under Fed. R. Civ. P. 30(b)(6). Some recent scholarship suggests that the rule can be misused to impose unfair burdens on responding parties. See Sinclair & Fendrich, Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms, 30 Ala. L. Rev. 651 (1999). The Committee on Federal Procedure of the New York State Bar Association has called a number of issues to the Advisory Committee's attention, and a Rule 30(b)(6) Subcommittee has been formed to evaluate these concerns.

The Subcommittee is inviting reactions from a number of bar groups to assist it in this task. It bears emphasis at the outset that the Subcommittee has not yet reached any conclusion about whether changes to the rule are needed, much less which changes might be appropriate.

To introduce the topic, this memorandum explains the background for addition of this rule provision in 1970. It then raises some questions about possible concerns with current use of the rule. Finally, it asks whether rule changes are needed -- as opposed to judicial decisions under the current rule -- by suggesting some possible rule amendment ideas that might address possible problems.

### *The background of the current rule*

Rule 30(b)(6) was added to the rules in 1970 to deal with problems encountered before then in obtaining information from corporations and other organizational litigants. Before that time, it often happened that litigants attempting to obtain information from organizational litigants faced a difficult burden if they wished to proceed by deposition. They could take the deposition of the organization only through an officer, director, or managing agent. But officers or directors might often lack the personal knowledge needed to answer the pertinent questions. There was often much dispute about who should be viewed as a "managing agent," and once that obstacle was surmounted the person involved might turn out not to have the required personal knowledge either. This runaround problem became common enough to earn a name -- "bandying."

The addition of Rule 30(b)(6) was designed to solve the bandying problem. Under the rule, the party taking the deposition must describe the matters on which information is requested with "reasonable particularity." If that is done, the organization has to designate a person or persons to testify on its behalf "as to matters known or reasonably available to the organization." The Committee Note explained that the burden on the organization of having to designate a person to testify on its behalf "is not essentially different from that of answering interrogatories under Rule 33." Thus, the premise seems to have been that the organization, like an individual litigant, can fairly be required to answer questions in a deposition about its knowledge regarding the events in issue in the litigation. The rule has not been substantively amended since 1971.

### *Inquiries about current practice under of Rule 30(b)(6)*

Rule 30(b)(6) appears initially to have excited few concerns; a commentator writing in the early 1990s even called it the "forgotten" rule. But more recently some have asserted that it permits an undue imposition on organizational litigants. Particular attention has been drawn to the use of Rule 30(b)(6) depositions early in the litigation to commit the organization to its version of disputed events, which often occurred long in the past, and perhaps to preclude the organization from offering evidence supporting a version of those events different from the one proffered by its designated representative. The Subcommittee needs more information about current practice to evaluate these

concerns. It would therefore benefit from reactions about the following topics, with some possible questions suggested:

(1) General: Have your members encountered difficulties in using or responding to Rule 30(b)(6) depositions? If so, have the difficulties become more acute in the last decade?

(2) Burdens and benefits of Rule 30(b)(6) practice: Do your members find that the burden of preparing witnesses for Rule 30(b)(6) depositions outweighs the benefits of such depositions to the discovery process? If so, please explain why. If burden is a problem, is it more acute (or only important) with regard to events that occurred in the distant past or are otherwise obscure? Is there often difficulty determining what information is "reasonably available" to the organization?

(3) Adequacy of preparation of witnesses proffered by organizations: Is it clear what is required to prepare a witness to testify in a Rule 30(b)(6) deposition? Is it frequent that witnesses are not properly prepared? Under the current rule, have courts been able to handle arguments about whether witnesses were adequately prepared in an appropriate manner?

(4) Scope of examination and specification of issues: Are Rule 30(b)(6) notices typically sufficiently detailed and limited to permit adequate preparation of witnesses? Does examination often proceed on issues not identified in the notice if the witness also has knowledge about those additional issues? Has such examination on additional topics caused problems?

(5) Timing and number: Should Rule 30(b)(6) depositions usually be taken early or late in the discovery process? If they are taken early, should there be an opportunity to supplement? Should there be any limitation on the number of Rule 30(b)(6) depositions a party can take?

(6) Possible impact on work product protection: Do Rule 30(b)(6) depositions pose greater threats to work product protection than other depositions? Are contention questions used in Rule 30(b)(6) depositions in ways that intrude into protected areas? Are Rule 30(b)(6) depositions used to compel organizations to take positions on contested issues too early in the litigation?

(7) "Binding" effect of answers: Are Rule 30(b)(6) deposition answers being given an unduly binding effect at trial? Are organizations being unfairly prevented from providing evidence that contradicts or supplements what was said in the deposition?

(8) Conflicting decisions under current rule: Have your members found that conflicting rulings are emerging in the application of current Rule 30(b)(6)? If so, we would appreciate being apprised about those decisions.

*Inquiry about need for rulemaking*

(9) Resolve problems though caselaw? Until there is a good understanding of the gravity and nature of any current problem with practice under Rule 30(b)(6), there can be no serious consideration of whether a rule amendment might be desirable. Can any problems your members have encountered with practice under Rule 30(b)(6) be addressed through litigation under the current rule, or would a rule change be a better way to address such problems?

One perspective for addressing this question is to consider what might be done by rule changes. The following is a nonexhaustive list of possible amendment ideas. The listing does not suggest that any of these ideas is under current study, and they are offered only to provide some basis for considering whether rule amendments are needed to deal with problems that otherwise would be addressed by judges under the current rule.

- Limiting Rule 30(b)(6) discovery to identifying the location of discoverable information within the custody or control of the organization: This approach would limit Rule 30(b)(6) depositions to providing a precursor to other discovery and would preclude their use to generate admissible evidence for trial. That would seem likely to reduce burdens on organizations preparing witnesses. But for organizations that wanted to designate a single representative to present their positions, this would perhaps be a negative change. And it could also significantly erode the value of Rule 30(b)(6), which now permits the organization's opponent to discern the organization's position through a deposition.

- Providing by rule that the witness's testimony is not a "judicial admission": A rule amendment might deal with the effect of testimony in the deposition, perhaps by affirmatively preserving the organization's right to offer evidence in support of different versions of the facts. But such a change might significantly reduce the utility of Rule 30(b)(6) and might encourage bandying.

- Providing for supplementation of a Rule 30(b)(6) deposition: If it is a problem that the rule currently freezes the organization's version of events to that presented in an early Rule 30(b)(6) deposition, that might be solved by providing for supplementation in Rule 26(e)(1), which presently makes no provision for such supplementation. But such a change would, under Rule 37(c)(1), seem to strengthen arguments that the organization is not allowed to proffer competing evidence unless it has provided a timely supplementation.

- Forbidding "contention" questions during 30(b)(6) depositions: If efforts to require the organization to commit to certain positions during the deposition are unfair, perhaps a prohibition on contention questions during a deposition could be fashioned. Defining what is forbidden might prove difficult, however, and disputes about whether certain questions are of the forbidden type could complicate Rule 30(b)(6) depositions.

- Limiting questioning to those matters identified in the notice, or for which the witness was designated: If questioning about matters not identified in the notice of deposition is a serious problem, the Rule 30(b)(6) deposition could be limited to those matters. That change would seem consistent with the provision now in the rule that, if it designates more than one person to testify, the organization may specify the matters on which each such witness will testify on its behalf.

SUMMARY OF RESPONSES
RULE 30(b)(6) INQUIRY
March, 2006

The following attempts to summarize the responses received to the January, 2006, inquiry from a subcommittee of the Advisory Committee on Civil Rules regarding Rule 30(b)(6). The comments are ordered alphabetically among bar groups. A seemingly individual comment is at the end.

Topically, the comments are arranged in the sequence of the questions in the inquiry (which are repeated before the comments received pertinent to those inquiries).

## Overall

ABA Section of Lit.: Our comments should not be interpreted as urging changes to Rule 30(b)(6). More information and input would have to be gathered from our Section members before we would be in a position to recommend any changes on behalf of the Section. At a leadership meeting attended by Judge Rosenthal, however, the strong consensus of the group was that a study was appropriate.

Assoc. of the Bar of the City of N.Y.: Our Federal Courts Committee agreed that Rule 30(b)(6) serves an important purpose in streamlining the pretrial search for information held by organizational litigants. Although we understand that the rule offers the potential for abuse, our members' experience suggests that abuse of this rule is no more likely than with any other discovery device, and that the potential for abuse is suitably managed by the district court' supervision of the process. In addition, existing caselaw surrounding the rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. Given this context, the Association does not believe an amendment would improve the effectiveness of the rule or provide any greater protection against attempted abuse.

Assoc. of Trial Lawyers of America: We start with first premises. We require human litigants to testify to all the topics that might be designated in a 30(b)(6) notice. Once they say, under oath, that X happened, or that my contention is Y, they can explain further, but we do not let them pretend that they never said X or Y. The same should be true for a corporation, testifying through a designated representative. We reject the conclusion asserted by others that corporate knowledge does not exist, and believe that Congress' recent adoption of the Sarbanes-Oxley Act shows that it also regards corporations as actors responsible for what they know. The buck needs to stop somewhere. The corporation's burden of being treated as a person under Rule 30(b)(6) is a concomitant obligation from the privilege of being able to use the corporate form to conduct business. The many advantages of the corporate form should not include privileged treatment by the federal rules.

Calif. Employ. Lawyers' Ass'n: There does not appear to be any showing of problems with Rule 30(b)(6) which would require the rule to be altered. Judges have been able to deal with any issues that arise under the current rule. Rule 30(b)(6) depositions allow parties to narrow issues and focus discovery, at a very early stage of the litigation. The rule has led to greater efficiency, and to better use of time and economic resources, than would be true if parties were not allowed to depose entities in this way.

Consumer Att'ys of Calif.: We urge the committee to reject suggestions that Rule 30(b)(6)be changed. The rule is a critically necessary discovery tool for parties litigating against corporations -- whether they be injured individuals or other businesses. Although it is not a complete solution, it goes far toward solving the problems of bandying. Making the rule friendlier to corporations would

only serve to make it less effective. That would create greater litigation obstacles and would result in even more need for judicial intervention in the discovery process.

Fed. of Defense & Corp. Counsel: Rule 30(b)(6) is being used with greater frequency early in discovery to comprehensively -- and prematurely -- examine corporate representatives on issues that can be outcome determinative.

Nat. Ass'n of Consumer Advocates: NACA agrees with the fundamental premise of the rule, that the organization, like an individual litigant, can fairly be required to answer questions in a deposition about its knowledge regarding the events in issue. That is not an undue imposition on organizational litigants because, at some point in the litigation, they have to determine their knowledge regarding the events at issue. The only issue is when they have to do that. The rule properly pushes that point back so that all parties can learn the organizational entity's knowledge.

Nat. Employ. Lawyers' Ass'n: The rule is critical to timely discovery. Although it puts a burden on the corporation to identify sources of information, it is the corporation that has the information. our members have successfully used 30(b)(6) to avoid lengthy detailed interrogatories and unnecessary depositions. Early use of a 30(b)(6) deposition often obviates the need for other discovery, and thereby significantly reduces the costs of litigation for all parties. Rule 30(b)(6) is not a rule a that provokes significant contention. But because careful use of it has a dramatic impact in reducing discovery, changes to it are likely to cause an increase in those costs.

W. Va. Trial Lawyers Ass'n: The rule has served to provide a level playing field in litigation involving corporations. It plays a crucial role in assuring access to justice. Three perspectives show that the rule should not be changed, and that it is right to rely on the well-developed body of caselaw: (1) the risk of bandying; (2) the substantial body of caselaw now in existence; and (3) the unique perspective of the presiding trial judge in administering any disputes. The rule has been tried and tested over more than 30 years under myriad factual scenarios.

R. Graham Esdale, Jr.: Based on my experience over the last 12 years or so of litigating products liability cases, I do not believe the rule needs to be changed as suggested by the inquiry. If anything, it needs to be strengthened. It is a major tool for those suing corporations to get information. Defendants in products liability cases always want to get the plaintiff's deposition first in order to lock the plaintiff into the facts and claims being made. Often that happens before defendants have produced anything in the case. The plaintiff should be allowed to use 30(b)(6) to do somewhat the same thing. Yet corporations often produce a representative who knows little or nothing regarding the listed matters, and judges rarely impose sanctions when this happens. I have never had an occasion where a judge imposed a sanction or required the defendant to pay costs when it was necessary to take a second deposition because the first representative was unable to respond to all areas in the notice. If the corporation could change its answers at trial, that would cause confusion and devalue the 30(b)(6) deposition. Similarly, forbidding contention questions would deprive the plaintiff of an essential discovery opportunity. Answering about matters beyond the notice is rare, and not a problem. This is an attempt to enact tort reform through changing the rules of court.

(1) General: Have your members encountered difficulties in using or responding to Rule 30(b)(6) depositions? If so, have the difficulties become more acute in the last decade?

Assoc. of Trial Lawyers of America: Our members do report difficulties using 30(b)(6) depositions, primarily with failure to produce suitably knowledgeable designees. This is viewed as willful. We don't know whether these problems have become more acute over the last decade.

Calif. Employ. Lawyers' Ass'n: From the perspective of our members, who notice such depositions, there are a number of problems. First, if the person who is most knowledgeable about the matter of interest is no longer employed by the entity, there seems to be nothing in the law which requires the entity to gather information from former employees. Second, the entity may claim that there is no one person most qualified to testify regarding a particular matter, which can require the propounding party to conduct numerous depositions; we would prefer that the responding entity have to designate the person "most knowledgeable" to testify about the particular matter stated in the notice. Another problem is that the responding entity may not do a sufficient investigation to determine whom to designate; often the department head will be designated, and it is only at the deposition that the lawyers find that this person is not really qualified to answer questions. There should be some consequence for such misconduct, but the rule does not need to be changed for that to happen. Judges have the means of correcting discovery problems such as this. Yet another problem comes from the ten-deposition limit, particularly if the entity does not produce the correct person, with the result that one of the propounding party's depositions has been wasted. A Rule 30(b)(6) deposition should count as only one deposition for purposes of the ten-deposition rule. It is also undesirable that there is no requirement that the responding party identify the individual who will testify in advance, so that the propounding party learns for the first time on the day of the deposition the identity of the individual. Requiring advance notice would be better. In addition, it often happens that counsel for the witness resists questions about the witness's possible bias, but such questions should be allowed, so it would be good if the rule said so explicitly. Finally, it often happens that the individual has discoverable information on topics not listed in the notice. A deposing attorney should be able to question on these matters, but the deposition should still count as only one toward the ten-deposition limit of Rule 30(a).

Consumer Att'ys of Calif.: The only difficulties under the rule are in obtaining full responses. It is still possible, despite the rule, for corporations to hide their wrongdoing. But with 30(b)(6) as a foundation, at least the adverse party has the ability to set the stage for a motion to compel.

Nat. Ass'n of Consumer Advocates: A quotation from one of our members best summarizes NACA's experience with the rule: "In 26 years of practice, my impression has been that Rule 30(b)(6) generally works well. The major problem I have seen is the practice of some defense counsel producing witnesses with little or no real knowledge of the topics they have been designated to testify about." This response was echoed by lawyers from around the country.

Nat. Employ. Lawyers' Ass'n: The short answer is no. Like any other discovery tool, there are disputes as to scope of depositions and the deponents provided. These disputes are usually resolved by the parties and in circumstances where the parties are unable reach agreement, courts have proven quite adept at reaching a resolution.

Trial Lawyers for Public Justice: The largest problem is the failure of corporations to meet their obligation to provide knowledgeable representatives. Although corporate lawyers often claim that Rule 30(b)(6) places a great burden on the corporation, in our experience the opposite is true. The rule is vulnerable to circumvention by corporate defendants. The choice of the designee rests entirely with the corporation, and it is often to the advantage of the corporation to choose somebody who is not most knowledgeable. Increasingly, corporations choose wholesome looking, young people who, prior to receipt of the notice, had little, if any, involvement with the issues involved in the case. One corporate defendant even produced a document about this practice, which referred to its designee as "the fall guy." One problem that results is that the designee cannot fully address the topics listed in the notice. Often the designee will deny personal knowledge and suggest others who have such knowledge. Too often, entities seem to think that so long as they produce a witness, they have satisfied their obligations no matter how much the witness knows. And entities frequently try

to evade discovery by asserting that the information is old, or that all knowledgeable employees have died or left. They thus ignore their obligation to provide a designee prepared to testify beyond his or her personal knowledge. In the experience of several of our members, corporations never seek information from former employees about designated topics. Designees often say they have never seen pertinent documents when presented with them during the deposition. Although the caselaw says that the corporation must prepare the witness, the rule does not; it should. A related problem is that corporations often disregard their duty to provide a substitute witness when the first one claims lack of knowledge. This problem becomes more acute in light of the ten-deposition limit, for corporate parties can exhaust the ten-deposition limit by failing to prepare their witnesses properly.

W. Va. Trial Lawyers Ass'n: Before the rule went into effect in 1970, there must have been a great deal of difficulty caused by bandying. Under the rule, the risk of bandying has been reduced a great deal, although not eliminated. Because there is a body of caselaw on the obligations of the corporation, there is less risk of the corporation "pushing the envelope" to avoid revealing information. Rather than restrict the rule at the behest of those who gain by returning to the problems of bandying, the better route is to preserve the rule and to allow it to develop as it has.

(2) Burdens and benefits of Rule 30(b)(6) practice: Do your members find that the burden of preparing witnesses for Rule 30(b)(6) depositions outweighs the benefits of such depositions to the discovery process? If so, please explain why. If burden is a problem, is it more acute (or only important) with regard to events that occurred in the distant past or are otherwise obscure? Is there often difficulty determining what information is "reasonably available" to the organization?

ABA Section of Lit.: For large organizations, or with regard to topics that involve events that occurred many years ago, it is often difficult to gather all the information that may be requested by a 30(b)(6) deposition notice. This is particularly true early in discovery, when all the witnesses and documents may not have been located. It is also true when those most familiar with the facts are no longer employed by the organization. A corporation served with a 30(b)(6) notice has an obligation not only to designate and produce persons who will satisfy the requirements of the rule, but also to prepare its witnesses so that they can give complete and accurate information. But those goals, while easy to express, are hard to implement. Too often counsel conducting 30(b)(6)depositions are inclined to make the extent and nature of preparation for the deposition an issue in the litigation. Much of the deposition may focus on preparation rather than the underlying facts. Some counsel would like to see the Advisory Committee consider amendments to reduce the situations in which the rule creates an inappropriate burden on a litigant.

Amer. Coll. of Trial Lawyers: This issue has two faces -- the burden on the entity to provide a witness who can testify to its knowledge concerning enumerated subjects, and the degree to which the entity can "create" an expert who presents himself as a fact witness. A supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation. Otherwise, a 30(b)(6) deposition would produce the same answer to every question -- "I will get back to you on that."

Assoc. of the Bar of the City of N.Y.: The consensus of our Committee members was that preparing a Rule 30(b)(6) witness for deposition requires unusually extensive time from both the witness and the attorney. Because the witness must testify about information not only known but also "reasonably available" to the organization, counsel must assure that th organization gathers responsive information from all sources. This is important because there is a risk that if the witness cannot properly testify the court may find that there has been a non-appearance, which might result in the inability to present additional evidence in the future. (The example cited involves failure to

consult a former employee who had relevant information, with the result that the entity was barred from presenting subsequent contradictory evidence by that employee.) Notwithstanding these points, our members believe that witnesses can be effectively prepared and protected from overreaching during the deposition by giving careful attention to the scope of the examination specified in the notice, and challenging or negotiating items where necessary. Existing caselaw already provides significant guidance to aid witness preparation and informs the bases on which protection should be sought. (Several cases are cited.)

Assoc. of Trial Lawyers of America: Our members don't have to prepare such witnesses, but they are quick to note that corporate failure to prepare witnesses regularly leads to frustration and to further depositions. Even if proper preparation is burdensome, it is less burdensome than serial depositions.

Calif. Employ. Lawyers' Ass'n: We firmly believe that Rule 30(b)(6) depositions are enormously beneficial, and that they streamline the litigation and discovery process. Without such depositions, the time required for, and cost of, litigation would increase tremendously.

Consumer Att'ys of Calif.: Obviously, there is some burden on the corporation to respond. But it best knows how to find the needed information, and it has the option to select the person to answer questions. The general discovery process demands that the relevant information be found and produced. Fulfilling that obligation is no more burdensome in the 30(b)(6) situation than in any other. But the benefits of that process are extraordinary because it streamlines discovery for the adverse party, who is a distinct disadvantage in the discovery process. If it is a "burden" for a corporation to figure out who is the most knowledgeable person with respect to a particular issue, it is simply impossible for the adverse party to figure out how otherwise to get the needed information.

Nat. Employ. Lawyers' Ass'n: Eventually the entity will have to identify the relevant witnesses, either for trial or for a motion for summary judgment. Rule 30(b)(6) depositions simply move this process to an earlier stage of the litigation, making it more efficient. For a corporation that honestly seeks to represent its interests with candid discovery responses, 30(b)(6) depositions are really a boon. They become burdensome only when the corporation does not want to provide candid responses. That can result in substituting interrogatory answers that are carefully drafted by a lawyer that invariably lead to further discovery. There is no difference between depositions regarding recent events and older ones. To the contrary, when the corporation has difficulty identifying a suitable witness because of the length of time that has passed, it is forced to recognize the paucity of available evidence. That realization often leads to an early settlement.

N.Y. St. Bar Ass'n: We hope that consideration can continue of ways of narrowing or at least making clearer the scope of required preparation for a Rule 30(b)(6) witness. In complex litigation, that can be a thorny problem as to which there is no clear guidance in the Rule or the caselaw. At the same time, the Committee should consider whether more emphasis should be given to the imposition of meaningful sanctions for inadequate preparation of, or performance by, a Rule 30(b)(6) witness given the nominal sanctions in the reported cases. Courts should be encouraged to consider preclusive sanctions under Rule 37(c) where other parties have been prejudiced by failure to prepare the witness.

Trial Lawyers for Public Justice: These depositions are incredibly beneficial. They are among the most potent weapons in a litigant's arsenal. They can streamline litigation. They reduce discovery costs. Were the Committee to recommend substantial changes along the lines suggested in its inquiry, this would be tantamount to eliminating the chance of any meaningful discovery against organizational entities. The burden involved for the corporation is not great. The usual basis

for testimony is the corporation's records. The lawyer for the entity will have to become familiar with those records, so counsel knows what sources should be used to prepare the witness. True, the party seeking discovery does not have any burden of preparing the witness. Although the corporation will always claim that the burden outweighs the benefit, that is very rarely true in this situation.

(3) Adequacy of preparation of witnesses proffered by organizations: Is it clear what is required to prepare a witness to testify in a Rule 30(b)(6) deposition? Is it frequent that witnesses are not properly prepared? Under the current rule, have courts been able to handle arguments about whether witnesses were adequately prepared in an appropriate manner?

Assoc. of Trial Lawyers of America: Unprepared witnesses are a signal concern of our members. They find that judges are too reluctant to use the tools at their disposal to sanction misconduct.

Calif. Employ. Lawyers' Ass'n: Witnesses are often ill-prepared for their depositions. Sometimes they are unaware that they have been designated by the entity to testify on its behalf. They are often not prepared to testify fully regarding the areas designated. We believe that there should be a sanction for any waste of time involved due to an ill-prepared witness. Judges should be encouraged to impose such sanctions.

Consumer Att'ys of Calif.: Although Rule 30(b)(6) witnesses are often not adequately prepared, that is not the fault of the rule. Inadequate preparation results either from insufficiently-specific designations of the areas of testimony or from the corporate defendant's deliberate obfuscation. The former problem is typically resolved through objections and a meet-and-confer process. The latter problem requires resort to judicial intervention. Judges are very effective an assessing whether a witness is adequately prepared.

Nat. Ass'n of Consumer Advocates: The problems that do occur usually involve a witness repeatedly answering "I do not know" or identifying some other person that needs to be asked. Because judges vary in their application of the rules, the consequences of such answers also vary. One member who practices in the "Rocket Docket" in the E.D. Va. finds that the judges tolerate very little bandying, but another reports a judge seemingly impatient at the lawyer's persistence when 30(b)(6) witnesses insisted on testifying only about their personal knowledge. Currently, Rule 37 adequately provides a rule-based method of dealing with such issues, but there is a difference among judges in whether or how to respond to problems of lack of preparation. The basic problem is that some corporations don't appreciate or accept the fundamental fairness of revealing their facts to the other side during the deposition. How quickly the entity marshals these facts is normally a function of the amount of resources and effort expended to accomplish the task.

Nat. Employ. Lawyers' Ass'n: Little preparation is really required of a 30(b)(6) witness. Either an individual has the information or he does not. Preparation really means identifying the proper individual and making sure this person is capable of answering questions. This is best done simply by reviewing the 30(b)(6) notice with the potential deponent. Problems develop only when attorneys do not properly use the rule. Examiners who poorly phrase their notices will lose the value of the deposition. When the notice is ambiguous, it falls to counsel to work together to reach an understanding. If the corporation fails to do its job in making the first designation, it should have to make another. Occasionally courts will deem the corporation to be without knowledge on a particular topic due to failure to respond. This again narrows discovery and decreases the cost of litigation.

Trial Lawyers for Public Justice: This is the largest problem under the rule. As one lawyer wrote, "Is it frequent that witnesses are not properly prepared? Answer: Without exception in my quarter century of experience using this rule."

W. Va. Trial Lawyers Ass'n: Instances of inadequate preparation do occur, but not due to any deficiency in the rule. That results, instead, from improper behavior by counsel or efforts by corporations to avoid revealing information. The courts have a settled body of caselaw to deal with these problems.

(4) Scope of examination and specification of issues: Are Rule 30(b)(6) notices typically sufficiently detailed and limited to permit adequate preparation of witnesses? Does examination often proceed on issues not identified in the notice if the witness also has knowledge about those additional issues? Has such examination on additional topics caused problems?

ABA Section of Lit.: Counsel may require in the notice that a large organization track down and prepare a witness to testify about every issue in the litigation, even if those topics are not appropriate for 30(b)(6) testimony. For tactical reasons, counsel may serve repeated 30(b)(6) notices with multiple categories, which makes it virtually impossible for one witness to be able to address all the issues.

Amer. Coll. of Trial Lawyers: The caselaw is not uniform on whether it is permissible to ask questions that go beyond the scope of the designated topic areas (citing a case that identifies two lines of cases). We believe that a clarification would be helpful.

Assoc. of Trial Lawyers of America: Our members report following lines of questioning within the knowledge of the witness if that knowledge is otherwise discoverable. They view this as efficient.

Calif. Employ. Lawyers' Ass'n: We recommend that examination of the witness be allowed as to all relevant areas within the witness's knowledge. Otherwise, it is conceivable that a single person could be produced as a witness under Rule 30(b)(6) and then again as an individual. The inefficiency of that procedure is obvious. Moreover, that would count as two witnesses against the ten-deposition limit.

Consumer Att'ys of Calif.: As with every discovery device, the quality of 30(b)(6) designations is necessarily tied to the experience and skill of the lawyer drafting them. But when there are problems, it is relatively easy for opposing counsel to work them out in a meet-and-confer process. Regarding questioning about topics beyond the list, that depends on whether the parties think it preferable to wrap up everything in one session. If the responding party opts for a second deposition to cover the other area, so be it.

Nat. Ass'n of Consumer Advocates: In its training sessions, NACA takes the position that Rule 30(b)(6) notices must be sufficiently detailed. Given that our members are producing the notices, we have heard no complaints from them about the sufficiency of what they produce. Whether the examination goes beyond the notice is up to the counsel in the deposition. For efficiency reasons, it often happens that if the witness has pertinent knowledge that can be obtained later by having another deposition, counsel normally allow the witness to provide that testimony during the 30(b)(6) deposition.

Nat. Employ. Lawyers' Ass'n: The burden falls on the examiner to provide a clear and detailed notice. A good notice eases the way of discovery. If a notice is poor, the corporation can respond by working with the examiner to clarify what is needed, or simply provide the best witness it can. In our experience, courts are generally not inclined to reopen depositions, forcing counsel to do their job carefully in the first instance. Because the examiner is prepared on the issues in the notice, he is generally not prepared to ask questions beyond the notice. The 30(b)(6) deposition has specific goals and going beyond the notice is often worthless. Objections to questions which go beyond the scope are invariably sustained by the court and examiners who do so typically find that they have wasted time. But if it turns out that the witness has a wealth of other information, that usually saves time on other depositions, as the testimony of this witness is used instead.

Trial Lawyers for Public Justice: The party seeking discovery knows that its effort will be hopeless unless the subject matter is specified in great detail. But the organization often objects to the scope of the notice. Defendants may object for tactical reasons, essentially extorting plaintiffs into abandoning requests for relevant information as the price for going forward on other topics. When the witness has personal knowledge about matters beyond the scope of the notice, it would be a waste of time to require a second deposition to pursue those matters.

(5) Timing and number: Should Rule 30(b)(6) depositions usually be taken early or late in the discovery process? If they are taken early, should there be an opportunity to supplement? Should there be any limitation on the number of Rule 30(b)(6) depositions a party can take?

Amer. Coll. of Trial Lawyers: Our committee is not aware of any problems that have arisen from the Committee Note suggestion to treat all individuals designated in response to a 30(b)(6) notice as a single deposition for purposes of the number of depositions, but to treat each individual as subject to the seven-hour day limitation for his or her deposition. We agree with a magistrate judge's ruling that a 30(b)(6) deposition is the deposition of the entity, and that a second deposition of that same entity can only be done by agreement or order. That would mean that litigants would be required to exhaust all possible topics in their first 30(b)(6) deposition. We note that many district courts have local rules limiting the number of interrogatories, and suggest that there could be a limit on the number of topics included in a 30(b)(6) notice.

Assoc. of Trial Lawyers of America: Inadequacy of witness preparation raises concerns about how depositions or designees should be counted. As the deposition of the corporation, the 30(b)(6) deposition should count as one deposition, regardless of how many persons are designated. In terms of timing, it is impossible to declare what is the right time for all cases; "30(b)(6) depositions should be taken when they need to be taken." Generally, this will be relatively early in the litigation. Delaying testimony would prevent plaintiffs from discovering the corporate position. We see no reason, however, to address the timing or number by rule. Judges can handle these things on a case-specific basis.

Calif. Employ. Lawyers' Ass'n: We believe that there should be no opportunity to supplement. Particularly in the late stages of litigation, supplementation might result in a completely different factual scenario than that for which the parties have been preparing. It would required reopening discovery in many cases, resulting in tremendous inefficiency.

Consumer Att'ys of Calif.: Our members normally take 30(b)(6) depositions early in the discovery process, but litigants need flexibility to take them at any time during the litigation. Limitations on the number of 30(b)(6) depositions would be counterproductive. Crafting one would

also be difficult. You can't limit the number of individuals designated. If one tried to limit the number of topics designated, all that would result is that litigants would delineate broader, less specific and less effective topics to cover more with fewer. Propounding lawyers don't want corporations to spend more time than is necessary to get the information they need to litigate their cases. The simple reality is that most attorneys use 30(b)(6) depositions only as needed.

Nat. Ass'n of Consumer Advocates: These issues should be addressed and normally worked out during the Rule 26(f) conference. Regardless of the number of people designated by the corporation, a Rule 30(b)(6) should count as one deposition for purposes of the ten-deposition limit. The duration and timing of the deposition depends on the condition of the court's docket and the circumstances of the individual case. The 30(b)(6) deposition should occur early enough to allow for follow-up discovery before dispositive motions or trial preparation.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions should be taken early in the discovery process, because they have a unique ability of helping the parties cut directly to the central issues and avoid wasted discovery efforts. If the witness is carefully selected, there should be no need to supplement a 30(b)(6) deposition. Supplementation would be necessary only in cases in which the witness is not able to answer the questions asked. It is unusual for more than one 30(b)(6) deposition to be noticed. When there is another, it is usually because the corporation has changed its position, or because amendments have been made in the pleadings. Limiting the number of 30(b)(6) depositions a party may take will only lead to motions for additional depositions. The rule should state that all depositions taken pursuant to this rule shall count as one deposition for purposes of the ten-deposition limit.

Trial Lawyers for Public Justice: There should be no restriction on the number or timing of Rule 30(b)(6) depositions. They are useful on a broad array of topics. Interrogatories, by way of contrast, have proven a poor discovery tool. Rule 30(b)(6) depositions provide a way to pierce the objections, evasions, non-information and non-responsive features of interrogatory answers.

W. Va. Trial Lawyers Ass'n: Some counsel take these depositions "up front" to get the position of the institutional litigant on the record. Others prefer to utilize them further into, or even at the end of, the discovery process. Like other discovery tools, these matters are best left to the lawyers. Changing the rule to limit the number of such depositions is not warranted; the trial judge is well-situated to deal with such issues.

(6) Possible impact on work product protection: Do Rule 30(b)(6) depositions pose greater threats to work product protection than other depositions? Are contention questions used in Rule 30(b)(6) depositions in ways that intrude into protected areas? Are Rule 30(b)(6) depositions used to compel organizations to take positions on contested issues too early in the litigation?

Amer. Coll. of Trial Lawyers: It is not clear that Fed. R. Evid. 612(2) should apply to a 30(b)(6) deposition. Does the document really refresh the witness's memory? Or does it "create" a memory brought into being for purposes of the deposition? Depending on how the court resolves that issue, it might insist that any documents used to prepare the witness be turned over to the other side.

Assoc. of the Bar of the City of N.Y.: Our members reported that this sort of problem does not usually arise, and they were confident that it could be successfully addressed by a court on a motion for a protective order. One of our members, however, was concerned that such a deposition

could invade work-product immunity when the notice requests the witness to testify about all documents and information supporting the organization's claims or defenses. Because it is reasonable to assume that counsel is involved in gathering that information and analyzing documents that support claims, the attorney's thought processes may well be revealed.

Calif. Employ. Lawyers' Ass'n: We have found that contention questions are not being asked in these depositions. The rule does not explicitly invade or violate the work product protection. Rule 30(b)(6) depositions pose no greater threat to work product than do any other types of deposition. Contention questions, if they are asked at all, do not endanger the attorney work product immunity any more gravely than if they are posed to individual parties.

Consumer Att'ys of Calif.: We have not found that 30(b)(6) depositions have any greater impact on work product issues than any other type of depositions. Nor is it our experience that contention-type issues arise in the 30(b)(6) context. Generally, the depositions focus on obtaining information about the corporation's structure, departments, organization, document retention and access policies, and other general informational facts, not contentions or positions.

Nat. Ass'n of Consumer Advocates: The deponent has the most control over how much work product is involved in its own investigation. If it chooses to have its lawyer perform its investigation, then it will have work product that must be disclosed. If it instead has non-lawyers interview its employees and examine documents and records, it will avoid most work-product issues. (Note: Rule 26(b)(3) provides protection for trial preparation work done by nonlawyer agents of the party.) NACA has heard no complaints from its members about the contention question issue raised by the Committee's request for comments.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions pose no greater threat to work product protection than interrogatories or document requests. Indeed, in a sense there is less threat because the topics are specified in advance. Contention questions don't pose a problem. There should be nothing protected about contentions. Often contention questions cut to the heart of the matter much faster and save discovery and litigation costs. Rule 30(b)(6) depositions are often used to compel organizations to take positions on contested issues early in litigation. That is one of the great benefits of such depositions, because they save the other side from doing much additional discovery to get to the same place. Particularly in an era of early discovery deadlines, this is important. A corporation should no more be permitted to avoid taking positions than an individual.

Trial Lawyers for Public Justice: Often, having chosen a "fall guy" to represent the corporation, counsel educate the witness for the deposition and try to thwart discovery about the basis for the testimony by interposing work product objections. This is improper, since work product protection does not apply to facts learned in preparation for litigation. It does not matter that this particular witness has learned some or all of this factual information from the lawyer.

(7) "Binding" effect of answers: Are Rule 30(b)(6) deposition answers being given an unduly binding effect at trial? Are organizations being unfairly prevented from providing evidence that contradicts or supplements what was said in the deposition?

ABA Section of Lit.: Counsel who regularly represent corporations believe that treating Rule 30(b)(6) testimony as a judicial admission is too harsh. "Most had faced arguments for the preclusive nature of testimony; some reported that a court had issued preclusion rulings. All reported that the potential for a preclusion ruling increased the burden of producing a properly prepared 30(b)(6) designee." Even the best intentioned counsel and their clients face a risk of careless or

wrong answers during such a deposition. Some opportunity for supplementation should be considered. This is not to suggest that it is never appropriate to preclude an organization from contradicting the testimony, or lack of testimony, on a particular topic. It is important that counsel and parties take seriously the obligation to prepare thoroughly for a 30(b)(6) deposition. When there has been undue prejudice to the examining party, or to litigants who rely on original testimony, preclusive sanctions may be warranted.

Amer. Coll. of Trial Lawyers: The rule can be, and has been, interpreted to provide for a binding effect. A substantial and persuasive argument can be made that a 30(b)(6) deposition ought to be no different than the deposition of an individual. Beyond that, even allowing impeachment of the entity that provided the deposition answers might be questioned. "When an individual says different things on different occasions under oath, the impeachment value is real. But when two different individuals who are spokespersons for the same entity say two different things, the effect if far different, far less substantial." "If 30(b)(6) depositions are not binding, what is the point of taking them? . . . Yet if they are binding, how does one avoid the potential for unfairness?" One answer may be a supplementation process. That is allowed for interrogatory answers, even though by their nature they allow for reflection and dissemination within the entity that is not true of 30(b)(6) answers. "Parties should have a right to binding answers from corporate entities; corporate entities should have a right not to be led into binding themselves by blindside testimony." If one decides that a 30(b)(6) deposition should be treated the same as any other deposition -- that the witness is free to give contrary trial testimony subject to impeachment -- then perhaps there should be some provision to make the impeachment as effective as in individual depositions. Although many courts already make a practice of explaining to juries what a representative deposition is, perhaps that explanation could be required by the rules.

Assoc. of the Bar of the City of N.Y.: None of our members had found that the binding effect issue played an important role in one of their cases. This may be because few cases reach trial, where the admissibility and effect of deposition testimony becomes important. But although the decisions on this issue approach it from slightly differing points of view, none appears to preclude additional testimony when the facts suggest it would not be fair to do so. (The letter cites cases.) The Association expects this body of law to continue to develop and to narrow, if not eliminate, uncertainty about the binding effect of Rule 30(b)(6) testimony.

Assoc. of Trial Lawyers of America: We mean for a corporation to be bound in a 30(b)(6) deposition in the same way a human litigant is bound by a deposition. There is no unfairness in requiring a corporation to present its knowledge. It chooses the person through whom to do it and prepares the agent to testify. The buck must stop somewhere.

Calif. Employ. Lawyers' Ass'n: We wonder, if deposition answers are not being given a binding effect at trial, why one would conduct the depositions at all. All depositions are intended to be given a binding effect at trial; if a party wishes to contradict its testimony the trier of fact is entrusted with the obligation of determining the facts and giving the deposition answers proper weight. Requiring deposition answers to be given binding effect guarantees fairness and prevents "trial by ambush."

Consumer Att'ys of Calif.: Rule 30(b)(6) depositions are no different than any other discovery devices -- if a change or supplement is required, it can be made. Obviously, like every other change or alternation, such changes can be commented on at trial.

Nat. Ass'n of Consumer Advocates: The rule requires the entity to send a person to "testify" "on its behalf." The use of the word "testify" implies that the information is sworn to be true. The phrase "on its behalf," in turn, means that the answers be truthful on behalf of the entity. The

inherent nature of any testimony -- that it can be used against the deponent -- is not a problem for those entities who complete a suitable investigation of their own facts prior to the deposition.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization. If the deposition is not binding, there is no reason for the rule.

Nat. Employ. Lawyers' Ass'n: Unfortunately, the contrary is true; depositions are generally not given binding effect at trial. Rather, they are used to impeach witnesses who testify differently than they did in their deposition. This is a very effective technique against individuals, but when a corporation presents someone at trial to provide testimony contrary to that provided by the person who gave the 30(b)(6) deposition, the fact that the deposition was of a different individual makes its use as a tool of impeachment very weak. The result is that corporations use this technique to defeat the purpose of Rule 30(b)(6). A corporation should not be allowed to contradict its own testimony free of consequence any more than an individual.

(8) Conflicting decisions under current rule: Have your members found that conflicting rulings are emerging in the application of current Rule 30(b)(6)? If so, we would appreciate being apprised about those decisions.

ABA Section of Lit.: Courts have taken two opposing positions on the "binding" nature of Rule 30(b)(6) deposition testimony. In some jurisdictions, the testimony is taken as a judicial admission, and the organization is precluded from taking any position inconsistent with its 30(b)(6) testimony. In others, the organization is bound to the same extent as any other witness, but it may contradict its position, with a credibility price to pay.

Amer. Coll. of Trial Lawyers: The current caselaw is in conflict regarding whether and to what extent a 30(b)(6) deposition binds the entity that designated the witness. The caselaw is neither definitive nor uniform. We believe that the practicing bar would benefit from knowing what the rule really means, one way of the other. There is also a conflict about whether questioning can go beyond the scope of the notice.

Assoc. of Trial Lawyers of America: We are not aware of significant conflicting authority.

Calif. Employ. Lawyers' Ass'n: We are not aware of conflicting rulings, and have found that judges are able to manage this discovery very well under the current rule.

Consumer Att'ys of Calif.: At least in California, no conflicts or problems have emerged.

Fed. of Defense & Corp. Counsel: Many courts prohibit a party from submitting evidence that contradicts its deposition testimony. Greater leeway is given in other jurisdictions, which allow an organization to present evidence that contradicts or rebuts the testimony of its own 30(b)(6) witness. (The letter cites cases.)

Nat. Ass'n of Consumer Advocates: There are differences among judges and among courts in their attitude toward the failure of parties to prepare their witnesses adequately.

Nat. Employ. Lawyers' Ass'n: Courts have managed to resolve the rare 30(b)(6) disputes with great facility. Rule 30(b)(6) is really far easier to police than regular depositions because the notice is provided in advance. We have seen no conflicting rulings on this issue.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization.

(9) Resolve problems though caselaw? Until there is a good understanding of the gravity and nature of any current problem with practice under Rule 30(b)(6), there can be no serious consideration of whether a rule amendment might be desirable. Can any problems your members have encountered with practice under Rule 30(b)(6) be addressed through litigation under the current rule, or would a rule change be a better way to address such problems?

Amer. Coll. of Trial Lawyers: Our Federal Rules of Civil Procedure Committee believes that the rule leaves substantial open questions in its current form. We believe further that those question are better answered by amending and clarifying the rule than by the development of caselaw, which to some extent already has produced and likely will continue to produce inconsistent results. At the same time, we believe that the rule can be a very important and valuable litigation tool.

Assoc. of Trial Lawyers of America: ATLA is a strong believer in the mechanisms of the common law. We do not perceive problems that can be addressed better through rulemaking than through the judicial application of principles to fact.

Consumer Att'ys of Calif.: Our members have not experienced problems with this rule. It is the use of the tool by some parties -- often responding parties -- that has created difficulties. Legislating more changes will not solve that problem; it will just change the issues courts will have to resolve.

Nat. Ass'n of Consumer Advocates: NACA requests that the Committee allow any problems that exist to be addressed through caselaw.

Nat. Employ. Lawyers' Ass'n: Generally, rule changes make litigation less certain and increase the costs to the parties. Although changes may be appropriate in certain circumstances, such as dealing with E-Discovery, this is not an area where changing the rules would be helpful. Rule 30(b)(6) is a rule more easily managed by the courts than many others.

Trial Lawyers for Public Justice: Generally, we think that it is better to let courts resolve issues relating to Rule 30(b)(6) through specific decisions with specific facts rather than attempting to craft general rules in response to pressures from interested groups.

● Limiting Rule 30(b)(6) discovery to identifying the location of discoverable information within the custody or control of the organization: This approach would limit Rule 30(b)(6) depositions to providing a precursor to other discovery and would preclude their use to generate admissible evidence for trial. That would seem likely to reduce burdens on organizations preparing witnesses. But for organizations that wanted to designate a single representative to present their positions, this would perhaps be a negative change. And it could also significantly erode the value of Rule 30(b)(6), which now permits the organization's opponent to discern the organization's position through a deposition.

Assoc. of Trial Lawyers of America: This proposal would recreate the very problems that the rule was designed to solve.

Calif. Employ. Lawyers' Ass'n: this change would render the depositions pointless. Although this would reduce the burdens on organizations, the result would be testimony by witnesses who cannot testify confidently, resulting in further motions and further discovery. This would also give the entity an advantage in litigation.

Nat. Employ. Lawyers' Ass'n: Such a limitation would effectively eliminate the primary value of the rule. The result would inevitably be to return to the "bandying" that the rule was created to eliminate. Currently, Rule 30(b)(6) depositions can dramatically decrease the cost of litigation, but if such a deposition cannot be used to obtain a corporation's position on a matter or to obtain specific information, parties will often find themselves in need of more depositions and extensions on discovery.

N.Y. St. Bar Ass'n: We oppose this suggestion. Rule 30(b)(6) depositions have an important role in developing the factual record in appropriate cases involving organizations, particularly when the institution has an advantage in collecting information or employee knowledge that is relevant to the case and perhaps difficult to integrate or widely dispersed within it. It would be better to limit examination to "factual" matters.

- Providing by rule that the witness's testimony is not a "judicial admission": A rule amendment might deal with the effect of testimony in the deposition, perhaps by affirmatively preserving the organization's right to offer evidence in support of different versions of the facts. But such a change might significantly reduce the utility of Rule 30(b)(6) and might encourage bandying.

Assoc. of Trial Lawyers of America: This would clarify existing law. Caselaw already says that testimony is not a judicial admission, and that it may be explained or contradicted. An organization is bound by a designee's testimony in the same way that any other individual would be.

Calif. Employ. Lawyers' Ass'n: If the answers did not bind the entity, the deposition would be of very little value. Making such a change would encourage bandying.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to confirm a party's right to provide evidence that contradicts or explains the testimony of 30(b)(6) deponents.

Nat. Employ. Lawyers' Ass'n: Our membership does not see courts treating 30(b)(6) testimony as a judicial admission. Rather, parties use depositions to impeach witnesses at trial who contradict their depositions. Corporations have an unfair advantage because they can simply send a different person to testify at trial. To remove this unfair disparity, the rule should probably be amended to require that the testimony of a 30(b)(6) witness be treated as a judicial admission.

- Providing for supplementation of a Rule 30(b)(6) deposition: If it is a problem that the rule currently freezes the organization's version of events to that presented in an early Rule 30(b)(6) deposition, that might be solved by providing for supplementation in Rule 26(e)(1), which presently makes no provision for such supplementation. But such a change would, under Rule 37(c)(1), seem to strengthen arguments that the organization is not allowed to proffer competing evidence unless it has provided a timely supplementation.

ABA Section of Lit.: A change to allow supplementation or amendment to answers given at 30(b)(6) depositions, at least under limited circumstances, may be appropriate. Rule 26(e)(2) allows and requires such supplementation with respect to both interrogatories, documents production requests, and requests for admissions.

Amer. Coll. of Trial Lawyers: The potentially unfair burden of binding effect can be ameliorated by having clear procedures in place for the entity to reflect and amend. With an interrogatory answer, a party that learns its answer was wrong has a duty and right to correct or supplement it. One possibility would be amending Rule 26(e), Rule 30(b)(6), or both to make it clear that the entity has some period of time to amend or supplement its answers before the answers become binding. Of course, when there is newly discovered information that was not reasonably known at the time of the deposition or supplementation period, that new information could provide an acceptable basis to supplement. But the supplementation right should not be a substitute for adequate preparation of the witness in the first instance; it should be only a right to supplement, not to substitute a promise to provide more information later.

Assoc. of Trial Lawyers of America: This would lessen incentives to prepare thoroughly and invite delay.

Calif. Employ. Lawyers' Ass'n: Making such a change would result in trial by ambush. It would also make problems for a court ruling on a summary judgment motion if the entity were not bound by statements made in the deposition, and could contradict them with affidavits prepared after service of the motion.

Nat. Employ. Lawyers' Ass'n: Permitting supplementation would basically require retaking the 30(b)(6) deposition and probably impact on other discovery as well because 30(b)(6) depositions are commonly used to identify the necessary parameters of discovery. Supplementation is a sign that the corporation did not do a proper job of preparing the witness in the first place.

Trial Lawyers for Public Justice: Like any party's deposition, Rule 26(e) provides a process that permits the deponent to amend or supplement an answer. Why should parties who are corporations receive more protections than individuals? They should not.

- Forbidding "contention" questions during 30(b)(6) depositions: If efforts to require the organization to commit to certain positions during the deposition are unfair, perhaps a prohibition on contention questions during a deposition could be fashioned. Defining what is forbidden might prove difficult, however, and disputes about whether certain questions are of the forbidden type could complicate Rule 30(b)(6) depositions.

ABA Section of Lit.: Several counsel expressed concern about using 30(b)(6) depositions to ask questions about legal arguments, contentions, or positions. They noted that interrogatories are better vehicles for eliciting the other side's contentions and positions, and that few, if any, lay litigants are competent to testify on those matters in any event. Several suggest that if there are contention depositions, then the depositions should occur later in discovery, a sequence specifically recognized for contention interrogatories.

Assoc. of Trial Lawyers of America: The suggestion that interrogatories would be a better tool for getting at contentions is wrong. If a corporation wants counsel to answer questions (as would be true for interrogatories), it can designate counsel to testify at the deposition. A deposition,

with opportunities for clarifying questions and for significantly narrowing issues, can reveal more than edited and calculated writing, and can do it more quickly. Limiting deposition questions by forbidding contention questions would hinder, not assist, the search for truth.

Calif. Employ. Lawyers' Ass'n: We are not aware that such questions are being asked during deposition. The typical practice in state court in California is that contention questions may be asked in interrogatories but not in depositions.[1]

Fed. of Defense & Corp. Counsel: We urge that the rule be reformed to eliminate or curtail a party's ability to take binding "contention" depositions of 30(b)(6) witnesses in the early stages of the case.

Nat. Employ. Lawyers' Ass'n: Although forbidding contention questions would not eviscerate the rule as much as limiting the deposition to the location of discoverable information, it would greatly reduce the usefulness of these depositions in identifying the parameters of discovery. Without that tool, many litigants would be forced to use wider discovery requests.

- Limiting questioning to those matters identified in the notice, or for which the witness was designated: If questioning about matters not identified in the notice of deposition is a serious problem, the Rule 30(b)(6) deposition could be limited to those matters. That change would seem consistent with the provision now in the rule that, if it designates more than one person to testify, the organization may specify the matters on which each such witness will testify on its behalf.

Amer. Coll. of Trial Lawyers: We believe that a clarification on this subject would be useful. There are issues raised by questioning beyond the scope of the notice. What is the effect of an answer? Is it an admission of the organization at all? Is it binding? Does venturing beyond the scope convert a 30(b)(6) deposition into one under Rule 30(b)(1), counting as two depositions under the ten-deposition rule? What should be the process for objecting to questions that exceed the topics listed. Although the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

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[1] The comment cites Rifkind v. Superior Court, 27 Cal.Rptr. 822 (Cal. Ct. App. 1994), which held that contention questions were improper in the deposition of a party who was a lawyer. The court explained (id. at 826-27):

> [L]egal contention questions require the party interrogated to make a "law to fact application that is beyond the competence of most lay persons." (1 Hogan, Modern California Discovery (4th ed. 1988) § 5.9, p. 252.) Even if such questions may be characterized as not calling for a legal opinion or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions. . . . So used, the interrogatory becomes an instrument for forcing one's opponent (or, more realistically, the opponent's attorney) to engage in a rather sophisticated process of legal reasoning.

Assoc. of Trial Lawyers of America: Caselaw holds parties to the matters identified in the discovering party's notice (citing S.D.N.Y. case). We do not see any need to amend.

Calif. Employ. Lawyers' Ass'n: We believe that it should be permissible to ask the witness about any discoverable information, whether or not on a topic listed in the notice. The party doing discovery should not be required to notice a second deposition of the witness (perhaps counted as another deposition against the ten-deposition limit). Moreover, to the extent there is a need for relief on this issue, judges can make sensible decisions without a rule change.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to clarify that a party's right to interrogate a 30(b)(6) witness is limited to those categories specified with reasonable particularity in the deposition notice.

Nat. Employ. Lawyers' Ass'n: Typically, courts are already enforcing this limitation. Where questions go beyond the scope, courts usually sustain objections. But sometimes examination on additional topics is allowed, and that provides benefits. The alternative is a second deposition of the witness.

Other ideas

ABA Section of Lit.: One possible idea to deal with the "binding" effect problem would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to believe that a previous 30(b)(6) piece of testimony needs to be modified. The burden of proving good faith preparation of the witness would be on the party seeking the change, and the opposing party would be permitted reasonable discovery to test the assertion at the expense of the party seeking the change in testimony. The party seeking the change might also be required, if the change is permitted, to pay the additional expenses, including attorney fees, resulting to the other side from the change in testimony. Another possible idea would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Amer. Coll. of Trial Lawyers: There are a number of issues about the use of the 30(b)(6) witness at trial. Should personal knowledge or hearsay issues be approached differently from ordinary witnesses? Ordinarily personal knowledge is not a prerequisite for admissibility of statements or testimony by a party, which would seem to include the testimony of a 30(b)(6) witness. The lack of personal knowledge of the individual who testified should not be controlling. Indeed, the obligation to prepare the witness to testify underscores the impropriety of treating that witness's lack of knowledge as a ground for excluding at trial the deposition testimony. But if the testimony is offered by the entity itself, a different attitude may be proper. Otherwise, the entity is allowed to get in evidence that does not satisfy Fed. R. Evid. 602. The caselaw is not uniform, however. In a similar vein, are there any limits on using the deposition testimony to impeach a witness called by the entity at trial? Even if it's the same individual, at trial he or she may be testifying in an individual rather than representative capacity. How should the rule of completeness be handled with regard to hearsay if the entity insists on admission of additional parts of the deposition in addition to those used by its opponent? There are also questions about how the comparable procedure under Rule 45 should operate. Can a party subpoena a nonparty entity and require it to designate and prepare a witness at trial knowledgeable on specified topics? The commentators have not yet addressed that question, but there is nothing in Rule 45 that prohibits it.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to limit the number of categories that can be designated under the rule.

Nat. Ass'n of Consumer Advocates: If the rule is to be changed, it should be strengthened, as follows:

> (1) The rule does not presently say explicitly that an entity will be bound by the testimony absent a good cause showing of changed circumstances. To help deponents understand how the rule works, this could be made explicit.
>
> (2) Unlike Cal. Civ. Proc. § 2025.230, the federal rule does not require the deponent to produce the "most qualified" or "most knowledgeable" person. The entity may thus have a tendency to offer the least qualified individuals in an effort to prevent plaintiffs from developing evidence.
>
> (3) The rule does not require that an organizational entity "immediately" or "promptly" designate an additional witness in the event the person first designated cannot answer a question on a matter designated in the notice. This encourages defendants to draw out discovery.

N.Y. St. Bar Ass'n: We think that the Committee should consider the following specific proposals that were included in our 2004 submission (which prompted the Committee's interest in this subject):

> Our proposal (1): All 30(b)(6) depositions of a party should be treated as one deposition with a presumptive cumulative limit of seven hours in total.
>
> Our proposal (3): Although an examining party should be permitted to direct attention in the deposition notice to specific testimony about, or documents concerning, the organization's conduct, the obligation of the testifying witness in preparation should not generally extend to the review of testimony or documents form other parties or nonparties, unless these are present or former employees or agents of the organization.
>
> Our proposal (5): Rule 30(b)(6) should be amended to insert the word "factual" before "matters" in the fourth sentence to establish that such depositions should not be a vehicle for seeking discovery of legal arguments, contentions or positions that are not simply factual statements or evaluations of the legal significance of facts.
>
> Our proposal (8): Testimony under Rule 30(b)(6) should not be treated as preclusive, but merely as probative.

Trial Lawyers for Public Justice: The rule does not currently say that the entity must adequately prepare the witness, although the caselaw does so state. The rule should say so. There are three ways of doing this: (1) the rule could require that the organization provide the "most knowledgeable person" rather then leaving it free to choose whomever it wishes; (2) the rule could be amended to specify clearly the organization's responsibility to prepare the witness; and (3) the rule could mandate monetary sanctions for failure to provide a prepared witness.

## Notes on Rule 15 Subcommittee Report

These Notes provide additional background to flesh out the Rule 15 Subcommittee Report and Professor Gensler's comments. The topics winnowed through to conclude with the recommendations advanced in the Report are described at length in the Rule 15 memorandum that has grown through successive agenda books. The most recent version of that memorandum is attached as a resource to address particular questions that may occur, not as required reading for present purposes.

These Notes are divided into three parts. The first two, addressing Rules 15(a) and 13(f), are brief. The questions are clearly framed by the Report and comments and there is no occasion for elaborate additions. The third part addresses the perennially difficult problems of relation back under Rule 15(c). This part is not so brief because the Subcommittee has divided on some important issues.

### I. Rule 15(a)

The effect of the proposed amendment of Rule 15(a) is discussed in the draft Committee Note, which was presented to the Subcommittee only after the final conference call. The right to amend once as a matter of course is both curtailed and expanded.

The more important changes address amendment of a pleading to which a responsive pleading is required. The right to amend once as a matter of course established by the present rule is changed in several ways, both to limit and expand the current right.

The right to amend once as a matter of course is curtailed for situations in which a pleading that requires a responsive pleading is challenged by motion without filing a responsive pleading. Under present Rule 15(a), the right to amend once persists after a responsive motion is filed, allowing the pleader to amend long after the motion has been taken under advisement and even after the motion is granted unless the court acts to cut off the right. The amended rule would cut off the right to amend 21 days after a motion under Rule 12(b), (e), or (f) is served. This change responds to a complaint frequently heard about the indefinite survival of the right to amend — that the court may be forced to undertake most or all of the work required to decide the motion, only to have its labors undone by an amendment made without any opportunity for prior evaluation.

The right to amend once as a matter of course is expanded, on the other hand, for situations in which a responsive pleading is served. Under present Rule 15(a), the right terminates upon service of the responsive pleading. The amended rule permits amendment within 21 days after service of the responsive pleading. This change reflects the view that unnecessary motion practice can be avoided by enabling a pleader to act on deficiencies pointed out by the responsive pleading, just as happens now by responding to a motion that attacks the pleading.

The right to amend once as a matter of course is expanded in a minor way as to a pleading that does not require a responsive pleading. The time to amend is extended from 20 days to 21 days, anticipating the prospect that many time periods will be changed to multiples of 7 days in the Time Project. More importantly, the amended rule discards the further limit that cuts off the right to amend short of 20 [to become 21] days if the action has been placed on the trial calendar. The Committee Note addresses the reasons for this change.

**Rule 15. Amended and Supplemental Pleadings**

**(a) Amendments Before Trial**

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

**(A)** ~~before being served with a responsive pleading~~ 21 days after serving it, or

**(B)** ~~within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f) addressed to the pleading, whichever is earlier.

* * * * *

**Committee Note**

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A

responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,[1] and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).[2]

**Choice of Time-Extending Motions**

The proposed rule allows one amendment of a pleading to which a responsive pleading is required over a period that is longer — and potentially much longer — than 21 days. The 21-day period begins to run only after the earlier of service of a responsive pleading or service of a motion under Rule 12(b), (e), or (f). The ordinary period to serve a responsive pleading is set by Rule 12(a) at 20 days, but it is 60 days to serve an answer after service is waived (or 90 days if the defendant is outside the United States), and 60 days if the defendant is the United States or a United States agency or official. It seems likely that these periods are at times extended or tacitly ignored. As compared to present Rule 15(a), the result still is only an additional 21 days if a responsive pleading

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[1] This statement anticipates adoption of Style Rule 40 — or Style-Substance Rule 40 — on December 1, 2007.

[2] If Rule 13(f) is abrogated, it might be appropriate to add a final paragraph to the Rule 15 Committee Note: "Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim."

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is filed without a prior Rule 12 motion; if a Rule 12 motion is filed first, the result almost always will be less time.

Amendment once as a matter of course seems useful, albeit for an abbreviated period, as to several of the defenses listed in Rule 12(b); if it is unlikely that a motion based on insufficient process or insufficient service of process will point out anything to be cured by amending a pleading, it did not seem worth the drafting complication to specify an exclusion. Amendment similarly seems useful to meet a motion for more definite statement under Rule 12(e), or a motion to strike under Rule 12(f).

The subcommittee decided that two additional motions should be omitted from the list in proposed 15(a)(1)(B). A Rule 12(c) motion for judgment on the pleadings can be made only after the pleadings are closed; the 21 days allowed after service of a responsive pleading seemed sufficient. A Rule 56(b) motion for summary judgment can be made by a party against whom a claim is made at any time; if it is made before serving a responsive pleading, again there is plenty of time to make one amendment as a matter of course. One other motion might be noted. Style Rule 12(i) carries forward the provision of present Rule 12(d) allowing a motion for pretrial disposition of a Rule 12(b) defense made in a pleading. Amendment after such a motion is properly governed by the time of the pleading. The result of these deliberations is the designation of motions under Rule 12(b), (e), and (f).

**Professor Gensler's Comments**

Professor Gensler is uncertain whether anything will be gained by recognizing a right to amend once within 21 days after a responsive pleading is served. The most common situation involves a complaint and an answer. He suspects that a plaintiff who has not chosen to amend the complaint before service of the answer is likely to stand on the complaint rather than make unwelcome amendments, secure in the belief that if the complaint fails the court will grant leave to amend. But he recognizes that there may be different responses — that the plaintiff may recognize the validity of the challenge in the answer, or prefer to expedite the litigation by amending to meet the challenge. The proponents of the rule change would add that unless amendment is plainly futile, leave is almost certain to be granted; recognizing a right to amend once is more efficient.

**(Incidental Note on Trial Calendars)**

6 Wright, Miller & Kane, § 1483, p. 591, observes that Rule 15(a) means what it seems to say. If a plaintiff files an amended complaint and the defendant files an amended answer, the defendant can amend the amended answer once as a matter of course within 20 days [a period the amendment would expand to 21 days]. That increases the prospect that an amendment may be made close to trial. But it still seems likely that in cases of any complexity all of this will be governed by a scheduling order.

## II. Rule 13(f)

Style Rule 13(f) reads:

> **(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

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Rule 15(a) probably allows addition of a counterclaim by amendment of a pleading within the period for making one amendment as a matter of course. See 6 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1430, p. 226. There may be some tension between that result and a possible negative implication that Rule 13(f) requires permission.

More importantly, Style Rule 15(a)(2) carries forward virtually unchanged the standard for amendment after expiration of the opportunity to amend once as a matter of course: "The court should freely give leave when justice so requires." Rule 13(f) does not refer to "free" leave, but adds "oversight, inadvertence, or excusable neglect" to the list. There is little apparent reason to have different standards. Nor is there any apparent reason to believe that the two rules are administered differently. Wright, Miller and Kane say, § 1430 p. 227, that "[t]his variation in wording has not led to different standards for granting leave to amend * * *."

The overlap between Rule 13(f) and Rule 15 does present one problem in addition to the seeming redundancy. It is not clear whether addition of an omitted counterclaim under Rule 13(f) invokes the relation-back provisions of Rule 15(c). The better argument is that Rule 15(c) applies — Rule 13(f) expressly establishes amendment of a pleading as the means of adding a counterclaim. There is district-court authority on both sides of this question; the only square appellate decision rejects application of Rule 15(c). FP&P § 1430, pp. 227-228. In many cases the effect of relation back can be achieved under applicable limitations doctrine without more on the theory that filing a claim tolls the limitations period as to counterclaims growing out of the same transaction or occurrence. But that may not always be so.

The Subcommittee proposes to delete Rule 13(f). Addition of an omitted counterclaim will be governed by Rule 15. The published proposal would read:

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

**Committee Note**

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430.* Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

## III. Rule 15(c)

The Rule 15 agenda topic began with a suggestion that Rule 15(c)(3) should be amended to supersede a nearly uniform interpretation of the "mistake" that is required to permit relation back of an amendment changing or adding a party against whom a claim is asserted. "[M]istake" has been read to mean that the pleader must have believed, but erroneously, that the proper person had been identified. There is no relation back — because no mistake — if the pleader knows that the proper

identity is unknown. Ignorance is not enough. The question arises most frequently in police misconduct cases in which the plaintiff cannot learn the identity of an intended defendant within the limitations period. Consideration of that question — spurred in part when Judge Becker urged the Committee to carry it further — gradually evolved into an elaboration of many reasons to be dissatisfied with Rule 15(c)(3), and also to question the legitimacy of Rule 15(c)(2).

The Subcommittee divided on Rule 15(c). Some would recommend that no changes be proposed for Rule 15(c). This view rests on a combination of two thoughts. The practical observation is that there is no sign of general distress with Rule 15(c), apart from the peculiar issue of the plaintiff who is ignorant rather than mistaken. The theoretical concern is that Rule 15(c)(2) and (3) sorely test Enabling Act limits in ways that might compel drastic retrenchment on undertaking any thorough revision.

Other Subcommittee members favor at least two revisions. One would forbid any application of Rule 15(c)(2) or (3) to claims governed by state law. Relation back would be permitted only when the state law that governs the limitations issues permits relation back. The other would dramatically change the relation back of amendments adding or changing defendants when the claim is governed by federal law.

*A. Claims Governed by State Law: Present Rule 15(c)(1), (2)*

The Subcommittee did not discuss the terms of any amendment that would distinguish between claims governed by state law and claims governed by federal law. Because Rule 15(c)(3) requires that Rule 15(c)(2) be satisfied, it should suffice to amend (c)(2) — or, in the Style Rule that we hope will be in effect, (c)(1)(B). The simplest drafting would be:

> **(B)** the amendment asserts a claim or defense that is governed by federal law and that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading * * *

**Committee Note**

Rule 15(c)(1)(B) is amended to take claims and defenses governed by state law outside the relation-back provisions of subparagraphs (B) and (C). These provisions permit relation back when the law that supplies the limitations period does not permit relation back. Although relation back to cure a failure of pleading procedure is appropriately accomplished by a rule of federal procedure when the claim is governed by federal law, deference to state law counsels reliance on state law alone when the claim is governed by state law.[3]

**Discussion**

The wisdom of attempting this change was not much discussed. It raises at least three difficulties. One is that there may indeed be circumstances in which relation back is desirable even if state law would not permit relation back. *Schiavone v. Fortune*, 1986, 477 U.S. 21, may be a good example. The plaintiff lost on a limitations defense because the complaint mistakenly named the

[3] This sentence is a bald statement of two conclusions. Each of them can be challenged by arguments difficult to state and resolve in a Committee Note.

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defendant as Fortune, Inc. Fortune existed only as an unincorporated division of Time. Service was made on Time just after the limitations period had run, but well within the time that would preserve the claim had the complaint caption named Time rather than Fortune. There was no plausible reason to suppose that Time was in any way affected by the misnomer. The misadventure really could be characterized as a matter of pleading; any possible state-law limitations purposes were satisfied by the prompt service on Time's agent.

A second difficulty is that it may prove awkward to permit relation back as to a federal claim or defense while denying it as to a parallel state-law claim or defense. The difficulty will be most acute when the limitations issue turns on an issue of fact — if the defendant police officer beat up the plaintiff on February 25 there is no limitations problem at all, while if the beating occurred on February 24 shortly before midnight the state assault and battery claim is time-barred. Resolution of the fact issue might be affected by knowing that the federal claim will survive either way. Apart from that, there will be many situations in which the same state-law limitations period governs both a federal claim and a supplemental state claim. It is conceptually sound to apply federal law to defeat the limitations defense by relation back for the federal claim, while applying state law to uphold the limitations defense for the state claim. But conceptual soundness is not always satisfying. If state law would permit some remedy unavailable on the federal claim, the marginal increment in repose gained by denying the particular remedy may be small. And if at the end of the litigation the federal claim fails for reasons that do not defeat the state claim, the burdens of litigation have been incurred. Still, recognizing the limitations defense would protect against the risk of mistake in adjudicating a stale claim, and by protecting against liability would restore some measure of the repose shattered by instituting the action.

The third difficulty is more general. Rule 15(c)(1) ensures that relation back is permitted as to a federal claim when federal limitations doctrine permits relation back. If state claims can relate back only when state limitations doctrine permits, the remaining provisions that would apply only as to claims governed by federal law seem to be detached from procedural purposes. Here too it is conceptually proper to argue that the purpose is procedural, but that deference to state law deters implementing this procedural purpose at the expense of state limitations rules. But again the conceptually proper argument is not fully satisfying.

*B. Claims Governed by Federal Law: Present Rule 15(c)(3)*

Two members of the Subcommittee would amend present Rule 15(c)(3), Style Rule 15(c)(1)(C). The amendment would make explicit the opportunity — recognized by some courts now — for relation back when a defendant is added as well as when a defendant is changed. More dramatically, it would change the terms for relation back in several ways. It would add requirements that the party asserting the claim act diligently in ascertaining the name of the party to be added and also seek to amend within a reasonable time after serving the other defendants. It would eliminate any statement of the time within which the added defendant must receive notice of the institution of the action; instead, it is enough that the added party "will not be prejudiced in maintaining a defense on the merits."

With a few style changes, this proposal might look something like this for publication:

**(c) Relation Back of Amendments.**

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

(C) the amendment changes the name or the identity of — or adds — a ~~the~~ party against whom a claim is asserted, ~~if~~ Rule 15(c)(1)(B) is satisfied, and the court [concludes]{finds}: ~~if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the party's identity~~

(i) the pleader [has exercised diligence]{acted diligently} in ascertaining the name of the party;

(ii) the amendment is sought within a reasonable time after [service of]{serving} the complaint on the other parties against whom the claim is asserted; and

(iii) the party to be added, identified, or named will not be prejudiced in [maintaining a defense]{defending} on the merits.

**Committee Note**

Rule 15(c)(1)(C) is revised to effect several changes.

The rule text now clearly permits the addition of a party against whom a claim is asserted, not only a change in the party or the naming of the party against whom a claim is asserted.

The former provision requiring that the party to be added have received notice of the action within the period provided by Rule 4(m), and that the notice have certain qualities, is deleted. Incorporation of Rule 4(m) can defeat any opportunity for relation back if the original pleading is filed more than 120 days before expiration of the limitations period. Rule 4(m), moreover, provides for discretionary extensions of the time to effect service, creating an open-ended possibility that the limitations period could be extended for reasons extraneous to limitations policy. Focus on the quality of the notice opens up elusive fact questions not only as to when notice was received but also as to whether the new party actually knew or somehow should have known — without actually knowing — that but for a mistake it would have been sued.

The new party's limitations-based interests are protected under the amended rule by several requirements. The pleader seeking relation back must act diligently in identifying the new party. Amendment must be sought within a reasonable time after serving the other parties. And the court must find that the new party will not be prejudiced in defending on the merits.

**Discussion**

The proposed draft is designed to apply only in federal-question cases. Present 15(c)(3), to become Style (c)(1)(C), would not apply to state-law claims or defenses; the "Rule 4(m)" question would be moot as to them.

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The proposal illustrates a frequent frustration of the Enabling Act process. In forbidding rules that abridge, enlarge, or modify any substantive right, § 2072 decrees that the extraordinarily careful rulemaking process, involving literally dozens of judges as well as others, cannot address substantive issues that are routinely dispatched by a single judge deciding a particular case, often with little help from the parties' briefs and arguments. Rule 15(c)(1)[(A)] recognizes relation back whenever federal limitations law, as developed by the courts, permits it. That means that within all of the limits of interpretive and common-law ingenuity, a single federal judge can decide whether a limitations defense is available in a particular case. The decision that there is no limitations defense means that federal law permits relation back. The decision, moreover, may be made by utilizing all of the increasingly spongy doctrines that have emerged to make once-exacting limitations statutes much more forgiving or even porous.

That very freedom to elaborate federal limitations law, however, may be as much an argument against opening up a new discretionary power in Rule 15(c) as an argument for doing so. The proposed draft eliminates any direct concern for the defendant's repose, one of the central purposes of limitations law. To be sure, the present attempt to protect repose by invoking Rule 4(m) is subject to many cogent objections. It would be better to substitute direct reliance on notice to the new defendant at a time when service of process in a timely-filed action would satisfy the controlling limitations statute. But the weakness of the Rule 4(m) strategy may not support switching to open-ended reliance on "diligence," "reasonable time," and "not be prejudiced." Diligence can be frustrated for a very long time, even after an action is filed — the discovery moratorium in Rule 26(d) alone will create real problems even when the plaintiff begins the action knowing that it lacks information as to the identity of an intended but unnamed defendant. A "reasonable time" also may be a very long time, for similar reasons. Unless a named defendant promptly points out the defect, a plaintiff may in all reasonable discovery fail to identify an added defendant for many months or even longer. And a determination whether a defendant will be prejudiced in defending may be precarious, particularly if a court is tempted to believe that the preparation of originally named defendants can carry much of the load.

We can be confident that the Standing Committee will scrutinize with great care any attempt to add such expansive discretion to defeat a limitations defense. Should the proposal be published, Enabling Act protests are likely to be made by the public agencies that employ the officials most commonly caught up in these problems. The protests will be cogent, and may reopen the legitimacy of all of Rule 15(c) beyond the simple recognition that relation back is proper when applicable limitations law allows it. The result might jeopardize such defensible uses as can be found for (c)(2) and (c)(3) to correct what are truly pleading misadventures, properly treated by general rules of practice and procedure

**Publication Schedule**

It seems sensible to publish all near-term Rule 15 amendments as a single package. If some of these proposals seem ready for publication while others seem to require further work, there is no urgent need to publish some of them now.

April 22, 2006

**MEMORANDUM**

TO: Honorable Lee Rosenthal, Chair
Civil Rules Advisory Committee

FROM: Judge Michael M. Baylson

DATE: March 23, 2006

RE: Report of Rule 15 Subcommittee

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The members of this subcommittee are Judge C. Christopher Hagy, Professor Steven S. Gensler, Robert C. Heim, Esquire, Frank Cicero, Jr., Esquire and Judge Michael M. Baylson. We exchanged written memoranda and have had several telephone conferences of the entire subcommittee with our Reporter, Professor Cooper (and you) and other discussions; we would like to present this report of our discussions concerning various suggestions that have been made over a long period of time for amendments to Rule 15, and our recommendations with regard to those proposals.

1. The committee is unanimously of the opinion that some amendments should be allowed without leave of court. There is no support for a change to Rule 15 to require leave of court for any and all amendments to pleadings.

**Rule 15(a)**

2. Under current practice, where a motion to dismiss is filed before a responsive pleading on any of the grounds allowed under Rule 12(b), the rule now allows an amended complaint to be served at any time until the court rules on the motion to dismiss, and if it is denied, until an answer is served. The current rule is too open-ended and some restrictions on the time to amend are appropriate.

3. We are unanimously of the view that Rule 15(a) should be changed to read as follows:

> A party may amend a party's pleading once as a matter of course within the later of:
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> (1) 21 days after serving it, or
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> (2) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or of a motion under Rule 12(b),(e), or (f) addressed to the pleading.

4. There are several reasons for this change.

a. We see a major advantage over current practice. This new procedure will likely speed up the pleading stage of many cases. Amendments will be made more promptly. Judges will have fewer motions to amend pleadings because lawyers will take advantage of the new requirement to amend promptly without seeking leave of court, because, if they wait, they can only amend with leave of court. The judge can more promptly hold a Rule 16 conference, and discovery will start more promptly.

b. When a motion to dismiss is served, it is simply unfair to the other party, and the judge, to allow plaintiff to file an amendment long after a defendant has filed a motion to dismiss. Presumptively, the trial judge (and/or the law clerk) has invested substantial hours in researching a fully briefed motion to dismiss.

For example, after the matter has been fully briefed, some months may go by during which plaintiff's counsel must infer that the judge and/or the law clerk is working on the matter. Under the current rule, without any notice, along comes an amended complaint, filed as a matter of right, and all of the work on the pending motion to dismiss has been a waste of time.

c. By the same token, if an answer has been filed, the plaintiff may discern from the contents of the answer (including affirmative defenses) that the complaint will be strengthened by adding new allegations, and, the plaintiff, acting promptly in this situation, will likewise be able to file an amended complaint without the necessity of seeking leave of court. Under current practice, leave to amend is required as soon as an answer is served.

d. Although it is true that most judges usually grant motions to amend made early in the case, the new procedure will alleviate the need for all such motions if made within the stated time limit, and eliminate the risk that some judges would deny such a motion in some cases.

e. If the plaintiff amends under this procedure, without leave of court, the defendant would have the same options as before, to answer or file a motion. Because word processing equipment is universally used, this is not burdensome.

5. Under this change to Rule 15(a), the reference to a "trial calendar" will also be eliminated. Many courts do not have a trial calendar.

**Rule 13(f)**

6. We recommend that Rule 13(f) should be eliminated because it states a standard that is overlapping and perhaps contradictory to the standard in Rule 15. We briefly considered whether Style Rule 8(c)(2) should be eliminated or amended to add a cross reference to Rule 15.

Because this rule serves other purposes, we do not recommend any amendment to Style Rule 8(c)(2).

**Rule 15(c)**

7. Relation-back as to claims in diversity cases, and state law claims in federal question cases (whether "borrowed" for purposes of the federal statute of limitations and/or based on supplemental jurisdiction), should be controlled by the applicable state law. If this consensus is adopted, then relation-back as to such claims would be governed exclusively by Rule 15(c)(1). The remainder of the rule would govern federal question cases where state law is not relevant.

8. We had extensive discussions about whether Rule 15(c)(3) should be changed to account for the suggestion which Judge Becker made in the Singletary case, 266 F.2d 186, 200 n.5 (3d Cir. 2001), which would put "ignorance" about a party on an equal legal standing with "mistake." Singletary holds the current rule does not allow for relation-back when there is ignorance about a party.

9. We had a number of discussions about the cross reference to Rule 4(m) and whether this gives the court too much discretion in allowing relation-back, and whether the same concept can be stated more directly in Rule 15 without a cross reference to Rule 4(m).

10. Two members of the committee are in favor of amending Rule 15(c)(3) by replacing it with the following:

> (c)(3) The amendment changes the name, or the identity, of a party, or adds a party, against whom the claim is asserted, paragraph (2) is satisfied, and the court concludes:
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> (i) the plaintiff has exercised diligence in ascertaining the name of the party;
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> (ii) the amendment is sought within a reasonable time after service of the complaint on the other defendants; and
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> (iii) the party to be added, identified or named will not be prejudiced in maintaining a defense on the merits.

11. One member of the subcommittee is of the view that existing Rule 15(c)(3) may violate the Enabling Act, and an expansion of a judge's discretion to ignore an applicable statute of limitations may run into substantial Enabling Act arguments and disapproval by the Supreme Court.

12. One member of the subcommittee is of the view that the proposed change is unnecessary because the present rule works satisfactorily.

13. The reason for the proposed change is that the new language will give the trial judge substantial discretion to allow the relation-back amendment but only if the plaintiff has been diligent, the amendment is sought within a reasonable time after service of the complaint on the other defendants, and also, that there is no prejudice to the party that will be added. The amendment posits more specific tests than the "good cause" standard in Rule 4(m). It also avoids the need to cross-reference a different rule. The two members in favor do not think this amendment substantively expands any limitation period, given the fairly open ended regime currently existing by the reference to Rule 4(m), and the general ability of a trial judge to apply traditional "equitable tolling" doctrines. In addition, this language will satisfy the problem posed by Judge Becker in Singletary.

14. The subcommittee's consensus is that there is no urgency in moving these proposals forward by themselves. However, if the full committee, in its consideration of other changes to other rules, decides to move forward with some of those other changes, and any of the above proposals for Rule 15, the latter would be part of a "package."

To: Judge Michael M. Baylson

From: Steve Gensler

Date: March 22, 2006

Re: Comments to Report of Rule 15 Subcommittee

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I would like to make just a few separate comments to accompany the subcommittee's report:

1. I continue to have doubts about whether limiting amendments as of right to a defined period after service of a responsive pleading will stimulate quick self-correction. Plaintiffs already have an incentive to do so because if they do not amend quickly then they have to respond to the motion to dismiss. If the defect is clear, the path of least resistance is already to amend. Those plaintiffs who are not amending under the current scheme have probably elected to fight on – i.e., respond to the motion – because they do not want to make the amendment needed to fix the problem, perhaps because it would complicate their case or raise tricky proof issues. Those plaintiffs, I believe, will continue to fight the motion to dismiss secure in the knowledge that, if they loose, they can then make the curative amendment with leave of court, which the court will freely grant.

2. But I also have doubts about my doubts – that is, I realize I might be completely wrong in my armchair speculation about how parties will behave under the proposed scheme. That makes my shy away from formally opposing the proposal. Still, I want to share my doubts to see of others share my doubts.

3. On a technical note, perhaps the deadline for making an amendment of right after a responsive pleading is filed should be the earlier of (1) 14 days, or (2) serving a response to the motion to dismiss. As written, a plaintiff could respond to the motion to dismiss on day 3 and still amend as of right on day 20. My apologies for not thinking about this issue during our earlier discussions.

4. I am not in favor of bifurcating Rule 15(c) to differentiate between diversity cases and federal question cases. (¶ 7 of the memo) Apart from mechanical problems, I think the Rules Enabling Act constrains our ability to "extend" both state and federal limitations periods. That doesn't mean that federal judges are powerless to extend federal limitations, just that I believe it must come through decision-making rather than rule-making.

Thanks for the opportunity to add this to the report.

# BACKGROUND INFORMATION

# ON

# PROPOSED AMENDMENTS TO RULE 15

## Rule 15

A number of Rule 15 proposals have been advanced in recent years. The most recent have emerged from the Style Project. The most familiar addresses the relation-back provisions of Rule 15(c)(3), a topic that has been on the agenda for recent meetings. Older proposals address more general problems. All are gathered in this memorandum to establish a framework for deciding whether to undertake comprehensive revision.

In 1995, possible Rule 15 revisions were framed around suggestions from two judges — one urged that the right to amend once as a matter of course should be abolished, while the other urged that it should be terminated by a Rule 12(b)(6) motion to dismiss. The 1995 memorandum is copied below, with a few variations. Action on these proposals was postponed indefinitely in November 1995.

During the initial review of Style Rule 15, Professor Marcus made some suggestions for substantive revision. They are summarized in conjunction with the 1995 proposals. Still other revisions might be considered; the purpose of this memorandum is to open Rule 15 for general discussion.

Finally, the Rule 15(c)(3) materials are carried forward from the October 2002 agenda. Judge Becker has made a persuasive case for a "simple" correction of the gloss that courts have placed on the requirement that there be a "mistake concerning the identity of the proper party." But the matter is not as simple as it might appear. One practical concern is that further expansion of the opportunity to escape limitations problems by changing parties will pull federal practice deeper into the morass of "Doe" pleading. A more conceptual concern is that Rule 15(c)(3) already pushes the limits of Enabling Act authority, particularly with respect to state-law claims. It may be better to leave old trespasses alone without pushing further along perhaps prohibited paths.

## Rule 15: The 1995 Proposals: Amendment of Course

The proposal.

Rule 15(a) begins:

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

The Style version currently begins:

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

A Rule 12 motion — most commonly a 12(b)(6) motion to dismiss for failure to state a claim — is a motion, not a responsive pleading, and does not cut off the right to amend.

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

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

Judge Guthrie's suggestion raises the basic question whether there is any need to permit amendment even once as a matter of course. There is a fair argument that amendment should be

available only by leave. This approach would encourage more careful initial pleading, supplementing Rule 11. It might permit more efficient disposition of attempted amendments by denying leave without going through renewal of a motion to dismiss and renewed consideration of the motion. Rule 15(a) still would encourage a free approach to amendments. The drafting chore would be simple. The first sentence of present Rule 15(a), to be Style 15(a)(1), would be deleted. "Otherwise" would be deleted from the second sentence in present Rule 15(a); "other than as allowed in Rule 15(a)(1)" would be deleted from the Style rule.

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

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

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

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
>
> > **(A)** before being served with a responsive pleading or [responsive] motion; * * *

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

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

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

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

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

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

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

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

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

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

**Style Process Suggestions**

"Trial calendar" cut-off. The provision of Rule 15(a)(1)(B) that cuts off the right to amend if the action is on the trial calendar was questioned on the ground that many courts do not have a "trial calendar." One approach would be to delete this provision, relying on Rule 15(b), Rule 16, and perhaps inherent authority to authorize whatever control is needed when it would be disruptive to have an amendment as a matter of course within 20 days after serving a pleading to which no responsive pleading is required. Another would be to find some substitute. None has yet been suggested.

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

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

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

The question, then, is whether Rule 15(b) should be revised for any of three reasons: it gives a false impression of actual practice; it accurately reflects a practice that is too liberal; or it causes confusion with Rule 16(e). No work has yet been done to determine whether any of these possibilities reflects a real need to revise the rule. Practical advice on the need for further work is essential.

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

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

on a mere showing of "oversight" or "inadvertence." It might be better to incorporate Rule 15 and delete any semblance of an independent standard from Rule 13(f): "The court may permit a party to amend a pleading under Rule 15 to add a counterclaim," or "A party may amend a pleading under Rule 15 to add a counterclaim."

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

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

**Rule 15(c)(3)**

The agenda carries forward a "mailbox" suggestion that Rule 15(c)(3)(B) be amended to overrule several appellate decisions. This proposal has been urged again by the Third Circuit opinion in Singletary v. Pennsylvania Department of Corrections, 2001, 266 F.3d 186.

The nature of the problem is illustrated by the Singletary case. The plaintiff's decedent committed suicide in prison. On the last day of the applicable 2-year limitations period, the plaintiff sued named defendants and "unknown corrections officers." The claim was deliberate indifference to the prisoner's medical needs. Eventually the plaintiff sought to amend to name a prison staff psychologist as a defendant. The court concluded that relation back was not permitted because it was clear that the new defendant had not had notice of the action within the period prescribed by Rule 15(c)(3)(A). It took the occasion, however, to address the question whether there is a "mistake" concerning the proper party when the plaintiff knows that the identity of a proper party is unknown. The court counts seven other courts of appeals as ruling that there is no mistake, and relation back is not permitted even though all other requirements of Rule 15(c)(3) are met, when the plaintiff knows that she cannot name a person she wishes to sue. For this case, the psychologist could not be named as an added defendant. The court also concludes that its own earlier decision had taken a contrary view; if the other requirements of Rule 15(c)(3) are satisfied, the psychologist could be named.

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

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

There are good reasons to avoid the thicket of Rule 15(c)(3) amendments. Perhaps the most important is that the questions that can be raised on reading the rule do not appear to have emerged in practice. At least one leading treatise, for example, gives no hint of these problems. A second reason is that amendments should be made only when good answers can be given. Good answers are not immediately apparent, at least as to many of the questions. A third reason arises from the interplay between Erie principles and the Rules Enabling Act. Rule 15(c)(1) allows relation back whenever "relation back is permitted by the law that provides the statute of limitations applicable to the action." Putting aside for the moment the settings in which state limitations periods are borrowed for federal claims, diversity actions present obvious problems. Limitations periods are "substantive" for Erie purposes. Any attempt to adopt limitations periods for state-law claims through the Rules Enabling Act would surely be challenged as abridging, enlarging, or modifying the state-created substantive claim. As they stand, the relation-back provisions of Rule 15(c)(2) and (3) invite the same challenge whenever they permit litigation and judgment on a claim that would be barred by limitations in the courts of the state that created the claim. Why is this a matter of pleading procedure, necessary to make effective the notice-pleading regime of Rule 8, not a direct adoption of limitations policies?

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Three alternative courses of action appear most likely: (1) Invest substantial time and energy in a thorough reconsideration of Rule 15(c)(3). (2) Make the simple change to protect the plaintiff who knows that an intended defendant cannot be identified. (3) Do nothing, concluding that it is better not to attempt to fix one identified incoherence created by judicial interpretation than to expand the reach of a rule that needs more drastic revision.

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

**(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

**(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, ~~or~~

**(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading or the opposing party's pleading,[1] or

**(3)** the amendment changes[2] the party or the naming of the party against whom a claim is asserted ~~if the foregoing provision (2) is satisfied and, within the period~~

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[1] This reference to the opposing party's pleading is intended to make clear the opportunity to amend an answer that did not initially assert a counterclaim. It is not necessary if an answer that consists only of denials still "set[s] out" the conduct, transaction, or occurrence set out in the complaint.

In order to ensure that issues of attorney conduct and evidence law are not overlooked, consider this illustration of an amendment that changes a defense. The original answer pleads advice of counsel. That waives privilege. The amended answer retracts the defense. Does it relate back, reinstating the privilege (at least if no privileged communication touching the same subject matter has been revealed)? If the defense is not pursued, the need for waiver vanishes. But does an amendment that retracts a defense "assert[]" a defense?

The language of present 15(c)(2), carried forward here, suggests an intriguing illustration of the variations of word formulas. If words have meaning, "*conduct*, transaction, or occurrence" in (c)(2) is broader than "transaction or occurrence" in Rule 13(a). Is it possible to imagine an amended answer that presents a counterclaim growing out of the conduct set forth in the original answer but not out of the transaction or occurrence that is the subject matter of the complaint?

[2] Should we make a further amendment to reflect the use of relation back when a defendant is added, not simply substituted? One possible formulation would be: "the amendment asserts a claim against a new party or changes the party or the naming of the party against whom a claim is asserted, and:" (A brief reflection of the division of views on the use of Rule 15(c)(3) is provided in *Arthur v. Maersk, Inc.*, 3d Cir.2006, 2006 WL 73442. The court sides with the view that Rule 15(c)(3) is properly used to add a new party as well as to correct a misnomer or misidentification of a party already joined.)

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~~provided by Rule 4(m) for service of the summons and complaint~~ and:

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

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

(C) the party to be brought in by amendment has received ~~such~~ notice of the institution of the action that meets the requirements of Rule 15(c)(3)(D) within 120 days after expiration of the limitations period for [commencing the action]{filing the claim},[3] or within the[4] period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action;[5] and

(D) the notice received within the time set by Rule 15(c)(3)(C) is such that the party to be brought in by

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

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

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

In any event, the formulation in the rule needs to be clarified. A conservative approach to the Enabling Act would suggest that the period provided by state law should control. The 120-day period, taken by analogy to the present incorporation of Rule 4(m), would apply only if state law gives no answer or, perhaps, if there is a federal claim.

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amendment ~~(A)~~ (i) will not be prejudiced in maintaining a defense on the merits, and ~~(B)~~ (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party. ~~The d~~Delivering or mailing ~~of~~ process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of items (i) and (ii) ~~subparagraphs (A) and (B) of this paragraph (3)~~ with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.[6]

**Committee Note**

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

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

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

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

Incorporation of Rule 4(m) seemed to provide a convenient means of restoring the purpose of relation back. But it creates several difficulties. If the action is filed more than 120 days before expiration of the limitations period, the time for notice to a defendant not named seems to end before the limitations period. There is little apparent reason, on the other hand, to impose on a defendant not named the open-ended uncertainty that arises from the prospect that the court may have extended the time to serve someone else for reasons that have nothing to do with the situation of the defendant not named. And there is no apparent provision at all for cases that fall outside Rule 4(m) entirely — by its terms, Rule 4(m) does not apply "to service in a foreign country pursuant to [Rule 4] (f) or (j)(1)." Further perplexities may arise if a claim for relief is stated in a cross-claim or counterclaim, followed by a later attempt to amend to add an additional defending party.

The amended rule deletes the reliance on Rule 4(m). Instead, it requires that notice to the defendant not named be received within the shorter of two periods. The first period is 120 days after expiration of the limitations period for [commencing the action]{filing the claim}. This period corresponds with the most direct application of the present rule in an action that in fact is filed on the final day of the limitations period. To this extent, it does not change the period in which a defendant is vulnerable to amendment and relation back. But it alleviates any uncertainty that might arise from the prospect that the period may extend beyond 120 days because an extension was granted under Rule 4(m), and applies to cases of foreign service that fall outside Rule 4(m). [It also gives a

clear answer for counterclaims, cross-claims, and the like: the new defending party must have had notice of the required quality no later than 120 days after expiration of the limitations period for commencing the action.] {As to a claim stated by counterclaim, cross-claim, or the like, the amended rule is open-ended. By referring to the time for filing the claim, it allows 120 days from whatever limitations rule governs the counterclaim, cross-claim, or other claim.} The alternative period is less than 120 days. This period applies when the limitations law governing the claim requires service in less than 120 days after filing. A federal court may be bound by a state limitations statute that requires service within a defined period after the action is filed. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). There is no reason to subject a defendant not named in the original complaint to a longer period for receiving notice of the action than applies to a defendant who is named in the original complaint.

A new requirement is introduced in addition to deleting the reliance on Rule 4(m). Relation back is permitted under Rule 15(c)(3) only if the party asserting the claim has acted diligently to identify the party to be brought in by amendment. The rule should not encourage a plaintiff to prepare poorly during the limitations period, relying on relation back to save the day.

An unrelated change is made in describing the quality of the notice that must be received by a defendant not named in the complaint. A common problem arises when a plaintiff is not able to identify a proper defendant. Several courts have ruled that a plaintiff who knows that an intended defendant has not been identified has not made a "mistake concerning the identity of the proper party." The result is that a diligent plaintiff whose thorough investigation has proved inadequate is less protected than a less diligent plaintiff who mistakenly thought to have identified the proper defendant. This result cannot be justified by looking to differences in the position of a defendant not named — if anything, a defendant not named may be put on better notice by a complaint naming an "unknown named police officer" than by a complaint that incorrectly names a real police officer.[7] The reasons for allowing relation back against a defendant who knew that the lack of identification arose from a diligent plaintiff's lack of information are clearly stated in *Singletary*

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

*v. Pennsylvania Department of Corrections,* 266 F.3d 186 (3d Cir.2001).

**Rule 15(c)(3) Puzzles**

The excuse for addressing Rule 15(c)(3) is 98-CV-E, a law student's suggestion that something should be done to overturn the unfortunate result in *Worthington v. Wilson*, 7th Cir.1993, 8 F.3d 1253, and like cases. That suggestion will be addressed in due course. As often happens, however, consideration of one possible defect in a rule suggests consideration of others. Rule 15(c)(3) was amended in 1991 to supersede the decision in *Schiavone v. Fortune, Inc.*, 1986, 477 U.S. 21. It seemed like a good solution at the time. But literal reading leads to a number of puzzles. The puzzles may have satisfactory answers, but they present genuine difficulties.

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

**Limitations Background**

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

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

Civil Rule 15(c) generally addresses the question whether an amendment to a pleading "relates back" to the time of the initial pleading. Rule 15(c)(1) provides the most general rule: if "relation back is permitted by the law that provides the statute of limitations applicable to the action," relation back is permitted. If federal law provides the statute of limitations, relation back can be addressed as a matter of federal law, supplemented if need be by Rule 15(c) paragraphs (2) and (3). If state law provides the statute of limitations, state-law relation-back doctrine is the first fall-back.

Rule 15(c)(2) allows a claim or defense asserted in an amended pleading to relate back if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This is a nice functional provision that of itself creates few problems. It may raise a question when an attempt is made to add a new plaintiff, a separate issue described below.

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

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

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

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

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

**Mistake**

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

> (A) * * * received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party.

The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering. Knowing that the new party would have been sued

if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period.

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

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

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

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

That argument may not seem forceful, but it is the most plausible one that comes to mind. It may gain some force from a different consideration. The problem facing the plaintiff in the Worthington case is not easily met by filing an action well within the limitations period. Who is to be the defendant? The plaintiff escaped Rule 11 sanctions for suing the village only because the

complaint was filed in state court, and under the version of Rule 11 then in effect the court concluded that it could not apply sanctions. The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts. See, e.g., *Petition of Ford*, M.D.Ala.1997, 170 F.R.D. 504. Perhaps it would not do much good to allow correction when the defendant lacks information as to the identity of the defendant. But there will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.

An amendment supplementing the "mistake" language in Rule 15(c)(3)(B), in short, is attractive, but it may not reach very many cases. Drafting also may not be as easy as might be wished.

Any draft should confront — at least in Committee Note — the distinction between two problems. In one, the plaintiff can — within the limits of Rule 11 — identify one real defendant, but hopes to enhance the quality of notice to unidentified defendants by pleading that there are others who will be sued when they can be identified. Adding a "Doe" or "unknown-named" defendant, as an "unknown-named police officer," does carry a message to the unidentified defendant that the plaintiff wants to sue. That practice might well be blessed in the Note, to avoid Rule 10 questions. In the other, the plaintiff is unable to name any real defendant without violating Rule 11. What advice do we give for that situation? That it is, after all, proper to sue only unknown-named defendants, so long as Rule 11 is satisfied as to the existence of a claim against someone unidentifiable? Does an action against parties who are real but who cannot be identified satisfy Article III — is there a real case or controversy? If the only purpose of protecting the opportunity to sue is to provide a vehicle for discovery, would it be better after all to create a procedure for discovery in aid of framing a complaint?

**Rule 4(m) Incorporation**

The specification that the new defendant must know of the mistake within the period provided by Rule 4(m) for effecting service of the summons and complaint is easily understood when the complaint is filed at the end of the limitations period. Suppose a 2-year, 730-day limitations period applies. The complaint is filed on Day 730. If the proper defendant is properly named, the effect of Rule 4(m) — putting aside Erie complications for the moment — is that service up to Day 850 is proper. Since a properly identified defendant is exposed to actually learning of the suit as late as Day 850, it seems to make sense to say that it also is enough that the properly intended defendant, although not named, should be exposed to substitution if knowledge of the mistake was brought home at any time up to Day 850. That is the problem of the Schiavone case, and it is cured by the incorporation of Rule 4(m).

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

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The problem of the new defendant who learned on day 350 of an action filed on day 180 is made more curious by comparison to the pre-1991 version of Rule 15(c)(3). Until 1991, it was enough that the new defendant have notice within the period provided by law for commencing the action against him. With a two-year limitation period, notice on day 350 is adequate with more than a year to spare. Curiously, an amendment designed to make sufficient notice received on day 740 — so long as filing occurred on or after day 620 — bars relation back.

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

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

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

There are yet other difficulties with incorporating Rule 4(m). One is that Rule 4(m) does not apply to service in a foreign country under Rule 4(f) or (j)(1). There is no period provided by Rule 4(m) for making service in those cases: so what are we to make of Rule 15(c)(3) relation back? Say that "within the period provided by Rule 4(m)" simply invokes all of the Rule 4(m) procedures, including extension of the 120 days, and does not actually incorporate Rule 4(m) as might be the case if it were "under Rule 4(m)"?

Another is that Rule 15(c)(3) is deliberately drafted to refer not to a complaint, but to any pleading that states a claim for relief. If the complaint is filed on the last day of the limitations period, a counterclaim that grows out of the same transaction or occurrence may not be barred by limitations as a matter of limitations doctrine, without need for relation back. So the counterclaim is made. Then after a time the counterclaimant seeks to change the party against whom the counterclaim is made: can Rule 4(m) apply in an intelligible way? If the change is from one original plaintiff to a different original plaintiff there is no need to serve a summons. But if the change is to bring in a new counterclaim-defendant, presumably the summons and counterclaim must be served under Rule 4, but the 4(m) period can apply only if filing the counterclaim is treated as filing the "complaint" for purposes of Rule 4(m). That seems sensible enough as a rule governing service of the counterclaim on a nonparty, but it is difficult to make sense of relation back to the time of the original counterclaim for purposes of Rule 15(c)(3).

There is at least one more question. Rule 15(c)(3) defines the time within which the new defendant must have notice, but does not require the plaintiff to act diligently once the plaintiff discovers the mistake. Should this be an added requirement, or is adequate protection provided by Rule 15(a) — at least when the right to amend once as a matter of course has expired?

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## Extending Rule 4(m) Period

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

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

> In allowing a name-correcting amendment within the time allowed by Rule 4(m),[8] this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

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

It may be possible to read the incorporation of Rule 4(m) in a still more expansive way. Although the Committee Note illustrates only an extension actually granted, it does not specify the time when the extension was granted. Perhaps invocation of the Rule 4(m) power to extend the time for service would support an ad hoc determination that the time when the new defendant learned of the action and the mistake was "soon enough," so the court will "extend" the time for "service" to include that time even though there is in fact no problem of service at all. This interpretation would create an open-ended power to suspend the statute of limitations in favor of a plaintiff who mistakes the proper defendant, even though there is no such power to favor a plaintiff who simply waits too long to sue (often in a layman's forgivable ignorance of the limitations period). That would be exceedingly strange, and directly contrary to the general belief that limitations periods should be held as firmly as possible.

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

## Adding Plaintiffs

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

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

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

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

A good illustration of the problems that may arise from adding a new plaintiff is provided by *Intown Properties v. Wheaton Van Lines, Inc.*, 4th Cir.2001, 271 F.3d 164. A Wheaton truck ran into Intown's motel-restaurant. Transcontinental paid Intown's losses and sued Wheaton. Eventually Intown sued Wheaton in state court for damages not covered by the insurance — loss of revenues and loss of reputation and good will. The state-court action was dismissed on limitations grounds. Then Intown and its insurer moved to amend the complaint in the insurer's action to add Intown as plaintiff. Days later, the insurer settled with Wheaton. The court of appeals ruled that a Rule 15 amendment cannot be used to effect a joinder that would be untimely if attempted by motion to intervene. It suggested that if Intown had been named as plaintiff in the original complaint, its added claims for damages not covered by the insurance might well relate back under Rule 15(c)(2). "But Rule 15 has it limits." A new defendant can be brought in only if there is fair notice. "Similarly, courts have limited the applicability of Rule 15; a motion to amend the pleadings comes too late if it unduly prejudices the opposing party." Here "Wheaton had no timely notice that it faced liability above and beyond those damages sought by Transcontinental. * * * Wheaton might well have negotiated differently or refused to settle with Transcontinental had it been confronted with viable additional Intown claims." (Neither could Rule 17 substitution of Intown as real party in interest do the job. "Those courts that have permitted late amendment under Rule 17 have not exposed defendants to additional liability without notice; they have ordinarily confronted requests to exchange a plaintiff or plaintiffs for another plaintiff or plaintiffs with identical claims. * * * As with Rule 15, Rule 17's liberality evaporates if amendment would unduly prejudice either party.")

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

## "Erie"

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

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

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

## Redrafting Rule 15(c)(3)

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

> **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted and:
>
> **(A)** Rule 15(c)(2) is satisfied;
>
> **(B)** within the time specified in Rule 15(c)(3)(C) the party to be brought in by amendment (i) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the

action would have been brought against the party; and

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

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

**(B)** within the time for effecting service on a correctly named defendant, [the party asserting the claim has acted diligently to identify the party to be brought in by amendment, and][9] the party to be brought in by amendment (i) has received such notice * * *

These time provisions still leave a question akin to the Rule 4(m) question: should the time be measured by hypothetical extensions of the time to serve process? A comment in the Committee Note might suffice to address this issue. One answer could be that an extension of time to serve counts only if in fact an extension was granted to effect service on a party named in the original complaint. That answer would prevent fiddling with the limitations period based on the court's sense of fairness for the specific case. Other answers also could be given.

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

[9] The question of diligence is squarely framed in *Arthur v. Maersk, Inc.*, 3d Cir., 2006 WL 73442. The district court first granted leave to amend the complaint to add the United States as a party, then granted summary judgment to the original two defendants because they had statutory immunity as agents operating a vessel owned by the United States Navy, then denied Rule 15(c)(3) relation back because the plaintiff had not been diligent in pursuing the question whether it should have sued the United States. The court of appeals reversed. The majority concluded that undue delay factors only into the Rule 15(a) determination whether to grant leave to amend. Delay alone is seldom a ground for denying leave, absent prejudice to the defendant. No prejudice was even claimed here. The analogous inquiry under Rule 15(c)(3) asks whether the defendant received such notice during the appropriate period as not to be prejudiced, as the court recognized. Either way, the result seems to focus on prejudice rather than the justifications for the plaintiff's mistake. Of course the focus must be on Rule 15(c)(3) if, for want of a responsive pleading, the plaintiff does not need leave to amend.

**(B)** the party to be brought in by amendment has received notice that meets the requirements of Rule 15(c)(3)(C) within 120 days after expiration of the limitations period for commencing the action, or within a shorter period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action; and

**(C)** the notice received within the time set by Rule 15(c)(3)(B) is such that the party to be brought in by amendment (i) will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party.

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

**Quality of Timely Notice**

Rule 15(c)(3) requires not only that the new defendant have notice of the action within the defined time, but also that the notice serve the purposes of limitations periods. The new defendant should recognize that the plaintiff wants to sue, and — recognizing that — be put into a position to gather and preserve evidence.

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

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

A separate puzzle arises from counting notice such that the new defendant "should have known" that the action would have been brought against it. Can there be any justification for this alternative other than the need to deflect the need to extend the finding by inference from "should have known, therefore *did* know"?

## INTERPLAY: RULES 54(D)(2), 58(C)(2), APPELLATE 4(A)(4)(A)(III)

*Introduction: A Simple Proposal*

The Appellate Rules Advisory Committee has recommended that this Committee amend Civil Rule 58(c)(2) "to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees [under Civil Rule 54(d)(2)] have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59."

These three rules were shaped in reaction to the decision in Budinich v. Becton Dickinson & Co., 1988, 486 U.S. 196, 108 S.Ct. 1717. After winning the jury verdict the plaintiff "timely filed new-trial motions" and also filed a motion for attorney fees under the governing Colorado statute. The district court denied the new-trial motions, ruled that the plaintiff was entitled to attorney fees, and requested briefing and documentation to establish the amount of the fee award. Nearly three months later it entered the fee award. The plaintiff filed a notice of appeal 28 days later. The Supreme Court ruled that the decision on the merits was final for § 1291 appeal purposes before disposition of the fee motion. At least "as a general matter * * * a claim for attorney's fees is not part of the merits of the action to which the fees pertain." Nor does a fee motion count as a Rule 59(e) motion to alter or amend the judgment — it does not seek reconsideration of anything decided on the merits. Thus appeal must be taken in appeal time measured without regard to the pending fee motion. The appeal in the Budinich case, filed more than 30 days after disposition of the Rule 59 new-trial motions, was timely only as to the order on the fee motion; the merits must go unreviewed.

The "bright-line" rule established by the Budinich case, standing alone, means that appeals on the merits often must be taken or lost before disposition of attorney-fee motions. The fee order becomes the subject of a second appeal. Two appeals, often covering related ground, may not be efficient. Rules 54(d)(2), 58(c)(2), and Appellate Rule 4(a)(4)(A)(iii) were revised to enable the district court to suspend the time to appeal on the merits by ordering that the fee motion has the same time-suspending effect under Rule 4 as a Rule 59 motion. Rule 58(c)(2) directs that the court must "act before a notice of appeal has been filed and become effective." We do not have any information about the frequency of these orders. They may be routine, familiar although not routine, or rare.

The Appellate Rules Committee suggestion is designed to correct an inadvertent drafting gap in the present rule. The present rule can be read to permit an absurd result — allowing entry of an order that revives appeal time long after expiration. The only event that cuts off this authority is the actual filing of a notice of appeal. If no notice is filed, the court is acting before a notice has been filed. But a long-delayed and otherwise useless notice of appeal will cut off an order that for the first time would give the attorney-fee motion the effect of a Rule 59 motion.

This open-ended reading was not intended. Those who drafted the present provision that for the time being has become Rule 58(c)(2) had in mind a subtle but effective limit that would coordinate all of the appeal-time provisions in a way that would not disrupt clear limits or orderly transfer to the court of appeals. Subtlety and reliance on sophisticated understanding, however, may not be the best drafting approach to "no-excuses-accepted" rules such as the "mandatory and jurisdictional" appeal-time rules.

An amendment responding to the direct language of the Appellate Rules Committee's suggestion might look something like this, drawing from the Style Rule 58(e) provision that is scheduled to supersede present Rule 58(c)(2):

> **(e) Cost or Fee Awards.** Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if the court gives notice or a party moves within 14 days after a timely motion for attorney's [sic] fees is made [filed?] under Rule 54(d)(2), the court may ~~act before a notice of appeal has been filed and become effective to~~ order that the Rule 54(d)(2) motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

A more direct way of responding to the apparent drafting lapse would be to add a single word to the present rule: "the court may act before a timely notice of appeal has been filed and become effective * * *." "Timely" would include a premature notice that becomes effective under Appellate Rule 4(a)(4)(B)(i); "become effective" would incorporate the balance of the same rule. The objection to this approach is that it carries forward the complex scheme of cross-references in the present rule. Three rules have to be read together, one of them not always found in the same book as the Civil Rules. And at least one of them — Appellate Rule 4 — is intricate. Hence the alternative of a simple deadline expressed in days.

*Background*

If a simple proposal can be identified, it remains to decide whether it is better to do something more complicated or to do nothing at all. The question comes to the agenda because one court had to work hard to achieve a correct result in one case. The result was loss of any opportunity to appeal a judgment on the merits, a common enough occurrence under the provisions of Appellate Rule 4. Many possible responses are possible. The materials prepared for the Appellate Rules Committee and the relevant part of the Appellate Rules Committee Minutes for November 9, 2004, are attached. They cover most of the alternatives summarized below. They make rewarding reading, not only as an illustration of many possible approaches but also as a demonstration of the complexity that has invaded the rules that control appeal time.

Appellate Rule 4 has been frequently amended. It is designed, first and foremost, to ensure that the decision whether to appeal is made promptly after judgment is entered. A simple rule could ensure that. But it has proved useful to integrate appeal-time provisions with the procedures for self-correction by post-judgment motions in the trial court. Attorney-fee motions do not fit into the category of "self-correction," but may present similar reasons for suspending appeal time. The difficulties that arise from these provisions often have nothing to do with drafting intricacy. For good reason, only "timely" motions suspend appeal time. Often, alas, a party relies on a motion that was not timely, only to find that appeal time was not suspended. It seems likely that most of the remaining difficulties arise not from rule 4's intricacy but from careless reading (or no reading at all). The Appellate Rules Committee no doubt is right that it is better to work on the Civil Rules than to further amend the oft-amended Appellate Rule 4, unless all attorney-fee motions are to be given the same time-suspending effect as Rule 59 motions. And the Appellate Rules Committee can be forgiven for not reconsidering the well-settled rule that appeal time is "mandatory and jurisdictional," an alternative that would protect the unwary but at a real cost in repose for the wary.

This question came to the agenda by way of a plea made in the opinion in Wikol ex rel. Wikol v. Birmingham Public Schools, 6th Cir.2004, 360 F.3d 604, 610. The court could "not help but express dismay over the complexity of the rules regarding the timeliness of an appeal * * *. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. * * * Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure." (Rule 59 was included in the count of four rules.)

The circumstances of the Wikol case were these:

**Date Unspecified**: Jury verdict for the plaintiffs.

**March 22, 2002**: Plaintiffs move for attorney fees.

**March 27, 2002**: Judgment entered.

**May 15, 2002**: Fee motion denied.

**May 24, 2002**: Plaintiffs move for a 58(c)(2) order.

**June 14, 2002**: Plaintiffs file a notice of appeal.

**July 11, 2002**: Rule 58(c)(2) order extending time.

The court ruled that the June 14 notice of appeal was timely as to the May 15 order denying the fee motion, but was not timely as to the judgment on the merits. It reached this result by what may seem a linguistic tour de force: the June 14 notice of appeal was "effective" when filed, so the July 11 Rule 58(c)(2) order was made after a notice of appeal was filed and became effective. At best, this result depends on the happenstance that the notice of appeal was timely — thus "effective" — with respect to the order denying the fee motion. The notice was not "effective" to appeal the judgment on the merits. The court further says that Appellate Rule 4(a)(4)(B)(i) "suggests * * * that the concept of 'effectiveness' is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided."

The result of the Wikol decision seems right, at least within the well-settled tradition that Appellate Rule 4 time limits must be applied without accepting any excuses. The intended working of Rule 58(c)(2) can be illustrated by a few variations on the circumstances.

**(1) No Other Post-Judgment Motion.** If no party has made any of the timely Rule 50, 52, 59, or "60" motions that suspend appeal time under Appellate Rule 4(a)(4)(A), a notice of appeal must be filed 30 days after March 27 unless an extension is obtained. A timely notice of appeal cuts off the opportunity to enter a Rule 58(c)(2) order — the case has been transferred to the court of appeals. An untimely notice of appeal cannot revive the forfeited opportunity to appeal the judgment on the merits, whether by direct operation or by reviving the opportunity to enter a Rule 58(c)(2) order that the fee motion have the appeal-time-suspending effect of a timely Rule 50, 52, 59, or "60" motion.

**(2) Premature Notice of Appeal, No Other Post-Judgment Motion.** A notice of appeal is filed in March 21; it is premature because judgment has not been entered. It apparently becomes effective on March 27 under Appellate Rule 4(a)(4)(B)(i), and the lack of any timely 4(a)(4)(A) motion means that its effectiveness is not suspended. This seems a bit surprising — the plaintiffs could preserve the opportunity to seek a Rule 58(c)(2) order by making a timely 4(a)(4)(A) motion, but otherwise the premature notice cuts off any opportunity for a 58(c)(2) motion. [The language of 4(a)(4)(B)(i) is incomplete. It says that "if a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." If there is no such motion, there is no order disposing of the last such remaining motion. Presumably the result is that the notice becomes effective on the day judgment is entered, not on the day after the last day to timely file any of the 4(a)(4)(A) motions.]

**(3) Premature Notice of Appeal, Timely Post-Judgment Motions.** This one seems clear. The time to enter a Rule 58(c)(2) order expires upon disposition of the last remaining Rule 4(a)(4)(A) motion. That is when the notice of appeal "has been filed and has become effective."

**(4) Notice Filed After Judgment, Before Timely Post-Judgment Motions.** Same result as (3). Although the notice seemed to "become effective" when filed, it did not really transfer the case to the court of appeals. Under 4(a)(4)(B)(i) it "becomes effective" on disposition of the last 4(a)(4)(A) motion.

**(5) Notice Filed While Timely Post-Judgment Motion Pending.** This is the easiest one of them all. The notice is not effective when filed, and does not even seem to be effective. It becomes effective upon disposition of the last remaining 4(a)(4)(A) motion.

**(6) No 58(c)(2) Order, Merits Appeal Time Lapses While 54(d)(2) Motion pending; Timely Appeal after Fee order**. This is the Wikol case. Nothing happened to suspend the time to

appeal judgment on the merits, just as in the Supreme Court's Budinich case. No notice of appeal can become "effective" to appeal the merits. If a notice of appeal is filed within the Rule 4 period after entry of the fee order, the fee ruling can be reviewed. (It may be difficult to review the fee order with respect to matters on which the judgment would have been reversed on timely appeal, but it does not seem likely that the Appellate Rules, much less the Civil Rules, will be amended to address the scope of the appeal. But this question raises some doubt as to the present rule. An appeal on the fee motion remains possible. The litigation has not concluded. If the district judge believes that the merits should be open for review, does the need to protect the appellee require that this authority be denied?)

**(7) Rule 58(c)(2) Order After Appeal Time Expired.** This is *Mendes Junior Internal Co. v. Banco do Brasil, S.A.*, 2d Cir.2000, 215 F.3d 306, 312-315. The plaintiff made a motion to extend the time to move for "reconsideration" and to extend appeal time. The court granted the motion, but the order was ineffective — there is no authority to extend the time to move under Civil Rule 59(e), and the appeal-time extension ran beyond the limit permitted by Appellate Rule 4(a)(5). The defendant made a timely motion for attorney fees. After appeal time had expired, the plaintiff won a Rule 58(c)(2) order extending appeal time. This order too was held ineffective as contrary to the language and purpose of Rule 58(c)(2) and "inimical to the sanctity of final judgments." Rule 58(c)(2)'s reference to an order before a notice of appeal has become effective means that a notice of appeal "could become effective."

**(8) No Rule 58(c)(2) Order, No Timely Notice of Appeal Ever.** This is the horrid monster that might be conjured out of the present language of Rule 58(c)(2). It is no longer possible to file a notice of appeal that will "become effective." The district court retains power to act at any time to permit a belated appeal by entering an order that the fee motion has the effect of a timely Rule 59 motion. Presumably few district judges would do this. (It would be really strange to seize on the partial-effectiveness of the notice in the Wikol case to argue that a notice that is not timely to appeal anything is an effective means of cutting off the Rule 58(c)(2) authority — it becomes, when filed, as "effective" as it ever can be. How many parties will think to file an untimely notice of appeal — often with no desire to appeal — simply to cut off the faint prospect that an adversary might persuade the court to enter a belated 58(c)(2) order to revive expired appeal time?)

*Further Discussion*

The alternative draft amendments set out above are designed to close the possible linguistic gap in Rule 58(c)(2). The draft that would require a "timely" notice of appeal does nothing to reduce the intricacy bewailed by the Wikol court. Its only potential contribution is to cut off the remote prospect that Rule 58(c)(2) might be read, as sketched in example (8) above, to make an untimely notice of appeal the only means of terminating an otherwise perpetual power to revive expired appeal time. That does not seem a great advance in rulemaking.

The first draft amendment would change the subtle integration of attorney-fee motions with Appellate Rule 4 that Rule 58(c)(2) now attempts. Instead it would adopt an uncomplicated rule. An attorney-fee motion suspends appeal time only if the court gives notice that it is contemplating an order or if a party moves for an order within 14 days after the fee motion is made. No time limit is set for the court to act. The provision for court notice is included to enable the court to act on its own, but without requiring that it act to enter the order within 14 days (compare Rule 59(d), which allows a court to order a new trial on its own only if it makes the order within 10 days). The 14-day period is chosen because it allows some time but still integrates with the appeal-time provisions in most circumstances. Rule 54(d)(2) sets a presumptive motion time at 14 days after entry of judgment; an additional 14 days fits within the general 30-day appeal period. But the fit becomes awkward if a statute or court order sets a time different than 14 days, as Rule 54(d)(2) allows. Perhaps a shorter period should be set. The shorter the period, the greater the difference from the

present rule. As the rule now is, the court can consider the best integration of the fee proceedings with an appeal during the perhaps extended period required to decide timely post-judgment motions. Consideration of the other motions may give a much better sense of the advantages and disadvantages of deferring any appeal until the fee motion has been decided. As usual, it turns out that there is a reason for the subtle intricacy of the present rules.

Many other approaches are available. They can be described rather briefly. Full development would be warranted only on the basis of reliable information about the impact of present Rule 58(c)(2). The assumption that underlies 58(c)(2) is clear enough. Sometimes it is good that the merits appeal be taken while the fee motion remains pending in the district court. Sometimes it is good that appeals be deferred until the district court has resolved the fee motion. The district court is in a better position than the court of appeals to make this determination. And, given the rigorous enforcement of intricate appeal-time rules, there must be a clear integration of the time for district-court action with the appeal-time rules.

Rule 58(c)(2) may be working as intended. The result may be that appeal-time-suspending orders are routine, common, or rare. These orders may be entered when they ease the burdens on the parties and appeals courts, and denied when they might aggravate the burdens on the parties and courts. Trial courts may experience little difficulty in making wise decisions on these matters. The converse of each of these propositions may be true. If there are problems, quite different rules are possible.

One alternative, and a simple one, would be to provide that a timely fee motion always suspends appeal time, just as a timely Rule 59 motion does. Appellate Rule 4(a)(4)(A)(iii) would be simplified to refer only to a Rule 54(d)(2) motion. Rule 58(c)(2) would be abolished. Among the problems with this approach are the delay of appeal, the importance of the appeal disposition for intelligent decision of the fee motion, and the prospect that fee disputes may be resolved among the parties once the outcome on appeal is known. There may be some small technical problems as well. It is not quite true that the 14-days allowed to file a fee motion is never longer than the 10-days allowed for a Rule 59 motion. It is possible that a judge will accept a judgment for filing on a Sunday; under present time-counting rules the time for a Rule 59 motion expires on Friday 12 days later. The 14 fee-motion days would expire on Sunday, allowing filing on Monday. that quirk is likely to be fixed in the time-counting project. Far more importantly, the Rule 54(d)(2) authority to set a different time than 14 days may mean that a timely motion is filed well after expiration of the Rule 59 time. These problems could be addressed by changing the requirement that the fee motion be timely to a requirement that it be filed within the period allowed for a Rule 59 motion. Or the Time-Counting Project might set the same time for attorney-fee motions as for other post-judgment motions.

A different alternative would be to effectively overrule the Budinich decision by providing in Rule 54(b) that a judgment that does not dispose of attorney-fee issues is final only upon express entry of judgment. This would be simple, and would take advantage of the flexibility that allows a premature appeal on the merits to be saved by retroactive entry of a Rule 54(b) judgment. Whether this approach is attractive depends on how often it is desirable to defer appeal on the merits until fee issues have been resolved. It is worth pursuing if serious inquiry — most likely by the Federal Judicial Center — shows either that this is how Rule 58(c)(2) is implemented now or that experience with appeals taken before disposition of fee motions proves the need to defer appeal until fee motions are decided.

Yet another possibility would be to adopt a rule that a fee motion never suspends appeal time. This one is reasonably simple. Rule 58(c)(2) and Appellate Rule 4(a)(4)(A)(iii) would be rescinded. After the Budinich decision, the fee request is not a "claim," and remains outside Rule 54(b). It is not a Rule 59(e) motion. Two appeals will be common — but that fits the reported experience of

Appellate Rules Committee members that "appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason."

*Tentative Recommendation*

The only sign of distress with the present set of rules is the Sixth Circuit's accurate suggestion that it would be better to avoid this much intricacy if a good rule can be drafted in less intricate terms. Read intelligently in context, present Rule 58(c)(2) — and also its translation in Style Rule 58(e) — relies on district-court discretion to accomplish a sensible case-specific integration of fee motions with appeal time. There is no evidence that discretion is not working. Any rules amendments in this setting must be framed with great care and foresight, as witness the linguistic opportunity to misread the present rules. The next step might well be to report to the Appellate Rules Committee that the case for amending the rules seems weak in the absence of better information about actual experience. If the Appellate Rules Committee continues to believe that potential problems deserve further study, the two Committees can work together to determine the need to gather additional information and the means of gathering any information that may be needed.

— EHC

# REPORT FROM PROFESSOR STEVEN GENSLER

# ON RESEARCH OF AND RECOMMENDATIONS

# ON PROPOSED AMENDMENTS TO

# RULES 54 AND 58

**MEMORANDUM**

To: The Honorable Lee H. Rosenthal
Chair, Civil Rules Advisory Committee

From: Steve Gensler

Date: May 1, 2006

Re: Rule 58(c)(2)

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Rule 58(c)(2) addresses the time for appeal when the party who prevailed on the merits has filed a motion for attorneys' fees under Rule 54(d). At the October 2005 meeting in Santa Rosa, we took up Rule 58(c)(2) to consider an amendment recommended by the Appellate Advisory Committee. We deferred action on the recommendation pending research by the Federal Judicial Center ("FJC"). This memo brings us up to date.

A. What Rule 58(c)(2) Does.

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Supreme Court held that a decision on the merits is final – and therefore ripe for appeal under 28 U.S.C. §1291 – even though fee motions have been filed. Thus, under the *Budinich* rule, parties must appeal the trial court's merits ruling immediately, without waiting for the trial court to resolve the fee motion. If a party then wants to challenge the trial court's ruling on the fee motion, that appeal is filed separately (though it can be joined up with the merits appeal if it is still pending).

Federal Rule of Appellate Procedure 4 does not directly displace the "split appeal" result given by the *Budinich* rule. Under FRAP 4(a), various post-judgment motions toll the time for appeal. But fee motions under FRCP 54(d) are not among them.

After *Budinich*, many questioned the wisdom of having "split appeals" for fee challenges, especially since the federal rules generally try to avoid piecemeal appeals. In that spirit, the Civil and Appellate Advisory Committees turned their collective attention to how best to deal with fee motions. Options ranged from making all fee motions "tolling motions" under FRAP 4(a) to doing nothing and leaving in place the split appeal system given by *Budinich*. The Committees chose a middle path – Rule 58(c)(2).

Rule 58(c)(2) leaves it to the trial judge to decide whether to give a fee motion tolling effect. If the trial judge does nothing, fee motions do not toll the time for appeal. But the trial judge may order that the fee motion have tolling effect. The conditions are that (1) the fee motion must have been timely filed; and (2) the trial court must designate it as a tolling motion before the merits appeal is taken and becomes effective. The

second element reflects the view that, once appeal is effective, the case moves from the trial court's docket to that of the court of appeals.

B. Problems with Rule 58(c)(2).

The Appellate Advisory Committee referred Rule 58(c)(2) to us after Judge Gilman issued his decision in *Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In that case, Judge Gilman ultimately held a merits appeal to be untimely. Although the trial court had entered a tolling order under Rule 58(c)(2), Judge Gilman found it to be ineffective: while the motion under Rule 58(c)(2) had been *filed* before the merits appeal was taken, the trial court did not *grant* it until after the notice of appeal had been filed and become effective. In the course of the opinion, Judge Gilman lodged two criticisms of the rules he had to apply and urged reform.

First, Judge Gilman lamented the complexity of determining when appeals are timely. He wrote that lawyers (and judges) should not have to wade through a thicket of interconnected rules just to find out when to appeal. He urged the advisory committees to make this area simpler.

Second, he identified a hole in Rule 58(c)(2). Under the current rule, a federal judge may give a fee motion tolling effect *"before a notice of appeal has been filed and become effective."* So, what happens if nobody files a notice of appeal at all? Literally read, the window for giving a fee motion tolling effect stays open.

The Appellate Advisory Committee was persuaded that the possibility of an unlimited window to extend the time for appeal via belated tolling orders was a problem, but thought it was our problem and suggested that we close that loophole. The Appellate Advisory Committee did not directly take up Judge Gilman's concern about complexity and made no referral to us on that point.

C. Additional FJC Research

Committee members will recall that we discussed this issue at the Santa Rosa meeting in October 2005. We deferred taking any action, however, so that we could ask the FJC to find out how often courts use Rule 58(c)(2).

The FJC searched docket sheets from multiple districts going back 10 years and found only a handful of instances in which Rule 58(c)(2) appeared to have been used. Follow up tests to validate the search methodology showed that, while the process was not perfect, it was reasonably reliable. Thus, the FJC's conclusion was that courts rarely use their power under Rule 58(c)(2) to designate fee motions as tolling motions in order to align the fee appeal with the merits appeal.

This finding jibed with the anecdotal sense many of us have that Rule 58(c)(2) is relatively lost in obscurity. But it prompted us to task the FJC with a follow-up research assignment. Unitary appeals of the merits and fee motions seem not uncommon. But if

courts are not using Rule 58(c)(2), then how is this happening? Of particular concern – at least to me – was the possibility that courts were delaying entry of the merits judgment, a practice prohibited by Rule 58(c)(1).

The FJC searched cases and docket sheets to find out whether merits and fee issues were being appealed together and, if so, how that was occurring. The FJC found many such instances, and discovered that unitary appeals occur for a great variety of reasons. In a few circumstances, trial judges appeared to have violated Rule 58(c)(1). But in most of the cases the unitary appeal was the result of wholly legitimate and natural forces. To give one example, in many of the cases, the party who lost on the merits filed a post-judgment motion – such as a motion for new trial under Rule 59 – that tolled the time for appeal. The trial court then ruled on the new trial motion and the fee motion at the same time, teeing up both rulings for a unitary appeal.

D. Analysis

1. The Defects in Rule 58(c)(2) Do Not Warrant an Amendment.

At this point, it does not look like the loophole in Rule 58(c)(2) is worth closing.

First, in order for Judge Gilman's scenario to occur, the trial judge must be complicit – the trial judge must affirmatively act to give the fee motion tolling effect, and be willing to do so at that late time. Other than the *Wikol* case, we found no case in which that has occurred.

Second, the most direct method for closing the loophole would involve yet another of the complex cross-references that Judge Gilman finds troubling. We could, for example, amend Rule 58(c)(2) to say that the trial judge must act to give a fee motion tolling effect "before a *timely* notice of appeal has been filed an become effective." But the timeliness of appeal is itself dependent on a mass of interconnected rules.

As an alternative, it has been suggested that a fixed period – say 14 days for the court to act – would close the loophole and be simple to follow. But a fixed period is not practicable. While Rule 54(d) sets a default period of 14 days to file fee motions, various statutes extend the time and the court can change it at will. Since we have no precise deadline for parties to file fee motions, it is dangerous to try to fix a precise deadline for whether to give those motions tolling effect.

Finally, the results of the FJC's research do not support making a change. Collectively, the FJC's research demonstrates (1) that the timing of fee appeals is subject to a large number of variables; and (2) that trial judges seem to be sorting through them and finding their way. I did not see any trends or areas that looked to consistently be causing trouble.

2. Complexity of Time for Appeal

Judge Gilman is descriptively correct: the rules governing time for appeal are complicated and often require a lawyer (or judge) to track through several rules to reach the correct result. But they are that way with good reason.

Having said that, this Committee might consider whether fee motions should ordinarily have tolling effect. One possibility would be to urge the Appellate Advisory Committee to amend FRAP 4(a) to include fee motions in the list of tolling motions. A more moderate proposal would be for this Committee to amend our rules to change our default standard. Under current Rule 58(c)(2), fee motions do not toll time for appeal unless the trial court acts to give them tolling effect. We could alter that scheme to state that fee motions have tolling effect unless the trial court acts otherwise.

*Federal Judicial Center*
*Research Division*

# memorandum

DATE: January 30, 2006
TO: Tom Willging and Joe Cecil
FROM: Rebecca Norwick
SUBJECT: Fed.R.Civ.P. 58(c)(2)

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As you requested, I have conducted a preliminary examination regarding the prevalence of the use of Federal Rule of Civil Procedure 58(c)(2), and have summarized the results below. In brief, I found few indications of requests for extension of time under the Rule.

I examined a sample of more than 8500 cases from eight districts, terminated within the last eleven years. This set of cases oversampled civil rights cases and therefore may have included more cases with a request for attorney's fees than would be expected in a random sample. Of these cases, 105, or 1.2%, contain both the phrases "notice of appeal" and "attorney('s) fee(s)" within their docket sheets. Only one of these 105 cases seems to relate to Rule 58(c)(2), in that it involves a request for an extension of time to file a notice of appeal, following a motion for attorney's fees.[1] Sixteen of the 105 cases contain the terms "appeal" and a variant of "extend" (e.g., extend, extending, extension) within the same docket entry,[2] but in each case except the one mentioned above, the extension either does not appear to relate to an anticipated appeal or does not appear to relate to a request for attorney's fees. None of the 105 cases contains "notice of appeal" and "attorney('s) fee(s)" within the same docket entry, and none of the 105 cases makes reference to "Rule 58," "58(c)," or "58(c)(2)."

In order to test the appropriateness of the search terms used in examining the docket sheets, I obtained the docket sheets from 15 cases I identified through Westlaw as raising issues relating to Rule 58(c)(2). I then applied the search terms used above to these 15 cases' docket sheets and found that 12 of the 15 would have been identified by the first set of search terms (i.e., "attorney('s) fee(s)" and "notice of appeal" within the docket sheet). Two additional cases would be identified if the search included "attorneys' fee." Five of the 15 cases contain "notice of appeal" and "attorney('s) fee(s)" in the same docket entry (as compared to no cases in the docket search above). As above, none of these 15 docket sheets contains reference to "Rule 58." Finally, six of the 15 cases would have been identified by the more limited search for "appeal" and a variant of "extend" within the same docket entry. The other cases would not have been identified, for idiosyncratic reasons (e.g., a request for extension was made orally and was not listed in the docket sheet; the docket sheet was sparse; one entry read "*staying* the time" rather

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[1] In this Massachusetts case, the judge granted the defendants' request to extend the time to file an appeal until after he disposed of the plaintiff's pending motion for attorney's fees. Note that *Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004)) would not have appeared because it was not part of the sample examined.
[2] Within the subset of 105 cases that included both "notice of appeal" and "attorney('s) fee(s)" in the cases' docket sheets, the exact grep search command in Unix was: *grep –ip appeal * | grep –ip "exten.*"*

than "extending the time," etc.). In addition, some of the 15 cases were appeals court decisions that cited Rule 58(c)(2) in ruling that because no request for extension had been made, the appeal was untimely. These results suggest that it may be difficult to identify, through searches of docket sheets, some cases in which the parties struggled with Rule 58(c)(2). This identification difficulty arises because docket entries do not seem to use consistent terminology when referencing these cases, and because an important aspect of Rule 58(c)(2) can be a failure to file a timely motion; this *lack* of action will rarely be reflected within a docket entry.

Finally, I conducted a search within CourtLink in LexisNexis. I searched at least 200,000 docket sheets for all cases that contain reference to "attorney's fee(s)" anywhere in the docket sheet, and "appeal" and "extend" within the same docket entry.[3] This search yielded only nine cases. Five of these nine cases included docket entries for a motion to extend time for filing a notice of appeal under Rule 58. In three of the cases the motion was granted and in two of the cases the motion was denied. I believe the paucity of cases reflects both the relative rarity of instances that explicitly refer to Rule 58(c)(2) and the limitations of the CourtLink database.

In short, this search of docket sheets identified few cases that refer to requests for extensions of time for appeal due to a motion for attorney's fees.

I regard my search of 8500 docket sheets as a preliminary effort and am willing to expand this search to more docket sheets if that will aid the committee. Please let me know how you wish me to proceed.

[3] The exact CourtLink search command was, within the database "All US District Courts (Civil)": *Key Word search ALL: appeal, extend and Key Word search ANY: "attorney's fee."* A second search in which I substituted "attorney fee" for "attorney's fee" yielded only one case, which was a duplicate of one of the nine already identified.

*Federal Judicial Center*
*Research Division*

# memorandum

DATE: March 7, 2006

TO: Tom Willging and Joe Cecil

FROM: Rebecca Norwick

SUBJECT: Coinciding appeals of a judgment on the merits and a decision regarding attorney fees

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Per your request, I have researched the circumstances under which appeals of judgments on the merits and decisions regarding attorney fees can occur at the same time. I discovered several different circumstances under which these appeals can occur simultaneously.[1] Within the 19 recent district court cases that my search yielded, there were at least six different circumstances under which these appeals coincided. At the end of this memo is a table that summarizes the circumstances under which the appeals occurred in each of the 19 cases. Although some cases were difficult to classify (see the final full paragraph of this memo), those that could be classified are described below, along with how frequently the situation occurred within the set of 19 cases:

- A single order contained both a judgment on the merits and a decision regarding attorney fees. This single order was subsequently appealed. [Occurred in 5 of 19 cases]
- Multiple orders implemented either a judgment on the merits or a decision regarding attorney fees. An appeal of two or more of these orders followed. In two cases in this sample, the part of the appeal that related to the earlier of the two decisions was ruled by the Courts of Appeals to be untimely. In the third case, both decisions were affirmed. [Occurred in 3 of 19 cases]
- A notice of appeal (NOA) was filed regarding a judgment on the merits, and later, following a decision regarding attorney fees, an amended NOA was filed regarding both the judgment on the merits and the fees decision. [Occurred in 2 of 19 cases]
- Following a judgment on the merits, a motion was filed that automatically extended the deadline by which to file an appeal (e.g., a motion to amend judgment, a motion for relief from judgment). An appeal was filed following a ruling on this motion and a decision regarding a previously pending motion for attorney fees. [Occurred in 2 of 19 cases]
- Following an appeal of a judgment on the merits, the Court of Appeals ruled that it would not hear the appeal until a pending motion for attorney fees was also decided. The motion for fees was subsequently granted and an appeal of both the judgment on the merits and the fees decision was heard. [Occurred in 1 of 19 cases]
- Summary judgment was granted, and the judge set a deadline for the prevailing party to file a motion for attorney fees. Final judgment was entered following submission of this

[1] To research this question, I first collected a set of U.S. Courts of Appeals opinions that discussed an appeal both of a judgment on the merits and of a decision regarding attorney fees. I then obtained and read the docket sheets from the district court cases from which these appeals originated, in order to identify and classify the circumstances leading to the appeals. To find the Courts of Appeals opinions, I searched within Westlaw's U.S. Courts of Appeals Cases database for the terms *appeal, attorney! fee!,* and *judgment*, all appearing within the same sentence. I reviewed the 30 most recent results (as of 2/21/06), and by excluding those opinions that did not address both types of appeals, was left with a sample of 19 cases. The appellate cases I reviewed were decided between November 2005 and February 2006; the district court cases were filed between September 1998 and February 2004.

fees motion. Attorney fees were awarded soon after, and an appeal of the final judgment and the fees decision followed. [Occurred in 1 of 19 cases]

Several points worth noting emerged during this research. First, none of these 19 cases seems to involve the problems associated with F.R.Civ.P. 58(c)(2) that appeared in *Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004). Within these 19 cases, the relevant Court of Appeals ruled that it lacked jurisdiction in three: in one, the Court ruled it lacked jurisdiction over an appeal of a summary judgment ruling because the appeal was untimely and thus, a (timely) appeal of an attorney fees decision was ruled to be moot; in a second, the Court ruled that an appeal of a judgment on the merits was untimely but affirmed a timely appeal of an attorney fees decision; and in the third, the Court affirmed a summary judgment ruling but dismissed an appeal of an attorney fees decision because the Court of Appeals ruled that it lacked jurisdiction due to the appeal's interlocutory nature and the fact that the amount of fees had not yet been decided by the district court. It does not appear that the appellant requested an extension of time under Rule 58(c)(2) in any of these three cases.

Second, in seven instances, the Court of Appeals opinion clearly documented an appeal of both a judgment on the merits and a decision regarding attorney fees, but this information was not evident from the district court cases' docket sheets. In six of these seven instances, the district court docket sheets did not mention a decision or appeal regarding attorney fees. In the remaining instance, the docket sheet did not explicitly mention the appeal of a judgment on the merits. This made these cases difficult to classify in the list at the beginning of this memo (only two are included). This also supports our observation from the Rule 58(c)(2) research that, at times, searches relying exclusively on docket sheets can overlook relevant cases, due to some docket sheets' lack of information.

In short, it seems that there are multiple ways in which an appeal of a judgment on the merits and of a decision regarding attorney fees can occur simultaneously.

I would be happy to conduct any additional research that would be helpful. Please let me know how you wish me to proceed.

ATTACHMENT: Table

| Case | Circumstance: A single order contained both a judgment on the merits and an attorney fees decision. This order was appealed. |
|---|---|
| Pinner v. Budget Mortg. Bankers, Ltd., 2006 WL 238376 (2nd Cir.) | A "minute entry" in the docket records a jury verdict in favor of the plaintiff on one cause of action. That entry reports that the judge states that any motion for attorney fees is due within two weeks. Following the plaintiff's subsequent motion for attorney fees, the judge issues an order that awards the attorney fees, enters the judgment, and closes the case. The defendant appeals this order. The Court of Appeals affirms the decision. |
| CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Authority, --- F.3d ---, 2006 WL 91478 (5th Cir.) | Final judgment is entered in favor of the plaintiff. Both parties appeal this judgment within 30 days. According to the Court of Appeals opinion, the defendant appealed the judgment and the plaintiff appealed the denial of attorney fees (although there is no mention of attorney fees in the district court docket). The Court of Appeals affirms the final judgment, but vacates and remands the fees decision. |
| Weiss v. Violet Realty, Inc., 2005 WL 3527870 (2nd Cir.) | The judge issues an order in which the defendant's motion for summary judgment is granted in part and the defendant's request for attorney fees is granted in part (among other rulings). The plaintiff files a NOA of this order. The Court of Appeals affirms the merits decisions, and vacates and remands the attorney fees decision. |
| HSBC Bank, PLC v. Goldstein, 155 Fed.Appx. 923 (7th Cir. 2005) | A "consolidated motion by [the plaintiff] for entry of judgment, voluntary dismissal of outstanding claims, and award of prejudgment interest, and attorney fees" is granted in one order. The defendant files a NOA of the order. The Court of Appeals dismisses the defendant's appeal because it is without merit. |
| Baker v. American Airlines, Inc., 430 F.3d 750 (5th Cir. 2005) | The judge grants two separate motions by the defendant to compel, awarding the defendant attorney fees as sanctions each time. Final judgment is entered in favor of the defendant – the complaint is dismissed with prejudice. The judge orders that the defendant will recover from the plaintiff "all costs of court incurred by it." The plaintiff files a NOA of the judgment and order. The Court of Appeals affirms the judgment and the awards of attorney fees as sanctions. |

| Case | Circumstance: Multiple orders implemented either a judgment on the merits or an attorney fees decision. Two or more of these orders were appealed. |
|---|---|
| Gnesys, Inc. v. Greene, --- F.3d ---, 2005 WL 3489378 (6th Cir.) | On 8/22/00, a consent permanent injunction and final judgment are entered. Two years later, on 11/26/02, the defendant is found in contempt of court and the judge requests from the plaintiff documents to support an award of damages within 20 days. The plaintiff submits documents on 12/16/02. The judge awards damages on 8/27/03. In the damage order, the judge requests documents to support an award of attorney fees within 30 days. The plaintiff submits documents on 9/24/03. The judge awards attorney fees on 7/21/04. The defendant files a NOA on 8/20/04 of three orders: the finding of contempt, the award of damages, and the award of attorney fees. The Court of Appeals rules that the appeal of the contempt and damages decisions is untimely. The Court of Appeals affirms the ruling regarding attorney fees. |

| | |
|---|---|
| O'Brien v. ABB DE Inc., 2005 WL 3445574 (11th Cir.) | Final judgment is entered on 6/15/04 for the defendant, dismissing the case. On 7/14/04, the defendant files a motion for attorney fees. On 3/16/05, the fees are awarded. On 4/11/05, the plaintiff files a NOA of the order awarding fees. The Court of Appeals opinion states "O'Brien appeals...entry of summary judgment...and court's order awarding fees," although the appeal of the summary judgment decision is not evident from the district court docket. The Court of Appeals rules that it lacks jurisdiction over the appeal of the summary judgment decision because the appeal is untimely and thus, the appeal of the attorney fees decision is moot. |
| Twentieth Century Fox Film Corp. v. Entertainment Distributing, 429 F.3d 869 (9th Cir. 2005) | Judgment and order: the defendant must pay statutory damages. The defendant files a motion for reconsideration. The defendant files a NOA of the judgment and order. The defendant's motion for reconsideration is denied. The plaintiff files a motion for attorney fees. The plaintiff's motion for fees is granted in part. The defendant files a NOA of the fees award. The Court of Appeals affirms the judgment and the fees decision. |

| Case | **Circumstance: A NOA of a judgment on the merits was filed. Following an attorney fees decision, an amended NOA was filed, addressing both the merits and fees decisions.** |
|---|---|
| Applied Medical Resources Corp. v. U.S. Surgical Corp., --- F.3d ---, --- F.3d ---, 2006 WL 163187 (Fed.Cir.) | *NOTE: Docket starts with entry 738*<br>An order grants the plaintiff's motion for enhanced damages. The defendant files a NOA of that order. Later, a final judgment of willful infringement in favor of the plaintiff is entered. The final judgment grants the plaintiff damages, enhanced damages, attorney fees, interest, and costs. The defendant files an amended NOA of this judgment and order. The Court of Appeals affirms the final judgment order. |
| Haagen v. Saks & Co., 2005 WL 3503149 (9th Cir.) | The defendant's motion for summary judgment is granted. The judge sets an approx. three week due date for any motion for attorney fees and costs. The plaintiff files a NOA of the summary judgment. The defendant files a motion for attorney fees, which is granted. The plaintiff files an amended NOA, appealing the summary judgment ruling and fees decision. The Court of Appeals reverses and remands the summary judgment ruling, and vacates the attorney fees decision. |

| Case | **Circumstance: Following a judgment on the merits, a motion automatically extended the deadline for filing an appeal. Following a ruling on this motion and on a previously pending motion for attorney fees, an appeal of both decisions was filed.** |
|---|---|
| Murphy Oil USA, Inc. v. Wood, --- F.3d ---, 2006 WL 350394 (10th Cir.) | Jury trial: three verdicts in favor of the defendant, one in favor of the plaintiff. Approx. a month later, the judge partially sets aside the jury verdict and issues JMOL in favor of the plaintiff. The plaintiff files a motion for attorney fees. The defendant files a motion to amend the judgment and findings; this motion is later denied. The plaintiff's motion for attorney fees is granted. The defendant files a NOA of three orders: the JMOL decision, the denial of the motion to amend judgment, and the grant of the plaintiff's motion for attorney fees. The Court of Appeals reverses the JMOL decision and the attorney fees decision. |
| Kruman v. Class Law Solicitors, 2005 WL 3556188 (2nd Cir.) | An order grants the defendant's motion to dismiss. NOA – affirmed in part, vacated in part, and remanded. Settlement proceedings begin. A motion by the defendant for attorney fees is denied. An order and final judgment awards attorney fees, costs, etc., to the plaintiff. A motion for relief from judgment and for attorney fees by the defendant is denied. The defendant files a NOA of the denial of the motion for relief from judgment and of the attorney fees decision. The Court of Appeals affirms. |

| Case | **Circumstance: The Court of Appeals ruled it would not hear an appeal of a judgment on the merits until a pending attorney fees motion was decided. Following a decision on the fees motion, an appeal of both the judgment and the fees decision was subsequently heard.** |
|---|---|
| Hamilton v. Washington State Plumbing & Pipefitting Industry Pension Plan, 433 F.3d 1091 (9th Cir. 2006) | The original complaint is for "benefits due and attorney fees and costs." The plaintiff's motion for summary judgment is granted. The plaintiff files a motion to amend the judgment to include attorney fees. A NOA of the summary judgment ruling is filed by the cross-claimant. The Court of Appeals orders "Proceedings in this court shall be held in abeyance pending the district court's resolution of the pending [attorney fees] motion." A subsequent "supplemental judgment" awards the plaintiff attorney fees. The defendant files a NOA of the summary judgment and the fees decision. The Court of Appeals reverses the summary judgment ruling and fees decision and remands the case. |

| Case | **Circumstance: Following a summary judgment decision, the court set a deadline for filing an attorney fees motion. After submission of a motion for fees, the court entered the final judgment and ruled on the fees motion. An appeal of both decisions followed.** |
|---|---|
| FieldTurf Intern., Inc. v. Sprinturf, Inc., 433 F.3d 1366 (Fed.Cir. 2006) | The defendant's motion for summary judgment is granted. The judge states that the defendant may file a motion for attorney fees within 30 days. After the motion for fees is filed, the docket states "parties agree that court's order [granting summary judgment; docketed approx. two months earlier] be entered as the judgment in this case subject to appeal..." Approx. 10 days later, the judge grants the motion for attorney fees. The plaintiff files a NOA of the summary judgment and fees decisions. The Court of Appeals affirms one summary judgment decision, reverses two others, and vacates the award of attorney fees. |

| Case | **Circumstance: Difficult to classify based upon the district court docket sheet.** |
|---|---|
| Goodwin v. C.N.J., Inc., --- F.3d ---, --- F.3d ---, 2006 WL 216695 (1st Cir.) | *NOTE: This case is *Lunnin v. C.N.J., Inc., et al* in both the Court of Appeals docket and the district court docket*<br>An order of partial summary judgment is issued in favor of the defendant. A NOA is filed by the plaintiff. The Court of Appeals opinion states that the appeal is of both the summary judgment ruling and an attorney fees decision, although there is no mention of attorney fees in the district court docket. The Court of Appeals affirms the summary judgment ruling and the denial of attorney fees. |
| Corrigan v. Dale, 2006 WL 83342 (9th Cir.) | An order grants two motions by the defendant for summary judgment, and one motion by the counter-claimant for summary judgment. The plaintiff objects the next day to attorney fees (which implies that a fees ruling may have been included with summary judgment order, although that is not stated in the district court docket). The plaintiff appeals the order. The Court of Appeals opinion states that the plaintiff appealed two summary judgment rulings and a ruling awarding attorney fees. The Court of Appeals affirms the summary judgment rulings but reverses the fees ruling. |
| Perricone v. Medicis Pharmaceutical Corp., 432 F.3d 1368 (Fed.Cir. 2005) | Judgment is entered in favor of the defendant. An appeal and cross-appeal are filed. The Court of Appeals opinion states that the cross-appeal is of a denial of a motion to declare the case "exceptional" and of an award of attorney fees, although the fees appeal is not evident from district court docket. The Court of Appeals affirms both decisions. |

| | |
|---|---|
| Rapid Displays Inc. v. Gorder, 155 Fed.Appx. 962 (9th Cir. 2005) | Judgment is granted in favor of the plaintiff. Both parties appeal the judgment. The Court of Appeals opinion states that the plaintiff also appeals a denial of a motion for attorney fees, but this is not evident from the district court docket. The Court of Appeals "reverse[s] the district court's damages award in part, affirm[s] in part, and remand[s] for recalculation of damages...[and] to consider whether judgment creditor had any valid claim for attorney fees." |
| Hobratschk v. Spahr, 154 Fed.Appx. 400 (4th Cir. 2005) | An order partially grants and partially denies the plaintiff's motion for summary judgment (among other rulings, although there is no mention of attorney fees in this order). The plaintiff files an "interlocutory notice of appeal" of the order. The Court of Appeals opinion states that the plaintiff appeals both the summary judgment ruling and an award of attorney fees to the defendant. The Court of Appeals affirms the grant of partial summary judgment and dismisses the appeal of the attorney fees decision. |

# BACKGROUND INFORMATION ON

# PROPOSED AMENDMENTS TO RULES 54 AND 58

# FROM AGENDA MATERIALS PREPARED

# FOR OCTOBER 27-28, 2005, COMMITTEE MEETING

## II. F. Rule 54(d) and Rule 58(c): Motions for Attorney's Fees and the Time to Appeal

### 1. Introduction

The Appellate Rules Advisory Committee has recommended that this Committee amend Civil Rule 58(c)(2) "to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees [under Civil Rule 54(d)(2)] have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59."

These three rules were shaped in reaction to the decision in *Budinich v. Becton Dickinson & Co.*, 1988, 486 U.S. 196, 108 S.Ct. 1717. After winning the jury verdict, the plaintiff "timely filed new-trial motions" and also filed a motion for attorneys' fees under the governing Colorado statute. The district court denied the new-trial motions, ruled that the plaintiff was entitled to attorneys' fees, and requested briefing and documentation to establish the amount of the fee award. Nearly three months later it entered the fee award. The plaintiff filed a notice of appeal 28 days later. The Supreme Court ruled that the decision on the merits was final for § 1291 appeal purposes before disposition of the fee motion. At least "as a general matter * * * a claim for attorney's fees is not part of the merits of the action to which the fees pertain." Nor does a fee motion count as a Rule 59(e) motion to alter or amend the judgment — it does not seek reconsideration of anything decided on the merits. Thus appeal must be taken in appeal time measured without regard to the pending fee motion. The appeal in the Budinich case, filed more than 30 days after disposition of the Rule 59 new-trial motions, was timely only as to the order on the fee motion; the merits must go unreviewed.

The "bright-line" rule established by the *Budinich* case, standing alone, means that appeals on the merits often must be taken or lost before disposition of attorneys' fee motions. The fee order

becomes the subject of a second appeal. Two appeals, often covering related ground, may not be efficient. Rules 54(d)(2), 58(c)(2), and Appellate Rule 4(a)(4)(A)(iii) were revised to enable the district court to suspend the time to appeal on the merits by ordering that the fee motion has the same time-suspending effect under Rule 4 as a Rule 59 motion. Rule 58(c)(2) directs that the court must "act before a notice of appeal has been filed and become effective." We do not have any information about the frequency of these orders. They may be routine, familiar although not routine, or rare.

The Appellate Rules Committee suggestion is designed to correct an inadvertent drafting gap in the present rule. The present rule can be read to permit an absurd result — allowing entry of an order that revives appeal time long after expiration. The only event that cuts off this authority is the actual filing of a notice of appeal. If no notice is filed, the court is acting before a notice has been filed. But a long-delayed and otherwise useless notice of appeal will cut off an order that for the first time would give the attorney-fee motion the effect of a Rule 59 motion.

This open-ended reading was not intended. Those who drafted the present provision that for the time being has become Rule 58(c)(2) had in mind a subtle but effective limit that would coordinate all of the appeal-time provisions in a way that would not disrupt clear limits or orderly transfer to the court of appeals. Subtlety and reliance on sophisticated understanding, however, may not be the best drafting approach to "no-excuses-accepted" rules such as the "mandatory and jurisdictional" appeal-time rules.

## 2. Suggested Solutions and Their Problems

An amendment responding to the direct language of the Appellate Rules Committee's suggestion might look something like this, drawing from the Style Rule 58(e) provision that is scheduled to supersede present Rule 58(c)(2):

> (e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if the court gives notice or a party moves within 14 days after a timely motion for attorney's [sic] fees is made [filed?] under Rule 54(d)(2), the court may ~~act before a notice of appeal has been filed and become effective to~~ order that the Rule 54(d)(2) motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

A more direct way of responding to the apparent drafting lapse would be to add a single word to the present rule: "the court may act before a timely notice of appeal has been filed and become effective * * *." "Timely" would include a premature notice that becomes effective under Appellate Rule 4(a)(4)(B)(i); "become effective" would incorporate the balance of the same rule. The objection to this approach is that it carries forward the complex scheme of cross-references in the present rule. Three rules have to be read together, one of them not always found in the same book as the Civil Rules. And at least one of them — Appellate Rule 4 — is intricate. Hence the alternative of a simple deadline expressed in days.

If a simple proposal can be identified, it remains to decide whether it is better to do something more complicated or to do nothing at all. The question comes to the agenda because one court had to work hard to achieve a correct result in one case. The result was loss of any opportunity to appeal a judgment on the merits, a common enough occurrence under the provisions of Appellate Rule 4. Many possible responses are possible. The materials prepared for the Appellate Rules

Committee and the relevant part of the Appellate Rules Committee Minutes for November 9, 2004, are attached. They cover most of the alternatives summarized below. They make rewarding reading, not only as an illustration of many possible approaches but also as a demonstration of the complexity that has invaded the rules that control appeal time.

Appellate Rule 4 has been frequently amended. It is designed, first and foremost, to ensure that the decision whether to appeal is made promptly after judgment is entered. A simple rule could ensure that. But it has proved useful to integrate appeal-time provisions with the procedures for self-correction by post-judgment motions in the trial court. Attorney-fee motions do not fit into the category of "self-correction," but may present similar reasons for suspending appeal time. The difficulties that arise from these provisions often have nothing to do with drafting intricacy. For good reason, only "timely" motions suspend appeal time. Often, alas, a party relies on a motion that was not timely, only to find that appeal time was not suspended. It seems likely that most of the remaining difficulties arise not from rule 4's intricacy but from careless reading (or no reading at all). The Appellate Rules Committee no doubt is right that it is better to work on the Civil Rules than to further amend the oft-amended Appellate Rule 4, unless all attorney-fee motions are to be given the same time-suspending effect as Rule 59 motions. And the Appellate Rules Committee can be forgiven for not reconsidering the well-settled rule that appeal time is "mandatory and jurisdictional," an alternative that would protect the unwary but at a real cost in repose for the wary.

This question came to the agenda by way of a plea made in the opinion in *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir.2004, 360 F.3d 604, 610. The court could "not help but express dismay over the complexity of the rules regarding the timeliness of an appeal * * *. There

should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. * * * Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure." (Rule 59 was included in the count of four rules.)

The circumstances of the *Wikol* case were these:

Date Unspecified: Jury verdict for the plaintiffs.

March 22, 2002: Plaintiffs move for attorney fees.

March 27, 2002: Judgment entered.

May 15, 2002: Fee motion denied.

May 24, 2002: Plaintiffs move for a 58(c)(2) order.

June 14, 2002: Plaintiffs file a notice of appeal.

July 11, 2002: Rule 58(c)(2) order extending time.

The court ruled that the June 14 notice of appeal was timely as to the May 15 order denying the fee motion, but was not timely as to the judgment on the merits. It reached this result by what may seem a linguistic tour de force: the June 14 notice of appeal was "effective" when filed, so the July 11 Rule 58(c)(2) order was made after a notice of appeal was filed and became effective. At best, this result depends on the happenstance that the notice of appeal was timely — thus "effective" — with respect to the order denying the fee motion. The notice was not "effective" to appeal the

judgment on the merits. The court further says that Appellate Rule 4(a)(4)(B)(i) "suggests * * * that the concept of 'effectiveness' is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided."

The result of the *Wikol* decision seems right, at least within the well-settled tradition that Appellate Rule 4 time limits must be applied without accepting any excuses. The intended working of Rule 58(c)(2) can be illustrated by a few variations on the circumstances.

(1) No Other Post-Judgment Motion. If no party has made any of the timely Rule 50, 52, 59, or "60" motions that suspend appeal time under Appellate Rule 4(a)(4)(A), a notice of appeal must be filed 30 days after March 27 unless an extension is obtained. A timely notice of appeal cuts off the opportunity to enter a Rule 58(c)(2) order — the case has been transferred to the court of appeals. An untimely notice of appeal cannot revive the forfeited opportunity to appeal the judgment on the merits, whether by direct operation or by reviving the opportunity to enter a Rule 58(c)(2) order that the fee motion have the appeal-time-suspending effect of a timely Rule 50, 52, 59, or "60" motion.

(2) Premature Notice of Appeal, No Other Post-Judgment Motion. A notice of appeal is filed in March 21; it is premature because judgment has not been entered. It apparently becomes effective on March 27 under Appellate Rule 4(a)(4)(B)(i), and the lack of any timely 4(a)(4)(A) motion means that its effectiveness is not suspended. This seems a bit surprising — the plaintiffs could preserve the opportunity to seek a Rule 58(c)(2) order by making a timely 4(a)(4)(A) motion, but otherwise the premature notice cuts off any opportunity for a 58(c)(2) motion. [The language of 4(a)(4)(B)(i) is incomplete. It says that "if a party files a notice of appeal after the court announces or enters a

judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." If there is no such motion, there is no order disposing of the last such remaining motion. Presumably the result is that the notice becomes effective on the day judgment is entered, not on the day after the last day to timely file any of the 4(a)(4)(A) motions.]

(3) Premature Notice of Appeal, Timely Post-Judgment Motions. This one seems clear. The time to enter a Rule 58(c)(2) order expires upon disposition of the last remaining Rule 4(a)(4)(A) motion. That is when the notice of appeal "has been filed and has become effective."

(4) Notice Filed After Judgment, Before Timely Post-Judgment Motions. Same result as (3). Although the notice seemed to "become effective" when filed, it did not really transfer the case to the court of appeals. Under 4(a)(4)(B)(i) it "becomes effective" on disposition of the last 4(a)(4)(A) motion.

(5) Notice Filed While Timely Post-Judgment Motion Pending. This is the easiest one of them all. The notice is not effective when filed, and does not even seem to be effective. It becomes effective upon disposition of the last remaining 4(a)(4)(A) motion.

(6) No 58(c)(2) Order, Merits Appeal Time Lapses While 54(d)(2) Motion pending;

(7) Timely Appeal after Fee order. This is the *Wikol* case. Nothing happened to suspend the time to appeal judgment on the merits, just as in the Supreme Court's *Budinich* case. No notice of appeal can become "effective" to appeal the merits. If a notice of appeal is filed within the Rule 4 period after entry of the fee order, the fee ruling can be reviewed. (It may be difficult to review the

fee order with respect to matters on which the judgment would have been reversed on timely appeal, but it does not seem likely that the Appellate Rules, much less the Civil Rules, will be amended to address the scope of the appeal. But this question raises some doubt as to the present rule. An appeal on the fee motion remains possible. The litigation has not concluded. If the district judge believes that the merits should be open for review, does the need to protect the appellee require that this authority be denied?)

(8) No Rule 58(c)(2) Order, No Timely Notice of Appeal Ever. This is the horrid monster that might be conjured out of the present language of Rule 58(c)(2). It is no longer possible to file a notice of appeal that will "become effective." The district court retains power to act at any time to permit a belated appeal by entering an order that the fee motion has the effect of a timely Rule 59 motion. Presumably few district judges would do this. (It would be really strange to seize on the partial-effectiveness of the notice in the Wikol case to argue that a notice that is not timely to appeal anything is an effective means of cutting off the Rule 58(c)(2) authority — it becomes, when filed, as "effective" as it ever can be. How many parties will think to file an untimely notice of appeal — often with no desire to appeal — simply to cut off the faint prospect that an adversary might persuade the court to enter a belated 58(c)(2) order to revive expired appeal time?)

The alternative draft amendments set out above are designed to close the possible linguistic gap in Rule 58(c)(2). The draft that would require a "timely" notice of appeal does nothing to reduce the intricacy bewailed by the *Wikol* court. Its only potential contribution is to cut off the remote prospect that Rule 58(c)(2) might be read, as sketched in example (7) above, to make an untimely

notice of appeal the only means of terminating an otherwise perpetual power to revive expired appeal time. That does not seem a great advance in rulemaking.

The first draft amendment would change the subtle integration of attorney-fee motions with Appellate Rule 4 that Rule 58(c)(2) now attempts. Instead it would adopt an uncomplicated rule. An attorney-fee motion suspends appeal time only if the court gives notice that it is contemplating an order or if a party moves for an order within 14 days after the fee motion is made. No time limit is set for the court to act. The provision for court notice is included to enable the court to act on its own, but without requiring that it act to enter the order within 14 days (compare Rule 59(d), which allows a court to order a new trial on its own only if it makes the order within 10 days). The 14-day period is chosen because it allows some time but still integrates with the appeal-time provisions in most circumstances. Rule 54(d)(2) sets a presumptive motion time at 14 days after entry of judgment; an additional 14 days fits within the general 30-day appeal period. But the fit becomes awkward if a statute or court order sets a time different than 14 days, as Rule 54(d)(2) allows. Perhaps a shorter period should be set. The shorter the period, the greater the difference from the present rule. As the rule now is, the court can consider the best integration of the fee proceedings with an appeal during the perhaps extended period required to decide timely post-judgment motions. Consideration of the other motions may give a much better sense of the advantages and disadvantages of deferring any appeal until the fee motion has been decided. As usual, it turns out that there is a reason for the subtle intricacy of the present rules.

Many other approaches are available. They can be described rather briefly. Full development would be warranted only on the basis of reliable information about the impact of present Rule 58(c)(2). The assumption that underlies 58(c)(2) is clear enough. Sometimes it is good that the merits appeal be taken while the fee motion remains pending in the district court. Sometimes it is good that appeals be deferred until the district court has resolved the fee motion. The district court is in a better position than the court of appeals to make this determination. And, given the rigorous enforcement of intricate appeal-time rules, there must be a clear integration of the time for district-court action with the appeal-time rules.

Rule 58(c)(2) may be working as intended. The result may be that appeal-time-suspending orders are routine, common, or rare. These orders may be entered when they ease the burdens on the parties and appeals courts, and denied when they might aggravate the burdens on the parties and courts. Trial courts may experience little difficulty in making wise decisions on these matters. The converse of each of these propositions may be true. If there are problems, quite different rules are possible.

One alternative, and a simple one, would be to provide that a timely fee motion always suspends appeal time, just as a timely Rule 59 motion does. Appellate Rule 4(a)(4)(A)(iii) would be simplified to refer only to a Rule 54(d)(2) motion. Rule 58(c)(2) would be abolished. Among the problems with this approach are the delay of appeal, the importance of the appeal disposition for intelligent decision of the fee motion, and the prospect that fee disputes may be resolved among the parties once the outcome on appeal is known. There may be some small technical problems as well.

It is not quite true that the 14-days allowed to file a fee motion is never longer than the 10-days allowed for a Rule 59 motion. It is possible that a judge will accept a judgment for filing on a Sunday; under present time-counting rules the time for a Rule 59 motion expires on Friday 12 days later. The 14 fee-motion days would expire on Sunday, allowing filing on Monday. that quirk is likely to be fixed in the time-counting project. Far more importantly, the Rule 54(d)(2) authority to set a different time than 14 days may mean that a timely motion is filed well after expiration of the Rule 59 time. These problems could be addressed by changing the requirement that the fee motion be timely to a requirement that it be filed within the period allowed for a Rule 59 motion. Or the Time-Counting Project might set the same time for attorney-fee motions as for other post-judgment motions.

A different alternative would be effectively to overrule the *Budinich* decision by providing in Rule 54(b) that a judgment that does not dispose of attorney-fee issues is final only upon express entry of judgment. This would be simple, and would take advantage of the flexibility that allows a premature appeal on the merits to be saved by retroactive entry of a Rule 54(b) judgment. Whether this approach is attractive depends on how often it is desirable to defer appeal on the merits until fee issues have been resolved. It is worth pursuing if serious inquiry — most likely by the Federal Judicial Center — shows either that this is how Rule 58(c)(2) is implemented now or that experience with appeals taken before disposition of fee motions proves the need to defer appeal until fee motions are decided.

Yet another possibility would be to adopt a rule that a fee motion never suspends appeal time. This one is reasonably simple. Rule 58(c)(2) and Appellate Rule 4(a)(4)(A)(iii) would be rescinded. After the *Budinich* decision, the fee request is not a "claim," and remains outside Rule 54(b). It is not a Rule 59(e) motion. Two appeals will be common — but that fits the reported experience of Appellate Rules Committee members that "appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason."

### 3. Tentative Recommendation

The only sign of distress with the present set of rules is the Sixth Circuit's accurate suggestion that it would be better to avoid this much intricacy if a good rule can be drafted in less intricate terms. Read intelligently in context, present Rule 58(c)(2) — and also its translation in Style Rule 58(e) — relies on district-court discretion to accomplish a sensible case-specific integration of fee motions with appeal time. There is no evidence that discretion is not working. Any rules amendments in this setting must be framed with great care and foresight, as witness the linguistic opportunity to misread the present rules. The next step might well be to report to the Appellate Rules Committee that the case for amending the rules seems weak in the absence of better information about actual experience. If the Appellate Rules Committee continues to believe that potential problems deserve further study, the two Committees can work together to determine the need to gather additional information and the means of gathering any information that may be needed.

# DRAFT

**Minutes of Fall 2004 Meeting of**
**Advisory Committee on Appellate Rules**
**November 9, 2004**
**Miami, Florida**

## I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, November 9, at 8:30 a.m., at the Wyndham Grand Bay Coconut Grove Hotel in Miami, Florida. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

## II. Approval of Minutes of April 2004 Meeting

The minutes of the April 2004 meeting were approved.

## III. Report on June 2004 Meeting of Standing Committee

Judge Alito reported that, at its June 2004 meeting, the Standing Committee gave final approval to all of the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"), with one exception. Those proposals were subsequently approved by the Judicial Conference and now are awaiting Supreme Court action.

The exception was proposed Rule 32.1 on the citation of unpublished opinions. Judge Alito reported that the Standing Committee had returned the proposal to this Advisory Committee for further study. Judge Alito said, and Prof. Coquillette agreed, that the decision of the Standing Committee did not signal a lack of support for the proposal. Rather, given the strong opposition to the proposal expressed by many commentators, and given that some of the claims of those commentators can be tested empirically, the Standing Committee wanted to ensure that every reasonable step is taken to gather information before it makes a final decision on the proposal.

A member moved that Item No. 04-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### 2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was added to the Committee's study agenda at the request of Judge Ronald Gilman, writing in *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In *Wikol*, the parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman, author of the Sixth Circuit's opinion, reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committees consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A).

The Reporter said that, in light of *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (which held that a judgment is final and appealable even if a motion for attorney's fees is pending), this Committee and the Civil Rules Committee essentially have three options if they wish to address the problem raised by *Wikol*:

First, the Committees could decide that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion for attorney's fees is always treated like a timely Rule 59 motion for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the Committees could decide that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion is never treated like a timely Rule 59 motion. Under this approach, a Rule 54 motion would not toll the time to appeal, and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Finally, the Committees could decide to maintain the "hybrid" approach. Under this approach, a default rule is established — at present, the default rule is that a motion for attorney's fees under Rule

54 is not treated like a Rule 59 motion — but then the district court is given authority to make exceptions to the default rule. At present, Civil Rule 58(c)(2) gives district courts authority to "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." To solve the *Wikol* problem, though, the rules would have to be amended to impose a deadline by which a district court must act. For example, a deadline could be patterned after Criminal Rule 35(a), under which a court has authority to correct a sentence within seven days after the sentence is imposed, but loses such authority after the seventh day.

The Committee discussed the options described by the Reporter. Most Committee members said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would always be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits would always have to be brought together with the appeal on the fees. In the experience of Committee members, appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason. A decision on fees can be much more difficult than a decision on the merits. District court judges often do not want to have to make a decision on fees until they know for certain that the decision on the merits will stand. Also, once the appeal on the merits is over, parties often settle the fees dispute.

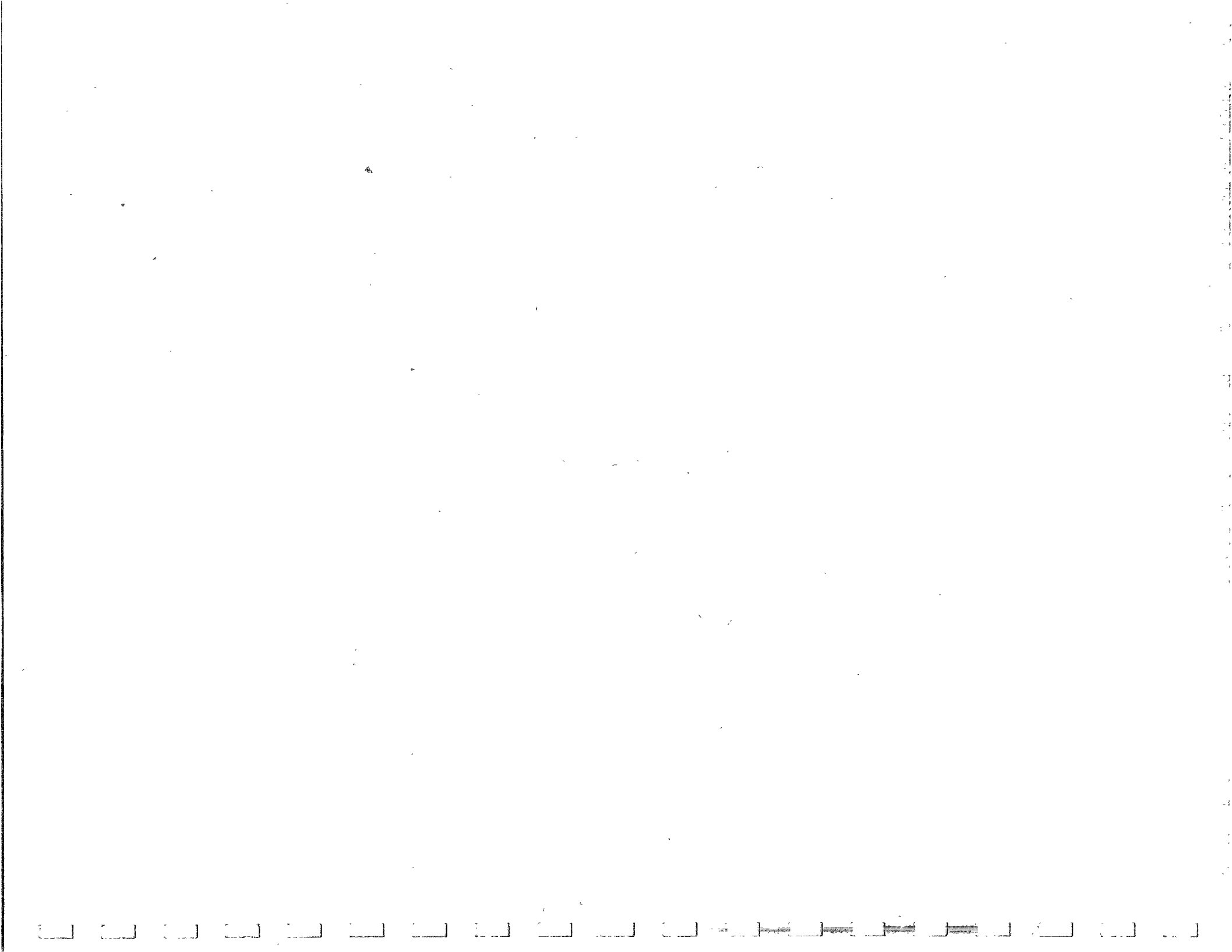
Most Committee members also said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would never be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits could never be brought together with the appeal on the fees. Members pointed out that the Federal Circuit has held that, in patent infringement cases, appeals on the merits must always be packaged together with appeals on the fees. Sometimes there is good reason to present the appellate court with the merits and the fees in the same appeal.

In sum, Committee members favor maintaining the current hybrid approach, under which the assumption is that the appeals will proceed separately, unless the district court orders otherwise. Committee members believe, however, that a time limit should be added to Civil Rule 58(c)(2) so that the *Wikol* facts are not repeated. Item No. 04-03 should be referred to the Civil Rules Committee, so that it can consider approving such an amendment.

A member moved that Item No. 04-03 be referred to the Civil Rules Committee, along with the recommendation of this Committee that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The motion was seconded. The motion carried (unanimously).

## VI. Additional Old Business and New Business

There was no additional old business or new business.



## MEMORANDUM

**DATE:** October 15, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 04-03

Some of you may recall that the Appellate Rules Committee, later joined by the Civil Rules Committee, spent almost five years working on the 2002 amendments to Appellate Rule 4(a)(7) and Civil Rules 54(d)(2)(C) and 58. Those amendments addressed incredibly complicated questions — questions that spawned at least four circuit splits — about how Appellate Rule 4(a)(7)'s definition of when a judgment or order is "entered" was intended to interact with the requirement in Civil Rule 58 that, to be "effective," a "judgment" (defined by an obscure provision of Rule 54(a) to include all appealable orders) must be set forth on a separate document. For those of you who regret that you were unable to participate in that effort, welcome to *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). The opinion is attached, but the following summary (which I wrote for the 2005 Supplement to Volume 16A of *Federal Practice and Procedure*) may suffice:

> The parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure

4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit, in a careful opinion by Judge Ronald Gilman, held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered

on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committee consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A). The suggestion is worth considering. It does seem silly that the Wikols would have preserved their appeal if they had filed their notice of appeal on July 12, but forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.[1]

Taking off my treatise author's hat, and putting on my Reporter's hat, I want to agree with me: I believe that this Committee and the Civil Rules Committee should consider addressing the problem that Judge Gilman brought to our attention. That said, I am not certain what a solution to the problem should look like.

Back in June, Prof. Edward Cooper (the Reporter to the Civil Rules Committee) and I engaged in an extensive e-mail conversation about the *Wikol* problem. (Several others, including Judge Alito, were included in that conversation.) Prof. Cooper and I tentatively identified several possible approaches to *Wikol*. For those who have interest, I have attached copies of our correspondence.[2] In addition, the *Wikol* problem was brought to the attention of the Committee by Prof. Philip A. Pucillo in a letter that I did not receive until after discussing the problem with Prof. Cooper. Prof. Pucillo's letter

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[1]16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE (3d ed. Supp. forthcoming 2005) (footnotes omitted).

[2]Prof. Cooper has graciously given me permission to share his messages. This is our raw e-mail correspondence, so please excuse the informal tone, brief excursions down blind alleys, typos, and other errors.

is also attached. As you will see, Prof. Pucillo has a somewhat different "take" on the problem than either Prof. Cooper or I.

Because I do not know whether this Committee will decide that the *Wilcol* problem is worthy of further attention, I do not want to discuss all of the potential solutions and their complications at this point. Perhaps it will suffice to say the following:

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Supreme Court held that a judgment is final and appealable even if a motion for attorney's fees is pending. After *Budinich*, then, the advisory committees basically had three choices (I'm oversimplifying somewhat):

First, the advisory committees could have decided that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions for attorney's fees were *always* treated like timely Rule 59 motions for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the advisory committees could have decided that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions were *never* treated like timely Rule 59 motions. Under this approach, a Rule 54 motion would not toll the time to appeal and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Third, the advisory committees could have decided to take a "hybrid" approach. Under this approach, a default rule would be established — a timely Rule 54 motion either would or would not be treated like a timely Rule 59 motion — but the court could, either on motion of a party or on its own motion, decide that a particular Rule 54 motion would be treated differently than the default rule provided.

The hybrid approach is, of course, the approach that the advisory committees took. Under Rule 4(a)(4)(A), a motion for attorney's fees under Rule 54 is not treated like a Rule 59 motion unless the court orders otherwise. Civil Rule 58(c)(2) gives district courts that authority; it provides that a district court may "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59."

The advantage of the hybrid approach is that it allows the district court to determine how an appeal should be packaged. The advisory committees concluded that sometimes it would be wise to allow an appeal of the underlying merits to go forward before the fee question was resolved, and other times it would be wise to defer the appeal of the underlying merits until the fee question was first resolved. The hybrid approach allows district judges to decide which cases are which.

The disadvantage of the hybrid approach is that it is complicated. It is not just inherently more complicated in the sense that, rather than setting forth a uniform rule, it instead sets forth a presumption that a court can reverse in particular cases. It is also complicated because it does not contain a deadline by which a party must ask for the presumption to be reversed, nor does it contain a deadline by which a court must make a decision on the party's request. The result is *Wikol* — and the potential

*Wikol*-related problems that Prof. Cooper and I discussed in our correspondence. (See especially "Message 5.")

There are several possible solutions to the *Wikol* problem. Prof. Pucillo, for example, argues that the rules should be amended to reverse the default rule — i.e., that Rule 54 motions should presumptively be treated like Rule 59 motions unless the district court orders otherwise. Another possible solution would be to maintain the current approach, but to impose a deadline by which the district court must decide whether a Rule 54 motion will be treated like a Rule 59 motion. Perhaps the easiest, clearest, and most effective solution, though, would be to reject the hybrid approach and instead choose one of the absolute approaches. The rules could be amended so that Rule 54 motions are *always* treated like Rule 59 motions, or the rules could be amended so that Rule 54 motions are *never* treated like Rule 59 motions.

Before the advisory committees can decide on the wisdom of these approaches, they will have to assess the value of the ability to package appeals — discretion that only the hybrid approach provides. If most parties now ask that their Rule 54 motions be treated like Rule 59 motions, and if courts routinely grant those requests, then it may be wise to amend the rules so that *all* Rule 54 motions are treated like Rule 59 motions. Conversely, if few parties ask that their Rule 54 motions be treated like Rule 59 motions, and if the few requests that are made are rarely granted, then it may be wise to amend the rules so that *no* Rule 54 motion is treated like a Rule 59 motion. But if parties and judges are making careful and judicious use of Rule 58(c)(2) — sometimes packaging the merits with the fee question, and sometimes not — then the cost of adopting one of the absolute approaches may be too high. If this Committee decides that the *Wikol* problem deserves further study, the Committee may

want to seek the assistance of the Administrative Office or the Federal Judicial Center with gathering empirical evidence on these questions.

## Addendum: Cooper-Schiltz Correspondence Regarding *Wikol* Issues

**Message 1 (from Schiltz)**

The recent opinion of the Sixth Circuit in *Wikol ex rel. Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), complains about the complexity of the interaction of the Civil Rules and Appellate Rules on the question of when a motion for attorney's fees under Civil Rule 54 tolls the time to appeal under Appellate Rule 4(a)(4)(A). The Sixth Circuit explicitly invites the attention of the Advisory Committee on Appellate Rules to the issue.

The facts are complicated, and I won't try to summarize them here. The Sixth Circuit's opinion is clear and concise. Essentially, the Sixth Circuit appears to be proposing that a timely motion for attorney's fees under Civil Rule 54 should *automatically* toll the time to appeal (as does, for example, a timely motion for a new trial under Civil Rule 59), rather than toll the time to appeal only if the court so decides under Civil Rule 58. Specifically, the Sixth Circuit wrote:

"As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) automatically extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure."

Because the problem cited by the Sixth Circuit implicates both the Civil Rules and Appellate Rules, I am copying this message to Judge Rosenthal and Prof. Cooper. Prof. Cooper has forgotten more about Civil Rule 54 than I will ever know, so I will be particularly interested in getting his reaction to the Sixth Circuit's suggestion. . . .

**Message 2 (from Cooper)**

Professor Schiltz is right at least as to this — I regularly suppress anything I learn about Rules 54 or 58. Out, out faint glimmer!

John can verify this much from the minutes, if I have it right. Rules 54(d)(2) and 58 were amended together, effective December 1, 1993. The impetus no doubt was the ruling in Budinich v. Becton Dickinson & Co., 1988, 486 U.S. 196, establishing a bright line rule that a decision on the merits is a final judgment whether or not a claim for attorney fees remains to be decided. The rule has all the

advantages of a bright line and some of the disadvantages. In some circumstances it is more convenient for all concerned to have a single appeal that presents both the merits and the fee award.

My recollection is that the system we now have was primarily the invention of Sam Pointer. Rule 54(d)(2)(B) deliberately set the time to move for attorney fees at 14 days after judgment, a period that does not exclude intervening Saturdays, Sundays, and Legal Holidays (no comment) and thus is no longer — and may be shorter — than the 10-day periods for all of the other motions that suspend appeal time under Appellate Rule 4(a)(4)(A). Then the part of Rule 58, now 58(c)(2) that still causes some consternation. The trial court may order that a timely motion for attorney fees has the same effect under Rule (4)(a)(4) as a timely Rule 59 motion if the court acts "before a notice of appeal has been filed and has become effective." That means that the trial court can act before a notice of appeal has been filed, or after a premature notice of appeal has been filed, or after a notice of appeal is filed but then suspended by a timely motion. (Or something like that.) It is, in its own way, a rather neat scheme. The district court is given discretion to determine what makes most sense as an appeal package; compare Rule 54(b).

I assume, without really remembering, that what now is Appellate Rule 4(a)(4)(A)(iii) was added at the same time. It may be that this is one of those ideas that is good, but too good to be administered effectively. That is to say, it may fit within a long chain of Appellate Rule 4 amendments designed to simplify perfectly workable rules to a point where the bar can actually understand and use them. But I offer no advice on whether the hint should be taken up, apart from the observation that if it is taken up the Civil Rules Advisory Committee will once again have the pleasure of addressing something in tandem with the Appellate Rules Committee. No matter who takes the lead, it will be an exhilarating experience. . . .

**Message 3 (from Schiltz)**

I'm of two minds on the issue.

The system is somewhat complicated, but it is not unclear. Every one of the rules parsed by the Sixth Circuit was clear. Ten minutes of careful reading by either the plaintiffs' attorney or the district court would have taken care of the problem. I'm generally not inclined to amend rules that are clear and that are not inherently unfair because they require a few minutes' work to understand. (If I was otherwise inclined, I'd be looking for ways to undo the work that we did on Civil Rule 58 and Appellate Rule 4(a)(7) in 2002 — work that is complicated but clear.)

That said, the plaintiffs' attorney and district court are probably not atypical. (I say that with particular confidence about the attorney. I know that the "special ed" bar takes most IDEA cases for free or at a heavy discount.) Everyone hates to see an appeal forfeited on a technicality, and it does seem silly that the plaintiffs would have preserved their appeal if they'd filed their notice of appeal on July 12, but

forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.

Might not there be merit in the Sixth Circuit's suggestion that timely Rule 54 motions automatically toll the time to appeal? Not only would fewer appeals be forfeited, but, in general, a single appeal would bring to the court both the decision on the merits and the decision on attorney's fees. In the typical civil case, would that not be preferable — or at least not less preferable?

**Message 4 (from Cooper)**

It is easier to react quickly, hoping to prod Pat into thinking things through, than to try to untangle the Rule 54(d)(2)/Rule 58(c)(2)/Rule 4(a)(4)(A)(iii) muddle on my own.

My first reaction at odd moments last evening was surely — well, come to look at it, no. There is nothing in these rules that actually belies the superficially "plain meaning": if there is no other complication, there is no stated limit on the time when the trial court must act under Rule 58 to give the attorney-fee motion the same effect as a timely Rule 59 motion. So in the *Wikol* case, it would be proper to make a timely attorney-fee motion, then do nothing more until the court has ruled on the motion. After that — perhaps months after judgment was entered — the intending appellant can still ask for, and the court can still grant, an extension. Perhaps the 4(a)(4)(A) provision that appeal time starts to run from the order disposing of the motion imposes an implicit limit that the court must act within appeal time as measured from that order. Perhaps not? So one obvious question is whether we need to put a time limit somewhere, with cross-references (further complicating the system).

Then I skimmed through *Wikol* and became even more thoroughly confused. The event that really confounds thinking is this: Order denying attorney-fee motion: May 15. Motion to give motion the effect of a timely Rule 59 motion: May 24. Protective notice of appeal filed: June 14. Order giving the effect of a timely Rule 59 motion: July 11. As in the paragraph above, it seems to be assumed that the May 24 motion was timely; had the plaintiffs not filed the protective notice of appeal on June 14, but instead waited to file a notice on or after July 11, the appeal would have been effective. But, in an astonishing bit of double-talk, the court concludes that it must dismiss the appeal based on the June 14 notice because the notice "became effective" on June 14. Say what?

Although I was involved only tangentially and lackadaisically as a new committee member, I can come close to warranting that no one gave any thought to this possible application, much less interpretation, of the "become effective" term in Rule 58. If anything is done, we have to do something to correct the bizarre result. Penalties should not be imposed for filing a protective notice of appeal. Compare the 4(a)(4)(B) provisions for premature notices.

That sense of the bizarre does not automatically translate into a vote to do anything about it. We have a long history of not reacting to a single decision that either is wrong or is right because of an unanticipated but probably exotic failure in drafting a present rule. Much depends on whether we can come up with a clear and right fix that at least does not add to the complication-trap aspects of these rules.

Because 4(a)(4)(A)(iii) relies on cross-reference to Rule 58, Rule 58 might be a place to begin thinking. One possibility would be to amend (c)(2) to permit an extension of appeal time only if a party moves or the court acts within the appeal period measured from the judgment, and before a notice of appeal has been filed and has become effective. That would mean that a notice of appeal must be filed if there is no timely motion to extend time or action sua sponte. I'm not at all sure that is a good idea. But at least it could be drafted, and avoids the risks of loosely guided discretion that arise if the request to extend appeal time can be deferred until the court has ruled on the fee motion.

Already this is longer than I had intended. Pat?

**Message 5 (from Schiltz)**

I, too, thought about this last evening. (It says something about our respective wives that they stay married to men who think about Rule 58 in the evenings.) I'm far from confident that I've got this figured out, but, at this point, I guess I lean toward believing that there is a problem here that needs to be fixed.

My first reaction was the same as Ed's: We have an unusual case here; it's important not to overreact, especially when the cure is likely to result in more complications than the disease. (I am not as critical of Judge Gilman as Ed is, though. I think he just applied the rules as they were written. I don't know what other choice he had.) My second reaction, though, is that although *Wikol* is an unusual case, and although the attorney screwed up, there is a rather serious problem that is at the root of all this, and that is the lack of any time limitations on Rule 58(c)(2). Rule 58(c)(2) puts no time limitation on when a motion must be *made* and no time limitation on when a motion must be *decided*. Think about this in reverse order:

1. First, as to the lack of a limitation on when a motion must be *decided*: Let us say that a judgment is entered against me. Under Rule 54(d)(2)(B), I have to move for attorney's fees within 14 days. Let us say that I do so. And let us say that, along with moving for attorney's fees under Rule 54(d)(2)(B), I move for a Rule 58(c)(2) order.

If I do not hear anything from the court, I will have a difficult decision to make when my judgment becomes 29 days old. At that point, I can either file a notice of appeal or not file a notice of appeal. If I file a notice of appeal, then I forfeit any chance of having my Rule 58(c)(2) motion granted, as my

notice of appeal will have been "filed" and become "effective." But if I do not file a notice of appeal, then I am taking a big gamble. It could be that, months from now, my Rule 58(c)(2) motion will be granted. If it is, I can bring my appeal. But it could be that, months from now, my Rule 58(c)(2) motion will be denied. If it is, I'm out of luck.

This is a rather unsettling situation to put attorneys in. More importantly, note that Rule 58(c)(2), by putting no time limitation on when the court must decide the motion, essentially permits a court to extend to forever the time to bring an appeal. Nothing would keep the judge from sitting on my Rule 58(c)(2) motion for two or three years — and, if the judge eventually granted my motion, I'd be free to bring my appeal. In the meantime, my opponent is in limbo, and there is absolutely nothing that it can do to speed things along.

2. Second, as to the lack of a limitation on when a motion must be *brought*: Suppose that, like the attorney in *Wikol*, I do not move for a Rule 58(c)(2) order when I move for attorney's fees. My opponent and I wait for months — years — for my motion for attorney's fees to be decided.

It seems to me that, as long as I don't file a notice of appeal, I can bring a Rule 58(c)(2) motion any time during this waiting period. I could bring it a month from now — a year from now — two years from now — as long as the motion for attorney's fees is still pending. And, if my Rule 58(c)(2) motion is eventually granted, I can appeal the underlying judgment months or years after it was entered. (Indeed, I could file my Rule 58(c)(2) motion even *after* the motion for attorney's fees is decided, although, after 30 days pass, it will be too late for Rule 58(c)(2) to do me any good.)

If I've thought this all through correctly, then it seems to me that the lack of any time limitation on when Rule 58(c)(2) motions must be brought or decided has the potential for creating a lot of mischief and uncertainty. That makes me ask again a question that I do not know enough about Civil Procedure to answer: Would it not be better if we simply provided that a timely Rule 54(d)(2) motion will always be treated like a timely Rule 59 motion: It will automatically suspend the time to appeal until the motion is decided?

**Message 6 (from Cooper)**

I agree with Pat on each of the two points he makes: (1) As the rules now stand, even a party who moves at the same time for a fee award and to have a fee motion treated as a Rule 59 motion must file a protective notice of appeal within the original appeal period if Rule 59 treatment has not been granted before the period expires. Otherwise the right to appeal may be lost. (2) There is nothing in the rules that prohibits making a motion to treat the fee motion as a Rule 59 motion while the fee motion remains pending (and, accepting *Wikol*, so long as no notice of appeal has been filed by any party). Apparently the motion can be filed even after disposition of the fee motion. That seems a bit extreme.

One fix might be as suggested — any fee motion made within 54(d)(2) time has the same effect as a timely Rule 59 motion. That would lead us to ask again why we should not set the 54(d)(2) period at 10 days. More importantly, it would reverse or confuse the Budinich clear line: judgment on the merits is not final and nothing can be appealed, or else judgment on the merits still is final and can be appealed or not at the option of the parties, or else judgment on the merits is final but any notice of appeal filed before disposition of the fee motion takes effect only on disposition of the motion. If I have not got confused again, we would have to make a choice. Present Rule 58(c)(2) created a discretionary system in the belief that often it is desirable to have an appeal on the merits before fee questions are resolved. Was that a wrong idea?

Separately, Pat has pointed out that not all questions would be answered by the alternative of requiring that the Rule 58(c)(2) question be raised during the initial appeal period. What happens if the judge acts on the fee motion but delays acting on the appeal period until the appeal period runs out as measured from the order deciding the fee motion? We could draft an answer, but we would have to figure out what we want.

Our spouses stay with us because we're obviously having fun with Rule 58. Glee is contagious. So keep the messages coming.

**Message 7 (from Schiltz)**

I think we now understand the problem. As an aside, and following up on one of Judge Rosenthal's comments: When two reporters to federal rules committees — one of whom is a legendary procederalist — have to work this hard to figure out what the rules mean and what problems they pose, it suggests that the rules are too complex for the typical lawyer and even the typical judge.

At this point, I suggest that, if Judge Alito and Judge Rosenthal agree, we ask our committees to react to the following suggestion: (1) Civil Rule 54(d)(2) be amended so that motions for attorney's fees must be brought within 10 days. (This first suggestion is easily "severable" from the next two.) (2) Civil Rule 58(c)(2) be amended — actually, deleted — so that district courts will no longer have discretion to certify which Rule 54(d)(2) motions toll the time to appeal and which do not. And (3) Appellate Rule 4(a)(4)(A) be amended so that all timely motions for attorney's fees under Rule 54(d)(2) toll the time to appeal, just as all timely Rule 59 motions do.

I think it would be worthwhile to get input from the two committees on this possibility. It might also be worthwhile to ask someone in the A.O. to do a little digging into the "legislative history" so that we can know exactly why such a scheme was rejected by the rulemakers in 1993 in favor of the current discretionary approach.

Ed, I do not think that this approach would undermine *Budinich*. We are not talking about the finality or appealability of judgments here; we are talking about tolling the deadline for filing a notice of appeal seeking review of final and appealable judgments. When a Rule 59 motion is timely filed — or a Rule 60(b) motion is filed within 10 days — they do not render the underlying judgment non-final. That judgment is still final and appealable; parties can still file notices of appeal, and those notices are "good." Rule 59 or 60 motions merely toll the time to file a notice of appeal from that final judgment. Likewise, under this approach, a Rule 54(d)(2) motion would not render the underlying judgment non-final, and thus would not "overrule" *Budinich*.

I suppose that other "fixes" are possible — such as putting time limits on bringing or deciding Rule 54(d)(2) motions — but, frankly, every other "fix" that I've been able to identify would make an already overly complicated set of rules even more complicated. Maybe Ed can do better.

**Message 8 (from Cooper)**

I'm still confused. I thought the point of Rule 4(a)(4)(B) is that although there is a final judgment, the notice of appeal does not become effective until disposition of the last remaining timely motion described in 4(a)(4)(A). So under the present system, a fee motion made after final judgment is entered does not postpone the effect of a timely appeal notice, nor suspend the time for filing the notice, unless the district court acts under Rule 58(c)(2). The purpose of 58(c)(2), as I had thought, is to carry forward the basic proposition that sometimes it is better to take and resolve the appeal on the merits before deciding the fee questions. If we routinely suspend appeal time until disposition of the fee questions, we are making a real change.

That may be OK if the only purpose of *Budinich* is to establish a bright line; any old bright line will do. It may be OK if *Budinich* chose the wrong bright line — appeal on the merits before resolution of fee issues is so seldom useful that we are better off defeating the opportunity (absent possible entry of a Rule 54(b) judgment on everything but the fee issue — that depends on whether the fee demand is a "claim" separate from the "claim" on the merits). But don't we need to make those decisions in order to justify always treating a Rule 54(d)(2) motion in the same way as a Rule 59 motion?

**Message 9 (from Schiltz)**

It has been a couple of years since I read *Budinich* (and I'm heading out the door), but I recall it as a finality case — a case that held, in essence, that a motion for attorney's fees does not render the underlying judgment non-final. I could be wrong. . . . But all I meant to say is that *Budinich*'s holding regarding finality would not be affected by the proposed change. Whether we keep the discretionary system or go to an automatic system, the underlying judgments would still be final and appealable whether or not motions for attorney's fees were filed.

**Message 10 (from Cooper)**

You are right that *Budinich* is only a finality ruling. But the finality ruling explicitly entails the proposition that unless the Civil and Appellate Rules get in the way, the appeal on the merits must be taken within appeal time measured by the rules that apply to a final judgment that resolves the entire dispute. A Rule 59 motion addressed to the merits defers appeal time, and so on. A separate appeal must be taken after disposition of the fee motion. My concern is that the present structure rests on the view that sometimes it is good to have an appeal on the merits before the fee question is resolved, while at other times it is good to defer the appeal on the merits until the fee question is resolved. There are lots of ways that can be accomplished. But my understanding is that if we simply make a timely fee motion equal to a timely Rule 59 motion, the appeal on the merits will always be deferred until the fee motion is decided. Unless, perhaps, Rule 54(b) can be pressed into duty to recreate the discretionary authority to sever the appeals.

So still: do I miss something?

**Message 11 (from Schiltz)**

I don't think you've missed anything. My assessment is the same as yours.

If we made the change that I propose — propose in the sense of, "we should think about this," not in the sense of, "we should do this" — then it is likely that, in almost all cases, the appeal of the underlying judgment would wait until the motion for attorney's fees was decided, and then a single appeal would bring both decisions up to the court of appeals. And you are right that someone at sometime decided that there is a benefit to going forward with the appeal of the underlying judgment without awaiting disposition of the attorney's fees motion. The question with which I'm struggling — because I don't know enough to answer it — is exactly what this benefit is and in how many cases is it realized.

Suppose, for example, that we learned that Rule 54 motions for fees are almost always accompanied by Rule 58(c)(2) motions, and those Rule 58(c)(2) motions are almost always granted. That would argue in favor of moving forward with the proposal. Suppose, on the other hand, that we learned that the appeals of the underlying judgments almost always go ahead first, and decisions on attorney's fees are usually not made until months later, and either the courts or the parties reap substantial benefits by being able to move the appeal several months along before the attorney's fees motion is decided. That would argue against moving forward with the proposal. The point is that it is impossible to know whether the proposal is advisable without first getting a sense of the day-to-day realities of practice under Rules 54 and 58. One way to get a sense of these day-to-day realities is to talk to the members of our committees who are in court every day. There may be others; perhaps the FJC could help with this. . . .

**Message 12 (from Cooper)**

So we are in exactly the same place after all. Sorry to have been obtuse about understanding your position.

The empirical questions you suggest are the ones easiest to answer, at least in the sense that someone like the FJC could find the answers. The more uncertain questions may not deserve our concern. Suppose, for example, we found that district courts almost invariably act under Rule 58(c)(2), so all issues await a single appeal: how do we figure out whether that is a good thing? By looking at the affirmance rate as compared to remands that require further fee determinations and potential second appeals? Or suppose we found out that district judges almost never act under Rule 58(c)(2): does that tell us that the experienced judgment of district courts is that dual appeals are better (whatever appeals courts may thing about it), or only that lawyers and courts have not yet learned about all this? And so on.

There well may be a point at which we need not worry over-much about all of that. Getting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering. On the other hand, it would be interesting to know whether there are any signs of distress other than this one case. If we do go into all of this, perhaps we may be pardoned if we decide to do nothing about the parallel finality rule with respect to sanctions. At least some courts have adopted the *Budinich* rule for sanctions — pending sanctions proceedings do not suspend the finality of an otherwise final judgment on the merits. We do not now cover this in 58(c)(2) or 4(a)(4)(A). So why go into it?

**Message 13 (from Schiltz)**

These are all good questions. I'm inclined to think that, to use your words, "[g]etting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering," but I'm anxious to hear from lawyers and trial judges, who have a lot more relevant experience.



the marijuana was seen "near" to the residence does not necessarily imply a connection between the two, particularly when Lawson knew that the plants were in fact approximately 900 feet from the Carpenter residence. Unlike *Malin*, when the marijuana grew in a fenced-in yard directly adjacent to the house, the marijuana "near" the Carpenters' trailer was far enough away that no officer could draw a firm connection between the two, or between the marijuana and any other residence in the neighborhood for that matter. If the marijuana had been growing next to the trailer or in the patch of corn behind the trailer, the officers' belief in the warrant's validity might have been more reasonable. Furthermore, the road "connecting" the residence to the marijuana plants was in reality a dirt path leading from the Carpenters' trailer to a separate tractor path that may have served as the connection between the city road and a homestead behind the Carpenters' trailer that had burned down several years before. The good-faith exception cannot apply here because Lawson's affidavit was based on two extremely inconclusive connections between the marijuana and the house, and therefore Lawson could not have reasonably believed that probable cause existed.

Because there was no probable cause to justify the search and because I do not believe that a law enforcement officer could form the objectively reasonable belief that the warrant was valid when so little linked the Carpenter residence to the marijuana plants growing "near" the residence, I would reverse the district court and exclude the evidence gathered from the illegal search.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting.

I join Judge Moore's very persuasive dissent and add only the following. Given the sophisticated technologies that the police now have at their disposal, as well as the wide discretion that they currently enjoy, it is especially important that we are careful not to expand their powers beyond what is authorized by the Constitution. In this case, the Constitution has been set aside in the name of expediency. Regrettably, we have descended further down that slippery slope of post-hoc rationalization, where everything that the police do becomes acceptable when viewed in retrospect.

For the reasons set forth by Judge Moore and for these reasons, I respectfully dissent.




**Anika WIKOL, by and through her next friends, Murray and Nanette WIKOL, Plaintiff–Appellant/Cross–Appellee,**

**v.**

**BIRMINGHAM PUBLIC SCHOOLS BOARD OF EDUCATION, Defendant–Appellee/Cross–Appellant.**

**Nos. 02–1798, 02–2047.**

United States Court of Appeals, Sixth Circuit.

Argued Feb. 5, 2004.

Decided and Filed March 10, 2004.

**Background:** Parents of autistic child brought Individuals with Disabilities Act (IDEA) action against school district, seeking reimbursement for child's home-based educational program. The United States District Court for the Eastern District of Michigan, Marianne O. Battani, J., entered judgment on jury verdict awarding parents

portion of costs being sought. Cross appeals were taken.

**Holdings:** The Court of Appeals, Gilman, Circuit Judge, held that:

(1) appeal from underlying judgment was untimely, and

(2) denial of attorney fees was abuse of discretion.

Dismissed in part; vacated and remanded in part.

**1. Federal Courts ⇐668**

Thirty-day time limit for filing notice of appeal in civil case is mandatory and jurisdictional. F.R.A.P.Rule 4(a)(1)(A), 28 U.S.C.A.

**2. Federal Courts ⇐669**

When timely post-judgment motion for attorney fees is filed, and district court exercises its discretion to extend time for filing notice of appeal, motion for attorney fees is given same effect as motion to amend or alter judgment, i.e., time to file notice of appeal is reset until attorney fee motion is disposed of. Fed.Rules Civ. Proc.Rules 54, 58, 59, 28 U.S.C.A.; F.R.A.P.Rule 4(a)(4)(A), 28 U.S.C.A.

**3. Federal Courts ⇐669**

Notice of appeal, filed after district court's post-judgment ruling on attorney fee motion but before filing of motion to extend time for filing notice of appeal, was effective when filed, and thus deprived district court of authority to rule on extension motion; thus, appeal was timely only as to issues decided within thirty days of filing of notice of appeal. Fed.Rules Civ.Proc. Rules 54, 58, 28 U.S.C.A.; F.R.A.P.Rule 4(a)(1, 4), 28 U.S.C.A.

**4. Schools ⇐155.5(5)**

District court abuses its discretion with regard to attorney fee award in IDEA suit when it relies upon clearly erroneous factual findings, applies law improperly, or uses an erroneous legal standard. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

**5. Schools ⇐155.5(5)**

IDEA's fee-shifting provision is to be interpreted consistent with attorney-fees provision for civil rights actions. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B); 42 U.S.C.A. § 1988.

**6. Schools ⇐155.5(5)**

Parent of disabled child, who prevails in IDEA suit, is entitled to award of attorney fees unless there are special circumstances militating against such award. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

**7. Schools ⇐155.5(5)**

Parents' submission of allegedly false or misleading billings to school district did not constitute special circumstance that would justify denial of attorney fees after parents prevailed in their IDEA suit. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B).

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Before: DAVID A. NELSON, GILMAN, and ROGERS, Circuit Judges.

## OPINION

GILMAN, Circuit Judge.

Anika Wikol is a child with autism who is eligible for special education and related services under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400–1487. She resides within the Birmingham Public School District in Birmingham, Michigan. At issue in this case are her parents' attempts to secure reimbursement from Birmingham for Anika's educational program for the 1998–99 and 1999–2000 academic years.

The Wikols have appealed what they regard as an inadequate award by the jury. They also seek to recover attorney fees, costs, and prejudgment interest, all of which the district court denied. In its cross-appeal, Birmingham challenges the timeliness of the Wikols' appeal with respect to all but their claim for attorney fees and costs. For the reasons set forth below, we agree that the Wikols' appeal was untimely except for these latter items. We accordingly dismiss the bulk of the Wikols' claims for lack of appellate jurisdiction. With regard to their claim for attorney fees and costs, we vacate the decision of the district court denying such relief and remand for reconsideration.

## I. BACKGROUND

When Anika was approximately two-and-a-half years old, her parents enrolled her in the preprimary impaired program in the Birmingham public schools. The Wikols soon became dissatisfied with the program. They consequently removed Anika from the public school system and established a full-time home-based alternative program recommended by the Lovaas Institute, a non-profit organization that specializes in educating children with autism. After approximately three years in the Lovaas home-based program, the Wikols decided to partially transition Anika back into the Birmingham public schools.

An "individualized education program team" comprised of the Wikols and members of Anika's school thus convened, pursuant to the IDEA, to develop an individualized education program (IEP) for Anika. At the meeting, Birmingham and the Wikols could not agree upon Anika's educational program because, according to the Wikols, Birmingham refused to (1) provide Anika with an IEP that would support her home-based education, and (2) reimburse the Wikols for their past expenses in providing Anika with the Lovaas program.

This impasse led the Wikols to request a due process hearing pursuant to 20 U.S.C. § 1415(f). The due process hearing did not occur, however, because the parties reached a settlement. Under the settlement agreement, dated April 8, 1998, Birmingham agreed to pay the Wikols $115,000 "as reimbursement for necessary educational services actually incurred or reasonably anticipated to be incurred during the 1994–95 through 1997–98 school years." The agreement further provided that Birmingham and the Wikols would meet to determine Anika's IEP for the following school years, and that if a Lovaas or Lovaas-style program were implemented, Birmingham would pay "one-half of the costs of any such program." Despite the settlement for these prior years, disputes continued between the Wikols and Birmingham regarding reimbursement for the Lovaas program in the 1998–99 and 1999–2000 school years.

In December of 1999, the Wikols again requested a due process hearing to resolve the outstanding reimbursement issues. A local hearing officer was appointed in early 2000, but Birmingham objected to the hearing officer's jurisdiction and requested that the matter be dismissed. Birmingham and the Wikols ultimately stipulated

to the dismissal of the Wikols' request for a due process hearing regarding the two school years in question, opting instead to "seek judicial resolution of the issues."

The Wikols brought suit in May of 2000 against Birmingham in the United States District Court for the Eastern District of Michigan. Eight months later, the Wikols moved for summary judgment, arguing that they were entitled to reimbursement from Birmingham for Anika's home-based Lovaas program. The district court granted the Wikols' motion in part with regard to the 1998–99 school year. It concluded that, pursuant to the settlement agreement, Birmingham owed the Wikols fifty percent of the "costs" of the Lovaas program, but that a genuine issue of material fact existed as to what constituted those costs. With regard to the 1999–2000 school year, the district court denied the Wikols' motion for summary judgment in its entirety.

The case then proceeded to trial, at the end of which the jury awarded the Wikols approximately $5,000 for costs incurred in providing Anika's home-based program for the 1998–99 school year. As for the 1999–2000 academic year, the jury determined that Birmingham's school-based educational program had provided Anika with a "free appropriate public education," and therefore declined to award the Wikols any reimbursement for that year.

Following the district court's entry of judgment on March 27, 2002, the Wikols timely moved for the recovery of attorney fees and costs pursuant to 20 U.S.C. § 1415, which the district court denied. The Wikols appeal from the district court's partial denial of their motion for summary judgment, the jury's verdict concerning the 1999–2000 school year, the district court's denial of their motion for attorney fees and costs, and the district court's denial of prejudgment interest. Birmingham cross-appeals, challenging the timeliness of the Wikols' appeal as to all issues other than their claim for attorney fees and costs.

## II. ANALYSIS

### A. Timeliness of the Wikols' appeal

We must determine, as a threshold issue, whether we have jurisdiction to hear the bulk of the issues raised in this appeal. On cross-appeal, Birmingham argues that we do not have such jurisdiction because the Wikols filed their notice of appeal late, outside of the time limits imposed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

[1] Determining the timeliness of the Wikol's notice of appeal requires an analysis of the interplay between Rule 4 of the Federal Rules of Appellate Procedure and Rules 54, 58, and 59 of the Federal Rules of Civil Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides the generally applicable limitation that a notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered." A litigant's compliance with this "mandatory and jurisdictional" requirement is of critical importance. 16A Wright et al., Federal Practice and Procedure § 3950.1 (3d ed.1999).

Exceptions to the 30–day rule exist, however. If a party timely files any one of the six post-judgment motions enumerated in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, other than the one for attorney fees, the time to file an appeal automatically runs for all parties from the entry of the order disposing of the last such remaining motion. The post-decisional motion relevant to this case is of course the one for attorney fees, which was filed pursuant to Rule 54 of the Federal Rules of Civil Procedure. When a liti-

gant files a Rule 54 motion for attorney fees, the time to file a notice of appeal will run from the disposition of that motion "*if* the district court extends the time to appeal under Rule 58." Fed. R.App. P. 4(a)(4)(A)(iii) (emphasis added). The plain language of Rule 4 thus stipulates that in order for the time to file an appeal to be tolled when a party moves for attorney fees under Rule 54, the district court must affirmatively act pursuant to Rule 58 of the Federal Rules of Civil Procedure. Rule 58, in turn, provides that

> [w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act *before* a notice of appeal has been filed and has *become effective* to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Fed.R.Civ.P. 58(c)(2) (emphasis added).

Rule 58's reference to "a timely motion under Rule 59" is initially puzzling, given that Rule 59 neither mentions the filing of a notice of appeal nor refers back to Rule 58. A number of cross-references are necessary to divine Rule 59's place in the Rule 4, 54, 58, 59 quagmire. The only part of Rule 59 that appears relevant to the timeliness of a notice of appeal is 59(e), which provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." If we then look back to Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, we see that a Rule 59 motion to alter or amend the judgment is one of the five enumerated motions that automatically resets the time to file a notice of appeal "from the entry of the order disposing of the . . . motion."

[2, 3] We therefore conclude that when a timely motion for attorney fees is filed under Rule 54, and the district court exercises its discretion under Rule 4(a)(4)(A) to extend the time for filing a notice of appeal, the motion for attorney fees is given the same effect as a Rule 59 motion to amend or alter the judgment, which, pursuant to Rule 4(a)(4)(A), automatically resets the time to file a notice of appeal until the newly characterized Rule 59 motion, formerly a Rule 54 motion for attorney fees, is disposed of. *See Mendes Junior Int'l Co. v. Banco do Brasil*, 215 F.3d 306, 312 (2d Cir.2000) ("Rule 58 expressly describes some of the temporal limitations on the district court's authority to order that a timely Rule 54 fee motion have the same effect as a timely motion under, for example, Rule 59 (which we will sometimes refer to as a 'Rule 58/54/59 order')."). Rule 58 imposes no time limit on when the district court must rule on the Rule 54 motion, except that it must act *before* "a notice of appeal has been filed and has become effective . . . ." This is the nub of the problem, because here the district court acted on the Wikols' Rule 54 motion *after* they had filed their notice of appeal.

On March 22, 2002, the Wikols moved for attorney fees and costs, which the district court denied on May 15, 2002. The Wikols then attempted to take advantage of the tolling provision of Rule 4(a)(4) in a May 24, 2002 motion to extend the time for filing a notice of appeal. Their motion provided in pertinent part as follows:

> 4. Plaintiffs hereby request that pursuant to Fed.R.Civ.P. 58, the Court order that the parties' motions for costs and attorneys' fees have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.
>
> 5. In the alternative, Plaintiffs request that pursuant to Fed.R.Civ.P. 58 and 59(e), the Court amend its May 15, 2002 Order to include a provision stating that the parties' March 22, 2002 motions to assess fees and costs shall be given the

> same effect under Rule 4(a)(4) of the Federal Rules of [Appellate] Procedure as a timely motion under Rule 59.

While this motion was pending in the district court, the Wikols filed their notice of appeal on June 14, 2002. On July 11, 2002, the district court granted the Wikols' motion for an extension of time in which to file a notice of appeal, ruling in pertinent part that

> the court grants the plaintiff's request and pursuant to Fed.R.Civ.P.[ ] 58, the March 22nd motion for costs and attorney fees shall have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Therefore, the time for filing a notice of appeal shall run from the date of the entry of the Court's order on the motion for attorney fees, May 15, 2002.

Birmingham argues that the district court's July 11, 2002 grant of an extension of time to file the notice of appeal was ineffective because it was entered *after* the Wikols filed their June 14, 2002 notice, contrary to the language contained in Rule 58 of the Federal Rules of Civil Procedure that limits the district court's power to act to the time "*before* a notice of appeal has been filed and has become effective . . . ." (Emphasis added.) It contends that when the Wikols filed their notice of appeal on June 14, 2002, the notice became effective immediately; therefore, "[b]y the express terms of Rule 58, the District Court had no authority, on July 11, 2002, to enter its Order Extending the Time for Filing the Notice of Appeal."

In response, the Wikols argue that although they had *filed* their notice of appeal before the district court entered its Rule 58/54/59 order, "it is indisputable that the notice of appeal as to the underlying judgment had not yet become effective." They reason that because the notice of appeal was filed outside of Rule 4(a)(1)'s prescribed time period, it could only become effective upon some action of the district court triggering one of the exceptions to the 30-day limit. The Wikols conclude that their notice of appeal "became effective upon the district court's entry of its July 11, 2002 Memorandum and Order." For the reasons that follow, we respectfully disagree.

The key issue is whether the notice of appeal became effective prior to the time the district court issued its July 11, 2002 order. We look to Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure for guidance as to the meaning of the word "effective." This portion of Rule 4 provides as follows:

> If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Rule 4(a)(4)(B)(i) does not apply here because the Wikols' notice of appeal was filed *after* the entry of the order disposing of their Rule 54 motion, not before. The rule suggests, however, that the concept of "effectiveness" is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided. Supporting this interpretation are the advisory notes to Rule 4, which explain that

> [a] notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals . . . . [A] notice of appeal will ripen

> into an effective appeal upon disposition of a posttrial motion....

Fed. R.App. P. 4(a)(4) advisory committee's notes.

Based upon this understanding of the word "effective," we hold that the Wikols' notice of appeal was effective on the day that it was filed, given that the judgment had been entered and that no motions that automatically toll the time to file a notice of appeal were pending. We therefore agree with Birmingham that the district court's July 11, 2002 order did not comply with the time requirements of Rule 58.

As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. *See generally,* Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge Over Troubled Water—Or Just Another Trap?,* 157 F.R.D. 587, 605 (1994) (noting that the amended Rule 4 "concerning the effect of post-judgment motions for attorney's fees" on the timeliness of a notice of appeal creates a "jurisdictional trap."). The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

In any event, we have no choice but to dismiss the Wikols' appeal as untimely with respect to all but their claim for attorney fees and costs. "[E]ven where the attorney's fee motion is filed before the notice of appeal, under the wording of [Rule 58], that motion would not extend the appeal time unless the district court also extended the appeal time before the notice of appeal was filed." Servay at 606. This leaves us with the remaining issue regarding the Wikols' request for attorney fees and costs, as to which the appeal was indisputably timely. We now turn our attention to this issue.

### B. The district court's denial of attorney fees and costs to the Wikols

Following the district court's entry of judgment, the Wikols filed a motion for the recovery of attorney fees and costs pursuant to 20 U.S.C. § 1415. The district court denied the Wikols' motion, reasoning that although they were technically the prevailing parties, they did not prevail on the bulk of their case and they were therefore not entitled to attorney fees or costs. On appeal, the Wikols argue that the district court erred because they were undeniably the prevailing party and because there were no "special circumstances" justifying a denial of fees.

The IDEA provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B). To be considered a "prevailing party" for the purpose of attorney fees, a plaintiff must "succeed on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit." *Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 526 (6th Cir.2003) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The district court found that the Wikols were a prevailing party because they had obtained a favorable judgment regarding reimbursement for Anika's schooling during the 1998–99

academic year. Birmingham does not contest the Wikols' prevailing-party status.

[4] We review a district court's decision of whether to award attorney fees under the "abuse of discretion" standard. *Phelan v. Bell*, 8 F.3d 369, 373 (6th Cir. 1993). A district court abuses its discretion when it relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard. *Id.*

[5, 6] The IDEA's fee-shifting provision is to be interpreted consistent with 42 U.S.C. § 1988, the attorney-fees provision for civil rights actions. *Id.* Sixth Circuit case law requires that a district court award attorney fees to a prevailing party where no special circumstances militate against such an award. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir.2001) ("[W]e have previously observed that although the Supreme Court has held [that] ... it is within the district court's discretion to award attorney's fees under section 1988, in the absence of special circumstances a district court not merely may but must award fees to the prevailing plaintiff.") (quotation marks and citation omitted).

The Ninth Circuit has adopted a two-prong test to determine whether special circumstances exist, presumably in an effort to define "special circumstances" more precisely. Under this test, a court must consider "(1) whether awarding fees would further the congressional purpose in enacting [the IDEA], and (2) the balance of the equities." *Barlow–Gresham Union High School v. Mitchell*, 940 F.2d 1280, 1285 (9th Cir.1991). Although the use of such a test gives the appearance of a systematic approach to defining "special circumstances," we question whether the Ninth Circuit's factors, due to their vagueness, render the test any more useful than the customary case-by-case analysis.

The Fourth Circuit has rejected the *Mitchell* test, reasoning that it "contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes." *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 264 n. 2 (4th Cir. 1998) (holding that an attorney-parent's representation of his own daughter in an IDEA proceeding constituted special circumstances that justified the denial of an award of attorney fees). *But see Borengasser v. Arkansas State Bd. of Educ.*, 996 F.2d 196, 199 (8th Cir.1993) (holding that the district court abused its discretion in not awarding attorney fees to the parents of a disabled child in an IDEA action where the school district had argued a lack of effort to resolve the dispute on the part of the parents' attorney). We agree with the Fourth Circuit's approach that attorney-fees awards should be analyzed on a case-by-case basis, without attempting to apply any predetermined formula.

[7] Birmingham argues that the Wikols' allegedly "false and misleading" billings to Birmingham constitute special circumstances that justify denying their request for attorney fees. But this court has rejected the argument that a plaintiff's bad acts are special circumstances warranting the denial of attorney fees. *Price v. Pelka*, 690 F.2d 98, 101 (6th Cir. 1982) (holding that the plaintiff's perjury was not a special circumstance that warranted a denial of attorney fees in a housing discrimination case). Given this precedent, the record does not support a finding of special circumstances warranting the denial of attorney fees to the Wikols, even if we assume that some billings were false or misleading. We therefore remand the issue of attorney fees and costs to the district court.

On remand, the district court should take into consideration the extent to which the Wikols succeeded on their claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.") The Wikols may well receive reimbursement for only a fraction of their total legal fees under the *Eckerhart* standard but, under this court's precedents, their "limited success" should not have acted as a total bar to recovery.

Birmingham also argues that the Wikols are barred from attorney fees under 20 U.S.C. § 1415(i)(3)(D), which provides that a plaintiff will not be awarded attorney fees where he or she rejects a written settlement offer and the court finds that the relief obtained by the plaintiff is not more favorable than the offer of settlement. The settlement-offer exception to an award of attorney fees might indeed bar the Wikols from recovery, but the district court did not make the requisite finding that the relief obtained by the Wikols was less favorable than whatever offer Birmingham may have made. On remand, the district court should therefore consider 20 U.S.C. § 1415(i)(3)(D)'s potential applicability to this case.

## III. CONCLUSION

For all of the reasons set forth above, we conclude that the Wikols' notice of appeal was untimely as to the bulk of their claims. We therefore have jurisdiction only over the district court's denial of attorney fees and costs, which decision we vacate and remand with instructions to reconsider.

**Raymond ZIMMERMAN, Individually and on behalf of a Class of Similarly Situated Soybean Farmers, et al., Plaintiffs–Appellants, Cross–Appellees,**

v.

**CHICAGO BOARD OF TRADE, Patrick H. Arbor, Thomas R. Donovan, et al., Defendants–Appellees, Cross–Appellants.**

**Nos. 02–3844, 02–3997.**

United States Court of Appeals, Seventh Circuit.

Argued Sept. 25, 2003.

Decided Feb. 9, 2004.

**Background:** Soybean farmers brought class action against board of trade, alleging that board violated Commodity Exchange Act in adopting Emergency Resolution requiring holders of futures contracts in soybeans to reduce their positions. At trial, following close of evidence, the United States District Court for the Northern District of Illinois, Wayne R. Andersen, J., granted judgment as matter of law to board. Farmers appealed.

**Holdings:** The Court of Appeals, Cudahy, Circuit Judge, held that:

(1) board did not act in bad faith in adopting Emergency Resolution, and

(2) there was no evidence that board adopted Emergency Resolution to advance directors' own private interests.

Affirmed.

**1. Federal Courts ⇐698.1**

Motion to strike matter from appellate record on ground that it is not proper-




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6/7/04

04-AP-C

AVE MARIA
SCHOOL OF LAW

May 24, 2004

Peter G. McCabe
Secretary
Standing Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(a)(4)(A)(iii) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

In *Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), the U.S. Court of Appeals for the Sixth Circuit addressed an interesting issue of federal appellate procedure, expressly inviting consideration by the Advisory Committee on Appellate Rules. *See id.* at 610. I write at this time to elaborate on the issue and to offer proposals.

Ordinarily, a party to a civil action must file a notice of appeal within 30 days of entry of the order or judgment to be challenged on appeal. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1). However, if a party timely files one of the six post-judgment motions listed in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A). The motions in question are: (1) a Rule 50(b) motion for judgment as a matter of law; (2) a Rule 52(b) motion to amend the judgment or to make additional factual findings; (3) a Rule 54 motion for attorney fees; (4) a Rule 59 motion to alter or amend the judgment; (5) a Rule 59 motion for a new trial; and (6) a Rule 60 motion for relief from the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(i)-(vi).

At issue in *Wikol* was the effect that a timely post-judgment motion for attorney fees had on the time to appeal from the underlying judgment. Under Rule 4(a)(4)(A)(iii), the time to appeal such a judgment does not begin to run until after the district court disposes of a timely motion "for attorney fees under Rule 54 *if the district court extends the time for appeal under*



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*Rule 58*." Fed. R. App. P. 4(a)(4)(A)(iii) (emphasis added). Because of the presence of the emphasized language, a timely motion for attorney fees, unlike the other five motions listed in Rule 4(a)(4)(A), does not automatically prolong the time for appeal from the judgment. Rather, the motion will prolong the time for appeal if, and only if, the district court affirmatively acts. The basis for affording such discretion to a district court is that the attorney-fees determination might be best left until after the appeal concludes, especially when the decision on appeal could obviate the need to address the attorney-fees issue in the first place. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

When a district court confronted with a motion for attorney fees acts to extend the time for appeal from the underlying judgment, a court of appeals must work through a number of interrelated provisions to determine whether the action had the desired effect. The process begins, of course, with Rule 4(a)(4)(A)(iii). Read in conjunction with Rule 4(a)(4)(A), the provision states that a timely motion for attorney fees will delay the time for appeal "if the district court extends the time for appeal under Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii). First and foremost, therefore, the court must determine whether the motion was timely, which involves a review of Rule 54(d)(2)(B) (requiring that such a motion for attorney fees be brought within 14 days after entry of judgment). If the motion was indeed timely, the court must then consult Rule 58 to understand the manner in which a district court is expected to effect an extension of the time for appeal. In particular, Rule 58(c)(2) provides that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59." Fed. R. Civ. P. 58(c)(2). Given Rule 58(c)(2)'s reference to Rule 59, the court must return to Rule 4(a)(4)(A) to ascertain the effect of a timely Rule 59 motion. *See* Fed. R. App. P. 4(a)(4)(A)(v).

Only after examining the various provisions can a court of appeals derive the governing principle: a timely motion for attorney fees will prolong the time to appeal from the underlying judgment only if the district court renders an order to that effect before a notice of appeal has been filed and becomes effective. The question for the Committee is whether the current framework imposes unnecessary difficulty upon the courts of appeals, as well as the litigants. The Sixth Circuit in *Wikol* made its view on the matter abundantly clear:

> As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

360 F.3d at 610 (internal citation omitted) (emphasis in original).

If the Committee finds merit in the *Wikol* court's sentiment, there are various alternatives for reform. Of course, motions for attorney fees could be easily synchronized with the other Rule 4(a)(4)(A) motions were the "if the district court extends the time to appeal under Rule 58" language of Rule 4(a)(4)(A)(iii) simply abrogated. But such an approach would fly in the face of sound policy by depriving the district court of the flexibility to take a wait-and-see approach in connection with an attorney-fees determination. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

A preferable solution would bring motions for attorney fees into line with other Rule 4(a)(4)(A) motions, while permitting district courts to continue determining the ultimate effect of a timely motion for attorney fees. Under this approach, Rule 4(a)(4)(A)(iii) would be amended to shift the current default rule—that a timely motion for attorney fees has no effect on the time to appeal—to one under which a timely motion for attorney fees *automatically* extends the time for appeal. If, however, the district court would prefer to consider the motion for attorney fees only after the appeal of the underlying judgment concludes, it would retain discretion to do so. Below is proposed language reflecting this suggested amendment:

**(4) Effect of a Motion on a Notice of Appeal.**

**(A)** If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * *

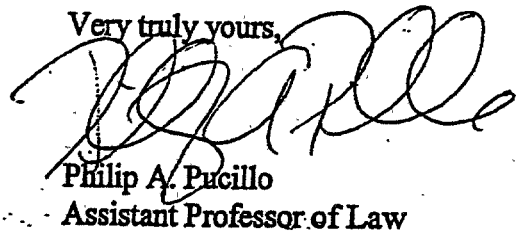
(iii) for attorney's fees under Rule 54 ~~if the district court, extends the time to appeal under Rule 58~~ unless the district court orders that the motion shall not affect the time to appeal, in which event the time to appeal shall run from the later of the date of such order or the order disposing of the last remaining motion under this Rule 4(a)(4)(A);

The revised provision must set forth some point at which the time for appeal will begin to run in the event that the district court defers adjudication of a timely motion for attorney fees until after conclusion of the appeal from the judgment. It follows that the district court's order to that effect would trigger the time for appeal. At the same time, the revised provision must account for the possibility that other Rule 4(a)(4)(A) motions will be pending when the district court enters its order. If such motions are indeed pending, the time to appeal cannot run until the district court has entered its order disposing of the last such remaining motion. *See* Fed. R. App. P. 4(a)(4)(A).

I note in closing that the proposed amendment to Rule 4(a)(4)(A)(iii) would require coordination with the Advisory Committee on Civil Rules. Specifically, Rule 58(c)(2) (providing that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59.") would be irreconcilable with the revised framework.

I hope that the Committee finds this analysis to be helpful.

Very truly yours,



Philip A. Pucillo
Assistant Professor of Law

Enclosure

## EVIDENCE RULE 502

The attached materials reflect the Evidence Rules Committee's work on a proposed Evidence Rule 502. The rule would govern some aspects of waiving attorney-client privilege and work-product protection. It does not address creation of privilege or protection, not even with respect to the confidentiality that must attend communications between attorney and client to create the privilege. It does not address other privileges and it does not address professional obligations of confidentiality that may apply even if privilege has been waived.

Although framed as an Evidence Rule, the Evidence Rules Committee is proposing affirmative enactment by Congress. The Rules Enabling Act, § 2074(b), provides: "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." The basic enterprise is to use the Enabling Act process to publish a proposed rule for public comment, improve the rule based on that comment, obtain the affirmative approvals required by Enabling Act, and then to seek enactment by affirmative act of Congress rather than the usual approach of waiting for a period to pass with no Congressional disapproval.

It appears that the Evidence Rules Committee may request that the Standing Committee approve publication of the rule for comment this summer. Parts of the rule bear directly on issues that were studied intensively by the Civil Rules Committee in connection with the e-discovery rules, and particularly impending Civil Rule 26(b)(5)(B). Because of this bearing on the Civil Rules, the Evidence Rules Committee graciously invited several members and staff of the Civil Rules Committee to attend and participate in their deliberations last April. Their meeting began with a "mini-conference" at Fordham Law School and then moved to regular committee deliberations.

The attached materials show that the Evidence Rules Committee began with a draft that reached out to prescribe rules for state-court proceedings as well as for federal proceedings. This approach was scaled back as the Committee worked through outside comments, the mini-conference, and its own views. The present draft still reaches the effects of federal proceedings on state courts, which raises federalism issues, but no longer undertakes other directions for state proceedings.

The proposed rule addresses separate aspects of privilege waiver. One question the Evidence Rules Committee discussed is whether it might be better be to divide the proposal into two, or perhaps three, separate rules.

One part of the proposed rule, subdivision (c), deals with "selective waiver" by disclosure of privileged or protected materials to government investigators. Most federal courts hold that disclosure to government investigators is a waiver, unless perhaps there is an explicit agreement preserving the privilege. Subdivision (c) would provide that disclosure to federal investigators does not effect a waiver as to non-governmental persons or entities, without any need for a protective agreement. State courts would be bound by the no-waiver rule. This proposal is caught up with the great and increasing controversy surrounding government efforts to obtain privileged or protected materials from companies or individuals under investigation by such means as making waiver a mark of cooperation. It will encounter lively debate, but this proposal does not bear directly on Civil Rules matters.

Subdivision (a) addresses subject-matter waiver "in federal proceedings." It assumes that there has been a waiver by disclosure, and borrows the "ought in fairness" standard of Evidence Rule 106 to determine the extent to which disclosure of one thing requires waiver as to something not disclosed. This rule is intended to apply only to rulings made in a federal proceeding, but it is not clear whether it applies only to a disclosure made in connection with the federal proceeding or to any disclosure, including a disclosure in state-court proceedings. The most likely meaning of "in federal proceedings" is that this part of the rule applies to federal-court consideration of any waiver by disclosure. A waiver by disclosure in state-court discovery, for example, would work a subject-

matter waiver in a federal proceeding only under the federal fairness standard, no matter whether the state court would apply subject-matter waiver and no matter whether other state courts would follow suit.

Subdivision (b) provides that inadvertent disclosure in connection with federal litigation or federal administrative proceedings does not waive attorney-client privilege or work-product protection so long as the holder of the privilege or protection took reasonable steps to prevent disclosure and took reasonably prompt measures to rectify the error once the holder knew or should have known of the disclosure. The holder also must follow the procedures of Civil Rule 26(b)(5)(B) if they apply. This non-waiver rule applies to nonparties, and binds state courts.

This provision resembles models that were considered in preparing the e-discovery amendments before the Civil Rules Committee decided not to pursue a rule directly addressing what would or would not constitute a waiver, given the limits of the Rules Enabling Act and the role of the Evidence Rules. It has the advantage of reflecting a strong line of cases in current practice. But it raises some of the same questions identified by some members of the Standing Committee in connection with the considerably more limited e-discovery rule on privilege waiver. For example, the waiver determination may turn on resolution of obscure fact questions as to reasonable efforts to screen discovery responses and the time when a producing party "knew or should have known of the disclosure." The proposed rule affords no protection to a receiving party that has relied on the disclosed information in preparing its case, and it may be subject to misuse by efforts to recapture information asserted at times or in ways that disrupt orderly trial preparation. One issue that may merit exploration is whether some of these difficulties might be reduced if the rule provided that there is no subject-matter waiver, and no waiver as to use by anyone in other proceedings, but that there is waiver as to use by any party in the present proceeding.

Subdivision (e) addresses the effect of an agreement between parties on preserving privilege or protection, and subdivision (d) addresses the effect of a court order adopting such an agreement. Subdivisions (d) and (e) work together and traverse terrain made familiar in developing the e-discovery rules. Subdivision (e) provides that an agreement on the effect of a disclosure is binding on the parties to the agreement, but does not bind other parties unless the agreement is incorporated in a court order. Subdivision (d) provides that a federal-court order incorporating an agreement of the parties before the court that disclosure in connection with litigation pending before the court does not waive attorney-client privilege or work-product protection "governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court." These provisions enable agreements on such approaches as the "quick peek" or "claw-back," tailored by the parties to their particular needs. Party agreements are common now, despite the lack of assurance of protection against nonparties. Adoption of these provisions will encourage more frequent agreements and will provide a strong incentive to secure adoption by court order. The likely result will be that subdivision (b) is displaced by court-ordered party agreements in almost all litigation with intensive discovery.

Finally, subdivision (f) defines attorney-client privilege and work-product protection by reference to "applicable law."

A review of Rule 502 by Gregory Joseph is attached. It provides helpful insights into the many strengths of the draft and suggests some questions that deserve to be addressed.

## PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation

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

or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

[( c ) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits

or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated

into a court order.

(f) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and

2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

**Committee Note**

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery

(however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. For example, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

**Subdivision (a).** The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which

fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

**Subdivision (b).** Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

**Subdivision (c)**: Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver

of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.

**Subdivision (d).** Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the

consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

**Subdivision (e).** Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes

clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

**Subdivision (f).** The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: Consideration of Rule Concerning Waiver of Attorney-Client Privilege and Work Product
Date: March 22, 2006

At its last meeting, the Committee reviewed two versions of a rule that would govern waiver of privileges and work product. The Committee agreed to continue its consideration of a possible rule on this subject. The Committee resolved that the questions of waiver of privilege and work product were of the utmost importance, and that disuniformity in these waiver rules imposed unnecessary cost and inefficiency in litigation.

In the interim, the Chair of the House Committee on the Judiciary, Congressman Sensenbrenner, issued a letter requesting that the Judicial Conference "initiate a rule-making on forfeiture of privileges." Of course, a rule of privilege cannot become law under the ordinary rulemaking process. Privilege rules must be enacted directly by Congress. Congressman Sensenbrenner's letter recognizes this fact. He requests the rulemaking process to proceed in the ordinary fashion, however, with the idea that whatever comes out of that process will be reviewed by Congress and directly enacted if acceptable.

In light of these developments, the Reporter and Consultant drafted a Rule 502, and a Committee Note. That Rule and Note are included in the hearing materials behind Tab 1 of the agenda book, and they are also attached as an appendix to this memorandum.

**Rule 502 and the accompanying note are intended to capture the discussion at the previous Committee meeting, at which there appeared to be substantial agreement on the following fundamental principles:**

1. Uniform rules on waiver are required, so that parties are able to predict in advance the consequences of litigation conduct.

2. The waiver rules must be uniform at both the federal and the state level. If, for example, conduct does not constitute a waiver in federal practice but does so in a state court, parties would have no assurance that information protected by privilege or work product will remain protected.

3. Subject matter waiver should be limited to situations where fairness requires such an extreme result.

4. Parties should be able to, and encouraged to, cooperate with government investigations by turning over protected material without risking a finding that the cooperation constitutes a waiver in private litigation.

5. When disclosure is by mistake, a waiver should be found only if the disclosing party was negligent in production and in failing to seek return of the protected material.

6. In addition to the protection provided by a default rule, litigants should be able further to reduce the costs of pre-privilege review by additional terms contained in court-entered confidentiality orders; for such orders to be protective, they must preclude a finding of waiver in any court.

This memorandum is in five parts. Part One is Ken Broun's memo on the case law concerning waiver (with a few Reporter's comments interspersed). Part Two is Ken's memo concerning the authority necessary for implementing a waiver rule that will bind state courts. Part Three is Ken Broun's memo on the justification for a fairness–based subject matter waiver test for work product. Part Four provides a discussion of comments received on the Rule so far. Part Five discusses and explains two important drafting choices made in preparing the draft rule for the Committee's consideration.

## I. Ken Broun's Memo on Case Law on Waiver of Privilege

Waiver of privilege problems frequently arise in large document litigation. The issues usually involve the attorney-client privilege, but may involve other privileges as well. There are at least three distinct, but sometimes overlapping, problems:

1. The effect on a privilege of an inadvertent production of a privileged document ["inadvertent waiver"].

2. The scope of the waiver of a document produced either intentionally or inadvertently ["scope of waiver"].

3. The effect on future privilege claims of the production of documents in the course of a government investigation, either with or without a confidentiality agreement entered into with the government agency ["selective" or "limited" waiver referred to in this memorandum as "selective waiver"].

Concern that privilege may be waived even by an unintended disclosure of a document will cause counsel and his or her staff to spend countless hours reviewing documents in large volume cases to insure against inadvertent disclosure. The rule applied by many courts that waiver of privilege by disclosure of a single document is a waiver of privilege with regard to all communications dealing with the same subject matter will cause counsel to guard against disclosure of privileged documents even though counsel may not really care if a particular document is disclosed to opposing counsel. These rulings raise the cost of pre-production privilege review to astronomic proportions — in the thousands of dollars for a basic action, in the millions for a major action with electronic discovery.

The likelihood that disclosure of documents to a government agency may result in waiver of privilege as against other parties may limit a party's willingness to cooperate fully with a government investigation.

With regard to the inadvertent waiver and scope of waiver issues, the cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

With regard to selective waivers, most federal circuits hold, at least without a confidentiality agreement, that a party may not selectively waive a privilege. In other words, disclosure to a government agency literally destroys the privilege. One circuit, the Eighth, holds to the contrary. The other circuits are split on whether the existence of a confidentiality agreement with the government agency preserves the privilege against the rest of the world.

This memorandum seeks to flesh out the dimensions of these interrelated problems, to discuss the case law dealing with the issues, and to propose some statutory models intended to ease the burden on the courts and counsel.

***Inadvertent waiver and scope of waiver: the problem***

The best formal statement of these two related problems is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 73; *Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures, and this memorandum and the draft Rule 502 continue that use of terminology.

Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th) § 11.446, setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6) and 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For example, such orders may deal only with inadvertent disclosures. Questions may and do arise under

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[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1995 WL 411805 at * 4 (Del. Super.Ct. Mar. 17, 1995), where the court quotes the order as stating:

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

such orders as to what is an inadvertent disclosure. See *Baxters Travenol Labs., Inc. v. Abbott Labs.*, 117 F.R.D. 119 (N.D. Ill. 1987) (disclosure not inadvertent under the circumstances).

Thus, an order requiring the return of an inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure, and it still requires counsel to conduct an extensive pre-production review for privilege.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the case law on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

***Inadvertent waiver***

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent disclosure may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing Dunn Chemical Co. v. Sybron Corp., 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the approach that analyzes

the precautions taken, noting that if precautions were adequate "the disclosure would not have occurred." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B.* 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness."

The court in *Hartford Fire* found there had been waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege).

For more detailed descriptions of the various approaches see John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law*, 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U.Ill. L. Rev. 643, 659.

***The scope of waiver based upon disclosure of documents during the litigation process***

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, supra, at 1636].

*International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley*, other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating, "the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result in a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States*, 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1627-28):

> Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers.

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641- 42):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.

***Selective Waiver***

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency. Other courts

have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement with the federal agency. The First, Third, Fourth, Sixth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost. Cases from the Third and Sixth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement.

*Cases permitting selective waiver*

The court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a "separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred." 572 F.2d at 611. The court explained, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . ." Id.

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis 1979), the court held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege. See also *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

*General rejection of selective waiver*

In *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), the court held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been disclosed voluntarily to the DOD pursuant to a regular audit. The same documents were sought as part of an IRS investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress." 129 F.3d at 685. The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty." Id.

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**Reporter's Comment:** The *MIT* rationale ignores the fact that while regulators might have the "means to secure the information they need," those "means" may 1) require substantial effort and cost, and 2) may never lead to the recovery of privileged information. Judge Boggs has critiqued the *MIT* rationale as follows:

> The court, as well as other courts addressing this question, argues that the government has "other means" to secure the information that they need, while conceding that those other means may consume more government time and money. *Massachusetts Inst. of Tech.*, 129 F.3d at 685. Presumably, the court is referring to search warrants or civil discovery. It should be emphasized, however, that the government has no other means to secure otherwise privileged information. That the documents or other evidence sought is privileged permits the target of an investigation to refuse production through civil discovery, to quash any subpoena duces tecum, or to prevent the admission of the privileged information even by the government. The only way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it. The court's argument about the adequacy of other means, suggesting that the only difference between them and voluntary disclosure is cost, requires the premise that all privileged information has a non-privileged analogue that is discoverable with enough effort. That premise, however, does not hold.

*In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting). Thus, a waiver rule that promotes voluntary disclosure — without resort to these other means, which are unlikely to be successful anyway — promotes efficiency and saves expense on the part of the government.

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In *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the

privilege had been waived by the SEC disclosure. The court stated that "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." 665 F.2d at 1221. The court added that the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment." Id.

*Rejection of selective waiver even with a confidentiality agreement*

Two prominent cases, from the Third and Sixth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC regulations providing that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized." 951 F.2d at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978). The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted (951 F.2d at 1425):

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in Diversified. . . .
>
> The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto

the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, see *Permian*, 665 F.2d at 1221, and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.

The court also noted that in 1984, Congress had rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency. 951 F.2d at 1425, citing SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934, in 16 Sec.Reg. & L.Rep. at 461 (March 2, 1984). A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act. See proposed 17 C.F.R. § 205.3 (e)(3), http://www.sec.gov/rules/final/33-8185.htm (Viewed Oct. 5, 2005). The Commission indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of the Commission's concern about its authority to enact such a provision. In its final report, the Commission reiterated its position that there were strong policy reasons behind such a provision and that, because of those policy reasons, it still intended to enter into confidentiality agreements. Id.

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that the privilege is waived only as to those communications actually disclosed, "unless a partial waiver would be unfair to the party's adversary." Id. at 1426 n.12. If partial waiver disadvantages the adversary by allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege. Disclosures in aid of an attorney's preparation for litigation would still be protected. However, the court found that disclosure to the federal agencies in this instance did operate as a waiver, because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process. Id. at 1429.

The court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002) also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions. Id. Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these

circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment." Id. at 303. The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to "assist in the obfuscating the truth-finding process." Id.

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**Reporter's Comment:** The court in *Westinghouse* recognizes that enforcement of selective waiver is good policy because it encourages cooperation with government investigations. But it dismisses this policy argument as "beyond the intended purposes of the attorney-client privilege." Yet at the point of disclosure to a government regulator, the relevant question is not the purpose of the attorney-client privilege, but rather whether the purposes behind the law of *waiver* of the privilege are effectuated. Judge Boggs, dissenting in *Columbia,* critiques the *Westinghouse* argument as follows:

> It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege. More precisely, we ought to seek guidance from the justifications for the waiver rule to which the exception is made. Those justifications are not exactly coincident with the justifications for the privilege itself. * * * The preference against selective use of privileged material is nothing more than a policy preference, and really also has very little to do with fostering frank communication between attorney and client. The question for this court is one of policy: Whether the benefits obtained by the absolute prohibition on strategic disclosure outweigh the benefits of the information of which the government has been deprived by the rule? As the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.

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*Recognition of selective waiver where a confidentiality agreement exists*

A few courts have at least indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." Id. at 646. The

court noted:

> [A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.

In *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), the court rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated (Id. at 236):

> In denying the petition, we decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . . Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

See also *Dellwood Farms, Inc. v Cargill,Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost "without steps to protect the privileged nature of such information;" follows Teachers Insurance); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

## II. Ken Broun's Memo on the Impact of the Draft Rule 502 on Waiver of Privilege in a State Action

If a statute or rule governing inadvertent waiver, scope of waiver and selective waiver of an evidentiary privilege is to be effective in eliminating the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, the provision would have to be binding in all courts, state and federal. The proposed rule, as submitted to the Committee, is drafted with the intent to accomplish that end as broadly as possible, at least with regard to the attorney-client privilege and work product protection.

My conclusion is that, in order to be binding in both federal and state courts, the Rule would have to be enacted by Congress using both its powers to legislate in aid of the federal courts under Article III of the Constitution and its commerce clause powers under Article I. Although a Rule might be enacted, binding on the states, setting forth waiver rules for all evidentiary privileges where a disclosure is made in the course of federal litigation, a Rule governing disclosure in other circumstances would have to be limited to areas that affect interstate commerce – probably limiting the permissible scope to attorney-client privilege and work product protection. A separate rule might be considered that dealt with disclosures of matters covered by other privileges (e.g., marital communications or psychotherapist-patient communications) in the course of litigation. However, virtually all of the waiver problems that the Committee is trying to address concern the attorney-client privilege or work-product protection.

### 1. Possible limitations on federal court rulings dealing with waiver of privilege

#### A. Power to bind the states in the absence of a Rule

In the absence of a Congressionally-adopted rule, there may well be limitations on the power of a federal court to bind the state courts with regard to waiver or non-waiver of an evidentiary privilege.

There is no question that a federal court has the power to limit the use of information obtained in discovery. Protective orders, especially those involving trade secrets, abound and have universally been upheld. See *E.I. DuPont De Nemours Powder Co. v. Masland,* 244 U.S. 100, 103 (1917); *Chem. & Indus. Corp. v. Druffel,* 301 F.2d 126, 130 (6th Cir. 1962); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2043.

However, limiting the use of documents or even information obtained in discovery is different from ruling that disclosures or other actions taken in federal court do or do not constitute a waiver of state evidentiary privileges. The most significant case dealing with this issue is *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003). *Bittaker* was an *en banc* decision of the Ninth Circuit involving the scope of a habeas petitioner's waiver of the attorney-client privilege. The district court

had held that the petitioner had waived the attorney-client privilege by filing a claim based on ineffective assistance of counsel. The court, however, entered a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition – including barring the state from use of the information in a re-prosecution. The state appealed claiming that the court had no authority to prevent a state court from dealing with the issue of waiver of privilege under state privilege rules. A majority of the *en banc* court, in an opinion written by Judge Kozinski, held that the district court's order effectively determined that there would be no waiver of the privilege in a subsequent state trial. The court held that the district court had the power to determine the limits of the waiver and to make that determination binding on the state courts. The opinion noted that a waiver limiting the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interest as well as preserving "the state's vital interests in safeguarding the attorney-client privilege in criminal cases." 331 F.3d at 722. The court further noted that the courts of California "remain free, of course to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation." 331 F.3d at 726. [emphasis by the court]

On one level, Judge Kozinski's opinion is compelling from a policy standpoint. Limiting the use of information covered by the attorney-client privilege to dealing with the ineffective assistance appropriately limits the waiver to what is necessary to resolve the petitioner's claim. Arguably, the petitioner would pay too high a price for his attack on the prosecution if the information were to be permitted to be used by the state in a re-prosecution. Yet, the two concurring judges also make a valid point, one relevant to the power of the federal courts in dealing with waiver of privilege in a statute or rule such as we have under consideration. Judges O'Scannlain and Rawlinson concurred in *Bittaker* on the basis that the judge's order should not be interpreted as dealing with the scope of the privilege under state law. Rather, the order should be interpreted as preventing the use of information obtained in the federal litigation but would not prevent the state from the use of the same information obtained from another source if the California law would so permit. The privilege law of California would govern in any re-prosecution of the defendant. The courts of that state should be free to determine whether or not the privilege had been waived. The federal courts have a right to limit the use of information obtained in connection with its litigation – as in trade secrets cases – but no power to determine the application of a state privilege in the state courts.

At least one lower court has refused to issue an order having the effect that the majority in *Bittaker* prescribed. In *Fears v. Bagley,* 2003 WL 23770605 (S.D. Ohio 2003), the court rejected the reasoning of the majority in *Bittaker* and ordered only that the state would be bound to keep the information obtained confidential but that the court would not decide the issue of waiver of privilege in a subsequent state court proceeding.

Even though not a controlling precedent, the *Bittaker* case is useful in framing the issues. Although, as the court notes, the case involves a waiver by implication rather than an intentional or inadvertent disclosure of a privilege document (see 331 F.3d at 719-20), the case squarely presents the issue of the power of a federal court, at least in the absence of a Congressionally-enacted rule,

to affect the future application of a state court privilege. As the divided opinion in *Bittaker* graphically illustrates, the result is far from clear.

**B. The effectiveness of a Federal Rule of Evidence or Civil Procedure, adopted under Congress's Article III powers, to bind the states**

That the question of whether an individual court has the power to issue an order affecting subsequent state court proceedings is in doubt does not necessarily mean that such a power might not be conferred by rule or statute. Arguably, an issue such as that raised in *Bittaker* could be based on the absence of a common law rule conferring authority on the court to make such orders binding on the state courts – an absence that might be corrected by the adoption of a rule or statute governing the issue.

28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress, was adopted by Congress and obviously could be modified or eliminated by Congress. Furthermore, Congress could itself adopt a Rule without going through the Rules Enabling Act, 28 U.S. C. § 2072(b). *See, e.g.,* Fed. R. Evid. 413-415.

A rule that governed the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality. Congress has broad powers to legislate in aid of the federal courts, whether through the Rules Enabling Act process or independently. Congress's power stems from Article III, §1 and Article I, § 8 cl. 9, giving it power to establish lower tribunals, as well as the necessary and proper clause of Article I, § 8, cl. 18. The broad power of Congress to describe and regulate modes of proceeding was established early in our Constitutional history. *See Wayman v. Southard,* 23 U.S. 1 (1825); *Livingston v. Story,* 34 U.S. 632, 656 (1835). *See also* the often quoted dissent by Justice Reed in *Erie RR v. Tompkins,* 304 U.S. 64, 92 (1938) ("no one doubts federal power over procedure").

Some have argued that the power of Congress to enact legislation dealing with procedural matters is broader than that delegated to the courts under the Rules Enabling Act. *See, e.g.,* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 Notre Dame L. Rev. 47, 94, 103 (1998).[3] However, whatever the merit of the debate over the extent of

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[3]Authors like Kelleher question whether Congress intended to delegate to the courts all of its power to establish procedure under Article III and the necessary and proper clause of Article I. Section 2072(b) prohibits rules that abridge, enlarge or modify any substantive right. The limitation was intended to reach not only federalism concerns but also to deal with the allocation of authority between Congress and the Courts. See Stephen B. Burbank, *The Rules Enabling Act of 1934,* 130 U.Pa.L.Rev. 1015, 1187 (1982). Certainly, Congress has established statutes dealing with clearly procedural matters, such as venue (28 U.S. C. § 1391) outside of the rules process. The argument is that there are certain policy matters, even though involving procedure, that

Congressional delegation, the issue is moot if the Rule is in fact enacted by Congress rather than promulgated through the Rules Enabling Act process.

It is unlikely that a rule limited to disclosures made in the course of federal litigation would be held invalid. *Hanna v. Plumer,* 380 U.S. 460, 472 (1965) established that the Congress's power delegated under the Rules Enabling Act extends to matters that fall in the "uncertain area between substance and procedure, [but] are rationally capable of classification as either." The Court has never found a Rule invalid for impermissibly affecting a substantive right, see, *e.g.,* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence,* 73 Notre Dame L. Rev. 963 (1998); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23,* 39 Ariz. L. Rev. 461 (1997).

One could argue about whether rules governing evidentiary privileges are essentially procedural or essentially substantive. However, even writers who objected to the enactment of the proposed Federal Rules of Evidence governing privilege assumed the power of Congress to enact such rules, arguing against their adoption on policy grounds. *See, e.g.,* Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives,* 122 U. Penn. L. Rev. 594 (1974). *See also* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law,* 82 Geo. L. J. 1781 (1994) (arguing for an amendment of Fed.R.Evid.501 to provide for deference to state privileges in most cases).

The ability of the Rules to bind state court actions has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment. *Semtek Intl. Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001). *See also Stewart Organization v. Ricoh,* 487 U.S. 22 (1988) ( federal law, not state law with regard to enforceability of forum selection clauses governed transfer under 23 U.S.C. § 1404); *Burlington Northern RR v. Woods*, 480 U.S. 1 (1987) (Fed.R.App.P 38, not state law, governed issue of damages after unsuccessful appeal).

The principle of the supremacy of federal law has been applied to state procedural rules where federal substantive law is preemptive. *See, e.g., Felder v. Casey,* 487 U.S. 131 (1988) (federal civil rights law prevented state from applying its notice of claim rule in a federal civil rights action filed in state court); *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359 (1952) (validity of a release under

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should be left to Congress at least in part because state interests are in fact represented in Congress. *See* Paul J. Mishkin, *Some Further Last Words on Erie – The Thread,* 87 Harv. L. Rev. 1682, 1685 (1974). For example, under § 2074(b), Congress left for itself issues involving evidentiary privileges. It determined that it should decide such issues; it did not determine that legislation about such issues was beyond its powers. See Kelleher, 74 Notre Dame L. Rev. at 111.

Federal Employers Liability Act determined by federal law); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (federal pleading test should have been applied in FELA action filed in state court).

On the other hand, it would be difficult to argue that a Rule governing the effect of a disclosure outside of the litigation process – e.g., disclosure to an administrative agency or in private settlement negotiations before any litigation had begun – would be within the power of Congress under Article III.

Despite the wide berth to enact procedural rules established both in the cases and the legal literature, the language in *Hanna* would have to be considered on its face – the rule would have to be rationally capable of classification as either substance or procedure. Fairly recent cases, although not invalidating rules of procedure, have interpreted the rules somewhat narrowly so as to avoid application in a way that might conflict with state substantive policy. *See, e.g., Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90 (1991) (limitations on application of Fed.R.Civ. P. 23.1 dealing with the demand requirement in a shareholders derivative action); *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996) (application of Fed.R. Civ.P. 59 and the test for granting a new trial); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class certification under Fed.R.Civ.P. 23 interpreted in light of constitutional limitations on the powers of Congress).

Any Rule seeking to have an effect beyond disclosure in the course of litigation would likely face a challenge that it was not rationally capable of classification as procedural. Arguments could be made in support of such legislation – *e.g.*, that the most significant likely impact of the waiver rules would be in the federal courts – but the risk of a finding that the rule would not be binding on the states would be significant.

In order to prevent more constitutional comfort for a rule dealing with disclosures outside the litigation process, Congress's commerce powers would have to come into play.

**C. The constitutionality of a Rule, binding on the states, governing waiver of evidentiary privilege if enacted by Congress under its Commerce Clause powers.**

A strong argument could and has been made for a federalized attorney client privilege enacted by Congress under its Commerce Clause powers. (Art. I, §8, cl. 3). The Rule under consideration would federalize issues of inadvertent and selective waiver and scope of waiver with regard to the attorney-client privilege and attorney work-product protection. If the power exists for a federalized attorney-client privilege, presumably a rule that affected only an aspect of that privilege, and its close relative – work-product protection – would also pass constitutional scrutiny.

Timothy P. Glynn, in his article, *Federalizing Privilege,* 52 Amer. U. L. Rev. 59, 156-171 (2002), argues that Congress would have the power under the Commerce Clause to enact a federal law of attorney-client privilege that would apply to the states. He recognizes that the Supreme Court has served notice that Congress's powers under the commerce clause have outer boundaries. Thus,

in *United States v. Lopez*, 514 U.S. 549 (1995), the Court invalidated an act making the possession of a gun on or near school premises a crime as beyond the commerce clause powers. It took the same action with regard to an act providing a federal civil remedy for the victims of gender-motivated violence. *United States v. Morrison,* 529 U.S. 598 (2000). Glynn points out the obvious differences between legislation such as that involved in *Lopez* and *Morrison* and a regulation that fosters and protects the economic and commercial activity between attorneys and clients. He adds that the "attorney-client privilege protects communications upon which the industry's article of commerce – provision of legal services depends." 52 Amer. U. L. Rev. 159.

Glynn also raises the possibility that Congressional action might be limited by Tenth Amendment considerations. There are recent cases that place limits on Congressional action because of a violation of principles of federalism. For example, in *New York v. United States,* 505 U.S. 144 (1992) the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act because it, in effect, required the states to implement legislation. Likewise, in *Printz v. United States,* 521 U.S. 898 (1997), the Court invalidated a provision in the Brady Handgun Violence Prevention Act that would have required law enforcement officers to administer a federal program. On the other hand, in *Reno v. Condon,* 528 U.S. 141 (2000), the Court upheld a provision of the Driver's Privacy Protect Act that made no such demands on state legislators or local executive officials.

The Rule under consideration makes no demands on the states like the legislation in *New York* and *Printz.* The rule is self-executing. It simply needs to be enforced by the courts of the state. At least one author has questioned the power of Congress under the Tenth Amendment to enact procedural rules unconnected with substantive federal rights. *See* Anthony J. Bellia Jr, *Federal Regulation of State Court Procedures,* 110 Yale L. J. 947 (2001). However, the legislation that was the focus of the Bellia article, the Y2K Act, involved notice to defendants before commencing suit – not a matter as integrally connected to the regulation of legal commerce as is the rule in question. Arguably, the attorney-client related protections involve substantive protections. The "privilege regulates, indeed protects and promotes, primary conduct and commercial activity – attorney-client communications and the provision of legal services– and serves interests wholly extrinsic to the litigation in which it is asserted." *See* Glynn, 52 Amer. U. L. Rev. at 165.

Although one could argue that Glynn takes the concept of a federal attorney-client privilege too far, politically and as a matter of policy, by proposing a federal law totally supplanting state attorney-client privileges, more modest legislation dealing simply with the existence and scope of waiver seems likely to be upheld. It is also arguable that the Article I commerce clause rationale may combine with the powers under Article III applicable in many instances to give a strong basis for the legislation.

Nevertheless, the likely validity of such legislation dealing with attorney-client privilege or work product protection may not extend to a statute that attempted to apply the same rules to evidentiary privileges generally. Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one's imagination.

It is even more difficult to argue for a statute that affected privileges such as those for marital or clergyman communications. Other privileges such as those involving law enforcement and the qualified journalist's privilege may involve additional constitutional analyses including a determination of the impact of the provisions on First or Sixth Amendment considerations.

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**Reporter's Comment:** In drafting Rule 502 in light of Ken's analysis of statutory authority, we were cognizant of situations in which waiver questions might not affect interstate commerce, and in those situations, we decided as an initial matter not to extend the rule. The most important example is the rule on mistaken disclosures. That rule is limited to mistaken disclosures made during the course of discovery. Of course, mistaken disclosures may be made in other circumstances (e.g, a privileged document is mistakenly included in a package of other materials sent to a friend). But disclosures outside the litigation context might not affect interstate commerce, and so we decided not to cover those situations.

There may also be situations in which state proceedings are so localized that they do not affect interstate commerce, and in those cases a "federalized" waiver rule may be problematic. We chose, however, not to carve out those proceedings in the rule, for at least two reasons: 1) They may not exist; you don't have to go far to affect interstate commerce in a litigation; and 2) If they do exist, they are hard to describe. We thought it best to leave the matter to the implementing legislation.

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## III. Ken Broun's Memo on the Scope of Waiver of Work Product

Proposed Rule 502(a) extends the waiver of both attorney-client privilege and work product protection "to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information." Some members of the committee and others have raised the question of whether the draft proposed rule extends the waiver of work product privilege beyond the existing law.

Wright and Miller state that the disclosure of some documents does not destroy work-product protection for other documents. 8 C. Wright and A. Miller, Federal Practice and Procedure § 2024 at 209 (1970). However, an analysis of the cases dealing with the issue indicates that the statement is too broad. Rather, the scope of the waiver depends upon considerations of fairness that include the nature of the disclosure giving rise to the waiver and the subsequent use of the protected materials such as the presentation of testimony based on them. The case law is entirely consistent with the language of proposed draft Rule 502.

The most important case on waiver of work product privilege is *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles,* the Court held that the defendant would waive his work product privilege by calling his investigator to testify about interviews with two prosecution witnesses. The Court held that the investigator, if he testified, would have to disclose his report. The defendant refused to turn over the report and the investigator was precluded from testifying. The Court held that the preclusion was appropriate – if the investigator testified, the report would have to be disclosed. The testimony would waive the privilege "with respect to matters covered in his testimony." 422 U.S. at 239. In a footnote, the Court distinguished counsel's ordinary reference to notes during the course of the trial from testimonial use of such materials. The effect of the Court's ruling was that, not only was the work product protection waived with regard to matters directly reflected in the report but to all related matters – a subject matter waiver. *See also Chubb Integrated Systems, Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 64 n. 3 (D.D.C. 1984) (*Nobles* cited for the proposition that "the testimonial use of work-product constituted waiver of all work-product of same subject matter").

More recent cases from the Courts of Appeal and District Courts reflect a view that subject matter waiver may be more limited than suggested in *Nobles* and that the limitation will depend upon consideration of fairness under the circumstances. Reflective of that view is *U.S. v. Doe*, 219 F.3d 175 (2d Cir. 2000). In *Doe*, a corporation had asserted its attorney-client and work-product privileges in its dealing with an ATF investigation concerning sales of firearms. A corporate officer testified and made references to advice of counsel. The primary question was whether his references to advice of counsel and disclosure of communications waived the corporation's attorney-client and work product privileges. The court noted that "the implied waiver analysis should be guided primarily by fairness principles." 219 F.3d at 185. The court indicated that the district court, in determining the existence and scope of waiver as a result of the corporate officer's disclosures, should consider such things as such as the witness's lack of legal training and the fact that the disclosures were made before the grand jury where the corporation could gain nothing affirmative.

Specifically with regard to waiver of work product privilege, the court stated (219 F.3d at 191), "[w]e believe that the district court on remand should consider further whether there was any waiver of Doe Corp.'s work-product privilege, and, if there was, the proper scope of the waiver. The fairness concerns that guide the waiver analysis above are equally compelling in this context." The court distinguished *Nobles* and *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), discussed below, stating (*Id.*)

> In this case, however, there was no actual disclosure of any privileged documents. Further the context – a grand jury proceeding – is, as already indicated, quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stand to benefit directly from disclosing privileged materials.

In *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir. 1976), the court held that there would be no subject matter waiver of work product protection under the circumstances. In *Duplan,* the party seeking protection had made partial and inadvertent waiver of some of the claimed protected documents, which consisted of mental impressions, opinions and legal theories of their attorneys and representatives. In refusing to find subject matter waiver, the court distinguished *Nobles* on two grounds. First, in *Nobles,* the work product was a witness's report, not the mental impressions of a lawyer. Second, the court noted that in this case the party had "neither made nor sought to make any affirmative testimonial use of the documents for which the throwsters [the party seeking protection] claim the work product privilege." 540 F.2d at 1223. The court noted that the principles of *Nobles* may be applicable if the documents were in fact used at trial.

The Fourth Circuit expanded on its reasoning in *Duplan* in *In re Martin Marietta Corp.*, cited above. In *Martin Marietta,* the defendant in a criminal case sought documents from Martin Marietta, his former employer, relating to matters on which he had been indicted. Martin Marietta claimed attorney-client and work product privilege. Defendant argued that the privilege had been waived because documents or some portions of them had been disclosed by the corporation to the United States. Attorney and the Department of Defense. The Court found a subject matter waiver of the attorney client privilege based upon the disclosure to the government. With regard to the work product privilege, the court held that the delivery to the government constituted a testimonial use of the documents, as in *Nobles,* and held that there would be a subject matter waiver of non-opinion work product. However, it held that there was no subject matter waiver of opinion work product. The court emphasized the added protection given to such work product and added (856 F.2d at 626):

> [T]he underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in Nobles: "where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure." . . . There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions

of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.

Both *Duplan* and *Martin Marietta* hold that there is not necessarily a subject matter waiver applied to disclosures of some matters protected as work product. Yet, the holding of both Fourth Circuit cases is consistent with the Proposed Rule: if it is fair to require apply the waiver to subject matter under the circumstances, the waiver should apply. *Martin Marietta* finds that the protected mental impressions had not been used in such a way as to require disclosure in that case and notes that there is little danger that they would be so used. The case does not predict the result where the party in fact used mental impression work product both as a shield and as a sword.

Relatively recent District Court cases confirm an approach that would apply considerations of fairness to the issue of subject matter waiver. One example is *Bank of America v. Terra Nova Insurance Co.,* 212 F.R.D. 166 (S.D.N.Y. 2002). The court found a split of authority on the issue of subject matter waiver of work product protection citing *Martin Marietta* and other cases.

The cases it cited are, with my brief parenthetical description of the holdings, as follows: Cases cited as holding that there is a broad subject matter waiver were *In re Sealed Case,* 676 F.2d 793, 822-23 (D.C. Cir. 1982) (revealing documents to the SEC waived work product privilege as to all other communications relating to the same subject matter); *Bowne v. AmBase Corp.,* 150 F.R.D. 465, 485-86 (S.D.N.Y. 1993) (work product protection waived based on deposition testimony); *Bristol-Myers Squibb Co. v. Rohne-Poulenc Rorer,* 1997 WL 801454 (S.D.N.Y) (subject matter waiver based on production of document; considerations of "fairness" govern). Cases limiting waiver to the specific materials disclosed were *Pittman v. Frazer,* 129 F.3d 983, 988 (8th Cir. 1997) (waiver limited to photographs actually used at trial); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,* 197 F.R.D. 620, 639 (N.D. Iowa 2000) (no subject matter waiver under the circumstances; "the scope of the waiver depends upon the scope of the disclosure"); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver limited to specific subject matter under the circumstances; where the party did not deliberately disclose documents in an attempt to gain a tactical advantage, "the law does not mandate a subject-matter waiver and such a waiver is more likely to undermine the adversary system than to promote it" ). The holding of none of these cases distracts from the proposition that fairness is a consideration in determining the existence of subject matter waiver.

In the *Bank of America v. Terra Nova* case itself, the court's treatment of the scope of waiver is based on the same kind of fairness considerations noted in the cases discussed in the preceding paragraphs (212 F.R.D. at 174):

> Here, the Court's decision on the scope of the waiver is guided by the nature of Terra Nova's conduct and the policies underlying the work product doctrine. Because all of the information available to Holland [the party's representative] regarding his investigation was made available in an oral presentation to the governmental authorities, it is only fair to permit Bank of America to examine the facts that were in Holland's possession at that time. That

Holland freely revealed the contents of his investigation in Terra Nova's presence reflects that Terra Nova had no great interest in ensuring the confidentiality of the investigation – be it the actual facts revealed to the government or the underlying documents upon which the presentation was based. Thus, Terra Nova must permit Holland to be re-deposed and to answer questions regarding what factual information was available to him at the time he met with the government agencies.

The court held that any documents relating to the investigation in Holland's possession at the time of his presentation to the government authorities would have to be produced. However, the protection would not be waived with regard to documents in his possession after that date.

*Cincinnati Ins. Co. v. Zurich Ins. Co.*, 198 F.R.D. 81 (W.D.N.C. 2000) is an example of circumstances calling for the extension of a subject matter waiver even with regard to opinion work product. The case involved an alleged negligent failure to settle by an insurance company. The attorney involved in the settlement negotiations was to be called as a witness at trial. The court held that there would be no work product protection, even for his opinions. In this case, the attorney's opinion would be used as a "sword."

In short, the proposed rule 502(a) language does not change the prevailing federal law with regard to the scope of work product waiver.

## IV. Discussion of Comments Received

This section of the memo addresses some comments that have already been received on draft Rule 502. Where appropriate, language is suggested to address a comment if the Committee determines that the comment requires an adjustment in the draft rule or Committee Note.

### *1. Scope of Work Product Waiver*

Greg Joseph expresses concern about the rule's provision that there is a subject matter waiver of work product when the undisclosed work product "ought in fairness to be considered with the disclosed information." He believes it changes existing law. As discussed in Ken Broun's memo on the subject, we believe that we accurately capture the existing case law on the subject. And it seems to us that there would have to be a subject matter waiver when the nondisclosed information "ought in fairness" to be considered. Certainly the work product doctrine should not be applied in such a way to allow the invoking party to engineer an unfair result.

Greg suggests that the first paragraph of the Committee Note should be amended to add some discussion about subject matter waiver of work product. He suggests first that the note clarify that the "ought in fairness" language is taken from Rule 106 (the rule of completeness); this reference will provide some guidance on how the subject matter waiver test should be applied. He also suggests that the note cite to a case involving subject matter waiver of work product.

Greg's suggestions seem eminently sensible. **What follows is a proposed change to the first paragraph of the Committee Note that would implement these suggestions:**

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that

makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule ~~thus~~ rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

* * *

Greg poses a hypothetical in light of these additions: Suppose a lawyer interviews three witnesses (all work product). Two are favorable and one unfavorable. If the lawyer proffers the two favorable statements, does that constitute a subject matter waiver as to the undisclosed unfavorable statement? If the answer to that is yes, then the rule obviously creates a substantial change in practice and it should be changed.

But at least in the Reporter's view, the hypothetical facts *do not* result in a subject matter waiver. The presentation of the two favorable witnesses is *selective*, but it is not *misleading*. The proper analogy is to the Rule 106 cases like *Branch,* cited above, where the government admitted a portion of the defendant's confession — the portion which essentially said, "I committed the crime." Other portions of the defendant's statement provided his motivation and a purported excuse for committing the crime. But the court held that Rule 106 did not require admission of these excised portions. According to the court, the government's presentation was "selective" but it was not misleading. The fact was that the defendant admitted the crime.

Accordingly, the Reporter's view of Greg's hypothetical is that it would not come close to a subject matter waiver. On the other hand, if counsel represented that his two favorable witnesses were the *only* witnesses to the event, then this would be not only a selective but also a misleading presentation, and it would result in a subject matter waiver under the rule.

The Consultant is less confident that Greg's hypothetical would not be problematic. He states that the question of "fairness" will be "difficult and often fact-bound", but concludes that these are the very kind of questions that courts are currently deciding in cases involving possible subject matter waiver of work product.

If the Committee is concerned that a subject matter waiver could be found under the facts Greg sets forth, or similar facts, then a sentence could be added to the Committee Note to allay concerns. That sentence could read something like this:

Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the

disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence.

*2. Who "holds" the privilege or work product immunity?*

Greg Joseph and Rick Marcus both raise the question of whether the rule should say something about who holds the privilege or work product protection, and accordingly who has the power to waive it. Greg suggests, for example, that subdivision (a) should be changed to read something like the following:

> **(a) Waiver by disclosure in general.** — A ~~person waives an~~ holder of an attorney-client privilege or work product protection ~~if that person~~ waives the privilege or protection if that holder — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

We decided to avoid the term "holder" as much as possible (though the term does appear elsewhere in the rule) because it is not always clear who is the holder of the privilege, and it is even less clear who is the holder of the work product protection. *See* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127, for an extensive discussion of this very murky area. We are not sure that the addition of the word "holder" in place of "person" is any kind of improvement in the rule. But if it is, we would caution against going any further and trying to define who is a holder and who is not. **In fact, if the Committee does wish to implement a change from "person" to "holder" in the text, we strongly suggest that a sentence be added to the Committee Note that would disavow any intent to determine who is the holder of a privilege or work product — leaving that question to common law.**

**The addition to the Committee Note could read something like this (including the changes to the entry on subject matter waiver, discussed above):**

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure

generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence. The rule ~~thus~~ rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

The rule governs waiver by disclosure of the "holder" of the attorney-client privilege or work product protection. The rule does not attempt to determine or define who is a holder of either the privilege or the work product protection. The "holder" question is often difficult and fact-bound. *See generally* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127.

*3. Inadvertent disclosure coverage limited to discovery:*

Professor Bob Pitler of Brooklyn Law School asks why the provision on inadvertent disclosure should be limited to the context of discovery. The draft rule provides that a disclosure is not a waiver if:

> the disclosure is inadvertent *and is made during discovery in federal or state litigation or administrative proceedings* — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B);

We made the choice to limit the rule's coverage to mistaken disclosures during discovery for three reasons: 1) Almost all of the reported cases on mistaken disclosure involve disclosure during discovery; 2) The rule sweeps broadly and dramatically in its attempt to control waiver principles under both federal and state law, and so we tried not to extend it to situations that rarely arise — as Ken puts it, it "seems piggy" to extend the rule any further than it already goes; and 3) At the state level, we were confident that the risk of mistaken disclosures in discovery would affect interstate commerce and therefore could be regulated by Congress — but we were less confident that commerce would be affected when a mistaken disclosure of privilege or work product is made outside of a litigation context.

**If the Committee believes, however, that the rule should extend to *all* mistaken disclosures, this can be done easily.**

1. The italicized, qualifying language in the above paragraph (*and is made during discovery in federal or state litigation or administrative proceedings* ) can simply be deleted.

2. The Committee Note would need to be altered to delete references to discovery, but again this could be effectuated easily. The relevant language of the Committee Note would be changed as follows:

> *Inadvertent disclosure during discovery:* Courts are in conflict on whether an inadvertent disclosure of privileged information or work product~~, made during discovery,~~ constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information ~~during discovery~~ constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *Zapata v. IBP*, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information protected by the attorney-client privilege or work product immunity should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure ~~during discovery~~ threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

***4. Subdivision (c) court orders: state and federal?***

Rick Marcus points out that subdivision (c) , on the controlling effect of court orders, does not specify whether state confidentiality orders are covered by the rule. The rule simply refers to "a court order." Rick states that ordinarily "court order" in a federal rule would mean the order of a federal district court.

Rick's point is well-taken. The rule is intended to cover both state and federal courts. (*See* Part Five of this memo for an explanation of this drafting choice.) It is intended to protect the expectations of all litigants, permitting them to rely on a confidentiality order, whether entered by a federal or a state court.

**Therefore, we suggest that the language of the subdivision be changed slightly, as follows:**

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a <u>federal or state</u> court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

***5. Subdivision (e)— Work Product***

Rick Marcus suggests that the reference to "work product" in the definitional section, subdivision (e), should instead be "work product *protection*" because that is the phrasing used throughout the rule. We agree with this suggestion and so propose adoption of that slight change, as follows:

> (e) Included privilege and protection. — As used in this rule:
>
> 1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and
>
> 2) "work product protection" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

***6. Committee Note Reference to Commerce Clause as the Source of Legislative Authority:***

The Committee Note makes reference to the Commerce Clause as the source of legislative authority for promulgating this rule — a rule that applies a single set of waiver rules to both state and federal litigation. That section of the Note states as follows:

> The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Rick Marcus argues that there might be enough authority for the rule in Congress's power to regulate federal courts, and finally concludes that "the Note need not say what the authority of Congress might be. That's not something it can get from the rules process." Reviewing Rick's comment, Ken Broun concludes that the Note should "leave out the question of the power to enact this legislation entirely" because the Note is "a guide for practitioners and the courts" and not an explication of the authority for promulgating the rule.

The Reporter placed the reference to authority for the rule in the Committee Note because this is obviously an unusual rule. It can be argued that an explanation of authority for is helpful — especially at this early point in the process — because otherwise those who review the rule during a public comment period may wonder how the Rules Committee could possibly believe it had the authority to promulgate not only a rule of privilege but also a rule that binds state as well as federal

courts. It is possible, of course, that this could all be explained in some kind of cover letter accompanying the rule through the public comment period. But those letters do not get the same focus as the Committee Note. And there is an argument that a notice function will be necessary for such a unique rule even once it becomes enacted.

Thus, the above paragraph in the Committee Note is intended to serve a (perhaps temporary) notice function that arguably is necessary given the unique provenance of the rule. But if the Committee decides that the source of authority for the rule is a topic not suite to, or better left untreated by, the Note, then the paragraph can be deleted.

### *7. Committee Note on Subdivision (d), Citation to Hopson*

The section of the Committee Note covering subdivision (d) — on confidentiality agreements not entered as court orders — declares as follows:

> Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Rick Marcus argues that the citation of the *Hopson* case is problematic. He explains that the theme of *Hopson* "is that the Ninth Circuit's decision in *Transamerica Computers v. IBM* establishes that protection can only come if the court orders production. Thus, that is involuntary and can be sanitized from waiver, while a voluntary act of production can't be protected." Rick concludes that the citation is inapt if intended to establish the proposition that voluntarily entered court orders guard against waiver.

While the point can be argued one way or the other, we agree that the citation is not necessary, and if it could confuse the point made in the note, then it should be deleted. We

recommend simply deleting the citation to *Hopson* (and of course the parenthetical) from the above paragraph of the Committee Note.

## V. Two Important Drafting Choices

The Reporter and the Consultant made (at least) two important drafting decisions in writing up the draft of the rule. The first is that the text of the rule specifically covers state court actions and state administrative proceedings. The second is that selective waiver is enforced even if there is no confidentiality agreement between the client and the government regulator. We want to explain why we made these choices, and set forth alternatives in case the Committee disagrees with these choices.

### A. Covering State Court Actions and State Administrative Proceedings in the Text of the Rule

The Committee determined at its last meeting that any rule on waiver must apply uniformly in state and federal proceedings. Otherwise the rule could not be relied upon, and clients and lawyers would be back where they started—expending substantial resources to guard against waiver and unnecessarily increasing the cost of litigation; and being subject to a disincentive for cooperating with government regulators.

The question, then, is not whether a waiver rule should apply uniformly to both state and federal proceedings. The question is whether this should be made explicit in a Federal Rule of Evidence. Obviously, the Federal Rules apply to federal proceedings and so it is unusual to include within it a rule that covers state proceedings. The coverage can be justified by the fact that Rule 502 would be directly enacted by Congress. Still, there is some tension between draft Rule 502 and Rule 1101(a), which states that the rules apply to "the United States district courts." It could be argued that Rule 1101 (c) resolves any anomaly by providing that rules of privilege apply to "all stages of all actions, cases and proceedings." But it could also be argued that the term "all" is implicitly limited by subdivision (a), which refers to federal proceedings only.

Given the fact that it is critical to cover both state and federal proceedings with the same waiver standards, is there any drafting alternative to that taken in the draft Rule 502? One alternative would simply be to cover only federal proceedings in the rule, and leave state proceedings to parallel legislation adopted by Congress. This possibility is referred to in the Sensenbrenner letter, attached to this memo. This alternative would mean that all references to state proceedings would be eliminated from the draft, and a separate letter to Congress would stress the need for conforming legislation that covers state proceedings.

We decided to include state proceedings within the text of the rule, at least at this point, to make the public aware that there is an explicit intent to cover state proceedings in any legislative attempt to promulgate a waiver rule. That intent would not be as clear if the references to state proceedings were taken out of the text of the draft and left to an explanation in some kind of covering letter. After all, this rule has to be enacted by Congress. The Judicial Conference will not provide the final language. We thought it better to provide notice about the reach of the rule in the text of the rule, and to leave it to Congress to implement the rule in the way it sees fit.

If the Committee disagrees with our drafting choice, the alternative can be implemented without difficulty. Reference to "state" proceedings can be deleted from the text of the rule and the committee note, and we can draft a letter accompanying the rule indicating the need for parallel legislation to govern state proceedings.

Another drafting alternative would be to limit rule 502 to disclosures made during litigation in the federal courts, but to define its effect as including a determination of waiver under either federal or state law. In other words, the Committee could remove the references to state action except in the definitional part (e). The triggering of the rule would then have to occur in the federal judicial process (much like res judicata). Waiver of state privileges would be affected by the rule, but not disclosures that occurred outside of federal litigation and administrative proceedings. A letter accompanying the rule would indicate the need for separate legislation to deal with disclosure in state court and state administrative or agency situations. Such a rule would probably more comfortably fit in the Federal Rule scheme. But again, we decided to put all the provisions in a single rule at this point, in order to obtain the fullest public comment. Ultimately the most efficient method for binding state courts has to be sorted out by Congress.

**B. Enforcing Selective Waiver Even Without a Confidentiality Agreement**

As indicated in Part One of this memo, a number of courts enforce selective waiver only if the client has entered into a confidentiality agreement with the government regulator. A few courts enforce selective waiver even without such an agreement. We decided to draft the rule so as not to require confidentiality agreements as a condition for enforcement of selective waiver. We made this decision in part because of a comment received by Judge Levi from Helane Morrison, District Administrator of the San Francisco office of the SEC. Ms. Morrison concludes that a requirement of a confidentiality agreement may not fully implement the policy of encouraging cooperation with government investigations that is the animating principle of the draft rule.

Ms. Morrison first points out that the term "confidentiality agreement" is not self-defining, and that many agreements entered into by the SEC contain only "conditional confidentiality language." The conditions include the possibility that the privileged material will be disclosed to other law enforcement officials, and that confidentiality is maintained "except to the extent that the Staff determines that disclosure is otherwise required by federal law or in furtherance of the Commission's discharge of its duties and responsibilities." Ms. Morrison states that the Commission "has to maintain the leeway" established by this conditional confidentiality language. If that is so, it seems that the confidentiality agreement does not establish very much that is relevant in determining whether to enforce a selective waiver. If the reason for a confidentiality requirement is to limit selective waiver to situations in which there will, by agreement, be a limit on widespread use of the protected material, the conditional confidentiality language cuts against that rationale.

Ms. Morrison also points out that legislation introduced in Congress in 2003 and supported by the Commission (H.R. 1729) "did not require a confidentiality agreement to prevent waiver of the privilege when privileged documents were shared with the Commission." To the extent we are doing Congress's work for them in drafting this rule, we felt that this proposed legislation had some relevance.

Finally, Ms. Morrison points out that a confidentiality agreement requirement "would not protect the privilege in the Commission's examination program, which inspects the books and records of brokerage firms, investment advisers and mutual funds, because examinations are not performed pursuant to confidentiality agreements (as currently handled)." To the extent cooperation with government regulators is to be encouraged by the rule, we determined that the encouragement should apply to all aspects of government regulation.

Fundamentally, we concluded that a confidentiality agreement requirement imposed a formalism that would impede efficient cooperation with the government; and it appears to be a formalism that has very little to do with whether it is fair or appropriate to limit the breadth of a waiver of privilege or work product. Essentially the requirement would create lawyers' work without an apparent corresponding benefit. We explain our reasoning in a paragraph of the draft Committee Note:

> The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

* * *

Of course we are aware that selective waiver would be a tough sell if a party gave privileged information to a government regulator with the express agreement that the regulator could and would disseminate it widely — on the news, to friends and family, etc. But this does not mean that a confidentiality requirement is necessary to justify a finding of selective waiver. We chose to address any concerns about widespread disclosure by putting as a condition that disclosure must be "limited to persons involved in the investigation."

**If the Committee disagrees with our assessment, however, there is a drafting alternative that would impose a requirement of obtaining a confidentiality agreement before a selective waiver will be found. That drafting alternative was reviewed by the Committee at its last meeting. The change from the draft would be as follows:**

**(b) Exceptions in general.** — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, ~~and is limited to persons involved in the investigation~~ under an agreement that preserves the confidentiality of the communications disclosed.

**The Committee Note would have to be changed as well:**

*Selective waiver:* Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y.

1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection if the holder of the privilege obtains a confidentiality agreement from the agency. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties). The requirement of obtaining a confidentiality agreement will tend to assure that the client is treating the privilege seriously and is not engaging in widespread disclosure of information that would be inconsistent with the justification for finding a selective waiver.

~~The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.~~

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ONE HUNDRED NINTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

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January 23, 2006

RECEIVED
EXECUTIVE
CORRESPONDENCE
UNIT
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ADMINISTRATIVE OFFICE
OF THE
UNITED STATES COURTS
WASHINGTON, DC 20544

Mr. Leonidas Ralph Mecham
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ralph:

I write to request that the U.S. Judicial Conference initiate a rule-making on forfeiture of privileges.

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

The expense in reviewing an enormous volume of papers, electronic files, and other materials in intensive discovery cases can represent a major component of litigation costs, which continue to rise. Lawyers are often compelled to expend countless hours screening vast quantities of documents to guarantee that any document produced in response to a discovery request does not include a privileged document for fear that the disclosure will waive the privilege for all other documents dealing with the same subject matter.

Parties occasionally try to facilitate the discovery process by agreeing to make discovery without forfeiting privileges so that any claim of privilege can be selectively asserted at a later date. Sometimes these agreements are approved by court order. Yet these agreements, even with a court

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order, do not provide adequate assurances that the privilege will not be deemed waived in other proceedings or in other fora. The same difficulties can arise when disclosure is made voluntarily to a regulatory or governmental agency.

I understand that implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act. Separate legislation would also be needed to extend the rule's protection to subsequent litigation in state court.

A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants. My Committee looks forward to working with the Judicial Conference on this important matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/bsm

cc: Chief Judge David F. Levi

# JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
*Presiding*

LEONIDAS RALPH MECHAM
*Secretary*

February 13, 2006

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of January 23, 2006, requesting the Judicial Conference to initiate the rulemaking process to address litigation costs and burdens arising from the review of attorney-client and work-product information. I have sent your request to the Advisory Committee on Evidence Rules for its consideration.

I understand that the Evidence Rules Committee is planning to hold a mini-conference with attorneys, academics, and judges expert in privilege law at the Fordham University School of Law in New York City on April 24-25, 2006. The Committee will consider a draft proposal that protects parties from waiving attorney-client privilege or work-product protection when information is inadvertently disclosed in discovery, when information is disclosed in accordance with the parties' agreement or a court order, or when information is disclosed by a party cooperating with a government agency in an investigation preceding the litigation. The Committee would welcome you or your staff at the New York City conference. In any event, we will keep you posted of progress on this important issue.

We appreciate your continuing support of the rulemaking process. If you need further assistance in this matter, please contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable David F. Levi, Chair,
Committee on Rules of Practice and Procedure
Honorable Jerry E. Smith, Chair,
Advisory Committee on Evidence Rules

# PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

## I. PROPOSED CHANGES TO THE FEDERAL RULES OF EVIDENCE

At the request of the Chairman of the House Committee on the Judiciary, the Judicial Conference Advisory Committee on Evidence Rules (the "Advisory Committee") has drafted a proposed rule of evidence, Rule 502[1], entitled "Attorney-Client Privilege and Work Product; Waiver By Disclosure," governing issues such as inadvertent disclosure, selective waiver, subject matter waiver, and the binding effect of confidentiality orders. Because of the importance and sensitivity of the issues, the Advisory Committee has determined to conduct a hearing on April 24, 2006 (the "Hearing"), on the proposed rule to assist it in deciding whether changes are needed before the rule is sent out for public comment. The authors of this paper[2] are pleased to have been invited to submit their views to the Advisory Committee and, in the case of Mr. Brodsky, to testify at the Hearing.

The authors expect that the ABA Task Force and the NYSBA Task Force may comment on Proposed Rule 502 at a later stage of the proceedings leading to its consideration by the Judicial Conference. In the meantime, for purposes of the Hearing, the authors of this paper

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1 Insofar as this paper is concerned, the proposed amendment to Rule 502 states, in relevant part, as follows:

"Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

"(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

"(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

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(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."

2 The authors of this paper, all of whom are participants in the American Bar Association Task Force on the Attorney-Client Privilege ("ABA Task Force"), include David M. Brodsky, Liaison to the ABA Task Force; Steven K. Hazen, Adviser to the ABA Task Force; R. William Ide, Chair of the ABA Task Force; and Mark O. Kasanin, Liaison to the ABA Task Force; in addition, one of the authors, David M. Brodsky, is also a member of the New York State Bar Association Task Force on the Attorney-Client Privilege ("NYSBA Task Force") (names of affiliations are solely for identification purposes; none of the authors are authorized to speak on behalf of his organization on this issue).

Because the ABA and the NYSBA did not have sufficient time prior to the Hearing, the authors of this paper are expressing their views in this paper in their individual capacity only. Accordingly, the views expressed in this paper are presented on behalf of its individual authors only and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association or by the leadership of the New York State Bar Association and, accordingly, should not be construed as representing the position of either association.

The list of all Members, Liaisons and Advisers of the ABA Task Force are identified on the Task Force's website: http://www.abanet.org/buslaw/attorneyclient/home.shtml.

recommend that Rule 502(b)(3) be dropped from further consideration. Among other things, we believe the procedure contemplated in it continues an alarming trend threatening the viability of the corporate attorney-client privilege, a privilege that we believe has important societal benefits and which trend we believe should be halted, if not reversed,[3] before consideration of "selective waiver" could occur in a truly non-coercive environment.

## II. THE ATTORNEY-CLIENT PRIVILEGE IS IN JEOPARDY BY CURRENT ENFORCEMENT PRIORITIES AND TACTICS

Since the mid-1990s and continuing to date, the principal law enforcement and regulatory authorities in the United States have developed policies and guidelines that are designed to induce corporations and other business entities[4] to waive, or not assert, applicable attorney-client and work-product privileges and protections.[5] There are a variety of reasons why such authorities adopted such polices and, for a fuller discussion of them, we refer to the Report of the ABA's Task Force on the Attorney-Client Privilege[6], and to the report by the Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002)[7]. Regardless of the reasons proffered, the result at the Department of Justice, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and other regulatory and self-regulatory agencies, as well as many state attorneys general offices and state regulatory

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[3] In this regard, the authors note that the ABA's House of Delegates unanimously adopted Recommendation 111 at its Annual Meeting in August 2005, which reads in its entirety as follows:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

[4] For convenience, each of such entities is referred to herein as a "company" as the actual organic nature of its formation and existence is not germane to the issues addressed in this paper. The term "corporate" is similarly used as an adjective with respect to such entities.

[5] See United States Attorneys' Criminal Resource Manual, Art. 162, §VI.B; United States Sentencing Guidelines Manual §8C2.5(g)(2001); the SEC's Seaboard Report, http://www.sec.gov/litigation/investreport/34-44969.htm; see also the EPA Voluntary Disclosure Program, the HHS Provider Self-Disclosure Protocol, and the Department of Justice Antitrust Corporate Leniency Policy.

[6] 60 Bus.Law. 1029 (May 2005); also available at http://www.abanet.org/buslaw/attorneyclient/home.shtml. The "Recommendation" approved by the ABA House of Delegates and outlined in footnote 4, *supra,* and not the related "Report" cited herein, constitutes official ABA policy.

[7] Available at http://www.actl.com.

agencies, has been a marked increase in the compelled, requested, suggested, or (pragmatically inevitable) "voluntary" waivers of the privilege and the work-product doctrine, in order to further enhance the likelihood that the company will avoid significant prosecution or regulatory action. The surge in such waivers has been well documented; a recent survey administered jointly by the Association of Corporate Counsel[8], an organization representing nearly 19,000 public companies, and the National Association of Criminal Defense Lawyers[9] found that

- Nearly 75% of both inside and outside counsel state that, in their experience, government agencies expect a company under investigation to waive legal privileges (1 percent of in-house counsel and 2.5% of outside counsel disagreed with the statement);
- Of the respondents who confirmed that they or their clients had been subject to investigation in the past five years, approximately 30% of in-house counsel and 51% of outside counsel said that the government expected waiver in order to engage in bargaining or be eligible for more lenient treatment; and
- Of those who had been investigated, 55% of outside counsel said the privilege waiver was requested either directly or indirectly; 27% of in-house counsel confirmed that experience.

Of the over 675 responses to the survey, almost half of the general counsels responding on behalf of public and private companies have experienced some kind of privilege erosion, caused by the government's policies. Of these companies, by far the most were not from global companies with high visibility, but rather from a wide variety of differently-sized businesses. After more than a decade of increased pressure, explicit and implicit, on companies to waive the attorney-client privilege and work-product protections, there has emerged a "culture of waiver" in which government agencies expect a company under investigation to waive legal privileges, and many companies do so, most without even being asked any longer but knowing there is no practical alternative to doing so.

The proposed Rule 502(b)(3) would have the effect of continuing this trend toward waiver and exacerbate it. Any pretense of requests for waiver being infrequent would be lost and such request would become item 1 in the playbook of regulators and enforcement agencies even at the earliest stages of the most generic investigations. We believe that such effect would be impossible to resist[10] As such, we conclude that promulgation of Rule 502(b)(3) would be an

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8 "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results, Presented to the United States Congress and the United States Sentencing Commission, March 2006, http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf, and http://www.acca.com/public/attyclntprvlg/coalitionussctestimony031506.pdf ("Survey Results").

9 The ABA and several other organizations provided active participation and access to their members in the survey process.

10 In connection with another aspect of the DOJ's policies regarding corporate cooperation, U.S. District Judge Lewis Kaplan recently characterized the government's apparent efforts to pressure KPMG not to pay the legal fees of employees that were indicted, despite indemnification provisions requiring it to do so, as "shameful and may be worse than that..." See "Lawyers Argue KPMG Motions," THE WALL STREET JOURNAL p. C3, March 31, 2006. Judge Kaplan noted that, in his view, companies under investigation ought to be free to decide whether to support their employees or former employees without Justice's "thumb on the scale." See "Corporate Injustice" THE WALL

*(footnote continued on following page)*

unintended and undesirable by-product of such "culture of waiver". We respectfully conclude it should not be promulgated until such time as efforts currently underway to roll-back government encroachment on the attorney-client relationship upon which the judicial system depends are successful and corporate clients have the ability to make a decision about waiver on a completely voluntary basis. That is already starting to occur.[11] As such, this is not about delay of a provision with which we pointedly do not take issue as it stands.[12] It is about making sure that such rule can be adopted on its own merit without becoming a tool for undermining the very protections it seeks to preserve.

## III. THE PUBLIC INTEREST IN PRESERVING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION AND THE RISKS IN NOT DOING SO

We believe it is beyond serious discussion that the attorney-client privilege and work product doctrine as applied in the corporate context are "vital protections that serve society's interests and protect clients' Constitutional rights to counsel."[13] A legal system that fails to

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*(footnote continued from preceding page)*

STREET JOURNAL p. A14, April 6, 2006, http://online.wsj.com/article/SB114429123411418521.html?mod=todays_us_opinion.

[11] On April 5, 2006, following hearings on November 15, 2005, and March 15, 2006, concerning this issue, at the latter of which the Survey Results were presented, the U.S. Sentencing Commission voted unanimously to reverse a 2004 amendment to the commentary for Section 8C2.5 of the Organizational Sentencing Guidelines that encouraged prosecutors to require companies and other organizations to waive their attorney-client privilege and work product protections as a condition for receiving credit for cooperation at sentencing. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006. The Commission's action marks a potentially vital change in momentum of the "culture of waiver."

This change may not, however, be an isolated event. At March 7, 2006, hearing of the Subcommittee on Crime, Terrorism and Homeland Security entitled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers", Members of Congress representing a broad political spectrum were united in their pointed skepticism during questioning of then-Acting Deputy Attorney General Robert McCallum as to the propriety of Department of Justice policies set forth in the Thompson Memorandum undermining the traditional confidentiality of the attorney-client relationship. The preliminary transcript of those hearings confirms that Mr. McCallum informed the Subcommittee that the Department of Justice would probably be willing to agree to the Sentencing Commission reverting to the position it held before the 2004 amendment, a position the Task Force was requesting. However, at the U.S. Sentencing Commission meeting on March 27, 2006, a Department representative denied that was the position of the Department of Justice. Most recently, the Wall Street Journal carried an editorial criticizing the policies of the Department that encroach on the attorney-client relationship upon which society depends for legal compliance and noting the remarks of Judge Kaplan at the impact of those policies. See footnote 10.

[12] The authors note that, in some regulated industries, there may effectively be no confidentiality of company records or communications vis-à-vis the regulatory authority. Where there is no confidentiality, there may be no privilege or work product protection. For example, 12 U.S.C. §481 is routinely invoked by examiners of the Office of the Comptroller of the Currency for unfettered access to all documents and records, regardless of their status as protected communications or work product. The authors do not take a position in this paper on whether there may be circumstances, such as those, in which some form of selective waiver may be appropriate. The authors also do not wish to imply that a company could not or should not, on a truly voluntary basis, waive the attorney-client privilege or the attorney work product doctrine.

[13] See "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results, Presented to the United States Congress and the United States Sentencing Commission, March 2006.

assure business entities the benefits of the attorney-client privilege and work product protection denies those entities the effective assistance of counsel when potentially illegal corporate behavior is discovered within the organization. As the Supreme Court has stated, impairment of these privileges and protections would "not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[14]

But it is precisely those confidential communications between corporate attorneys and the employees of the corporate client that are imperiled when the attorney-client privilege or work product doctrine is undermined. "Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner."[15]

And it is not only corporate employees who will curtail – and have curtailed – the extent of their confidential communications with counsel to seek legal advice on business programs and strategies. It is our experience that company legal counsel (internal and outside) are curtailing their own activities, such as taking extensive notes at business meetings, for fear that if the subject of the business meetings were ever implicated in a governmental inquiry (where the company might not even be the "target"), such counsel's notes would be turned over when the company waived the privilege and the counsel would be converted into a potential adverse witness against the company as client. Even outside counsel retained to conduct internal investigations are having to be sensitive to procedures that might result in their becoming involuntary adverse witnesses. Those pressures create a potential conflict of interest between attorney and client that the privilege otherwise helps to prevent.

The strongest criticism of the attorney-client privilege – and, indeed, of any evidentiary privilege – is that, in investigations or court proceedings, potentially valuable evidence may be suppressed and the "truth" harder to find. This debate has been raised countless times, and no doubt is the basis for concerns raised by the governmental organizations behind the shift in policy over the last decade. But in our society, the debate was long thought to have been settled. As one court has noted: "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."[16] The Supreme Court has held that this social good extends to companies as well as to individuals.[17]

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14 *Upjohn Co. v. U.S.*, 449 U.S. 383, 392 (1981). This point was made forcefully in *Comments of the ABA's Section of Antitrust Law On The Proposed Amendments To The Sentencing Guidelines For Organizations*, at 5-7, *available at* http://www.abanet.org/antitrust/comments/2004/sentencing guidelines0704.pdf.

15 See "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results.

16 *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). *See Trammel v. United States*, 445 U.S. 40, 50 (1980) (the privilege "promotes a public goal transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.").

17 *Upjohn*, 449 U.S. at 389-90.

Protecting the confidentiality of work product likewise furthers vital public interests.[18] Work product protection supports a fair adversary system by "by affording an attorney 'a certain degree of privacy' so as to discourage 'unfairness' and 'sharp practices.' "[19] The work-product doctrine is simply a recognition that a lawyer's work on behalf of a client preparing a response to litigation or a potential claim – even when not subject to the attorney-client privilege – must also be protected, lest all lawyers be discouraged from conducting those preparations effectively, the clients be punished and their adversaries be unfairly rewarded. Those corporate clients (including their authorized representatives) who fear that the work product generated by their counsel in determining an appropriate response will be disclosed to their adversaries and promptly used against them will, not surprisingly, be reluctant to seek legal assistance at all much less provide information that will assist the attorney in providing such assistance.

But in modern-day, post-Enron corporate America, the historic policies in favor of protecting privilege and work-product are being crowded by the policies of promoting cooperation with governmental agencies and maximizing the effectiveness and efficiency of governmental investigations.[20] Companies formerly expected that the work product of their counsel prepared as a result of an internal investigation, and advice given as a result of such investigation, will be protected. They have come to learn that, upon the initiation of a governmental inquiry, whether formal or informal, whether the company is a target or not, such expectations of confidentiality are illusory. Internal investigations, conducted by and at the direction of legal counsel, are still a critical tool by which companies and their boards learn about violations of law, breaches of duty and other misconduct that may expose the company to liability and damages. They are an essential predicate to enabling companies to take remedial action and to formulate defenses, where appropriate. But internal investigations no longer have clear and predictable protections of confidentiality in the "culture of waiver" environment. Privileged information and work-product are routinely expected to be made available to government authorities, sometimes, at the authorities' request, on a day-to-day basis during the internal investigations. Under current governmental policies, companies do not realistically have the option to preserve the confidentiality upon which an effective attorney-client relationship is so heavily dependent and otherwise protected by the privilege and doctrine, or they run the considerable risk of being deemed "uncooperative" by the governmental authority – a characterization that can be a virtual corporate death sentence[21] or, at least, extraordinarily

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[18] "[T]he work product privilege [exists] ... to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.", *In re Raytheon Securities Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003) (quoting *United States v. Amer. Tel & Tel. Co.*, 642 F.3d 1286, 1299 (D.C. Cir. 1980)).

[19] Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002), at 6, quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1946).

[20] Committee Note to Proposed Amendments to the Federal Rules of Evidence (Rule 502), at 8; see also *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) ("the public interest in easing government investigations counsels against holding the attorney-work-product privilege waived when the holder of the privilege discloses privileged information to the government...a limited disclosure pursuant to a government agency's investigatory request ought not waive the privileges as to all other parties...").

[21] As in the case of Arthur Andersen.

financially punitive. Putting it another way, if the government decides a company is not being cooperative, in essence the government can act as prosecutor, judge, jury, and executioner.

In the wake of such governmental policies, none of the court-developed tests or hurdles to establish a third party's right to such materials, such as, in the case of the attorney-client privilege, the so-called "crime fraud exception[22]," or in the case of work product, substantial need and undue hardship[23], need to be satisfied. As documented in the Survey Results, an Assistant U.S. Attorney most often conducts an inquiry, and makes the request, either implicitly or expressly, without even purporting to satisfy such tests or hurdles.

The problems that have arisen from this routine demand for waivers has led to a crisis – a true Hobson's choice – among companies desirous of maintaining the sanctity of the privilege, but more anxious to avoid being charged with corporate crime. As a result of many forced waivers, company after company has had to endure the inevitable by-product of a waiver – a demand for production by a third party civil litigant.

## IV. PROPOSED RULE 502(b)(3)

When a company produces protected materials, attorney-client privileged or work product, to a governmental authority, and later seeks to protect production to a third party in litigation, courts are routinely asked to opine on the question of whether that company can still invoke the confidentiality protections of the privilege and the doctrine. In other words, can a client selectively waive as to the government and successfully maintain the privilege as to third parties?

In 1977, the Eighth Circuit found that the production of documents, including privileged documents, to the SEC pursuant to subpoena did not constitute a general waiver as to a third party litigant in a private civil suit, thus initially recognizing what came to be called the "selective waiver" doctrine.[24] However, most courts in recent years have rejected the concept of "selective waiver," holding that waiver of privileged or protected material constitutes a waiver as to all parties and for all purposes.[25] Other courts have given greater or lesser protection depending on the presence of confidentiality agreements, or non-production to other third parties.[26] In recent years, only a few courts have sanctioned the "selective waiver" doctrine.[27]

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22 *See In re Sealed Case*, 107 F.3d 46, 50 (D.C. 1997); *In re Richard Roe, Inc.*, 68 F.3d 38, 39-40 (2d Cir. 1995); *U.S. v. Ruhbayan*, 201 F.Supp. 2d 682 (E.D. Va. 2002).

23 Fed. R. Civ. P. 26(b)(3).

24 *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

25 *See, e.g., Bank of America, N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 167 (S.D.N.Y. 2002); *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414 , 1458 (3rd Cir. 1992); *In re Martin Marietta Corp.*, 856 F.2d 619, 622-23 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

26 *See, e.g., Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414 (D.C. Cir. 1991); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 291 (6th Cir. 2002); *In re Steinhardt*

*(footnote continued on following page)*

It is as a result of such court confusion and resulting lack of certainty that the "selective waiver" portion of the Rule was proposed. It would create a measure of certainty by providing that disclosure of protected material to a local, state, or federal investigating authority would not constitute a general waiver of either the attorney-client privilege or work-product protection,[28] and it would "further[] the important policy of cooperation with governmental agencies, and maximize[] the effectiveness and efficiency of governmental investigations."[29]

However, our concern, and the basis of our objection to the rule, is that adopting the rule in the "culture of waiver" environment puts a Band-Aid on the corporate injury caused by wrong-headed governmental policies. The Advisory Committee has drafted a possible solution to the collateral problems caused by such policies.[30] But while much of Proposed Rule 502 appears appropriately designed to protect the confidentiality of attorney-client communications or attorney's work product, the "selective waiver" provision, if adopted, will undermine that same confidentiality by advancing the governmental policies that have that undermining as their *raison d'etre*. If adopted, the rule would effectively eliminate the possibility that a company could ever again assert the right not to waive the privilege or the work product doctrine.

In our view, the most important question that should be addressed, by Congress and by the various governmental agencies such as the Department of Justice and the SEC that have promulgated such policies that lead to such massive privilege waivers, is whether the policies contributing to the apparent need for "selective waiver" are themselves significant intrusions on

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*(footnote continued from preceding page)*

*Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993); *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638 (S.D.N.Y. 1981.

27 *See, e.g., Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *6, 11 (Del. Ch. Ct. 2002); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, 2002 WL 1628782, at *2 (S.D.N.Y. 2002) ; *In re McKesson HBOC Securities Litig.*, 2005 U.S. Dist. LEXIS 7098 (March 2005).

28 *See* Committee Note, at 6-7 (*infra*, fn 20).

29 *Id.*

30 The authors are concerned that even a proper "selective waiver" procedure in a truly voluntary environment would be ineffective unless uniformly applied in all jurisdictions. We note that there is a reasonable diversity of opinion as to whether a federally-enacted selective waiver rule would be effective in all instances in the courts of the various United States, *compare* Broun, "Memo on the Impact of the Draft Rule 502 on Waiver of Privilege in a State Action," Capra and Broun, Memorandum to Advisory Committee on Evidence Rules, April 24-25, 2006, at 17-23, *with* Comment Letter, Corporations Committee of the Business Law Section of the State Bar of California, at 2. The problems of inconsistency on questions of waiver can be profound. If otherwise protected information becomes available to a third party in one jurisdiction, the protections of disclosure in such jurisdiction may not be effective in another jurisdiction. And once the information is out, it is practically impossible to re-protect it. *Compare* (as to the same materials produced to the SEC by McKesson HBOC), *Saito v. McKesson HBOC, Inc.*, 2002 Del. Ch. LEXIS 139 [2002 WL 31657622 at p. *11 (Del. Ch. Ct. Nov. 13, 2002) ("[P]ublic policy seems to mandate that courts continue to protect the confidentially disclosed work product in order to encourage corporations to comply with law enforcement agencies."), with *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1241 (Cal. Ct. App. 2004) ("Given the Legislature's expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body. We agree with the trial court that under California law, McKesson waived the work product protection for the audit committee report and the interview memoranda."); *see also In re McKesson HBOC Securities Litig.*, 2005 U.S. Dist. LEXIS 7098, upholding the selective waiver doctrine on behalf of McKesson HBOC.

privilege and work-product protections and should be curtailed if not reversed. Under the auspices of the ABA Task Force, the Association of Corporate Counsel, the U.S. Chamber of Commerce, various state and local bar associations, and many other groups, strong efforts are being made to convince the appropriate authorities that such policies are misguided, destructive of important societal benefits, and should be repealed. In recent weeks, as mentioned above, after such efforts, the U.S. Sentencing Commission has voted to repeal its 2004 amendment to the Federal Sentencing Guidelines that encouraged prosecutors to require companies and other entities to waive their attorney-client privilege and work product protections as a pre-requisite for receiving credit for cooperation at sentencing.

We urge the Advisory Committee and, ultimately, the Congress, not to adopt Rule 502 with the provision set forth in (b)(3). We further urge that governmental agencies currently implementing policies of granting benefits for waiver and imposing penalties for not doing so look to the recent wise example set by the U.S. Sentencing Commission by no longer using a company's waiver of the attorney-client privilege or work product protections as a factor in determining whether a corporation has been cooperative with inquiries. In our judgment, that will be a far more effective way of reducing the incidence of waivers and the collateral problems addressed by proposed Rule 503(b)(3).

## V. IMPACT ON THE JUDICIAL PROCESS

As noted above and in virtually every serious discussion of the attorney-client relationship, recognition of the attorney-client privilege represents a balance made over several centuries of competing interests to preserve the integrity of the judicial process and thereby preserve important societal and governmental values. Recognition of the attorney work product doctrine is more recent but rests on exactly the same foundation of preserving the integrity of the judicial process. Whether that balance and those protections are established in case law, statute or rules of evidence, the judicial system has *always* been the locus of authority for interpreting and enforcing them. That is the only logical place for that locus to rest as it is the judicial system itself that can and must preserve that integrity.

Unfortunately, the authority of the judicial system in that context is undermined or even defeated if decisions are taken much earlier in the process than commencement of judicial proceedings that use waiver of those rights as a bargaining tool. The authors respectfully urge the Advisory Committee to be mindful that crafting a "selective waiver" protocol when governmental regulators and law enforcement agencies are pursuing policies resulting in a "culture of waiver" will merely contribute to interference in the lawyer-client relationship on which both self-informed compliance with laws and the judicial process itself depend.

To be sure, there is much to be said for attempts to bring uniformity to such a critical issue. Indeed, the ABA itself has long advocated the significant benefits of achieving uniformity in the judicial process.[31] Were that the only issue in play on this topic, the authors might come to

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[31] See, e.g., *amicus* brief submitted in the application for certiorari in *Martin Marietta Corp. v. Pollard*, 856 F. 2d 619 (4th Cir. 1988); cert. den. 490 U.S. 1011 (1989).

a different conclusion. But here, there is an overlaying issue of governmental policies and the impact they have on the requisite voluntary nature of waiver[32] and the actual freedom to assert rights of privilege and work product without which waiver cannot actually *be* voluntary. That complicates the evaluation in a way that causes us, on balance, to come down against the proposed Rule 502(b)(3).

## VI. SUPPORTING MATERIALS

As noted in this paper, the ABA has been working to preserve the attorney-client privilege and attorney work product protection. It has done so in a number of ways, including by testifying before Congress and the U.S. Sentencing Commission, submitting letters and other written statements to Congress and the Commission, participating in several *fora* involving privilege waiver issues, etc. The authors believe that it will continue to do so, individually or in cooperation with a coalition of organizations similarly concerned about threats to the attorney-client relationship. While not necessarily directly on point with issues presented by proposed Rule 502, the authors submit the following additional materials and attach them to this paper for the consideration of the Advisory Committee:

- Letter dated March 3, 2006 from the ABA Governmental Affairs Office to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, Committee of the Judiciary, U.S. House of Representatives.
- Letter dated March 28, 2006 from the ABA Governmental Affairs Office to the United States Sentencing Commission.

Respectfully submitted,

David M. Brodsky

Steven K. Hazen

R. William Ide

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April 19, 2006

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32 Proposed Rule 502(a) recognized the importance of voluntariness.

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March 28, 2006

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002
Attention: Public Affairs—Priorities Comment

Re: Comments on the Issue of "Chapter Eight – Privilege Waiver"

Dear Sir/Madam:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write in response to the Commission's Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006.[1] In particular, we would like to express our views regarding Final Priority (6), described in the Notice as the "review, and possible amendment" of the language regarding waiver of attorney-client privilege and work product protections contained in the Commentary in Section 8C2.5 of the Federal Sentencing Guidelines.[2] We urge the Commission to amend this language to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government.

The ABA has long supported the use of sentencing guidelines as an important part of our criminal justice system. In particular, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

In February 2005, the ABA House of Delegates met and reexamined the overall Sentencing Guidelines system in light of the recent Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* (the "*Booker/Fanfan* decision"). At the conclusion of that process, the ABA adopted a new policy recommending that Congress

[1] 71 Fed. Reg. 4782-4804 (January 27, 2006)
[2] In addition to this comment letter on the issue of "Chapter Eight – Privilege Waiver," the ABA is also filing separate comments with the Commission today on the specific issue of "Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)."

take no immediate legislative action regarding the overall Sentencing Guidelines system, and that it not rush to any judgments regarding the new advisory system, until it is able to ascertain that broad legislation is both necessary and likely to be beneficial.

Although the ABA opposes broad changes to the Sentencing Guidelines at this time, we continue to have serious concerns regarding certain narrow amendments to the Guidelines that took effect on November 1, 2004. These amendments, which the Commission submitted to Congress on April 30, 2004, apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. While the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.[3]

Before the adoption of this privilege waiver amendment, the Commentary was silent on the issue of privilege and contained no suggestion that such a waiver would ever be a factor in charging or sentencing decisions. This was true, even though the Department of Justice—acting in accordance with the 1999 "Holder Memorandum" and 2003 "Thompson Memorandum"[4]—was increasingly requesting that companies and other organizations waive their privileges as a condition for certifying their cooperation during investigations.

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[3] In August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Subsequently, on August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm. In addition, other useful materials regarding privilege waiver are available on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

[4] The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder, also known as the "Holder Memorandum," that encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit during investigations. The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson, also known as the "Thompson Memorandum." Subsequently, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," although the directive—also known as the "McCallum Memorandum"—does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. The Thompson and McCallum Memoranda are available online at http://www.usdoj.gov/dag/cftf/business_organizations.pdf and http://www.abanet.org/poladv/mccallummemo212005.pdf, respectively.

Since the adoption of the privilege waiver amendment to the Sentencing Guidelines in 2004, the ABA has been working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to persuade the Commission to reconsider, and perhaps modify, the waiver provision. Towards that end, the coalition sent a letter to the Commission expressing its concerns over the privilege waiver amendment on March 3, 2005 and the ABA sent a similar letter on May 17, 2005.

In June 2005, the Sentencing Commission issued its "Notice of Proposed Priorities and Request for Public Comment" for the amendment cycle ending May 1, 2006 in which it stated its tentative plans to reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines during its 2005-2006 amendment cycle. In response, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[5]—including three former Attorneys General—and Rep. Dan Lungren (R-CA) submitted separate comment letters to the Sentencing Commission on August 15, 2005 urging it to reverse the 2004 privilege waiver amendment and add language to the Guidelines stating that waiver should not be a factor in determining cooperation.[6] Later that month, the Commission issued its "Notice of Final Priorities" for the amendment cycle ending May 1, 2006 in which it stated its intent to formally reconsider the 2004 privilege waiver amendment to the Federal Sentencing Guidelines.

On November 15, 2005, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on the subject of privilege waiver.[7] In response to questions from several Commissioners regarding the frequency with which governmental entities have been requesting that businesses waive their privileges as a condition for cooperation credit, as well as the effects of these waiver requests, the coalition and the ABA subsequently undertook a detailed survey of in-house and outside corporate counsel, and the results were presented to the Commission in early March 2006.[8] Several representatives of the coalition also testified before the Commission on March 15, 2006 regarding the results of the new survey.

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[5] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[6] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the ABA, coalition and other August 15, 2005 comment letters and most other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[7] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

[8] The detailed results of the new March 2006 surveys of in-house and outside corporate counsel are available online at http://www.acca.com/Surveys/attyclient2.pdf. The new March 2006 surveys expanded upon the coalition's previous surveys of in-house and outside counsel that were completed in April 2005. Executive summaries of the April 2005 surveys are available at www.acca.com/Surveys/attyclient.pdf and www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf, respectively.

Meanwhile, the Commission issued its Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings on January 27, 2006. One of the issues on which the Commission sought public comment was the issue of "Chapter Eight – Privilege Waiver." In particular, the Commission sought additional comment on the following specific issues:

> (1) whether this commentary language [in Application Note 12 of Section 8C2.5 of the Guidelines] is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.[9]

**Unintended Consequences of the Privilege Waiver Amendment**

In response to the first two issues posed by the Commission, the ABA believes that the 2004 privilege waiver amendment to the Sentencing Guidelines has helped cause a variety of profoundly negative, if unintended, consequences.

The ABA believes that as a result of the privilege waiver amendment and related Justice Department policies and practices, companies have been forced to waive their attorney-client and work product protections in most cases. The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was exacerbated when the Commission added the new privilege waiver language to the Section 8C2.5 Commentary in 2004. While the new language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and standing in the marketplace.

Substantial new evidence confirms that the privilege waiver amendment, combined with the Justice Department's waiver policies, has resulted in the routine compelled waiver of attorney-client and work product protections. According to the new survey of over 1,200 in-house and outside corporate

[9] *See* Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings, 71 Fed. Reg. 4782-4804 (January 27, 2006).

counsel that was completed by the coalition and the ABA in March 2006, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel respondents also indicated that when prosecutors give a reason for requesting privilege waiver, the Sentencing Guidelines rank second only to the Justice Department's waiver policies among the reasons most frequently cited.

The ABA is concerned that that the 2004 privilege waiver amendment to the Guidelines and the related Justice Department waiver policies—which together have resulted in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, the 2004 privilege waiver has helped to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By authorizing and encouraging routine government demands for waiver of attorney-client and work product protections, the privilege waiver amendment discourages personnel within companies and other organizations from consulting with their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law, thereby harming not only companies, but the investing public as well.

Second, while the privilege waiver amendment—like the Justice Department's waiver policies—was intended to aid government prosecution of corporate criminals, it has actually made detection of corporate misconduct more difficult by helping to undermine companies' internal compliance programs and procedures. These compliance mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Unfortunately, because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client and work product protections will be honored makes it more difficult for companies to detect and remedy wrongdoing early. Therefore, by further encouraging prosecutors to seek waiver on a routine basis, the privilege waiver amendment undermines, rather than promotes, good corporate compliance practices.

Third, the privilege waiver amendment unfairly harms employees by infringing on their individual rights. By fostering a system of routine waiver, the 2004 privilege waiver amendment and the other related governmental policies place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that statements made to the company's or organization's lawyers will be turned over to the government by the entity or they can decline to cooperate and risk their employment. It is

fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights.

In recent months, many others—including the coalition of business and legal groups and the former senior Justice Department officials referenced above—have expressed similar concerns regarding the unintended consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines. The ABA shares these concerns and believes that the privilege waiver amendment is counterproductive and undermines, rather than enhances, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

**Congressional Oversight of Governmental Waiver Policies**

On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the subject of government-coerced waiver policies. The hearing, titled "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," included a number of prominent witnesses, including Associate Attorney General Robert McCallum, former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President Thomas Donohue, and William Sullivan, Jr. of the law firm of Winston & Strawn.[10] With the exception of Mr. McCallum, all of the other witnesses expressed serious concerns regarding the growing trend of government-coerced privilege waiver and identified the Justice Department's waiver policies and the 2004 privilege waiver amendment as major contributing factors causing the erosion of the privilege.

During the hearing, the Chairman of the Subcommittee, Rep. Howard Coble (R-NC), expressed his strong support for the attorney-client privilege and his concerns regarding routine prosecutor demands for waiver during investigations. In addition, after acknowledging that prosecutors "must be zealous and vigorous in their efforts to bring corporate actors to justice," Chairman Coble said that "there is no excuse for prosecutors to require privilege waivers as a routine matter." In addition, Chairman Coble vowed that his subcommittee would "examine the important issue with a keen eye to determine whether Federal prosecutors are routinely requiring cooperating corporations to waive such privilege." After noting that the Sentencing Commission is now reexamining the privilege waiver issue as part of the current amendment cycle, he concluded that "while the guidelines do not explicitly mandate a waiver of privileges for the full benefit of cooperation, in practical terms we have to make sure that they do not operate to impose a requirement..."

Later in the hearing, similar concerns regarding government-coerced waiver were also raised by Rep. Dan Lungren (R-CA), who previously served as California Attorney General. During the question and answer period, Rep. Lungren reiterated his longstanding opposition to the 2004 privilege waiver amendment to the Sentencing Guidelines as explained in his August 15, 2005 letter to the Commission, and he said that he had a "huge concern" with the 2004 amendment to the extent that it "require[d] entities to waive the attorney-client privilege and work product protections as a condition of showing cooperation." In addition, Rep. Lungren criticized the 1999 Holder Memorandum, the

[10] The written testimony of each of the witnesses who appeared at the March 7, 2006 hearing and the letter submitted by the ABA to the Subcommittee regarding the hearing are available at http://www.abanet.org/poladv/testimony306.pdf.

2003 Thompson Memorandum, and the 2004 privilege waiver amendment as together constituting a "creeping intrusion" on the attorney-client privilege.

Rep. William Delahunt (D-MA), himself a former long-time prosecutor, expressed similar misgivings at the hearing regarding government-coerced waiver in general and both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines in particular. At the conclusion of the hearing, Rep. Delahunt summed up the serious concerns that all the Subcommittee members had previously expressed regarding governmental privilege waiver policies, and he respectfully asked Associate Attorney General McCallum to convey those concerns to the Justice Department in order to avoid having to face bipartisan legislation designed to resolve the issue.

The concerns that the members of the House Judiciary Subcommittee expressed during the March 7 hearing are consistent with those previously expressed to the ABA and the coalition on November 16, 2005 by Sen. Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, and Rep. James Sensenbrenner (R-WI), Chairman of the House Judiciary Committee.[11]

**Recommended Changes to the 2004 Privilege Waiver Amendment to the Sentencing Guidelines**

In order to reverse the negative consequences that have resulted from the 2004 privilege waiver amendment to the Guidelines and help prevent further erosion of the attorney-client privilege, we urge the Commission to amend the applicable language in the Commentary to Section 8C2.5 of the Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted. To accomplish this, we recommend that the Commission (1) add language to the Commentary clarifying that cooperation only requires the disclosure of "all pertinent non-privileged information known by the organization", (2) delete the existing Commentary language "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization", and (3) make the other minor wording changes in the Commentary outlined below.

If our recommendations were adopted, the relevant portion of the Commentary would read as follows[12]:

> "12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent non-privileged information known

[11] On November 16, 2005, Sen. Specter and Rep. Sensenbrenner spoke at a legal conference dealing with the erosion of the attorney-client privilege that was sponsored by the U.S. Chamber of Commerce, the ABA, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. A transcript of Sen. Specter's comments on the privilege waiver issue, as well as the full text of Rep. Sensenbrenner's prepared remarks, are available online at http://www.abanet.org/poladv/acpriv_transcriptofsenspecter11-16-05.pdf and http://www.abanet.org/poladv/acprivsensenbrenner11-16-05.pdf, respectively.

[12] Note: The Commission's November 1, 2004 amendments on the privilege waiver issue are shown in italics. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

by the organization. A prime test of whether the organization has disclosed all pertinent non-privileged information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. *Waiver of attorney-client privilege and of work product protections is not* a factor in determining whether ~~*a prerequisite to*~~ *a reduction in culpability score under subdivisions (1) and (2) of subsection (g)* is warranted. ~~*unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.*~~."

Thank you for considering our comments. If you would like more information regarding the ABA's position on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the U.S. Sentencing Commission
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Defending Liberty
Pursuing Justice

March 3, 2006

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," Scheduled for March 7, 2006

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to express our views concerning the subject of your Subcommittee's upcoming hearing, "White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers," which is scheduled for March 7, 2006. In particular, we would like to express our strong support for preserving the attorney-client privilege and work product doctrine and our concerns regarding several federal governmental policies and practices that have begun to seriously erode these fundamental rights. We ask that this letter be included in the official record of the Subcommittee's March 7, 2006 hearing.

## The Importance of the Attorney-Client Privilege

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, both the attorney-client privilege and the work product doctrine help facilitate self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large.

## Federal Government Policies That Erode the Attorney-Client Privilege

The American Bar Association strongly supports the preservation of the attorney-client privilege and opposes governmental policies, practices and procedures that have the effect of eroding the privilege.[1] Although a number of federal governmental agencies have adopted policies in recent years that have weakened attorney-client and work product protections, the ABA is particularly concerned about policies recently adopted by the Department of Justice—and an amendment to the Federal Sentencing Guidelines adopted by the U.S. Sentencing Commission in 2004—that have led many federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition of receiving credit for cooperation during investigations.

*Justice Department Policies*

The Justice Department's privilege waiver policy originated with the adoption of a 1999 memorandum by then-Deputy Attorney General Eric Holder entitled "Federal Prosecution of Corporations." The so-called "Holder Memorandum" encouraged federal prosecutors to request that companies waive their privileges as a condition for receiving cooperation credit. It states in pertinent part:

> In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges.

Although the Holder Memorandum stated that waiver was not an absolute requirement, it nevertheless made it clear that waiver was a factor for prosecutors to consider in evaluating the corporation's cooperation. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

The Department's waiver policy was expanded in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled "Principles of Federal Prosecution of Business Organizations." The so-called "Thompson Memorandum" stated that:

> One factor the prosecutor may weigh in assessing the adequacy of the corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protection, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees

[1] On August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Previously, in August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Both ABA resolutions, and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/acprivilege.htm.

> and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.[2]

Although both the Holder and Thompson Memoranda state that waiver is not mandatory and should not be required in every situation, the reality is that these policies have led many if not most federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations. Moreover, prosecutors typically demand disclosure at the very beginning of the investigation, even before the government has sought to obtain information through techniques such as grand jury subpoenas, warrants, and in appropriate circumstances, compulsion of testimony.[3] In addition, the U.S. Attorney for the Southern District of New York "has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation."[4]

In an attempt to address this growing problem of routine governmental demands for privilege waiver, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and many local U.S. Attorneys are now in the process of implementing this directive.[5] Unfortunately, the McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, it will likely result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver.

*The 2004 Privilege Waiver Amendment to the Federal Sentencing Guidelines*

The problem of coerced waiver that began with the 1999 Holder Memorandum and the 2003 Thompson Memorandum was further exacerbated when the U.S. Sentencing Commission adopted certain amendments to the Federal Sentencing Guidelines that took effect on November 1, 2004. These amendments apply to that section of the Guidelines relating to "organizations"—a broad term that includes corporations, partnerships, unions, non-profit organizations, governments, and other entities. These organizational guidelines provide the standard by which the criminal

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[2] Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

[3] Public hearing held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines, Nov. 14, 2002, at 27.

[4] Judson W. Starr and Brian L. Flack, *Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001).

[5] A copy of the McCallum Memorandum of October 21, 2005 is available online at http://www.abanet.org/poladv/mccallummemo212005.pdf.

penalties for corporate wrongdoing are measured, and they ostensibly are designed to create incentives for good corporate behavior while increasing penalties for corporations that lack mechanisms for discouraging and detecting employee wrongdoing.

Although the ABA has serious concerns regarding several of these recent amendments, most alarming is the amendment that added the following new language to the Commentary for Section 8C2.5 of the Guidelines:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." Without some meaningful oversight over what waivers prosecutors may deem to be "necessary," this exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required.

Unfortunately, neither the Holder nor Thompson Memoranda provide any meaningful oversight over what waivers prosecutors may deem "necessary" under the new language in the Sentencing Guidelines. Therefore, now that this amendment has become effective, the Justice Department is even more likely than it was before to require companies to waive their privileges in almost all cases. Adding to our concern is that the Justice Department, as well as other enforcement agencies, is viewing the lack of congressional disapproval of this amendment as congressional ratification of the Department's policy of routinely requiring privilege waiver. From a practical standpoint, companies increasingly have no choice but to waive these privileges whenever the government demands it, as the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price, and credit worthiness.

## Unintended Consequences of Governmental Demands for Privilege Waiver

Substantial new evidence has demonstrated that the Justice Department's waiver policies, combined with the 2004 privilege waiver amendment to the Federal Sentencing Guidelines, have resulted in the routine compelled waiver of attorney-client privilege and work product protections. According to a new survey of over 1,400 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006,[6] almost 75% of corporate counsel respondents believe that

[6] The detailed Survey Results are available online at http://www.acca.com/Surveys/attyclient2.pdf.

a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The American Bar Association is concerned that the Justice Department's waiver policies and the 2004 amendment to the Sentencing Guidelines—resulting in routine government requests for waiver of attorney-client and work product protections—will continue to unfairly harm companies, associations, unions and other entities in a number of ways. First and foremost, these governmental policies seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the managers and the board and must be provided with all relevant information necessary to properly represent the entity. By requiring routine waiver of an entity's attorney-client and work product protections, these governmental policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This harms not only companies, but the investing public as well.

Second, while the Justice Department's waiver policies and the 2004 privilege waiver amendment were intended to aid government prosecution of corporate criminals, they are likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, any attempt to require routine waiver of attorney-client and work product protections will seriously undermine systems that are crucial to compliance and have worked well.

Third, the Justice Department's policies and the privilege waiver amendment to the Sentencing Guidelines unfairly harm employees by infringing on their individual rights. By fostering a system of routine waiver, these policies place the employees of a company or other organization in a very difficult position when their employers ask them to cooperate in an investigation. They can cooperate and risk that their privileged statements will be turned over to the government by the organization or they can decline to cooperate and risk their employment. It is fundamentally unfair to force employees to choose between keeping their jobs and preserving their legal rights. For all these reasons, the ABA believes that the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Guidelines are counterproductive and undermine, rather than enhance, compliance with the law as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

The ABA is working to convey these concerns to policymakers, and reverse the recent erosion of attorney-client and work product protections, in a number of ways. In 2004, we created the ABA Task Force on Attorney-Client Privilege to study and address the governmental policies and practices that have eroded attorney-client and work product protections. The ABA Task Force has held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy—unanimously adopted by our House of Delegates last August—supporting the privilege and opposing government policies that erode the privilege.[7] The new ABA policy and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/.

The ABA is also working in close cooperation with a broad and diverse coalition of legal and business groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—in an effort to modify both the Justice Department's waiver policies and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work product protections should not be a factor in determining cooperation. The remarkable political and philosophical diversity of that coalition shows just how widespread these concerns have become in the business, legal, and public policy communities.

On August 15, 2005, the ABA, the informal coalition, and a prominent group of nine former senior Justice Department officials[8]—including three former Attorneys General—submitted separate comment letters to the Sentencing Commission urging it to reverse or modify the 2004 privilege waiver amendment.[9] Subsequently, the ABA, several organizations from the coalition, and former Attorney General Dick Thornburgh testified before the Sentencing Commission on November 15, 2005 in order to reiterate these views.[10] In addition, the ABA and various members of the coalition have met repeatedly with a number of senior Justice Department officials in order to express our joint concerns over the Department's internal privilege waiver policies.

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[7] See ABA resolution regarding privilege waiver approved in August 2005, discussed in footnote 1, *supra*.

[8] The August 15, 2005 comment letter signed by the nine former senior Justice Department officials—including three former Attorneys General, one former Acting Attorney General, two former Deputy Attorneys General, and three former Solicitors General—is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

[9] The signatories to the coalition's August 15, 2005 comment letter to the Commission were the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. In addition, the ABA, which is not a formal member of the coalition but has worked in close cooperation with that entity, also submitted similar comments to the Commission on August 15, 2005. Links to the coalition and ABA August 15 comment letters and all other privilege waiver materials referenced in this letter are available at http://www.abanet.org/poladv/acprivilege.htm.

[10] The November 15, 2005 testimony of the American Bar Association, American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers, U.S. Chamber of Commerce, and former Attorney General Dick Thornburgh are available at http://www.ussc.gov/AGENDAS/agd11_05.htm.

**Reforms Necessary To Remedy the Privilege Waiver Problem**

In order to stop and reverse the erosion of the attorney-client privilege and work product doctrine in the corporate context—and start to undo the negative consequences that have resulted from this erosion—it will be necessary to modify both the 2004 privilege waiver amendment to the Sentencing Guidelines and the Justice Department's internal waiver policies.

After receiving extensive written comments and testimony from the ABA, the coalition, former senior Justice Department officials, and other organizations, the Sentencing Commission issued a request for public comment by March 28, 2006 on whether the privilege waiver language in the Guidelines should be deleted or amended. In addition, the Commission has scheduled a hearing on March 15, 2006 to consider proposed amendments to the Sentencing Guidelines on a number of issues—including privilege waiver. Several representatives of the coalition have been invited to testify at that March 15 hearing and explain the results of the new surveys of corporate counsel. In addition, the ABA and the coalition will file additional comments with the Commission on this issue prior to the March 28 deadline, urging the Commission to revise the Sentencing Guidelines by stating affirmatively that waiver of attorney-client and work product protections should not be a factor in determining cooperation.

Although we are encouraged by the Commission's willingness to reconsider the 2004 privilege waiver amendment during its current amendment cycle, it is not known what changes, if any, the Commission will make to the provision this year. Its final decision on this issue will not be known until it issues its final Proposed Rules in late April 2006. Therefore, we urge the Subcommittee to (1) express its concerns to the Commission regarding the privilege waiver issue as soon as possible and (2) encourage the Commission to amend the Guidelines—during the current amendment cycle—to state that waiver of attorney-client and work product protections should not be a factor in determining whether a corporation or other entity has fully cooperated with the government during an investigation.

Unlike the Sentencing Commission, the Justice Department is not yet formally taking steps to reexamine—and possibly remedy—its role in the growing problem of government-coerced privilege waiver. As a result of the 1999 Holder Memorandum and the 2003 Thompson Memorandum, most federal prosecutors now routinely demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, many local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous different waiver policies throughout the country.

For these reasons, the ABA urges the Subcommittee, as part of its oversight responsibilities, to hold additional hearings and encourage the Department to modify its internal policies on privilege waiver. Ideally, the Department's policies should be modified to (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the

attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: All members of the Subcommittee on Crime, Terrorism and Homeland Security

# TESTIMONY OF JAMES K. ROBINSON
# MINI-CONFERENCE ON PROPOSED EVIDENCE RULE 502
# UNITED STATES JUDICIAL CONFERENCE ADVISORY COMMITTEE ON RULES OF EVIDENCE
# FORDHAM UNIVERSITY SCHOOL OF LAW
# APRIL 24, 2006

JUDGE SMITH, AND MEMBERS OF THE COMMITTEE, THANK YOU FOR THE INVITATION TO EXPRESS MY VIEWS ON PROPOSED RULE 502.

IT IS A PARTICULAR PLEASURE FOR ME TO APPEAR TODAY SINCE IT WAS MY HONOR TO SERVE AS A MEMBER OF THIS COMMITTEE FROM 1993 THROUGH 1998.

I COMMEND THE COMMITTEE FOR ADDRESSING THE IMPORTANT ISSUES CONCERNING THE COLLATERAL CONSEQUENCES OF DISCLOSURES BY CORPORATIONS TO THE GOVERNMENT OF OTHERWISE PROTECTED ATTORNEY CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT INFORMATION DURING THE COURSE OF GOVERNMENT INVESTIGATIONS.

I AM CURRENTLY A PARTNER IN THE BUSINESS FRAUD GROUP OF CADWALADER, WICKERSHAM & TAFT LLP, IN ITS WASHINGTON, D.C. OFFICE.

MY PRACTICE INCLUDES THE REPRESENTATION OF CORPORATIONS, AS WELL AS CURRENT AND FORMER EMPLOYEES OF CORPORATIONS, IN CONNECTION WITH CIVIL AND CRIMINAL MATTERS RELATED TO GOVERNMENT INVESTIGATIONS.

I AM ALSO SERVING (BY SELECTION OF THE DEPARTMENT OF JUSTICE AND TIME WARNER, INC.) AS THE INDEPENDENT MONITOR OF TIME WARNER'S SUBSIDIARY AMERICA ONLINE (AOL) UNDER ITS DEFERRED PROSECUTION AGREEMENT WITH THE DEPARTMENT OF JUSTICE.

MY EXPERIENCE AS A FEDERAL PROSECUTOR INCLUDES SERVICE AS THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN (1977-80) AND AS THE ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE (1998-2001).

DURING MY TENURE WITH THE CRIMINAL DIVISION I WAS INVOLVED IN THE DRAFTING AND APPROVAL OF THE DEPARTMENT'S 1999 MEMORANDUM CONCERNING FEDERAL PROSECUTION OF CORPORATIONS, KNOWN AS THE HOLDER MEMO.

FOR MANY, THE ISSUANCE OF THE HOLDER MEMO IN 1999, WITH ITS RECOGNITION THAT A CORPORATION'S WAIVER OF THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE ENTITLED THE CORPORATION TO "COOPERATION CREDIT," WAS THE EQUIVALENT OF CORPORATE AMERICA OPENING A FORTUNE COOKIE READING: "A CHANGE FOR THE BETTER HAS BEEN MADE AGAINST YOU."

MUCH HAS BEEN SPOKEN AND WRITTEN ON THE SUBJECT OF WHETHER THE HOLDER/THOMPSON MEMOS' FORMAL RECOGNITION THAT "COOPERATION CREDIT" WILL BE GIVEN TO WAIVERS OF THE ATTORNEY CLIENT PRIVILEGE AND THE PROTECTION OF THE WORK PRODUCT DOCTRINE, IS A "CHANGE FOR THE BETTER" OR NOT.

THE AMERICAN BAR ASSOCIATION, AND OTHER GROUPS, HAVE COMPLAINED THAT THE HOLDER/THOMPSON MEMOS HAVE RESULTED IN A "CULTURE OF WAIVER" THAT HAS SERIOUSLY ERODED THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE TO THE DETRIMENT OF CONSTRUCTIVE CORPORATE COMPLIANCE WITH THE LAW, BY THREATENING THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN CORPORATE EMPLOYEES AND CORPORATE LAWYERS..

PROSECUTORS, ON THE OTHER HAND, CLAIM THAT CORPORATIONS WITH SERIOUS CRIMINAL EXPOSURE THAT SEEK LENIENCY (INCLUDING NON-PROSECUTION) SHOULD BE EXPECTED TO COOPERATE FULLY WITH LAW ENFORCEMENT IN ROOTING OUT CRIMINAL CONDUCT IN THE CORPORATE RANKS, TAKING APPROPRIATE ACTION AGAINST WRONGDOERS AND ASSISTING WITH PROSECUTION OF CORPORATE EMPLOYEES IN APPROPRIATE CASES.

TO PROSECUTORS "FULL COOPERATION" OFTEN MEANS THE DISCLOSURE OF INFORMATION PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.

BOTH SIDES OF THIS DEBATE HAVE LEGITIMATE ARGUMENTS. IN MY VIEW THERE IS NO CLEARLY RIGHT OR WRONG VIEW OF THE MATTER. MUCH DEPENDS ON THE PARTICULAR CIRCUMSTANCES AND SCOPE OF A WAIVER.

IT CANNOT BE SERIOUSLY DISPUTED, HOWEVER, THAT THE RECENT TREND TOWARD CORPORATE INTERNAL INVESTIGATIONS, COUPLED WITH VOLUNTARY DISCLOSURES TO THE GOVERNMENT, HAS PRODUCED MANY IMPORTANT PROSECUTIONS AND CONVICTIONS, AND HAS RESULTED IN

SUBSTANTIALLY IMPROVED COMPLIANCE PROGRAMS IN MANY CORPORATIONS, BOTH DIRECTLY AND INDIRECTLY THROUGH THE DETERRENCE OF CRIMINAL CONDUCT IN THE CORPORATE SETTING.

IT IS ALSO TRUE THAT MANY CORPORATIONS AND THEIR STAKEHOLDERS HAVE BEEN SPARED CRIPPLING CRIMINAL PROSECUTIONS AS A DIRECT RESULT OF THEIR COOPERATION, INCLUDING WAIVERS OF THE PRIVILEGE AND THE PROTECTION OF THE WORK PRODUCT DOCTRINE . IN THE PROCESS, THE CORPORATE CULTURE OF COMPLIANCE WITH THE LAW HAS BEEN SIGNIFICANTLY IMPROVED IN MANY CORPORATIONS.

THERE IS, HOWEVER, A LEGITIMATE DEBATE ABOUT WHETHER THE BENEFITS TO THE PUBLIC OF THIS NEW APPROACH OUTWEIGHS THE SUBSTANTIAL ECONOMIC COSTS OF COMPLIANCE AND THE EROSION OF THE TRADITIONAL PROTECTIONS OF THE CORPORATE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

SOME ADVOCATES ON EACH SIDE OF THE DEBATE HAVE OVER OR UNDER STATED THE BENEFITS AND THE COSTS OF THIS NEW APPROACH TO CORPORATE CRIMINAL AND CIVIL INVESTIGATIONS.

THERE HAS BEEN MUCH "MOTHERHOOD AND APPLE PIE" TALK ABOUT THE LONG HISTORY AND CRITICAL IMPORTANCE OF THE ATTORNEY CLIENT PRIVILEGE IN INSURING COMPLIANCE WITH THE LAW BY CORPORATIONS.

IN THE PROCESS, HOWEVER, SOMETIMES THE CRITICS OF THIS NEW APPROACH FAIL TO ACKNOWLEDGE THAT THE SETTING OF THE **CORPORATE** ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE DOES NOT

REACH BACK IN HISTORY AS FAR AS IT DOES FOR INDIVIDUALS, AND THE SCOPE AND CONTOURS OF THESE PROTECTIONS ARE DIFFERENT IN IMPORTANT RESPECTS FROM CASES WHERE THE CLIENT IS AN INDIVIDUAL.

CORPORATIONS, UNLIKE INDIVIDUALS, FOR EXAMPLE DO NOT ENJOY THE CONSTITUTIONAL PROTECTION AGAINST SELF-INCRIMINATION. THUS, THE CONSTITUTIONAL UNDERPINNINGS THAT SUPPORT THESE PROTECTIONS FOR INDIVIDUALS DO NOT APPLY IN THE CORPORATE CONTEXT.

CORPORATIONS ARE CREATURES AUTHORIZED TO EXIST BY THE STATE. THEIR OWNERS ARE ACCORDED SIGNIFICANT BENEFITS BY DOING BUSINESS THROUGH THE VEHICLE OF A CORPORATION, INCLUDING PROTECTION FROM UNLIMITED LIABILITY BEYOND THE RESOURCES OF THE CORPORATION ITSELF.

THE ATTORNEY CLIENT PRIVILEGE PROTECTS THE INDIVIDUAL EMPLOYEES WHO CONFIDE IN THE CORPORATION'S LAWYERS ONLY AS LONG AS THE CORPORATION CONTINUES TO INVOKE THE PRIVILEGE. EMPLOYEES HAVE NO STANDING TO OBJECT TO A WAIVER BY THE CORPORATION.

AS A RESULT, IT IS NOT UNREASONABLE THAT THE RIGHTS AND PRIVILEGES OF CORPORATIONS ARE VIEWED DIFFERENTLY FROM THOSE OF CLIENTS WHO ARE REAL PEOPLE ENGAGED IN PROTECTED COMMUNICATIONS WITH THEIR LAWYERS FOR THE PURPOSE OF SECURING LEGAL ADVICE.

THE RIGHTEOUS INDIGNATION THAT WOULD FLOW IF THE DEPARTMENT OF JUSTICE WERE TO INSTITUTE A POLICY OF WITHHOLDING COOPERATION CREDIT FROM INDIVIDUALS FOR FAILURE TO WAIVE PRIVILEGES SIMPLY DOES NOT HAVE EQUAL FORCE WHEN APPLIED IN THE CORPORATE SETTING.

ON THE ISSUE OF PROSECUTING CORPORATIONS GENERALLY, AND GIVING COOPERATION CREDIT FOR WAIVER OF PRIVILEGES, THERE ARE SERIOUS COMPETING POLICY CONSIDERATIONS THAT MUST BE WEIGHED.

THE CURRENT ISSUE OF THE AMERICAN CRIMINAL LAW REVIEW CONTAINS AN ARTICLE URGING THAT THE ENTIRE QUESTION OF INDICTING CORPORATIONS SHOULD BE REVISITED IN THE WAKE OF THE ARTHUR ANDERSON PROSECUTION. SEE AINSLIE, INDICTING CORPORATIONS REVISITED: LESSONS OF THE ARTHUR ANDERSEN PROSECUTION, 43 AM CRIM L. REV 107 (2006).

THE DEPARTMENT OF JUSTICE, OF COURSE, HAS TAKES A VERY DIFFERENT VIEW ABOUT THE PROPRIETY OF PROSECUTING CORPORATIONS — ALTHOUGH THE CURRENT TREND IS TO REFRAIN FROM PROSECUTION OF THE CORPORATION—PROVIDED THE CORPORATION FULLY COOPERATES, AND THAT FULL COOPERATION OFTEN INVOLVES SOME FORM OF PRIVILEGE WAIVERS.

UNTIL THE DEBATE ABOUT WHETHER TO PROSECUTE CORPORATIONS IS RESOLVED, HOWEVER, THE REALITY IS THAT CORPORATIONS DO HAVE SUBSTANTIAL CRIMINAL EXPOSURE FOR THE ACTS OF ITS EMPLOYEES IN FURTHERANCE OF THE CORPORATION'S INTERESTS—THAT IS SO EVEN IF THE EMPLOYEE'S ACTIONS CONFLICT WITH THE CORPORATION'S GENERAL POLICIES OR CODES OF CONDUCT.

UNLESS THE JUSTICE DEPARTMENT CHANGES ITS POLICY WITH RESPECT TO CORPORATE PROSECUTION, THERE WILL CONTINUE TO BE A POWERFUL

INCENTIVE FOR FULL COOPERATION BY CORPORATIONS, INCLUDING WAIVING THE PRIVILEGE AND THE WORK PRODUCT PROTECTION.

EVEN IF CRIMINAL PROSECUTIONS WERE TO CEASE, PUBIC COMPANIES WOULD CONTINUE TO HAVE A POWERFUL INCENTIVE TO FULLY COOPERATE WITH AGENCIES LIKE THE SEC, INCLUDING PRIVILEGE WAIVERS.

LIKE IT OR NOT, THE DAYS OF HOPING NEVER TO GET CAUGHT, OR SUCCESSFULLY CIRCLING THE WAGONS AND INSISTING ON THE PROTECTION OF THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE IN RESPONSE TO GOVERNMENT INVESTIGATIONS, ARE OVER.

IN LIGHT OF THIS REALITY, THE PROPOSAL BEFORE THE COMMITTEE TO LIMIT THE COLLATERAL COSTS OF A WAIVER IN THE CONTEXT OF A GOVERNMENT PROSECUTION IS A VERY APPROPRIATE MEASURE THAT WILL PROVIDE SOME PROTECTION FOR THESE IMPORTANT PROTECTIONS WHILE ELIMINATING A BARRIER TO CORPORATE COOPERATION WITH GOVERNMENT INVESTIGATIONS..

THE SELECTIVE WAIVER RULE RECOGNIZES THAT, AS A PRACTICAL MATTER, A DISCLOSURE OF PROTECTED INFORMATION IN THE CONTEXT OF A GOVERNMENT INVESTIGATION IS NOT TRULY "VOLUNTARY" IN THE MANNER THAT HAS TRADITIONALLY RESULTED IN A WAIVER OF THE PROTECTION OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

INSTEAD, THE DISCLOSURE IS FORCED BY THE STAKES INVOLVED AND CONSTITUTES A MUTUALLY BENEFICIAL SHARING OF INFORMATION BETWEEN

THE CORPORATION AND THE GOVERNMENT THAT SERVES THE PUBLIC INTEREST.

THE INTERESTS OF THE CORPORATION'S SHAREHOLDERS ARE ALSO SERVED BY RECEIVING THE BENEFITS OF AVOIDING CRIMINAL PROSECUTION AND MINIMIZING THE ADVERSE CONSEQUENCES OF A GOVERNMENT ENFORCEMENT ACTION.

ADVANCING THE MUTUAL GOALS OF THE GOVERNMENT AND THE CORPORATION, IN THE PUBLIC INTEREST, HOWEVER, IS SUBSTANTIALLY IMPEDED BY THE CURRENT WAIVER REGIME THAT INSISTS THAT DISCLOSURES TO THE GOVERNMENT CONSTITUTE A WAIVER TO THE WORLD, INCLUDING PRIVATE ADVERSARIES OF THE CORPORATION, OF THE PROTECTIONS OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

THE PERSUASIVE CASE FOR RECOGNITION OF THE SELECTIVE WAIVER RULE WAS WELL STATED BY SIXTH CIRCUIT CHIEF JUDGE DANNY BOGGS IN HIS DISSENTING OPINION IN *IN RE COLUMBIA/HCA HEALTHCARE,* 293 F.3D 289 (6TH CIR. 2002).

SOME MAY OPPOSE THE SELECTIVE WAIVER RULE FOR THE SAME REASONS THAT WERE ADVANCED TO OPPOSE THE SENTENCING GUIDELINE RECOGNITION OF "COOPERATION CREDIT" FOR PRIVILEGE WAIVERS—THAT IT WILL SOMEHOW PROVIDE OFFICIAL SUPPORT FOR A "CULTURE OF WAIVER" AND CONSTITUTE A "REGULATORY IMPRIMATUR" TO THE GOVERNMENT'S PRACTICE OF SEEKING, OR AT LEAST ACCEPTING, AND GIVING CREDIT FOR, WAIVERS.

UNLIKE THE SENTENCING GUIDELINE PROVISION RECENTLY RESCINDED BY THE SENTENCING COMMISSION, HOWEVER, THE SELECTIVE WAIVER DOCTRINE TAKES NO POSITION ON WHETHER WAIVERS SHOULD OR SHOULD NOT OCCUR, OR WHETHER IF THEY DO, THEY SHOULD RESULT IN ANY "COOPERATION CREDIT" FROM THE GOVERNMENT.

IT DOES, TO BE SURE, ELIMINATE A MAJOR IMPEDIMENT TO SUCH WAIVERS, AND THUS INDIRECTLY ENCOURAGES THEM.

REMOVING THE IMPEDIMENT OF WAIVER TO THE WORLD, HOWEVER, PROVIDES AT LEAST SOME MEASURE OF PROTECTION TO THE CORPORATE HOLDER OF THESE PROTECTIONS, AND TO THEIR EMPLOYEES AS WELL, WHEN PRIVATE PARTIES BRING CLAIMS AGAINST THE CORPORATION AND ITS EMPLOYEES.

DESPITE THE HOPE OF SOME THAT THE GOVERNMENT WILL BE FORCED BY CONGRESS TO RECONSIDER ITS CURRENT POLICIES AND ABANDON ITS POSITION THAT CORPORATE WAIVERS DESERVE CREDIT IN THE CHARGING OR SETTLEMENT NEGOTIATIONS WITH THE GOVERNMENT, OR THAT CONGRESS WILL MANDATE THAT NO CREDIT BE GIVEN FOR WAIVERS, IN MY VIEW THAT SHIP HAS SAILED.

CORPORATIONS THAT DECIDE IT IS THEIR BEST INTERESTS TO WAIVE THEIR PRIVILEGES -- EVEN WITHOUT AN EXPRESS GOVERNMENTAL REQUEST (THE MOST USUAL OCCURRENCE THESE DAYS IN MY EXPERIENCE, PERHAPS BECAUSE THE CONTEXT SUGGESTS THAT A WAIVER IS IN THE BEST INTERESTS OF THE CORPORATION), -- CERTAINLY WILL NOT (OR SHOULD NOT) WELCOME A

CONGRESSIONAL MANDATE THAT THEY BE GIVEN NO CREDIT FOR THEIR WAIVER.

THE ALTERNATIVE OF REFUSING "FULL" COOPERATION MAY WELL BE TO FACE CIVIL OR CRIMINAL ENFORCEMENT ACTIONS AGAINST THEM THAT COULD BE AVOIDED BY "FULL COOPERATION," INCLUDING WAIVERS.

THE COMMITTEE'S DRAFT OF RULE 502, RECOGNIZING A SELECTIVE WAIVER OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE, IS A VERY CONSTRUCTIVE STEP IN LIMITING THE CURRENT EXCESSIVE COST OF A "VOLUNTARY" DISCLOSURE TO THE GOVERNMENT.

I URGE THE COMMITTEE TO RECOMMEND ADOPTION OF THE PROPOSED RULE.

## Privilege Waiver Rule

**Gregory P. Joseph**

The Advisory Committee on the Federal Rules of Evidence is considering Proposed Fed.R.Evid. 502, which would address waiver of attorney-client privilege and work product protection. The Rules Enabling Act requires affirmative Congressional approval of any rule "creating, abolishing, or modifying an evidentiary privilege." 28 U.S.C. § 2074(b). Therefore, Proposed Rule 502 will become effective only if enacted by Congress, and, in drafting it, the Advisory Committee acted at the request of the Chair of the House Judiciary Committee.

The Proposed Rule has four primary aspects:

- It articulates a test for determining the extent of subject matter waiver of privileged or work product material that is voluntarily disclosed. .
- It resolves a split in the Circuits as to whether inadvertent disclosure effects a waiver.
- It adopts the principle of selective waiver, under which disclosure to a governmental agency conducting an investigation does not effect a waiver as to third parties.
- It resolves a longstanding quandary by providing that a court order forgiving inadvertent waiver in the course of a litigation is binding on subsequent courts and third parties.

**Subdivision (a): Voluntary Waiver & Scope.** Subdivision (a) of Proposed Rule 502 addresses waiver through voluntary disclosure and the scope of the subject matter waiver that results:

> **(a) Waiver by disclosure in general.** — A person waives an attorney-client privilege or work product protection if that person — or a predecessor

> while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

The first sentence of subdivision (a) unobjectionably codifies current law. It raises one drafting issue, as applied to attorney-client privilege (not work product). As drafted, a privilege holder effects a waiver if he or she "voluntarily discloses ... any significant part of the privileged ... information." But it is the communication, not the information, that is privileged. A complaint contains information communicated to the plaintiff's lawyer by the plaintiff, but including that information in the complaint does not waive any privilege covering the underlying communications. It might be more felicitous if the phrase were not "the privileged or protected information" but, rather, "the privileged *communication* or protected information."

The second sentence — dealing with the scope of subject matter waiver — merits greater attention.

*Rule 106 Provenance.* The "ought in fairness" language is borrowed from Fed.R.Evid. 106, which states the rule of completeness: "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." This phrase has not proved problematic in Rule 106, and there is no reason to believe it will prove problematic as applied to matter covered by the attorney-client privilege (work product is another matter).

This is not to minimize the differences in the implications of the phrase as used in Rules 106 and 502(a). Under Rule 106, the court has before it a specific document or recording, and the contours of the fairness determination are cabined by four corners of that item. Under Proposed Rule 502(a), the scope of the waiver extends to all communications, written or oral, on

the subject. Subject matter waiver, however, is existing law. The "ought in fairness" language provides, if anything, a potential limitation on the extent of the waiver — confining it to something less than the entire universe of the subject matter. This effectively captures what most judges have historically done in exercising their discretion.

*Extrajudicial Waivers Limited.* The "ought in fairness" language also has the virtue of codifying a line of decisions holding that the waiver effected by an extrajudicial disclosure of privileged information is limited to the disclosure itself, and extends no further, provided that this does not work unfairness on the adversary. *See, e.g., In re Grand Jury Proceedings*, 350 F.3d 299 (2d Cir. 2003) (counsel for target of grand jury investigation sent letter to prosecutor asserting that target acted in good faith based on counsel's prior conversations with regulators; prosecutor's subpoena seeking counsel's notes of conversations with regulators quashed: "The crucial issue is not merely some connection to a judicial process but rather the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion. No such unfairness was present here."); *XYZ Corp. v. United States*, 348 F.3d 16 (1st Cir. 2003) ("the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter").

*Work Product Issues.* The implications of the "ought in fairness" test for subject matter waivers of work product protection are potentially more troublesome. Assume an auto accident with three witnesses. Two witnesses say your client had the green light; one says the light was red. You take statements from all three. If you use the two statements that favor you, must you

"in fairness" disclose the third? That is not the law today, nor should it be. You may have taken the third solely for purposes of impeachment; you may highly distrust the accuracy of the third's rendition; and your client did not retain you to prepare your adversary's case. There is a strong argument that Rules 26(a)(1)(b), 26(a)(3) (first paragraph) and 26(b)(3) (second paragraph) contemplate that such statements are not subject to disclosure unless and until used for impeachment. A Congressionally-enacted Rule 502 may be deemed to supersede these provisions.

Or assume a Rule 30(b)(6) deposition. You represent the organization that is to be deposed. Assume that you practice in a jurisdiction that requires that you educate the deponents so that they can testify fully as to matters known or reasonably available to the organization about the noticed topics (*see* 7 MOORE'S FEDERAL PRACTICE § 30.25[3] (2005)). You prepare a thick binder of materials for the deponents to consult during the depositions. You know that the binder will be marked as an exhibit, and that nothing in it is protected. But what about everything else you know and have generated on the topics addressed in the binder? Is everything you have thought about these topics — including every email or assessment you have made of the strengths and weaknesses of your opponent's case — to be disclosed, too, "in fairness?" Is it to be reviewed in camera by a judge to determine what the boundaries of "fairness" are? This could develop into a nightmare for purposes of judicial administration as well the adversary process. These are issues that the Advisory Committee should clarify.

Note that Proposed Rule 502(a) governs only waiver through voluntary disclosure. The Advisory Committee Note stresses that it is not intended to displace or modify federal common law concerning waiver of privilege or work product in other circumstances — *e.g.*, reliance on

advice of counsel, "at issue" waiver, or refreshing recollection while testifying (Fed.R.Evid. 612).

**Subdivision (b)(1): Non-Waiver.** Proposed Rule 502(b)(1) provides that "[a] voluntary disclosure does not operate as a waiver if...the disclosure is itself privileged or protected." This would appear to be a truism, and its import is clear enough. As to privilege, it is simple to apply. The second communication (the disclosure) need only fall within the coverage of a privilege.

But what does it mean that the second disclosure is "protected" as work product? Work-product protection generally applies not to disclosures as such but to an activity — preparing for anticipated litigation or trial — and the documents and things produced by that activity. Does "protected" refers to any disclosure made in connection with preparation in anticipation of litigation or for trial? That is too broad — the exception would virtually consume the rule stated in subdivision (a).

Proposed Rule 502(b)(1) highlights an important difference between work product protection and the attorney-client privilege. Work product is not designed to preserve confidentiality — other than from an adversary. Disclosures that do not substantially increase the adversary's opportunity to obtain the work product do not effect a waiver. 8 Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE § 2024 (Supp. 2005). Presumably subdivision (b)(1) refers to communications that are protected as work product — for example, a disclosure of work product to a person aligned in interest with a client. Subdivision (b)(1) presumably would not apply where the communication itself was protected — such as the taking of a witness statement — because that is not a "disclosure." That instead falls within the definition of "work product" in subdivision (e)(2).

**Subdivision (b)(2): Inadvertent Waiver.** Subdivision (b)(2) settles the Circuit split concerning the effect of inadvertent disclosure, holding that no waiver is effected if:

> the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

This is a salutary provision that adopts the majority rule. Note the two-part test: the holder must have taken reasonable precautions to prevent disclosure and must take reasonably prompt measure to rectify the error after discovering the inadvertent production. This provision does not sanction intentional disclosure, such as the "quick peek" approach to electronic discovery under which data are turned over to the requesting party without review by the producing party; the requesting party then identifies the documents it is interested in; and the producing party will then conduct a privilege review. *See* ABA Civil Discovery Standard 32 (b) and (d)(ii). This approach could be covered under subdivision (c), discussed below.

**Subdivision (b)(3): Selective Waiver.** Subdivision (b)(3) adopts the doctrine of selective waiver, permitting a client who has disclosed privileged communications to the government to continue asserting the privilege against other parties. It provides that there is no waiver if:

> the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

This is highly controversial and politically charged. The selective waiver doctrine currently exists, in the federal system, primarily in the Eighth Circuit. *See Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). For years, corporate counsel have unsuccessfully urged other courts to adopt it, so that they could continue to protect from disclosure to civil plaintiffs

materials produced by businesses to regulators or prosecutors in the course of investigations. Now on the verge of statutory success, many corporate counsel have reversed course and oppose it.

They voice a legitimate concern that subdivision (b)(3) may encourage and exacerbate an existing trend by regulators and prosecutors to demand that persons being investigated waive privilege and work product. Some critics also express concern that this provision will require *Miranda*-like warnings to clients about the risk that they may as a practical matter be forced to waive, putting their communications with counsel at risk. Plaintiffs' counsel also object that their clients should continue to have access to materials disclosed to regulators and prosecutors because it is unfair to permit defendants to selectively waive privilege when it suits their purposes but conceal damning information when it does not.

While these concerns are legitimate, on balance subdivision (b)(3) is desirable. To the extent that prosecutors are able, fairly or unfairly, to compel waiver of attorney-client privilege, it is in the best interests of those being investigated that the scope of the waiver be contained. To the extent that selective waiver facilitates exoneration as well as inculpation, permitting persons under investigation to disclose privileged material gives them a freer choice. To the extent that governmental investigations are expedited, the public interest is served. It is not unfair to require civil plaintiffs to conduct their own discovery, without the benefit of materials supplied to facilitate governmental investigations or effectively compelled by the government at risk of loss of liberty.

There are no limits imposed on the governmental recipient of the privileged information. Will the use of the selectively-disclosed material at trial by a regulator waive the privilege? Does it matter if the regulator has forwarded the privileged material to another regulator or

prosecutor, who introduces it at trial? Presumably there is no effect on the privilege as to third parties in either scenario, since these uses of selectively disclosed materials are reasonably within the contemplation of this rule. A selective waiver provision that evaporates on the foreseeable use of the disclosed material would be a trap, not a protection. Perhaps introduction at trial is itself "protected" (it would be difficult to characterize it as "privileged") within the meaning of subdivision (b)(1).[1]

**Subdivision (c): Court-Ordered Non-Waiver.** Proposed Rule 502(c) provides that a court order concerning privilege waiver — *e.g.*, the typical agreed order that inadvertent production of privileged materials does not effect a waiver — binds not only the parties to the litigation but also third parties in subsequent litigations:

> **Controlling effect of court orders.** — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

This is a very constructive provision that resolves a serious, pre-existing problem — namely, that the court-ordered return and protection of inadvertently produced material in Case 1 did not afford any protection from the discovery demands of litigants in Case 2. As to them, the privilege may have been waived, subject to the protections afforded by subdivision (b)(2).

Note the breadth of this provision. First, a prior state court order is binding in federal court, and vice versa. Second, this provision is not limited to inadvertently-produced material. The "quick peek" approach to electronic discovery (or, for that matter, massive paper discovery), discussed above, can easily be accommodated.

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[1] Note that privileged material that has been submitted to a regulator may be offered into evidence by the prosecution in a criminal case, even though it may otherwise be excludable as settlement materials, under the amendment to Fed.R.Evid. 408(a)(2) that is expected take effect on December 1, 2006.

At the same time, note the limits of this provision. The binding effect of the order is limited to "the preservation or waiver" of the privilege or work product — not the separate determination whether a particular document or thing is privileged. A court-ordered disclosure of a privileged communication in Case 1 would not be "voluntar[y]" within subdivision (a) and is not given binding effect in Case 2 by subdivision (C).

**Subdivision (d): Mere Party Agreements.** Under Proposed Rule 502(d), the parties' agreement concerning privilege waiver must be "so ordered" by the court or it has no binding effect outside of the litigation in which it is entered:

> **Controlling effect of party agreements.** — Notwithstanding subdivision (a), an agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

This provision is a wake-up call to counsel to ensure that party agreements are incorporated in court orders. Or it is an invitation to the alert to lay a trap for the unwary.

**Subdivision (e): Definitions.** The definitional subdivision, Proposed Rule 502(e), provides:

> **(e) Included privilege and protection.** — As used in this rule:
> (1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and
> (2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

This provision is noteworthy in two respects. *First,* the definition of "attorney-client privilege" does not embrace "applicable" law but is limited to "federal or state law." This omits, on its face, foreign law. It cannot be intended that a conversation that is privileged in Toronto or London is unprivileged in federal court. Assume a multinational corporation headquartered in London with two operating subsidiaries, one in Toronto and one in New York. An internal

investigation is undertaken. A Toronto law firm conducts the interviews and prepares a report for the board of the parent concerning the Canadian operation. A New York law firm does the same with respect to the New York subsidiary. Both reports are presented to the SEC, together with underlying witness statements. A securities class action is commenced in New York and the plaintiffs seek both reports. The New York firm's report remain protected under subdivision (e). What about the Toronto firm's? What law determines waiver? Does a common law of waiver survive? What choice of law governs? Does this complexity make any sense? The phrase "applicable law" should be substituted for "federal or state law."

*Second*, note that the definition of "work product" extends to "federal common- law and state-enacted provisions or common-law rules." This properly recognizes that Fed.R.Civ.P. 26(b)(3) covers only "documents and tangible things." A great deal of work product is neither. Conversations with non-testifying experts, for example.

**Conclusion.** Although a modest bit of tinkering is in order, Proposed Rule 502 is a valuable proposal that merits enactment.

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Mr. Joseph is a fellow of the American College of Trial Lawyers and a past Chair of the Litigation Section of the American Bar Association. He can be reached at gjoseph@josephnyc.com. ©2006 Gregory P. Joseph

## RULE 56: INTERIM REPORT

Revisions of Rule 56 have been considered intermittently in the years following the 1986 Supreme Court decisions that set the basic standards for present practice. The first focused effort produced a dramatically revised rule that was rejected by the Judicial Conference in 1992.

The October 2005 agenda included extensive materials illustrating possible approaches to revising Rule 56, some modest and some more ambitious. The Minutes reflect a good discussion, pointing toward further active work in the short-term future. More detailed proposals will be presented at the fall meeting.

A survey of local summary-judgment rules has been undertaken since the October meeting. The attachments reflect this work. One, prepared by James Ishida, provides a disciplined review of the topics commonly addressed by local rules. The second provides a more eclectic selection of local-rules provisions divided into categories that correspond to the possibility of adopting corresponding provisions in Rule 56. Some of the provisions bear directly on questions that must be considered in any revision. Others seem interesting but do not seem likely candidates for incorporation in the national rule. Still others are rather clearly unsuited for incorporation in the national rule. If time allows, it would be useful to consider at this meeting some of the questions suggested by these local-rule materials.

The Rule 56 project has ties to two other projects. The time periods provided in Rule 56 will be reconsidered with the Time-Counting Project, and in any event are sufficiently troubling to command reconsideration on their own. And the interdependence of notice pleading, sweeping discovery, and summary judgment links Rule 56 directly to the notice pleading project. Both will proceed in tandem, at least at the outset.

# LOCAL RULES[1] PROCEDURES re SUMMARY JUDGMENT PRACTICE IN FEDERAL DISTRICT COURTS

## I. NUMBER OF SUMMARY JUDGMENT MOTIONS ALLOWED

A. Generally, no limit. A few districts, however, provide that a party may file only one motion for summary judgment, unless otherwise permitted by the court.[2]

## II. TIME FOR FILING SUMMARY JUDGMENT MOTION

A. FRCP 56(a). A party may move for summary judgment "after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party[.]"

B. Timetable for filing and serving motion and opposition. There is much variation among the districts.[3]

1. FRCP 56(c). "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits."

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[1]A sample of 20 districts with standing orders or general orders posted on their court web sites turned up nothing relevant to summary judgment practice.

[2]N.D.Okla. LCvR 56.1(a); W.D.Okla. LCvR 56.1(a); N.D.Tex. LR 56.2(b). *See also* E.D. Va. LCR 56(C) (unless permitted by court, separate motions for summary judgment shall not be filed addressing separate grounds for summary judgment); E.D. Va. LCR 56(C) (unless allowed by the court, a party may not file separate summary judgment motions that address separate grounds for summary judgment).

[3]*See, e.g.,* N.D. Ga. LR 56.1(D)(as soon as possible, but no later than 20 days after close of discovery); D. Guam LTR 9(b)(2) (any time 30 days after last pleading filed and within time so as not to delay trial); S.D. Ill. Rule 7.1(f) (must be filed 100 days before the first day of the trial month); D. Md. Rule 105(2)(b) (last-minute filing prohibited; supporting memoranda must be filed no later than 4:00 pm before the last business day preceding the hearing day to which the memorandum relates); D. N.M. Rule 56.1(a) (must be filed by deadline established in the "Initial Pretrial Report"); W.D. Tenn. LR 7.2(d)(1) (must be filed at least 45 days before trial, unless good cause shown or other deadline set by scheduling order); N.D. Tex. LR 56.2(a) (unless otherwise ordered, motion may not be filed within 90 days of trial); E.D. Va. LCR 56(A) (must be filed and set for hearing within "reasonable time" before trial).

## III. FORM OF MOTION FOR SUMMARY JUDGMENT

A. Motion must list all material facts where there is no genuine issue in dispute. Most local rules require the movant to set forth the specific material facts where there are no genuine issues to be tried.[4]

1. FRCP 56(c). "The judgment sought shall be rendered forthwith if the pleadings [etc.] . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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[4]S.D. Ala. LR 7.2(a) ("suggested Determinations of Undisputed Fact and Conclusions of Law"); D. Ariz. LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E.D. Ark. Local Rule 56.1(a); W.D. Ark. Local Rule 56.1(a); C.D. Cal. L.R. 56-1 (must submit proposed "Statement of Uncontroverted Facts and Conclusions of Law." The parties may also submit a statement of stipulated facts agreed to only for the purpose of deciding the motion for summary judgment); E.D. Cal. L.R. 56-1(a) (must submit "Statement of Undisputed Facts"); N.D. Cal. LR 56-2(a) (unless required by the court, the parties must not submit a separate statement of undisputed facts); D. Conn. Local Rule 56(a)1 (facts must be set forth in "Local Rule 56(a)1 Statement"); D.D.C. LCvR 7(h) and 56.1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S.D. Ga. LR 56.1 (motion to include list of material facts and conclusions of law which are contended there are no genuine issues to be tried); D. Haw. LR 56.1(a), (c), and (d) (party shall reference only the material facts that are absolutely necessary to decide the motion and must be no longer than five pages or 1500 words); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R. 56.1(a); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); E.D. and W.D. La. LR 56.1; D. Me. Rule 56(a); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a) and (c) (parties may also file statement of stipulated facts); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1) and (a)(2)(defines "material fact" as one pertinent to the outcome of the issues identified in the motion for summary judgment); D. Nev. LR 56-1; D. N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N.Y. L.R. 7.1(a)(3); W.D. N.Y. L.R. 56.1(a); D. N.H. LR 7.2(b)(1); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(a); D. Ore. LR 56.1(a); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1) (movant may also include facts that are assumed to be true); D.P.R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) (after each paragraph, the word "response" must be inserted and a blank space provided to allow the non-moving party an opportunity to respond); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) (movant should identify both the factual and legal basis for the summary judgment motion); N.D.Tex. LR 56.3 (movant must identify both the factual and legal grounds for the summary judgment motion and include a concise statement that identifies the elements of each claim or defense to which summary judgment is sought. The motion for summary judgment itself must not contain arguments and authorities); D. Vt. DUCivR 56-1(a) (motion must set forth succinctly, but without argument, the specific grounds of the judgment sought); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

2. Undisputed facts must be separately numbered.[5]

3. Movant must cite to specific part of the record. Many local rules require movant to cite to specific parts of the record supporting the contention that there is no genuine issue of material fact.[6]

4. Movant must attached supporting documentation. When a party cites to documents or other discovery, the party must attach or submit the relevant

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[5]S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); D. Conn. Local Rule 56(a)1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Me. Rule 56(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1) (failure to provide record references is grounds to deny the motion); D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N.Y. L.R. 7.1(3); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1) (a party may reference only material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local CV Rule 56(a); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

[6]S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); E.D. Cal. L.R. 56-1(a); D. Conn. Local Rule 56(a)1; D.D.C. LCvR7(h); M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S.D. Ga. LR 56.1; D. Haw. LR 56.1(c); N.D. Ill. LR 56.1(a)(3); S.D. Ill. LR 7.1(e); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R. 56.1(a); D. Kans. Rule 56.1(a); D. Me. Rule 56(a) and (f); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1); D. Nev. LR 56-1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(d); N.D. N.Y. L.R. 7.1(a)(3) (the record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions, and affidavits, but does not include attorney's affidavits); W.D. N.Y. L.R. 56.1(d) (all citations must identify the relevant page and paragraph or line number); D. N.H. LR 7.2(b)(1); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b) (court may disregard statement of fact not supported by a record citation); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) and (f) (the "record: includes deposition transcripts, answers to interrogatories, affidavits, and documents filed in support of or in opposition to the motion or other documents in the court files); W.D. Tenn. LR 7.2(d)(2) (if the movant contends that the opposing party cannot produce evidence to create a genuine issue of material fact, the movant must include relevant portions of the record that support the contention); E.D. Tex. Local Rule CV-56(a) and (d) ("proper summary judgment evidence" means excerpted copies of pleadings, depositions, answers to interrogatories, admissions, affidavits, and other admissible evidence. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

document.[7]

• FRCP 56(e):

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

5. Movant required to submit proposed order. A few courts require the movant to submit a proposed order with the motion for summary judgment.[8]

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[7]E.D. Cal. L.R. 56-1(a); D. Colo. LCivR 56.1 (voluminous exhibits discouraged. Parties to limit exhibits to essential portions of documents); D. Conn. Local Rule 56(a)1; D. Haw. LR 56.1(c) (only relevant excerpts); N.D. Ill. LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Mass. Rule 56.1; W.D. N.Y. L.R. 56.1(d) (all cited authority must be separately filed and served as an appendix to the statement of material facts); D. Ore. LR 56.1(c)(3) (the party must file excerpts of the document, not the entire document); W.D. Pa. LR 56.1 (B)(3) (must be included in an appendix but need not include the entire document. Excerpts to cited documents are acceptable); D. S.D. LR 56.1(A) (may also append a summary but must make the original documents available to the opposition); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) and (d) (movant should identify both the factual and legal basis for the summary judgment motion. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); N.D.Tex. LR 56.6 (a party that relies on affidavits, depositions, answers to interrogatories, or admissions on file must include such evidence in an appendix); D. Vt. DUCivR 56-1(e); D. V.I. Rule 56.1(a)(1); E.D. Wash. LR 56.1(a).

[8]S.D. Ala. LR 7.2(a); C.D. Cal. L.R. 56-4.

B. Motion must contain legal grounds demonstrating movant is entitled to judgment as a matter of law.[9]

1. Motion must be accompanied by notice, brief, memorandum, affidavits, exhibits, evidence, and other supporting documents.[10]

C. Page limitation. There is some variation among the districts.[11]

D. Sanctions for Noncompliance with rules. The court may deny the motion or impose other sanction for noncompliance with the rules.[12]

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[9]D. Alaska LR 7.1 (d)(2); S.D. Ala. LR 7.2(a) (movant must include with motion "suggested Determinations of Undisputed Fact and Conclusions of Law"); C.D. Ill. LR 7.1(D)(1)(c); N.D. Ill. LR 56.1(a)(3); S.D. Ill. LR 7.1(e); D. Nebr. Civil Rule 56.1(a)(1); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); E.D. Tex. Local CV Rule 56(a) (movant should identify both the factual and legal basis for the summary judgment motion).

[10]S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); N.D. Cal. LR 56-1 (court may sua sponte reschedule hearing to give movant time to file supporting affidavits); D. Colo. LCivR 56.1(A); D. Conn. Local Rule 56(a)3 and 4; D.D.C. LCvR 7(h) and 56.1; N.D. Ga. LR 56.1(C); S.D. Ga. LR 56.1; D. Haw. LR 56.1(a); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(2); S.D. Ill. LR 7.1(e); S.D. Ind. L.R. 56.1(a); N.D. and S.D. Iowa LR 56.1(a)(2); N.D. and S.D. Iowa LR 56.1(a)(4); D. Kans. Rule 56.1(a); D. Md. Rule 105 (1) and (5); E.D. Mo. Rule 7-4.01(A); D. N.M. Rule 56.1(b); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); W.D. Tenn. LR 7.2(d)(2); N.D.Tex. LR 56.5(a) (a summary judgment motion must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the motion); D. V.I. Rule 56.1(a)(1).

[11]S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must generally not exceed 25 pages); D. Ore. LR 56.1(d) (the concise statement of material facts may not be longer than 5 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval); D. Vt. DUCivR 56-1(b) (memorandum supporting motion must not exceed 25 pages).

[12]D. Alaska LR 7.1(d)(1); S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in motion being denied); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (motion without concise statement of material facts may be denied); D. Nebr. Civil Rule 56.1(a)(1) (failure to submit a statement of facts constitutes grounds for denying the motion); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (failure to submit statement of material facts not in dispute may be grounds for denying the motion); N.D. N.Y. L.R. 7.1(a)(3) (the failure to include an accurate and complete Statement of

E. Motion for Partial Summary Judgment. Some rules make special provision for partial summary judgment motions.[13]

## IV. SERVICE OF MOTION

A. In General.[14]

1. FRCP 56(c). "The motion shall be served at least 10 days before the time fixed for the hearing."

## V. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

A. Form of Opposition. Most courts generally require the non-moving party to identify the material facts where there is a genuine issue to be tried.[15]

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Material Facts will result in the denial of the motion); W.D. N.Y. L.R. 56.1(a) (failure to attach statement of material facts may constitute grounds for denying the motion); D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); M.D. Tenn. Rule 8(b)(7)(g) (failure to respond to a non-moving party's statement of additional facts will indicate that the additional facts are not in dispute for purposes of the summary judgment motion); D. Vt. DUCivR 56-1(a) (failure to comply may result in sanctions including (i) returning motion to counsel for resubmission, (ii) denial of the motion, or (iii) other sanction as appropriate).

[13]*See* N.D.Tex. LR 56.3(c) (if a moving party seeks summary judgment on fewer than all claims or defenses, the motion must be styled as a motion for partial summary judgment).

[14]D. V.I. Rule 56.1(a)(1) (the moving party must serve all parties with the notice and all pleadings and supporting documentation. The moving party must also file the notice of motion with the clerk of court (with a copy to the judge's law clerk), which extends the time for filing an answer if one has not yet been filed).

[15]S.D. Ala. LR 7.2(b) (opposition must identify disputed facts citing documents filed in the action); D. Ariz. LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E.D. Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party); C.D. Cal. L.R. 56-2 (non-moving party must file and serve a "Statement of Genuine Issues" setting forth all material facts contended to have genuine issues to be litigated); E.D. Cal. L.R. 56-1(b) (must deny all disputed facts contained in moving party's "Statement of Undisputed Facts"); D. Conn. Local Rule 56(a)2 (non-moving party must submit "Local Rule 56(a)2 Statement," which indicates whether facts material asserted by movant are admitted or denied); D.D.C. LCvR 7(h) and 56.1 (must include citation to the record and supporting memorandum); M.D. Ga. Local Rule 56 (insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP

56(f)); N.D. Ga. LR 56.1(B)(2) (court will deem each of movant's facts as admitted unless non-moving party (i) directly refutes movant's facts with concise responses supported by record references; (ii) states a valid objection to the admissibility of the movant's facts; or (iii) points out the movant's citation does not support the movant's facts, facts are not material, or other nonconformity with the rules. Insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP 56(f)); D. Haw. LR 56.1(b) (party opposing summary judgment must file and serve a concise statement identifying all material facts where there is a genuine issue to be litigated or all material facts that are accepted); C.D. Ill. LR 7.1(D)(2)(b) (non-moving party must set forth: (i) undisputed material facts, (ii) disputed material facts, (iii) immaterial facts, and (iv) additional material facts); N.D. Ill. LR 56.1(b) (non-moving party must file and serve opposing affidavits, a supporting memorandum, and a response to the movant's statement of material facts); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file: (i) brief that responds to each ground asserted in summary judgment motion, (ii) response to movant's material facts that admits, denies, or qualifies movant's facts, (iii) any additional material facts, and (iv) an appendix); D. Kans. Rule 56.1(b) and (e) (responding party must fairly meet substance of matter asserted. If responding party cannot admit or deny factual matter asserted, the response must state why); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated); D. Mont. Rule 56.1(b); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rules 7.1(b)(1)(A), (b)(2)(A), and 56.1(b)(1); D. Nev. LR 56-1; N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B) (non-moving party must file a statement of material facts that set forth disputed material facts. Each material fact in dispute must be numbered, contain a record reference, and if applicable, state the number of the movant's fact that is in dispute); N.D.Okla. LCvR 56.1(c); W.D.Okla. LCvR 56.1(c) (must be numbered and contain record references. If applicable, must also state the number of the movant's facts that are in dispute); D. Ore. LR 56.1(b) (non-moving party must response to movant's statement of undisputed facts by accepting or denying each fact, articulating opposition to the movant's contention or interpretation of the undisputed material fact, or offering other relevant material facts. A party may reference only

material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1 (opposing papers must include statement of material facts that non-moving party contends there is a genuine issue to be litigated. Statement must include references to the record); W.D. Pa. LR 56.1(C)(1) (non-moving party must file concise statement of material facts that (1) admits or denies each material fact contained in movant's papers, (2) sets forth the basis for the denial, and (3) sets forth in separately numbered paragraphs any other material fact that are allegedly at issue. Non-moving party must also include memorandum of law explaining why the movant is not entitled to judgment as a matter of law); D.P.R. LR 56(c) (opposing party must include in its opposition papers a separate, concise statement of material facts. The opposing statement must admit, deny, or qualify the movant's material facts and support each denial or qualification with a record reference. The opposing statement may include additional material facts in separate numbered paragraphs supported by references to the record); D. S.D. LR 56.1(C) (opposing party's statement of material facts must respond to each numbered paragraph in movant's statement with appropriate citation to the record); M.D. Tenn. Rule 8(b)(7)(c) and (d) (the non-moving party must respond to each of the movant's material facts by (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of the summary judgment motion only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by a record reference. The response must be set forth on the movant's statement of fact or a copy thereof. In either case, the non-moving party's response must be below the movant's material facts. The non-moving party may also include additional material facts. If the non-moving party sets forth additional material facts, the moving party must respond to the additional material facts within 10 days of the filing of the non-moving party's response); W.D. Tenn. LR 7.2(d)(3); E.D. Tex. Local Rule CV-56(b) (opposing papers must include a statement of genuine issues, which contain citation to proper summary judgment evidence); N.D.Tex. LR 56.4 (non-moving party must identify both the factual and legal grounds in response to the summary judgment motion. The response itself must not contain arguments and authorities. The response must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the response); D. Vt. DUCivR 56-1(c) (memorandum in opposition must include concise statement of material facts that party contends a genuine issue exists. Each disputed fact must be separately numbered, refer to the specific part in the record, and, if possible, reference the movant's fact that is in dispute); D. V.I. Rule 56.1(b) (opposing party may respond to motion by serving a notice of response, opposition, brief, affidavits, other supporting documents, and a counterstatement of all material facts where there exists a genuine issue to be litigated); E.D. Va. LCR 56(B) (non-moving party must include statement of disputed material facts with record references); E.D. Wash. LR 56.1(b) (opposition papers must include specific material facts, with record references, establishing a genuine issue for litigation. Non-moving party must explicitly identify any fact asserted by movant that non-moving party disputes or clarifies. The non-moving party may briefly state the evidentiary reason why the movant's fact is disputed).

B. Time Limit. There is much variation among the districts.[16]

C. Page limitation. There is some variation among the districts.[17]

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[16] D. Alaska LR 7.1(e) (opposition must be filed and served within 15 days of service of motion and reply must be filed and served within 5 days of service of the opposition); S.D. Ala. LR 7.2(b) (Nonmoving party has 30 days to file opposition); D. Ariz. LRCiv 56.1(a) (opposing party has 30 days after service of summary judgment motion to file and serve memorandum in opposition. Moving party has 15 days after service of opposition to file reply); E.D. Ark. Local Rule 7.2(b); W.D. Ark. Local Rule 7.2(b) (non-moving party has 11 days after service of motion to file and serve opposition); S.D. Cal. CivLR 7.1.e.2 (opposition must be filed and served no later than 14 calendar days prior to the noticed hearing date); D. Colo. LCivR 56.1(A) (response must be filed within 20 days after the motion was filed, or other time that the court may order. A reply may be filed within 15 days of the filing of the opposing brief); S.D. Ga. LR 56.1 (response to summary judgment motion must be made within 20 days of service of the motion); C.D. Ill. LR 7.1(D)(2) (non-moving party must file a response within 21 days after service of the summary judgment motion. Reply is due 14 days after service of response); S.D. Ill. Rule 7.1(c) (non-moving party has 30 days after service of summary judgment motion to file and serve opposition papers. Reply must be filed within 10 days of service of the opposition papers. A reply is not favored and should be filed only in exceptional circumstances); S.D. Ind. L.R. 56.1(b) and (c) (opposing party must file and serve papers in response no later than 30 days after service of the motion. Reply brief is due 15 days after service of the opposing party's submission); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file response within 21 days after service of summary judgment motion); E.D. Mo. Rule 7-4.01(B) (opposing memorandum, containing any relevant argument, citations to authorities, and documentary evidence, within 20 days after service of the motion. Reply memorandum is due within 5 days after service of the opposition); D. Nebr. Civil Rule 56.1(b)(2) (opposing brief may be filed no later than 20 days after service of the motion and supporting brief); W.D. N.Y. L.R. 56.1(e) (the opposing party has 30 days after service of the motion to file and serve opposition papers. The moving party has 15 days after service of the opposition papers to file and serve a reply. Surreply papers are not permitted unless with leave of court); W.D. Pa. LR 56.1(C) (opposition papers due 30 days after service of motion); M.D. Tenn. Rule 8(b)(7)(a) (non-moving party has 20 days after service of motion to serve a response, unless otherwise ordered by the court); D. Vt. DUCivR 56-1(b) (memorandum in opposition must be filed within 30 days after service of motion, or within time specified by court. A reply may be filed within 10 days after service of opposition); D. V.I. Rule 56.1(b) (original and two copies of opposing papers must be served on movant within 20 days after service of notice and motion);

[17] S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); C.D. Ill. LR 7.1(D)(2) (memorandum in support and opposition may not exceed 15 pages); S.D. Ill. Rule 7.1(d) (briefs in favor of and opposed to summary judgment motion must not exceed 20 pages. A reply must not exceed 5 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must

D. Sanctions for Nonconformity. If the non-moving party's opposition papers do not comply with the rules, many courts deem the moving party's material facts admitted.[18]

## VI. COURT REVIEW AND DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

A. Court review.[19] Some rules emphasize the court has no independent duty to search and consider any part of the record not referenced in the statements of material facts.[20]

B. Determination. Many rules provide that material facts not contested by the non-moving party are deemed admitted.[21] However, one district court will not enter

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generally not exceed 25 pages); E.D. Mo. Rule 7-4.01(D) (motion, memorandum in opposition, and reply must generally not exceed 15 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval).

[18]S.D. Ala. LR 7.2(b) (failure will be construed as an admission that no material factual dispute exists, however, the rule is not construed to require non-moving party to respond where the moving party has not carried its burden of establishing that there is no dispute as to any material fact); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in facts being deemed admitted); S.D. Ill. Rule 7.1(d) (allegations of fact not supported by citations may not be considered); N.D. and S.D. Iowa LR 56.1(b); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated. Failure to file will result in facts being deemed admitted); E.D. Mo. Rule 7-4.01(E); D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); D. Vt. DUCivR 56-1(f) (failure to respond timely to summary judgment motion may result in the court granting the motion without further notice).

[19]D. V.I. Rule 56.1(a)(3) (after the motion has been addressed by all parties and is ready for submission to the court, the moving party must file a cover letter listing all documents filed and all papers with the clerk of court (with a copy to the judge's law clerk), with copies served on all parties).

[20]D. Haw. LR 56.1(f) (the court has no independent duty to search through and consider any part of the court record not otherwise reference in the parties' papers); D. Me. Rule 56(f); D. Ore. LR 56.1(e); D.P.R. LR 56(e); E.D. Tex. Local Rule CV-56(c) (the court will not scour the record to find an undesignated genuine issue of material fact before entering summary judgment).

[21] E.D. Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party); D.D.C. LCvR 7(h) and 56.1;

summary judgment on an unopposed motion unless the court finds no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.[22]

## VII. HEARING AND ORAL ARGUMENT

A. Hearing/Oral Argument. Many courts do not ordinarily schedule oral argument on motions for summary judgment. A party must usually request oral argument.[23]

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M.D. Ga. Local Rule 56; S.D. Ga. LR 56.1; D. Haw. LR 56.1(g); N.D. Ill. LR 56.1(b)(3)(B); N.D. Ind. L.R. 56.1(b); S.D. Ind. L.R. 56.1(e); N.D. and S.D. Iowa LR 56.1(b) (court may grant motion if no opposition is filed); D. Kans. Rule 56.1(b); E.D., M.D., and W.D. La. LR 56.2; D. Me. Rule 56(f); D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B); N.D.Okla. LCvR 56.1(c); W.D.Okla. LCvR 56.1(c); D. Ore. LR 56.1(f); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1(E); D.P.R. LR 56(e); D. S.D. LR 56.1(D); M.D. Tenn. Rule 8(b)(7)(g); E.D. Tex. Local Rule CV-56(c); D. Vt. DUCivR 56-1(c); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(b).

[22]D. Alaska LR 7.1(d)(2).

[23]D. Ariz. LRCiv 7.2(f) and 56.1(b) (parties may request oral argument); C.D. Ill. LR 7.1(D)(4) (parties may file a request for oral argument, otherwise court may take the motion under advisement); S.D. Ill. Rule 7.1(h) (party must move for oral argument); N.D. Ind. L.R. 56.1(c); S.D. Ind. L.R. 56.1(g); N.D. and S.D. Iowa LR 56.1(f); D. Md. Rule 105(6); D. Nebr. Civil Rules 7.1(d) and 56.1.

## VIII. PRO SE LITIGANTS

A. Special Notice. Some courts require special notice to pro se litigants in summary judgment proceedings.[24]

[24]D. Conn. Local Rule 56(b) (represented party moving against pro se party must file and serve "Notice to Pro Se Litigant Opposing Motion for Summary Judgment"); D. Haw. LR 56.2; N.D. Ill. LR 56.2; N.D. Ind. L.R. 56.1(e); S.D. Ind. L.R. 56.1(h); D. Mont. Rule 56.2; E.D. and S.D. N.Y. Local Civil Rule 56.2.

## SELECTED TOPICS FROM LOCAL RULES ON SUMMARY JUDGMENT

*Introduction*

This discussion of local summary judgment rules is not intended to be complete. James Ishida compiled a rigorous collection of local rules provisions clearly organized around specific topics. This memo uses some selected provisions in the local rules to discuss what should be considered for inclusion in the national summary judgment rule.

Part I, "topics to consider," compiles local-rule provisions on the topics that should be discussed in deciding whether and how to revise present Rule 56. Some provisions are briefly summarized because the question the local rules raise are plain. Others are long and at times suggest distinctions that may be artifacts of drafting, not any actual differences in practice. The most extensive summaries address a two-part problem that might well be answered by Rule 56 itself: What should the court do when a motion is not opposed at all? When the motion is opposed but the nonmovant does not do an adequate job of sorting through contested and uncontested facts?

Part II lists a number of "interesting" topics suggested by local rules. They are separated out because they are not obviously suitable for consideration in Rule 56 itself. Many of these topics may well belong in Part III.

Part III describes a few provisions that do not seem suitable for consideration in Rule 56.

Part IV, finally, is a nonrepresentative sample of time provisions chosen as examples for consideration.

It is important to begin with an expression of caution. Actual practice under a local rule may be quite different from the impressions created by simple reading. Often enough ambiguity appears on a rule's face. But seemingly clear rules may not be so clear in practice.

### *I. Topics To Consider For Rule 56*

#### Specific Identification of Facts

Many rules, in various terms, require "a concise statement of each material fact as to which the moving party contends there is no genuine issue," D.Conn. Rule 56(a)(1). D.Neb. Rule 56.1(a)(2) calls for "pinpoint references" to supporting materials.

D.Me. Rule 56(b) requires "a separate, short, and concise statement of facts * * * stated in narrative." Compare D.Mont. Rule 56.1(a): "facts set forth in serial fashion and not in narrative form "; E.D.Wash. LR 56.1(a): "the specific facts shall be set forth in serial fashion and not in narrative form."

#### Specific Record Support

In addition to a specific statement of facts, many local rules require specific citations to record support. D.Conn. Rule 56(a)(3), for example, requires "specific citation" to "specific paragraphs when citing affidavits or responses to discovery requests and to cite specific pages when citing to deposition or other transcripts or to documents longer than a single page in length."

A local rule may take the tack of identifying things that will not be considered. N.D.Ga. LR 56.1(B)(1) says the court will not consider any fact not supported by a citation to evidence, or supported by a citation to a pleading, or set out in the brief but not the statement of facts.

#### "Default — No Response"

Two approaches might be taken when the nonmovant fails to respond to a summary-judgment motion. The failure could be treated by analogy to a pleading default — the movant prevails without requiring the court to determine whether the movant has carried the summary-judgment moving burden. The failure instead could be treated by analogy to trial — if the motion

is made by a party who would have the burden of production at trial, the court must determine whether the burden has been carried even if the nonmovant does not respond to the trial evidence. If the motion is made by a party who would not have the trial burden, on the other hand, failure to respond is equivalent to the nonmovant's failure to offer any evidence at trial — the movant wins. Local rules provide no more than ambiguous help in choosing between these perspectives.

Some local rules clearly require the court to decide an unopposed motion on the merits. D. Alaska is particularly clear: "No unopposed motion * * * will be granted unless the court is satisfied that there are no disputed issues of material fact and that the moving party is entitled to the decision as a matter of law." S.D.Ala. 7.2(b) says that failure to respond, pointing out disputed facts appropriately referenced to supporting documents, "will be considered an admission that no material factual dispute exists; provided, that nothing in this rule shall be construed to require the non-movant to respond in actions where the movant has not borne its burden of establishing that there is no dispute as to any material fact." This seems to mean that even if there is no response at all, the court still must determine whether the movant carried the Rule 56 burden.

Other rules seem to provide that a motion will be granted if there is no response. C.D.Ill. Rule 7.1(D)(2): "A failure to respond shall be deemed an admission of the motion."

Yet other rules openly recognize discretion. S.D.Ill. Rule 7.1(c) — which covers a variety of motions, including summary-judgment motions — says: "Failure to timely file an answering brief to a motion may, in the court's discretion, be considered an admission of the merits of the motion." N.D.&S.D.Iowa L.R.56.1(c) says that if there is no timely resistance the court "may" grant the motion without prior notice, and encourages a party who does not intend to resist the motion to file a statement that it does not resist. D.Neb. Rule 56.1(b)(2) is unique: "Failure to file an opposing brief *alone* shall not be considered to be a confession of the motion; however, nothing in this rule shall excuse a party opposing a motion for summary judgment from meeting the party's burden under" Rule 56. D.Vt.DUCiv 56-1(f): "Failure to respond timely to a motion for summary judgment may result in the court's granting the motion without further notice."

**Inadequate Response**

The proper approach to an attempted but inadequate response presents questions similar to those raised by failure to respond at all. Many local rules provide that an inadequate response may be deemed an admission, with variations that at times are interesting. Often it is unclear whether the deemed admission follows automatically or whether the court may still determine whether the motion itself carries the moving party's burden.

Rules that seem to treat the deemed admission as automatic tend to look like E.D. & W.D.Ark. Local Rule 56.1(c): facts set forth in the movant's short and concise statement "shall be deemed admitted unless controverted by the statement filed by the non-moving party." N.D.&S.D.Iowa L.R.56.1(b) and (d): "failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." D.Kan.LBR 7056.1(b): "all material facts set forth in the statement of the movant will be deemed admitted for purposes of summary judgment unless specifically controverted by the statement of the opposing party." D.Mass.Rule 56.1: deemed for purposes of the motion to be admitted unless controverted. E.D.Mo. is similar. E.D.&S.D.N.Y. Local Rule 56.1(c) "deemed admitted *for purposes of the motion* unless *specifically* controverted by *a correspondingly numbered paragraph in* the statement required". N.D.N.Y.: "deemed admitted unless specifically controverted." W.D.N.Y."deemed to be admitted unless controverted." E.D.Okla. L.R. 56.1(b): "deemed admitted for the purpose of summary judgment, unless specifically controverted"; N.D.Okla.LCvR56.1(c), W.D.Okla.LCvR56.1(c) are the same. D.Or. LR 56.1(f): "deemed admitted unless specifically denied, or otherwise controverted". M.D.Pa. LR56.1: "deemed to be admitted unless controverted." D.S.D. LR 56.1(D): "deemed to be admitted unless controverted." See also N.D.Ga. LR 56.1 B.(2)a.(2), which adds "[t]he court will deem the movant's citations supportive of its facts unless the respondent specifically informs the court to the contrary in the response."

W.D.Pa.LR 56.1 introduces a wrinkle — the motion may include a statement of facts the movant contends are "undisputed and material, including any facts which for purposes of the summary judgment motion only are assumed to be true." This seems to contemplate a conditional concession by the movant, rather than an assertion. Eventually the rule states that statements "which are claimed to be undisputed, will for the purpose of deciding the motion * * * be deemed admitted unless specifically denied or otherwise controverted."

Discretion is apparent on the face of other rules. M.D.Ga. LR 56, for example, says that facts in the moving statement that are not specifically controverted "shall be deemed to have been admitted, unless otherwise inappropriate."

Ambiguous advice is provided by rules that deem admitted facts that are "supported" in one way or another. D.Conn. Rule 56(a)(1) and (3): Facts in a Rule 56 Statement "and supported by the evidence will be deemed admitted" unless controverted by the opposing party's statement, and also if the opposing statement fails to provide specific citations to evidence in the record. "[S]upported by the evidence" may imply that the court must find that the evidence cited to establish the fact at least supports the fact, whether or not it shows there is no genuine issue. N.D.Ind. L.R.56.1(b) is similar: "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy,except to the extent that such facts are controverted * * * in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file." S.D.Ind. LR 56.1(e) is similar, but also recognizes opposition by showing that the claimed facts are not supported by admissible evidence "or, alone, or in conjunction with other admissible evidence, allow reasonable inferences to be drawn in the opposing party's favor which preclude summary judgment. {then, somewhat puzzlingly:} The Court will also assume for purposes of deciding the motion that any facts asserted by the opposing party are true to the extent they are supported by admissible evidence." D.Me.Rule 56(f): "Facts * * * if supported by record citations * * * shall be deemed admitted unless properly controverted. * * * The court may disregard any statement of fact not supported by specific citation to record material * * *." D.Neb. Rule 56.1(b)(1): "Properly referenced material facts in the movant's statement will be deemed admitted unless controverted * * * *." D.P.R. Rule 56(e): "if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." E.D.Tex. LR CV-56(c): "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted" in the opposing statement. D.Vt.DUCiv 56.1(c): "All material facts of record meeting the requirements of Fed.R.Civ.P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed.R.Civ.P. 56." W.D.Wash. LR 56.1(d): "the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by the record set forth" in opposing the motion.

Other rules seem to imply discretion. D.D.C.LCvR7(h) and 56.1, for example, says "the court *may* assume that facts identified by the moving party in its statement of material fats are admitted, unless such a fact is controverted * * *." E.D.Va. Local Civil Rule 56(b): "the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues."

**Materials Considered**

Local rules use a variety of terms to identify the materials that may be considered. Among them are "admissions"(surprisingly rare), "affidavit," "answer," "answers to interrogatories," "deposition," "discovery responses," "document," "documentary evidence," "exhibits," "interrogatory," "other admissible evidence [on file]," "other documentation," "other supporting materials," "parts of the record," "pleadings,"

D.Hawaii LR56.1 requires a separate concise statement detailing each material fact, but limits the statement to a maximum of five pages or 1,500 words.

**"Cannot Admit or Deny"**

Some local rules state that a party cannot respond by asserting that it is unable to admit or deny a fact stated in a summary-judgment motion unless the party simultaneously complies with Rule 56(f). E.g., Md.Ga.LR 56; N.D.Ga. LR 56.1 B(2)a.(4). This approach is questionable if the motion is made by a party who has the trial burden. The nonmovant should be able to insist that the movant establish the asserted facts, and with that to avoid making any showing of its own. If the nonmovant need make no showing, it should be permitted to state that it simply does not know.

A variation is introduced by C.D.Cal.L.R. 56-3. An opposing party must controvert the movant's stated fact by identifying it in the concise statement of genuine issues and also controverting it "by declaration or other written evidence filed in opposition to the motion." "Declaration" may refer to a sworn statement — an affidavit by a more modern name. If it means something more general, then there is an opportunity to oppose that at least comes close to seeking delay without offering admissible evidence to support the position.

**Agree (Stipulate) for Rule 56 Only**

D.Ariz. LRCiv 56.1(a) provides that the parties may jointly file a statement of stipulated facts, and "may state that their stipulations are entered into only for the purposes of the motion for summary judgment and are not intended to be otherwise binding." See also E.D.Cal. 56-260(b); D.Mont. Rule 56.1(c)

D.Tenn. Rule [?7?]c. recognizes a response that a stated fact "is undisputed for the purpose of ruling on the motion for summary judgment."

A different approach is taken in N.D.Cal. 56-2(a): a separate statement of undisputed facts or joint statement of undisputed facts is not permitted unless required by the judge.

**Contest Admissibility**

Some rules provide specifically for resistance by contesting admissibility of the supporting evidence. E.g., S.D.Ind. L.R.56.1(e).

*II. Topics Possible For Rule 56*

**Court Has No Duty To Search Record**

Some local rules emphasize that the court has no duty to search the record to consider parts not cited by the parties. See D.Haw. 56.1(f); D.Me.Rule 56(f); D.Ore. LR 56.1(e); D.P.R. Rule 56(e);

E.D.Tex. LR CV-56(c): "The court will not scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial."

**Successive Stages**

Many local rules provide for a reply by the movant to the nonmovant's response. A few provide for a surreply. D.Mont.Rul 56.1(d), on the other hand, requires leave of court to file "further factual materials" after the statement of uncontroverted facts and the statement of genuine issues.

**Record Support for Negative**

W.D. Tenn. 7.2(d)(2) nicely demonstrates the difficulty of articulating the nature of the summary-judgment burden imposed on a movant who does not have the burden at trial: "If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion."

### Rule 56(f)

E.D.Cal. Rule 56-260(b) fleshes out Rule 56(f) a bit — a party resisting summary judgment by asserting a need for more discovery must specify the particular facts or issues that need discovery.

### Partial Summary Judgment

E.D.Cal. Rule 56-260(a) and (f) seem to pick up the distinctions of the 1990s attempted revision, speaking of "summary adjudication" as a motion for an order "specifying material facts that appear without substantial controversy pursuant to Fed.R.Civ.P. 56(d)."

N.D.Cal. 56-3 sounds a caution: statements in an order denying summary judgment "shall not constitute issues deemed established for purposes of the trial of the case, unless the Court so specifies."

D. Guam LTR 9(b)(2) provides for summary adjudication on all or any part of the legal issues; supporting affidavits are permitted but not required. LTR 10 is more interesting, providing for submission of a case by motion if it does not "require[] a trial for the submission of evidence"; this provision resembles the "trial on a paper record" proposal considered and abandoned a few years ago.

N.D.Tex. LR 56.3c: "If a moving party seeks summary judgment on fewer than all claims or defenses, the motion must be a motion for partial summary judgment."

### Responses Beyond Denial

Some rules specifically recognize objections to the admissibility of evidence relied upon by another party. E.D.Wash. LR 56.1(b) adds that a party may "clarify" a fact.

## *III. Interesting Topics Probably Not For Rule 56*

### Appendix

Some courts require an appendix of materials. E.g., N.D.&S.D.Iowa L.R.56.1(e), which is supported by elaborate provisions for paper appendixes and for those served and filed electronically. W.D.N.Y. Rule 56.1(d) is simpler. N.D.Tex. LR 56.6 requires an appendix if a party relies on affidavits, depositions, answers to interrogatories, or admissions; it includes directions on such matters as oversized exhibits.

An appendix may be required by another name. W.D.Tenn. LR 7.2(d)(2), for example, requires "copies of the precise portions of the record relied upon as evidence of each material fact." "Highlighting" is encouraged. E.D.Tex. LR CV-56(a): "Proper summary judgment evidence" should be attached to motion and response. That means "excerpted copies of" the materials cited, referring to them by page and, if possible, by line. Highlighting and underlining are encouraged; the page preceding and following a highlighted page may be submitted if necessary to establish the proper context.

### "Highlighting"

Several local rules direct the parties to "highlight" (or underline) the specific portions of the record relied upon.

### Room for response

A few local rules direct that a motion leave space for a response. As electronic filing takes over this will be increasingly easy, and convenient. Rather than two separate lists of numbered facts, the facts set out in the motion will each be followed directly by the response; new facts set out in the response will be immediately followed by the reply. This exchange would include objections to the "admissibility" of the supporting materials relied upon.

A variation appears in E.D.Cal. Rule 56-260(b): the nonmovant "shall reproduce the itemized facts" in the movant's statement and admit or deny.

**Notice by Moving Party to Pro Se Litigant**

Several courts require an attorney to explain the requirements of Rule 56 to a nonmovant appearing pro se. Some of the rules include a specific form of notice. See D.Conn. Rule 56; D.Haw.LR 56.2; N.D.Ill. LR56.2; S.D.Ind. LR 56.1(h); D.Mont.Rule 56.2; E.D.&S.D.N.Y. Local Rule 56.2; W.D.N.Y. Rule 56.2; C.D.Ill. Rule 7.1(D) on summary judgment "does not apply to pro se litigants."

**Review on Agency Record**

Alaska local rules provide that the brief in a proceeding to review action on an agency record must be filed "in the form of a motion for summary judgment"; the brief in opposition "will be deemed a cross-motion for summary judgment."

E.D.Mo.Rule 56-9.02 requires leave of court to file a motion for summary judgment in a case seeking review of a denial of social security benefits.

**Cross-Motions**

D.Colo. LCivR 56.1(B) says that a cross motion must be made in a separate motion, not in a reply brief.

D.Md. rule [??]c directs that in a two-party case in which both parties intend to file summary-judgment motions, counsel are to agree which party is to file the initial motion. If more than two parties intend to file, counsel shall submit a proposed briefing schedule with the status report.

**Multiple Motions**

N.D.Okla. LCvR56.1(a): "Absent leave of Court, each party may file only one motion under Fed.R.Civ.P.56." W.D.Okla. LCvR56.1(a) is the same.

**Motion to Strike**

D.Me. Rule 56(e) prohibits a motion to strike, but allows an argument in the response that a statement of fact "should be stricken." D.N.H. Rule 7.2(c) allows a motion to strike material offered to support or oppose a motion, to be filed within 10 days after service of the motion.

*IV. Time*

Many local rules increase or finesse the time limits provided by Rule 56.

A particularly neat example is provided by N.D.Cal. 56-1 and commentary. If the parties serve papers in accordance with Rule 56 time limits, the court may sua sponte reschedule the hearing to allow more time. The commentary: "While the Court may not preclude a party from proceeding in accordance with the Federal Rules, it may reschedule the hearing to allow a party an opportunity to respond in the time and manner provided by" local motion rules.

S.D.Cal. has complex time rules. In part, 7.1e.1 sets "a minimum filing date of 28 calendar days prior to the Monday for which the matter is noticed"; .2 sets 14 days before the noticed hearing to file an opposition; and .3 sets 5 days before the hearing for a reply.

N.D.Ga. LR 56.1 D. sets the time limit at 20 days after the close of discovery, stating how to measure the close of discovery.

S.D.Ill. Rule 7.1(c), which applies to a number of motions including summary judgment, allows 30 days after service of the motion to serve and file an answering brief.

A deft response to time-counting conventions appears in D.Kan.LBR56.1(d), which provides 23-day days to respond and then 23 days to reply to the response, adding that "these time periods include the additional 3 day period allowed under Fed.R.Civ.P. 6(e) and, therefore, apply regardless of the method of service."

D.N.M. requires the motion to be filed within the deadline set in the initial pretrial report.

M.D.Tenn. R[7?](7)a. is blunt: Motions "shall be in accordance with [Rule 56] except that the party opposing the motion shall have twenty (20) days after service of the motion in which to serve a response."

W.D.Tenn. LR 7.2(d)(1) sets the deadline at 45 days before the trial setting. N.D.Tex. LR 56.2a is 90 days of the trial setting.

D.Vt. DUCivR 56-1 allows 30 days to oppose and 10 days to reply.

## NOTICE PLEADING: INTERIM REPORT

Pleading practice has been considered at intervals over the last several years, albeit briefly. The October 2005 meeting included extensive and fruitful discussion of these issues, as reflected in the Minutes. Since the October 2005 meeting, Jeffrey Barr has prepared a memorandum on heightened pleading. Not surprisingly, the memorandum shows that many courts have heeded the Supreme Court's admonitions by abjuring heightened pleading requirements. Also not surprisingly, it shows occasional continuing glimmers of attraction to more demanding pleading standards. And it properly notes that even this kind of painstaking examination of what courts say cannot plumb the depths of what courts actually do. Only independent examination of the full decision process in hundreds or even thousands of cases could determine whether courts in fact exact greater pleading particularity in some kinds of cases than in others, or just how to describe the balance between "notice" and "fact" pleading.[1] And even then the judgment would be subjective.

Jeff Barr's memorandum is the first attachment to this interim report on notice pleading. The second attachment is a memorandum that was included in the October 2005 Agenda Book to facilitate the Committee's discussion.

At least four alternative approaches can be identified to structure further discussion. Each approach rests on the belief that it is desirable to accelerate the resolution of cases that now persist for too long, at too great expense to the ultimate victor and to the courts. The concern is that the present system strikes the wrong balance between affording access to justice in circumstances that require discovery to establish a claim and protecting against the heavy burdens of litigation, particularly discovery. These burdens go uncompensated, and would remain largely uncompensated even if the victor were awarded attorney fees. In theory this concern could address the needs both of defendants faced by unfounded claims and also of plaintiffs faced by unfounded defenses and intensive defendant-directed discovery. But in fact the concern is almost always focused on the burdens plaintiffs impose on defendants.

One possibility is to abandon "notice" pleading, conceived of as a bare identification of the events giving rise to the claim, perhaps with some vague reference to the legal principles that translate the event into an occasion for legal redress. Some version of "fact" pleading would be adopted. The argument is that plaintiffs should not be encouraged to sue when they lack the information and even the imagination to allege the facts in some case-specific, non-generic way. This approach could be consistent with Rule 11(b)(3)'s permission to plead fact contentions without evidentiary support but with a reasonable belief that they are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Reluctance to adopt this approach stems from at least two sources. One is experience with "Code" pleading. A fact-pleading system

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[1] An example may be provided by describing *Rivera v. Rhode Island*, 1st Cir.2005, 402 F.3d 27. The court affirmed dismissal of an action claiming a substantive due process violation by the failure of police and prosecutors to fulfill promises to protect a 15 year-old murder witness who was murdered by the murderer. The court assumed that a claim can be stated for a state-created risk if the circumstances shock the conscience. Dismissal was affirmed for failure to plead facts that would show a state-created risk. The complaint set out many facts that were evaluated by the court — a short summary was "identifying and securing Jennifer as a witness, providing her with false assurances of protection upon which she relied, compelling her to act in this capacity as a witness, and * * * issuing a subpoena to her to confront [the murderer] in open court." (The complaint also stated that another child witness was placed in a witness protection program, and that the police and prosecutors were regularly informed about the continuing explicit threats made to the plaintiff's child.) There is no hint that the plaintiff failed because she pleaded too much — that the court would have upheld a complaint that alleged only that the defendants had acted in ways that created the risk of murder and that shocked the conscience. This court wanted explicit allegations in fine detail. It seems likely that most courts would rule in the same way.

can easily degenerate into a morass of wasteful litigation over niggling legalisms. The other is the deeper concern that there are wrongs that need to be righted and that need probing discovery for success, without raising the barriers by insisting that the plaintiff plead facts that cannot be known without discovery. This view discounts as a price of living in a just society the burdens that failed claims impose on defendants.

Another possibility is to adhere to notice pleading, but attempt to raise the threshold by invigorating the requirement that the short and plain statement "show[] that the pleader is entitled to relief." However drafted, the idea would be to raise the threshold above the level that sustains a complaint unless it is clear that a claim would not arise from any set of facts that could be offered to "support" the complaint. The purpose would be provide subtle support for the variable pleading standards that may persist even now despite the nearly universal recognition of the Supreme Court's "no heightened pleading" pronouncements.

A third possibility is to adopt substance-specific pleading rules in the vein of Rule 9(b). Examples can be found in the Supreme Court cases that reject heightened pleading — actions against public officials under 42 U.S.C. § 1983 and employment discrimination actions. Examples can be proliferated. Obvious candidates include securities law, antitrust, environmental clean-up, and RICO. The Committee has always been wary of this approach. Drafting would require a good grasp of the substantive principles in each particular area, and also a good understanding of the real-world procedural opportunities and obstacles involved with each. Concerns about Enabling Act limits also must be confronted. The precedent established by the Rule 9(b) requirement that fraud and mistake be pleaded with particularity may support the proposition that substance-specific pleading rules are in fact rules of procedure that do not enlarge, abridge, or modify the substantive rights. Even if that argument is right, however, any substance-specific rule will touch tender sensitivities.

A fourth possibility is to roll back the history of Rule 12(e). Without restoring "bill of particulars" as a label, Rule 12(e) could be revised to allow the court to order a more definite statement to "support informed decision of a motion under subdivisions (b), (c), (d), or (f)." This approach has the advantage of enabling nuanced case-specific adjustment of pleading standards. It also has the disadvantage that case-specific pleading standards might be used — and will be perceived as designed — to discriminate against disfavored "rights."

Several other possibilities have been sketched. Rules 7 and 8 could be amended to require a reply in all cases. Rule 11 could be amended to require verification of all pleadings. Rule 8 could be amended to include the standard alternatively proposed for Rule 12(e) — every pleading must "support informed decision of a motion under Rule 12(b), (c), (d), or (f)." No doubt yet other approaches may be identified.

Initial discussion has underscored the connection between consideration of pleading standards and consideration of summary judgment. It is possible to seek expedited dispositions by both increasing pleading standards and easing the way to summary judgment. It also is possible to conclude that one device is more promising than the other — that more demanding pleading tests obviate the need to facilitate summary judgment, or that it is better to adhere to present pleading standards and rely on more powerful summary-judgment procedures. And of course it is possible to conclude that neither device need be changed, or that the direction of change should be to make it more difficult to decide on the pleadings or on summary judgment.

The immediate questions for the pleading rules is whether specific proposals should be further developed now or whether it is better first to obtain additional information, and how best to structure the work on notice pleading to coordinate it with the work on Rule 56.

DATE: March 23, 2006

FROM: Jeffrey N. Barr, AO

SUBJECT: Judge-created heightened pleading requirements in the federal courts

TO: Edward H. Cooper, Reporter, Advisory Committee on Civil Rules

This memorandum canvasses federal cases in which courts have imposed heightened pleading requirements in circumstances in which it is unclear, at the least, that the Rules-based heightened pleading requirement of Rule 9(b) is applicable. I have tried to group the cases by subject-matter category, and, for each subject-matter category, indicate how widespread the heightened pleading standard seems to be among the respective circuits. (I truncated this research effort in midstream, in order to avert duplication with other research efforts, so what follows falls short of delivering fully on this promise).

One limitation of my research is that it inevitably focuses on cases in which the court has declared that it is applying a heightened pleading standard. Such cases, for obvious reasons, are relatively easy to spot. No doubt there are other cases – it is not clear how many – in which the court cites Rule 8(a), dutifully chants the mantra of notice pleading, and then proceeds to apply a pleading standard that arguably – or clearly – is not a notice standard at all. This memorandum does cite a few such cases, generally cases that were cited elsewhere as evidence of application of a heightened standard. But to read every recent case deciding a Rule 12(b)(6) motion and determine whether, on the facts, the court actually applied a standard different from notice pleading, would have been a task well beyond my abilities during the time allotted. Such an undertaking would be more akin to a full-fledged Federal Judicial Center-style research project, requiring many months and perhaps multiple researchers.

Another complication is that this is a fast-moving area of the law. As you know, in the last few years Supreme Court rulings have come down in this area at regular intervals emphasizing notice pleading, some less ambiguous than others, flying more or less in the face of what many lower courts have seemingly wanted to do. Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993). See also Crawford-El v. Britton, 523 U.S. 574 (1998). Thus in many circuits the state of circuit precedent on heightened pleading issues has changed in the last several years.

This memorandum focusses on the "current" state of the case law, on what circuits and courts appear – at the present time – to apply a heightened pleading standard in a particular substantive area. I do attempt to note, however, circuits in which courts once applied a heightened pleading standard in a particular substantive area, only to be cut off by a recent ruling of the reigning court of appeals re-establishing notice pleading in that area.

A note on root causes.

I have been charged merely with reporting the current extent of what Prof. Marcus has called "the puzzling persistence of pleading practice," not with trying to explain it (an issue Prof. Marcus discusses, Richard L. Marcus, The Puzzling Persistence of Pleading Practice, 76 Texas L. Rev. 1749 (1998)). But in reading these cases, I can't help but be reminded of something a well-known former chief judge once said to me (paraphrasing): "Beware of any system in which the judge perceives, however subtly, some non-trivial self-interest aligned with one side or the other."

Given the long-term reality of very heavy trial court caseloads, I suspect that in truth the persistence of heightened pleading has less to do with conceptual notions of what pleading system is most just, or of what balance between justice and efficiency is appropriate in addressing heavy caseloads, and more to do with the (understandable) self-interest of trial judges in clearing cases off their docket. It's like the old saying, "People generally do things for two reasons: a good reason, and the real reason." Judges are people, i.e., inherently more emotional than rational beings. Thus their self-interest comes into play at a deep emotional level, even if (in the manner of people everywhere) they do not acknowledge or articulate, even to themselves, the real reasons for their actions. I'm sure this is not a new idea, I just thought it might be helpful to be blunt and candid about it.

So whether or not heightened pleading is conceptually or in practice a good idea – I don't know – I do think much of its persistence in the case law may stem from impulses that arguably are inconsistent with our system of justice in that they have little to do with the goal of doing justice between the parties, or even with the different goal of addressing heavy caseloads on a systemic basis.

If I were right about that, I have no clue what implications that would have for the desirability of a change in the Rule 8 notice pleading regime. It may be that as long as caseloads are heavy, this hypothesized judges' self-interest will exist no matter what the Rule 8 standard is. If so, then perhaps the rulemakers should assume that whatever the Rule 8 standard is, the true pleading standard actually applied in practice will always tend to be somewhat more heightened than Rule 8. So perhaps if the rulemakers heighten the Rule 8 standard, they had better be convinced that's the right direction to go, because inevitably that change will produce more heightening in practice than the rule language on its face would suggest. On this reasoning, as long as caseloads are so heavy, all attempts to bring Rule 8 into line with actual pleading practice will inevitably fall short.

"Big cases" – Antitrust and CERCLA.

Antitrust.

The 9th Circuit, in Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1063-64 (9th Cir.

1998) (a case that appears inconsistent with later 9th Circuit law, see Empress LLC, infra), employed a heightened pleading standard to dismiss allegations that the "sham" exception to the Noerr-Pennington doctrine applied to permit antitrust claims based on conduct that otherwise appeared to consist of attempts to petition or lobby the government that were protected by the First Amendment. Presumably the allegation of conduct fitting the "sham" exception could be analogized to an allegation of "fraud" covered by Rule 9(b) heightened pleading, and the argument made that heightened pleading in such a case is directed by Rule 9(b). The Kottle court, however, did not say that. Instead, the court explained, "[W]hen a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." Kottle, supra, 146 F.3d at 1063.

It is not clear from the Kottle opinion whether the court means to say that in cases seeking damages for conduct prima facie protected by the First Amendment, the First Amendment itself requires a heightened pleading standard. If, instead, heightened pleading is not constitutionally demanded there, some might argue that, unless Rule 9(b) can be found to apply, the court has no discretion, under the existing rules regime, to opt for heightened pleading.

In any event, the vitality of Kottle seems in doubt in the light of the 9th Circuit's later strongly-worded dictum in Empress LLC v. City and County of San Francisco, 419 F.3d 1052, 1057 (9th Cir. 2005). The court there stated that although its precedents only addressed the demise of heightened pleading in the particular substantive contexts presented, "the logical conclusion of Leatherman, Crawford-El, and Swierkiewicz dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require." Empress LLC, supra, 419 F.3d at 1056. The court went on to address the district court's Rule 12(b)(6) dismissal, under heightened pleading standards, of plaintiff's allegations invoking the "sham exception" to the Noerr-Pennington doctrine. The court found that "[a]lthough the district court should not have applied a heightened pleading standard," plaintiffs' allegations were so bereft as to fall short of what notice pleading requires. Id. at 1057.

Courts have also applied heightened pleading to antitrust allegations having nothing to do with the "sham" exception. In Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002), the court stated that the Supreme Court's holding in Swierkiewicz "did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." See Southern Volkswagen, Inc. v. Centrix Financial, LLC, 357 F. Supp.2d 837, 846 (D. Md. 2005) (following Dickson). The court went on to dismiss certain of plaintiff's allegations on the ground that by failing to allege certain defendants' market share of power, plaintiff "has failed to set forth factual allegations necessary to support the basic elements of its" Sherman Act claims.

A dissenter (Gregory, J.) objected that "[t]he majority requires far more from [plaintiff] than is appropriate under notice pleading standards." Certainly plaintiff would need to prove the market shares of certain defendants to meet the ultimate evidentiary standard, but "the Supreme Court has made crystal clear . . . that an evidentiary standard does not determine the adequacy of

a complaint. It is inappropriate, therefore, to require plaintiffs to plead facts going to that evidentiary standard in a complaint." Dickson, supra, at 218 (dissenting opinion). The dissent went on to complain that "[t]his Court never suggested that a plaintiff must plead detailed facts supporting every subsidiary factual conclusion." Id. at 220.

A 1st Circuit decision in DM Research, Inc. v. College of American Pathologists, 170 F.3d 53 (1st Cir. 1999) (Boudin, J.), offered a fuller explanation of its rationale for "heightened pleading." Plaintiff had alleged a Sherman Act conspiracy, and alleged the following acts in furtherance of the conspiracy: "the creation, adoption, and enforcement of faulty and arbitrary standards and guidelines and . . . economic threats and intimidation of certain laboratories and referring pathologists to cease or refrain from doing business with [plaintiff and others]." The court found these allegations too conclusory to avert dismissal.

The court explained, "[T]he factual allegations must be specific enough to justify dragging a defendant past the pleading threshold. . . . The complaint . . . need not include evidentiary detail. On the other hand, the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." Id. at 55. "Occasionally, an implausible conclusory allegation may turn out to be true. . . . But the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." Id. at 56.

The court in DM Research framed its discussion as an analysis of Rule 8 notice pleading requirements, and did not point to any heightened pleading standard, so it may be open to debate whether this is in fact a heightened-pleading case. The district court opinion affirmed in this case had explicitly stated that there is no heightened pleading in antitrust cases. DM Research, Inc. v. College of American Pathologists, 2 F.Supp.2d 226, 228 (D.R.I. 1998). On the other hand, at least one commentator has classed this as a heightened pleading case, stating, "It is hard to see how this is much different from a heightened pleading standard." Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 1021 n. 209 (2003).

Later, the 1st Circuit in Town of Norwood v. New England Power Co., 202 F.3d 408, 423 (1st Cir. 2000)(Boudin, J.), made clear some limits on its holding in DM Research, supra. The court explained, "Just how much detail is required in notice-pleading complaints does not have a formulaic answer; we have been willing to sustain dismissals where a plaintiff's antitrust claim was expressed only in the bare words of the statute, seemed highly improbable, and was not strengthened by more specific detail offered in the face of a direct challenge on motion to dismiss. . . . But it is one thing to sustain a dismissal where the lack of detail was an issue pressed in the district court and the plaintiff, having had notice and incentive to respond, failed to do so by bolstering its complaint . . . . Here this "lack of detail" claim was not clearly present in the district court and is not even close to its ground for disposition; and the section 7 claim,

although doubtful on the facts, is not inherently impossible. . . . We think that a deficiency in detail is a matter to pursue on remand, although some form of summary disposition on this ground may yet be available."

These circuits would appear to be the exceptions. Most circuits now reject heightened pleading in antitrust cases (without mention of whether some special treatment is reserved for the "sham exception" to the Noerr-Pennington defense). Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 672 (D.C. Cir. 2005); Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc., 376 F.3d 1065, 1070 (11th Cir. 2004); Lum v. Bank of America, 361 F.3d 217, 228 (3rd Cir. 2004); Midwest Gas Services, Inc. v. Indiana Gas Co., 317 F.3d 703, 710 ("Though the short and plain statement of an antitrust claim must demonstrate antitrust injury and antitrust standing, antitrust plaintiffs need not plead to a heightened level of particularity"); Todd v. Exxon Corp., 275 F.3d 191, 198 (2nd Cir. 2001); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 984 (9th Cir. 2000).

CERCLA.

In a noted case, a district court in Cash Energy, Inc. v. Weiner, 768 F.Supp. 892, 897-900 (D. Mass. 1991) (Keeton, J.), applied heightened pleading to allegations under the Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The court reasoned, "Is CERCLA yet another area where a high standard of particularity will be required? Although an analogy to fraud is strained, CERCLA involves many of the circumstances that have led courts to invoke higher standards of specificity in other contexts. The consequences of individual liability for an environmental violation may be severe. Even more relevant to the present issue is the fact that defending against a non-meritorious claim – even one that upon reasonable inquiry could be determined to be patently non-meritorious – can be very expensive. The cost of establishing that a claim lacks merit is more likely to be subject to reasonable controls if some standard of specificity of pleading is enforced. I conclude that it is a reasonable prediction that higher courts, including the First Circuit, will extend specificity of pleading requirements to CERCLA cases. . . . Unless and until guidance to the contrary appears in legislation or precedent, I will so rule." Id. at 900.

Apparently the general perception now, fifteen years later, is that the sophisticated reasoning of Cash has been largely vitiated because the prognostications that guided that reasoning proved incorrect. Clear "guidance to the contrary" did "appear . . . in . . . precedent," i.e., in Leatherman and Swierkiewicz. See Warwick Administrative Group v. Avon Products, Inc., 820 F.Supp. 116, 121 (S.D.N.Y. 1993) (Leatherman "expressly overturned the line of civil rights cases requiring heightened specificity which . . . Cash . . . relied upon as its principal example of 'the trend toward specificity'").

One commentator has thus observed that "Leatherman has clearly affected pleading standards in CERCLA cases, returning the norm to a notice pleading standard." Fairman, supra, 45 Ariz. L. Rev. at 1026. This commentator does note, however, that many courts, albeit under

the rubric of notice pleading, still require that CERCLA plaintiffs plead a "cognizable response cost," which the commentator sees as an "enhanced pleading burden, however slight, [that] is a deviation from notice pleading." Id. at 1027.

Copyright.

The court in Paragon Services, Inc. v. Hicks, 843 F.Supp. 1077, 1081 (E.D. Va. 1994), stated, "An exception to this general rule [of notice pleading], however, has been recognized when the claimant is asserting a copyright violation. In such cases, courts have required a greater degree of specificity. Hartman v. Hallmark Cards, Inc., 639 F.Supp. 816, aff'd, 833 F.2d 117 (8th Cir. 1987). A claimant alleging a copyright claim must state: (1) which specific original works are the subject of the claim; (2) that plaintiff owns the copyrights in issue; (3) that the works in issue have been registered; and (4) by what acts and during what time frame defendants have infringed the copyright." See Sefton v. Jew, 201 F.Supp.2d 730, 747 (W.D. Tex. 2001) (same standard, which the court acknowledged to be "heightened pleading"); Vapac Music Publishing, Inc. v. Tuff 'N' Rumble Management, 2000 WL 1006257, at 6 (S.D.N.Y. 2000) (same standard, which the court characterized as the pleading standard "Rule 8 requires").

The 7th Circuit has disagreed, in Mid America Title Co. v. Kirk, 991 F.2d 417, 421-22 (7th Cir.), cert. denied, 510 U.S. 932 (1993), ruling that copyright infringement claims need not be pleaded with particularity. Plaintiff need only allege ownership of the copyright, registration, and infringement by the defendant. See Jetform Corp. v. Unisys Corp., 11 F.Supp.2d 788, 789-90 (E.D. Va. 1998) (same, disagreeing with the above-cited Paragon Services case from the same district court).

Negligence.

The 4th Circuit in Iodice v. United States, 289 F.3d 270, 281 (4th Cir. 2002), affirmed the dismissal of plaintiffs' Federal Tort Claims Act complaint, stating, "Because [plaintiffs] have not alleged that when [defendants] provided narcotics to Jones, they knew or should have known that Jones at that time was intoxicated and would shortly be driving, they have failed to allege the elements necessary to state an ordinary negligence claim . . . . Even in these days of notice pleadings, see Swierkiewicz, . . . a complaint asserting a negligence claim must disclose that each of the elements is present in order to be sufficient." (emphasis in original). The Fairman article sees this kind of analysis as heightened pleading – indeed, as "hyperpleading" – dressed up in notice-pleading clothes. Fairman, supra, at 1049.

Negligent misrepresentation.

Courts generally have recognized that "fraud," i.e., intentional misrepresentation, and the tort of "negligent misrepresentation," i.e., supplying false information without exercising reasonable care, are "closely akin . . . , differing primarily in the requisite state of mind of the purported actor." Dealers Supply Co. v. Cheil Industries, Inc., 348 F.Supp.2d 579, 590

(M.D.N.C. 2004). Thus, some courts have applied Rule 9(b) to allegations of negligent misrepresentation, reasoning that 9(b) should apply to "all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud." Toner v. Allstate Insur. Co., 821 F.Supp. 276, 283 (D. Del. 1993). See Dealers Supply Co., supra, 348 F.Supp.2d at 590 ("the court finds that the underlying rationales for requiring heightened pleading for fraud equally apply to negligent misrepresentation"); Breeden v. Richmond Community College, 171 F.R.D. 189, 202 (M.D.N.C. 1997); Pitten v. Jacobs, 903 F.Supp. 937, 951 (D.S.C. 1995).

Other courts have declined to apply Rule 9(b) to tort claims for negligent misrepresentation. See In re LILCO Securities Litigation, 625 F.Supp. 1500, 1504 (E.D.N.Y. 1986).

Defamation.

Some courts have held in defamation cases that the complaint must supply the specific defamatory words alleged. Smith v. Chicago Park District, 1999 WL 33883, at 4 (N.D. Ill. 1999); Goldstein v. Kinney Shoe Corp., 931 F.Supp. 595, 597 (N.D. Ill. 1996) ("The purpose of requiring in haec verba pleading is to enable the defendant . . . to responsively plead").

The 2nd Circuit has held that a plaintiff need not plead the exact defamatory words, Kelly v. Schmidberger, 806 F.2d 44, 46 (2nd Cir. 1986), but courts within that circuit have nevertheless required specificity in a defamation complaint, requiring that a defamation complaint provide the subject matter of the statements, the speaker of the statements, when the statements were made, whether the statements were written or verbal, and whether the statements were communicated to a third party. Mordhorst v. Skinner Valve Division, 2001 WL 863433, at 2 (D. Conn. 2001); Thomas v. St. Francis Hospital and Medical Center, 990 F.Supp. 81, 92-93 (D. Conn. 1998); Croslan v. Housing Authority, 974 F.Supp. 161, 169-70 (D. Conn. 1997); Wanamaker v. Columbian Rope Co., 713 F.Supp. 533, 545 (N.D.N.Y. 1989), aff'd, 108 F.3d 462 (2nd Cir. 1997). This is said to be required by Rule 8(a), in that that Rule requires "that a complaint must provide sufficient information to enable a defendant to respond." Mordhorst, supra, at 2. See Celli v. Shoell, 995 F.Supp. 1337, 1346 (D. Utah 1998) (defamation claim dismissed because "the complaint fails to identify any specific defamatory statements made by the defendants or when, where, or to whom any defamatory statements were made").

Deceptive trade practices.

A number of courts have applied the heightened pleading standard of Rule 9(b) to allegations brought under state statutes creating causes of action for unfair and deceptive trade practices. See, e.g., In re Universal Service Fund Telephone Billing Practices Litigation, 300 F.Supp.2d 1107, 1150 (D. Kan. 2003); Patel v. Holiday Hospitality Franchising, Inc., 172 F.Supp.2d 821, 825 (N.D. Tex. 2001); Adams v. NVR Homes, Inc., 193 F.R.D. 243, 251-52 (D. Md. 2000); Petri v. Gatlin, 997 F.Supp. 956, 973 (N.D. Ill. 1997). The general theory of these

cases is that such allegations often are tantamount to allegations of "fraud," and the underlying purposes served by Rule 9(b) apply to these allegations.

Other federal courts, by contrast, reject the application of heightened pleading to allegations of deceptive trade practices. "These courts distinguish deceptive trade practices from fraud. The former is broader and does not require the same essential elements of intent, reliance, and subjectiveness; thus, the historical rationales for requiring particularity for claims of fraud do not apply to deceptive trade practices. . . . Claims [of deceptive trade practices] are commonplace in litigation over commercial transactions and do not carry the same stigma of moral turpitude or damage to reputation that is associated with fraud. . . . Nor is the court aware of any abuse of [such] claims brought solely in hopes of dredging up some actual violation through discovery." CBP Resources, Inc. v. SGS Control Services, Inc., 394 F.Supp.2d 733, 739 (M.D. N. Car. 2005). See Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005). "Nothing in the language or history of Rule 9(b) suggests that it is intended to apply, willy-nilly, to every statutory tort that includes an element of false statement." CBP Resources, Inc., supra, 394 F.Supp.2d at 739 (quoting John P. Villano Inc. v. CBS, Inc., 176 F.R.D. 130, 131 (S.D.N.Y. 1997)).

Standing.

In United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992), the 1st Circuit applied heightened pleading requirements in addressing the question of an intervenor's standing to pursue an appeal from a consent decree. The court stated, "Because standing is fundamental to the ability to maintain a suit, and because the Court has saddled the complainant with the burden of clearly alleging facts sufficient to ground standing, we are of the opinion that, where standing is at issue, heightened specificity is obligatory at the pleading stage. . . . The complaint must set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing."

Subsequently the 1st Circuit suggested that AVX, supra, did not impose heightened pleading requirements on allegations of standing generally, but only "require[d] heightened specificity from an intervenor seeking to establish appellate standing." Sea Shore Corp. v. Sullivan, 158 F.3d 51, 54-55 (1st Cir. 1998). The court explained, "Although the question in AVX was whether an intervenor had appellate standing, the AVX panel broadly suggested that the heightened specificity requirement applies whenever standing is at issue. A subsequent panel has questioned this suggestion, noting [Leatherman]. See Adams v. Watson, 10 F.3d 915, 919 n.8 (1st Cir. 1993). Whatever effect the rationale of Leatherman might have on AVX's dictum with respect to pleading requirements in the district court, it is clear that AVX's core holding – that an intervenor seeking to establish appellate standing must set forth specific facts – remains good law in this circuit." Sea Shore Corp., supra, 158 F.3d at 55 n.3 (emphasis in original).

Even after Sea Shore Corp., a district court in the 1st Circuit relied on AVX to impose a heightened pleading requirement on standing allegations set forth by an ordinary plaintiff in a

district court complaint. Risinger v. Concannon, 117 F.Supp.2d 61, 68 (D. Me. 2000). But the district court in Citizens for Squirrel Point v. Squirrel Point Associates, 2003 WL 22867620, at 2 n.2 (D. Me.), stated that "[t]he holding in AVX affects standing allegations only with regard to intervenors," and observed that Risinger failed to mention "the First Circuit's subsequent narrowing of AVX in Sea Shore."

"Disfavored claims" – Inequitable conduct defense, RICO, conspiracy, section 1983, employment discrimination, prisoner complaints.

"Inequitable conduct" defense in patent cases.

A defendant in a patent infringement case can raise as a defense an allegation that the plaintiff's patent is unenforceable by reason of the plaintiff's "inequitable conduct" in securing the patent. Apparently this defense often involves fraud on the Patent Office in gaining the patent, but also can involve conduct other than fraud.

The Federal Circuit has stated that, although inequitable conduct is a broader concept than fraud, it must nevertheless be "pled with particularity." Ferguson Beauregard/Logic Controls v. Mega Systems, 350 F.3d 1327, 1344 (Fed. Cir. 2003).

In Stowe Woodward v. Sensor Products, Inc., 230 F.R.D. 463, 465-66 (W.D. Va. 2005), the court held that Rule 9(b) applies to all allegations of "inequitable conduct" in patent cases, whether or not what is alleged technically constitutes "fraud." The court reasoned, "The heightened pleading requirements of Rule 9(b) are meant to 'deter the filing of charges of fraud as a pretext for discovery of unknown wrongs.' This deterrent purpose is commensurate with the Federal Circuit's demonstrated antipathy towards the defense of inequitable conduct, which was enunciated in rather telling terms in Burlington Industries, Inc. v. Dayco Corp., 849 F.2d 1418, 1422 (Fed. Cir. 1988)[:] '[T]he habit of charging inequitable conduct in almost every major patent case has become an absolute plague . . . . A patent litigant should be made to feel, therefore, that an unsupported charge of 'inequitable conduct in the Patent Office' is a negative contribution to the rightful administration of justice.'".

Other cases applying heightened pleading are Depuy, Inc. v. Zimmer Holdings, Inc., 343 F.Supp.2d 675, 683 (N.D. Ill. 2004); MedImmune, Inc. v. Centocor, Inc., 271 F.Supp.2d 762, 772 (D.Md. 2003); Rhone-Poulenc Agro S.A. v. Monsanto Co., 73 F.Supp.2d 537, 538 (M.D.N.C. 1999); Systemation, Inc. v. Engel Industries, Inc., 183 F.R.D. 49, 51 (D. Mass. 1998); XILINX, Inc. V. Altera Corp., 1993 WL 767688 (N.D. Cal. 1993).

There has been some dissent. For example, in Rentrop v. The Spectranetics Corp., 2004 WL 1243608, at 2 (S.D.N.Y. 2004), the court stated that Rule 9(b) may not apply in all cases of inequitable conduct, and, for example, does not apply to allegations of theft of trade secrets (as distinguished from allegations of fraud on the Patent Office).

RICO.

Many RICO claims are based on predicate acts of mail fraud or wire fraud, to which heightened pleading may be said to apply by operation of Rule 9(b). Some courts have generalized from this circumstance to apply heightened pleading to all RICO allegations, whether or not they have to do with mail or wire fraud. See Fairman, supra, at 1051-59.

"Many federal district courts have issued standing orders in civil RICO cases requesting that plaintiff's counsel provide certain details concerning their RICO claim." Wagh v. Metris Direct, Inc., 363 F.3d 821, 826-27 (9th Cir. 2003) (stating that a leading treatise on civil RICO cited 15 district courts). The court in Wagh characterized these orders as "direct[ing] plaintiffs claiming RICO violations to state their allegations in detail and with specificity, including a detailed description of the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim." Id. at 826. "The use of RICO Standing Orders to compel plaintiffs to produce detailed RICO Case Statements, which are then treated by the district court as part of that party's pleadings, can in certain circumstances require far more information from plaintiffs than is required under either Rule 8(a) or 9(b) of the Federal Rules." Id. at 828.

The court in Wagh noted a 2nd Circuit case, Commercial Cleaning Services v. Colin Service Systems, Inc., 271 F.3d 374, 385 (2nd Cir. 2001), which held that the "Standing Order call[ed] for information far in excess of the essential elements of a RICO claim. . . . To the extent [the order] called for presentation of information going beyond what a plaintiff needs to present to establish a legally sufficient case, plaintiff's inability to produce it could not justify the grant of judgment to defendant." The court stated that it found the 2nd Circuit's reasoning "persuasive," but did not need to address the issue of the standing order's consistency with Rule 8(a) (and 9(b)) because plaintiffs' complaint was so deficient that it "failed to satisfy even the basic requirements of those rules." Wagh, supra, 363 F.3d at 828. Cf. Northland Insurance Co. v. Shell Oil Co., 930 F. Supp. 1069, 1073-75 (D.N.J. 1996) (Leatherman does not invalidate local rules or standing orders requiring RICO Case Statements, because RICO Case Statements constitute case management tools and not heightened pleading devices, RICO cases often involve allegations of fraud subject to 9(b) heightened pleading in any event, and RICO cases are far more vast and complex than section 1983 cases).

Sterling Interiors Group v. Haworth, Inc., 1996 WL 426379, at 4-5 (S.D.N.Y. 1996), appears to be typical of many RICO cases in which courts require that "the complaint must specifically allege" all the elements of the RICO cause of action.

In Taylor v. Bear Stearns & Co., 572 F.Supp. 667, 682 (N.D. Ga. 1983), the court stated that "there are many sound reasons for requiring that, like fraud, it [RICO] must be pled with particularity. First, the mere invocation of the statute has such an in terrorem effect that it would be unconscionable to allow it to linger in a suit and generate suspicion and unfavorable opinion of the putative defendant unless there is some articulable factual basis which, if true, would warrant recovery under the statute. Second, the concepts within the statute are so nebulous that if

the cause of action were only generally pled, a defendant would have no effective notice of a claim showing that the pleader is entitled to relief"). See Helicopter Support Systems, Inc. v. Hughes Helicopters, Inc., 1984 WL 3238, at 1 (M.D. Fla. 1984) (relying on the "scholarly opinion" in Taylor, supra, 572 F.Supp. 667)).

In Advocacy Organization for Patients and Providers v. Auto Club Insurance Ass'n, 176 F.3d 315 (6th Cir. 1999), the court imposed a heightened pleading standard on plaintiffs' allegations of malicious intent to commit extortion, id. at 327, on plaintiffs' allegations of a nexus between the racketeering activity and defendants' control of the racketeering enterprise, id. at 329, and on plaintiff's allegations of resulting injury, id. at 330-31.

In Browning v. Clinton, 292 F.2d 235, 249-50 (D.C. Cir. 2002), the court affirmed dismissal of plaintiff's civil RICO claim because the complaint "pleads no facts suggesting some direct relation between the injury asserted and the injurious conduct alleged."

Some courts have tended to impose heightened pleading requirements (whether acknowledged or not) to allegations of conspiracy under RICO. D'Orange v. Feely, 877 F. Supp. 152, 159 (S.D.N.Y. 1995) ("pleading of a RICO conspiracy" is subject only to Rule 8(a), but "even under these standards, . . . a . . . complaint, in the very least, must allege specifically such an agreement").

On the other hand, many courts have rejected the notion of heightened pleading in RICO cases, except for RICO claims involving predicate acts of fraud. Williams v. Mohawk Industries, 314 F.Supp.2d 1333, 1344 (N.D. Ga. 2004) ("where a predicate act does not sound in fraud, the plaintiff asserting a RICO claim need only comply with the general pleading requirements of Rule 8"), aff'd in part and rev'd in part on other grounds, 411 F.3d 1252 (11th Cir.), cert. denied, 126 S.Ct. 830 (2005); Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 945 F.Supp. 1355, 1379-80 (D. Ore. 1996).

Conspiracy.

The 10th Circuit in Scott v. Hern, 216 F.3d 897, 907-08 (10th Cir. 2000), applied heightened pleading to allegations of a section 1983 conspiracy despite Leatherman. "We have continued to apply this heightened pleading requirement to section 1983 claims alleging a conspiracy between private individuals and state officials even after Leatherman, in which the Supreme Court declined to apply a heightened pleading standard to section 1983 claims against municipalities." Id. at 907 (citation omitted). See Abdelsamed v. United States, 2002 WL 31409521, at 11 (D. Colo. 2002) ("a complaint alleging a conspiracy to deprive a person of constitutional rights must contain more than conclusory, vague or general allegations of conspiracy").

Many courts have retreated from heightened pleading for allegations of conspiracy. Walker v. Thompson, 288 F.3d 1005, 1008 (7th Cir. 2002) ("Cases . . . which say that conclusory

allegations of conspiracy . . . are not enough to withstand a motion to dismiss cannot be squared . . . with Swierkiewicz"); North Jackson Pharmacy, Inc. v. Express Scripts, Inc., 345 F.Supp.2d 1279 (N.D. Ala. 2004) ("The Court made clear in Swierkiewicz that for purposes of Rule 12(b)(6), so-called 'conclusory' allegations are not inherently objectionable. . . . Factual allegations in a complaint – even if 'conclusory' – are sufficient if they allow the defendant to understand the gist of the plaintiff's claim, thereby making it possible to formulate a meaningful response").

Indeed, although the 10th Circuit has yet to overrule Scott, supra, 216 F.3d 897, it is difficult to see how Scott can remain good law in the light of Currier v. Doran, 242 F.3d 905, 911-17 (10th Cir.) (no heightened pleading in a section 1983 case even where defendant has raised a qualified immunity defense), cert. denied, 534 U.S. 1019 (2001)

Section 1983 (qualified immunity).

The 11th Circuit in Swann v. Southern Health Partners, Inc., 388 F.3d 834 (11th Cir. 2004), held that Leatherman "made it clear that any heightened pleading requirements in section 1983 actions against entities that cannot raise qualified immunity as a defense are improper." Id. at 837. Thus, the court held, "Leatherman overturned our prior decisions to the extent that those cases required a heightened pleading standard in section 1983 actions against entities that cannot raise qualified immunity as a defense." Id. at 838. Swann did not address, and left untouched, 11th Circuit precedent that did impose heightened pleading in qualified immunity cases.

The 11th Circuit in Marsh v. Butler Co., 268 F.3d 1014, 1022-23 (11th Cir. 2001)(en banc), did not consider the adequacy under pleading standards of allegations of a section 1983 or other civil rights violation, but instead addressed the question of what a plaintiff in a section 1983 action must plead to avoid dismissal on grounds of the affirmative defense of qualified immunity. The majority opinion did not discuss the case in terms of notice pleading standards or any other pleading standards, but instead stated, "We apply the qualified immunity defense to dismiss a complaint at the 12(b)(6) stage where, (1) from the face of the complaint, (2) we must conclude that (even if a claim is otherwise sufficiently stated), (3) the law supporting the existence of that claim – given the alleged circumstances – was not already clearly established, (4) to prohibit what the government official is alleged to have done, (5) before the defendant acted." Id. at 1023.

A dissent accused the majority of an improper deviation from applicable notice pleading standards. "Under Supreme Court precedent and the Federal Rules of Civil Procedure, a court ruling on a motion to dismiss is required to accept a plaintiff's allegations as true and construe those allegations in the light most favorable to the plaintiff. In failing to do so here, the majority conflates the degree of specificity required of a complaint to adequately allege a substantive fact and the actual substantive facts which must be alleged to state a claim. To the extent that the majority suggests a different standard for pleading in anticipation of the affirmative defense of qualified immunity . . . [and] although the majority implies that the policy concerns behind

qualified immunity justify requiring more particular allegations from [plaintiff's] complaint, 'that is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' Leatherman." Marsh, supra, 268 F.3d at 1060 n. 1 (Barkett, J., concurring in part and dissenting in part).

Thus, despite the Supreme Court's re-emphasis on notice pleading, there remains an 11th Circuit tradition – whose current viability appears shaky but is not yet repudiated – of heightened pleading in section 1983 cases where a qualified immunity defense is available. See Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003); GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998) ("this circuit . . . has tightened the application of Rule 8 with respect to section 1983 cases in an effort to weed out nonmeritorious claims, requiring that a section 1983 plaintiff allege with some specificity the facts which make out its claim. . . . This is particularly true in cases involving qualified immunity . . . . Accordingly, when reviewing a district court's disposition of a motion to dismiss a section 1983 claim on qualified immunity grounds, we are guided both by the regular 12(b)(6) standard and by the heightened pleading requirement"), overruled, Marsh v. Butler Co., 225 F.3d 1243, 1245 (11th Cir. 2000), vacated, Marsh, supra, 268 F.3d 1014 (en banc); Mayo v. Regier, 2005 WL 2088580 (M.D. Fla. 2005) ("the Eleventh Circuit imposes 'heightened pleading requirements' for section 1983 cases, especially those involving qualified immunity"); Biasella v. City of Naples, 2005 WL 1925705 (M.D. Fla. 2005) ("The Eleventh Circuit imposes 'heightened pleading requirements' for section 1983 cases which involve individuals entitled to assert qualified immunity"); McCall v. Dep't of Human Resources, 176 F.Supp.2d 1355, 1364 (M.D. Ga. 2001); Fountain v. Talley, 104 F.Supp.2d 1345, 1349-50 (M.D. Ala. 2000); Williams v. City of Montgomery, 21 F.Supp.2d 1360, 1367 (M.D. Ala. 1998).

At least one district court case from within the D.C. Circuit also has clung to heightened pleading in qualified immunity cases. In M.K. v. Tenet, 99 F.Supp.2d 12, 33 (D.D.C. 2000), the court held that "a complaint asserting a claim subject to qualified immunity (i.e., seeking damages from an official for alleged illegal conduct in the performance of a discretionary function) must meet a heightened pleading standard."

The 1st Circuit, by contrast, has declared, "Given the lessons of Swierkiewicz, our duty is made manifest." Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004). The 1st Circuit went on to hold that "there are no heightened pleading standards for civil rights cases. . . . Let us be perfectly clear. The rule that we announce today is not contingent on the type of civil rights case, the capacity in which a particular defendant is sued, the availability vel non of a qualified immunity defense, or the need (or lack of need) of proof of illegal motive. All civil rights actions are subject to Rule 8(a)'s notice pleading regime." Id. at 66-67. The court thus overruled prior precedents embracing heightened pleading in civil rights cases, such as Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855, 865-66 (1st Cir. 1993) (Keeton, J., sitting by designation), overruled, 367 F.3d 61 (1st Cir. 2004).

Most other circuits too have now rejected heightened pleading in civil rights cases. Phelps v. Kapnolas, 308 F.3d 180, 186-87 (2nd Cir. 2002); Alston v. Parker, 363 F.3d 229, 233-35 (3rd Cir. 2004); Goad v. Mitchell, 297 F.3d 497, 502-03 (6th Cir. 2002) (no heightened pleading even where defendant has raised a qualified immunity defense); Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002); Doe v. Cassel, 403 F.3d 986, 988-89 (8th Cir. 2005); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002); Currier v. Doran, 242 F.3d 905, 911-17 (10th Cir.) (no heightened pleading even where defendant has raised a qualified immunity defense), cert. denied, 534 U.S. 1019 (2001).

But even among the many circuits that have bowed to Swierkiewicz and rejected or abandoned heightened pleading in civil rights cases, echoes and shadows of it may remain. At least that's one way to interpret the 4th Circuit's approach in Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2002), cert. denied, 540 U.S. 940 (2003), a civil rights case, in which the court held, "Our circuit has not . . . interpreted Swierkiewicz as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. . . . While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff is required to allege facts that support a claim for relief." (emphasis in original). See Dogwood Realty, Inc. v. Goodwin, 151 Fed. Appx. 290, 293-94 (4th Cir. 2005).

Employment discrimination.

Even after Swierkiewicz, a district court stated in Keene v. Thompson, 232 F.Supp.2d 574, 579 (M.D. N.C. 2002), a Title VII case, that "if a complaint fails to sufficiently state facts to support each element of the claims asserted therein, dismissal for failure to state a claim is proper." But there appear to be few such cases in the post-Swierkiewicz (2002) period. See Gorski v. New Hampshire Dep't of Corrections, 290 F.3d 466, 473 (1st Cir. 2002) ("Swierkiewicz makes clear that 'the Federal Rules do not contain a heightened pleading standard for employment discrimination suits'").

Prisoner cases.

The 6th Circuit imposes a heightened pleading requirement for allegations of exhaustion of remedies in complaints covered by the Prison Litigation Reform Act (PLRA), which requires federal courts to undertake sua sponte review of prisoners' section 1983 complaints to determine whether the complaints are subject to sua sponte dismissal. 28 U.S.C. sec. 1915A. The court in Baxter v. Rose, 305 F.3d 486, 489 (6th Cir. 2002) (Boggs, J.) "ma[d]e clear that . . . Swierkiewicz . . . does not displace our heightened pleading standard for exhaustion in PLRA cases."

The court explained that this was not a judge-made requirement, but part and parcel of the review required by the PLRA. "Our rule . . . does not take its authority from the Federal Rules of Civil Procedure, but from the Prison Litigation Reform Act. The PLRA established an [sic] unique procedure under which the court, not the parties, is required to evaluate whether a claim on which relief may be granted is stated. . . . The heightened pleading requirement, in cases to

which the PLRA applies, effectuates the PLRA's screening requirement. Courts would be unable to screen cases effectively if plaintiffs were able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted. . . . While Swierkiewicz may imperil judicially imposed heightened pleading requirements in the normal course of civil litigation, the interruption of the course of prisoner actions by the PLRA screening requirement makes actions covered by the PLRA sui generis." Id. at 490 (emphasis in original). The facts of Baxter involved failure to adequately plead exhaustion of remedies, but the court's rationale would seem to permit heightened pleading standards for all allegations in a complaint covered by the PLRA.

The 10th Circuit has also held that a prisoner plaintiff must plead exhaustion of administrative remedies, and rejected the contention that requiring plaintiff to plead exhaustion amounts to a heightened pleading requirement banned by Swierkiewicz. The court, agreeing with and quoting Baxter, supra, held that requirements that a prisoner plead exhaustion with a certain amount of specificity "do not amount to a judicially-created heightened pleading requirement. . . . [T]he need to plead exhaustion with specificity does not take its authority from the Federal Rules of Civil Procedure, but from the [PLRA]." Steele v. Federal Bureau of Prisons, 355 F.2d 1204, 1210-11 (10th Cir. 2003), cert. denied, 543 U.S. 925 (2004). The 10th Circuit recently applied this holding once again in Davis v. Simmons, 2006 WL 292257, at 2 (10th Cir. 2006).

"Most circuits that have considered this issue, however, . . . have held that nonexhaustion is an affirmative defense, and that therefore . . . prisoner plaintiffs need not plead exhaustion with particularity." McCoy v. Goord, 255 F.Supp.2d 233, 248 (S.D.N.Y. 2003). See, e.g., Wyatt v. Terhune, 315 F.3d 1108, 1117-18 (9th Cir.), cert. denied, 540 U.S. 810 (2003); Casanova v. Dubois, 304 F.3d 75, 78 n.3 (1st Cir. 2002); Ray v. Kertes, 285 F.3d 287, 295-97 (3rd Cir. 2002).

## Notice Pleading Reconsidered

Pleading and discovery are inseparably joined in the Civil Rules system of "notice pleading." The complaint and answer are designed primarily to set the framework for pretrial litigation, relying on disclosure, discovery, and increasingly on "managerial judging" to inform the parties as to fact, contention, and legal theory. The discovery part of this package, recently joined by disclosure, has provoked such continuing anguish that it has been the subject of constant Advisory Committee study for the last 40 years. At least some segments of the bar continue to be dissatisfied with the disruptions and costs imposed by discovery. Although discovery issues will remain on the agenda, it may be appropriate to explore once again the question whether the notice pleading part of the package should be revised.

The most likely goal of revising the pleading rules would be to strengthen the use of pleadings to dismiss at the outset actions by plaintiffs who cannot even identify in a complaint facts that, if proved, would establish a claim for relief. The argument would be that Rule 11 does not provide adequate protection against actions brought without a solid foundation in both fact and law, in the hope that discovery either will show that there actually is a sustainable claim or, less attractively, in the hope that the prospect of discovery will elicit a settlement offer.

Whether there is any force to the arguments that pleading rules need strengthening depends on experience, not theory. Experience, not theory, also will shape the revisions that might be considered. There may be no general problems, or no sufficient number of problems to believe that any "solution" is possible. Or there may be discrete problems that are better addressed by focused rules than by a general revision of notice pleading. Or there may be some number of significant problems, but no way to improve on wise administration of the current pleading rules, perhaps assisted by occasionally turning a blind eye to some of the more open-ended opinions that seem to deny any role for variable application of particular pleading requirements according to the nature of the litigation.

The immediate question is whether it would be desirable to undertake further study of notice pleading. As with recent discovery and class-action projects, organized bar groups are a likely source of help. Any useful appraisal of current pleading practice will require information drawn from many substantive areas and from courts in all parts of the country. Comparisons to state-court pleading practices also will be helpful. In addition to the familiar national groups that have helped with other projects, it may be particularly useful to seek out state bar groups in states that have distinctive pleading practices. It also may prove possible to enlist the Federal Judicial Center, either for an ambitious study or for something simpler akin to the recent survey of federal judges on Rule 11.

One testing hypothesis can be simply stated, with only brief elaboration. It begins with the belief that pleadings appropriately play different roles in different types of litigation. Form 9 is famous, and for good reason. The simplest pleading suffices for an automobile collision case based on negligence. There is likely to have been a collision, and with that reasonable ground for bringing suit. The law is familiar, the means of investigation and discovery ready to hand, and the need to test the sufficiency of the legal theory almost nonexistent. Many courts, on the other hand, might be less comfortable with a similarly brief allegation that from July 1, 2001 continuing to the present the defendant has contracted, combined, or conspired with others unknown to fix the price of widgets purchased by the plaintiff in violation of § 1 of the Sherman Act. The conclusion of this hypothesis is that courts in fact act on these distinctions, insisting on greater pleading detail in cases that seem to call for it. If the automobile collision occurred in a no-fault state, allegations will be required to bring the suit into the tort system. Different levels of detail will be required in alleging title depending on whether the action is one to compel specific performance with an allegation of marketable title, one to quiet title, one to remove a cloud from title, or one to eject a trespasser. More generally, courts will consider experience with frequent misuse of specific types of claims,

projected complexity in discovery and trial, and — more controversially — whether a particular type of claim should be favored. The burden is on would-be reformers to show that courts could do a better job if given more explicit authority to impose higher pleading standards.

Two Supreme Court decisions provide the texts that cast doubt on the proposition that lower courts can tailor the specificity required by notice pleading to the perceived needs of different types of litigation. The lead decision is Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 1993, 507 U.S. 163, 113 S.Ct. 1160. A 1993 memorandum on the Leatherman decision is attached. The lesson that pleading with particularity can be required only when directed by a specific Civil Rule provision was repeated in Swierkiewicz v. Sorema N.A., 2002, 534 U.S. 506, 122 S.Ct. 992. The Swierkiewicz decision ruled that a complaint claiming employment discrimination need not "plead facts establishing a prima facie case" within the familiar burden-shifting framework. The decision relied in part on the observation that a plaintiff who has direct evidence of discrimination may prevail without proving all the elements of a "prima facie case." Beyond that, the court observed:

> imposing the * * * heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) * * *. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See * * * Leatherman * * *.
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> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example * * *. This Court * * * has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability * * *, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[4]
>
> Other provisions of the Federal Rules * * * are inextricably linked to Rule 8(a)'s simplified notice pleading standard. * * * Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 72, 104 S.C.t 2229 * * * (1984). * * * the liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

Alongside these decisions lie other Supreme Court decisions that seem to look in a different direction. The first is Crawford-El v. Britton, 1998, 523 U.S. 574, 597-598, 118 S.Ct. 1584, 1596-1597. The claim was that the defendant prison official had punished the plaintiff prisoner for exercising his First Amendment rights by arranging for transfer of the plaintiff's legal materials to the plaintiff's new prison by inappropriately slow means. The claim required showing improper motive. The Court quoted an earlier observation that

> "firm application of the Federal Rules of Civil Procedure is fully warranted" and may lead to the prompt disposition of insubstantial claims. * * * Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing

[4] These requirements are exemplified by the * * * Forms * * *. For example, Form 9 sets forth a complaint for negligence * * *.

procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise is discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. * * * This option exists even if the official chooses not to plead the affirmative defense of qualified immunity."

Christopher v. Harbury, 2002, 536 U.S. 403, 416-418, 122 S.Ct. 2179, 2187-2188, is more difficult to describe. The Court recognized the legal theory underlying a claim that the plaintiff's access to court had been denied by State Department refusal to provide access to information that would have enabled the plaintiff to maintain an action arising from the killing of her husband by Guatemala officials who were trained, paid, and used as informants by the CIA. In order to make out the present claim, the plaintiff must show that if she had been given access to the information she could have successfully maintained an action for relief that cannot any longer be sought:

> Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant. See generally Swierkiewicz * * *. Although we have no reason here to try to describe pleading standards for the entire spectrum of access claims, this is the place to address a particular risk inherent in backward-looking claims. Characteristically, the action underlying this sort of access claim will not be tried independently, a fact that enhances the natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.
>
> Hence the need for care in requiring that the predicate claim be described well enough to apply the "nonfrivolous" test and to show that the "arguable" nature of the underlying claim is more than hope. * * *
>
> The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants * * * was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. * * * Since the need to resolve such constitutional issues ought to be avoided where possible, * * * the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.
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> * * * [T]he complaint should state the underlying claim in accordance with * * * Rule * * * 8(a), just as if it were being independently pursued, and a like plain

statement should describe any remedy available under the access claim and presently unique to it.

If it were not for the citation of the Swierkiewicz decision, even a careful reader might be pardoned for thinking these words recognize the role of heightened pleading.

The most recent of the Supreme Court decisions is Dura Pharmaceuticals, Inc. v. Broudo, 2005, 125 S.Ct. 1627, 1634. The ruling on the securities law question was that a fraud plaintiff cannot recover simply by showing that the price on the day of purchase was higher than it would have been but for the fraud; the purchaser must prove "economic loss." The Court concluded that the complaint "failed adequately to allege" proximate cause and economic loss:

> [W]e assume, at least for argument's sake, that neither the [Civil] Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the "short and plain statement" must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 * * * (1957). * * *
>
> [The complaint alleged only that the plaintiffs paid artificially inflated prices, and suffered damages. It did not claim that the share price fell significantly after the truth was known. But an artificially inflated purchase price] is not itself a relevant economic loss. And the complaint nowhere else provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentations * * *.
>
> We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. Swierkiewicz * * *. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. * * * Such a rule would tend to transform a private securities action into a partial downside insurance policy.

The Court quoted and cited to the legislative history of the Private Securities Litigation Reform Act. Again, the concept of "notice" seems to have taken on an increased level of detail in response to the perceived needs of a particular class of litigation.

Given the directness of the Leatherman and Swierkiewicz pronouncements and the indirectness of the Court's potentially opinions, it should not be surprising that the courts of appeals have generally abandoned the once-familiar theory that heightened pleading could be required in civil rights actions against government officials who are likely to plead official immunity. Judge Posner provided a succinct statement in Thomson v. Washington, 7th Cir.2004, 362 F.3d 969, 970-971:

> [T]he judge wanted the plaintiff to plead enough facts to show that it would be worthwhile to put the defendants to the bother of answering the complaint. That is an understandable approach in light of the burden that prisoners' civil rights litigation places on the district courts, the frivolousness of most of that litigation, and the endeavor of Congress in the Prison Litigation Reform Act to curb the abuse of legal process by prisoners with time on their hands. But it is an approach that the Federal Rules of Civil Procedure and the decisions of the Supreme court and the federal courts of appeals forbid. The federal rules replaced fact pleading with notice

> pleading. All that the rules require, with a few exceptions inapplicable to this case, such as pleading fraud, * * * is that a complaint state the plaintiff's legal claim, such as, in this case, denial of access to the courts in violation of the due process clause, infliction of cruel and unusual punishment by denying essential medical treatment (Eighth Amendment), and retaliation for seeking to use the legal process to petition for redress of grievances (First Amendment), together with some indication (here amply supplied) of time and place. * * * Federal judges are forbidden to supplement the federal rules by requiring "heightened" pleading of claims not listed in Rule 9.

Apart from this specific area, it is difficult without intensive and probably impressionistic study to guess at the ways in which notice pleading may, in practice, entail requirements that vary with the specific subject of action. The greater the variability, the less pressing the case will be for undertaking a lengthy study of possible reforms.

A few general observations remain possible. One is that careful lawyers commonly plead far more than needed to withstand a motion to dismiss. One reason is that the pleadings are the first part of the case to come to the judge's attention — it is important to tell a compelling story, or least a persuasive story. Another may be to frame the issues — a detailed complaint may elicit an answer that advances the litigation. Yet another reason may arise from the 2000 amendment that ties the scope of party-controlled discovery to the claims and defenses stated in the pleadings. A plaintiff who wants to ensure broad discovery without venturing into "subject matter" territory may simultaneously plead some claims in broad general terms and other claims in careful detail.

Apart from direct pleading requirements, courts may seek detailed statement by other means. Reconciling these means with general notice pleading practice may prove difficult. Some courts, for example, have adopted standing orders that require a "case statement" in actions under the Racketeer Influenced and Corrupt Organizations Act. These orders stand on shaky ground to the extent that they go beyond the requirements of Rule 9(b); see Wagh v. Metris Direct, Inc., 9th cir.2003, 363 F.3d 821. Even case-specific directions may prove vulnerable. In Wynder v. McMahon, 2d Cir.2004, 360 F.3d 73, 77-79, the court reversed dismissal of the action based on failure to comply with an order that the plaintiff articulate in a logical way his theory of the case and his employment discrimination claim. "Rule 8 would become a dead letter if district courts were permitted to supplement the Rule's requirements through court orders demanding greater specificity or elaboration of legal theories, and then to dismiss the complaint for failure to comply with those orders." If this were allowed, "district courts could impose disparate levels of pleading requirements on different sorts of plaintiffs."

More extreme situations, however, may provoke different responses. Acuna v. Brown & Root Inc., 5th Cir.2000, 200 F.3d 335, affirmed dismissal for failure to comply with a scheduling order that required statement of the individual claims of some 1,600 plaintiffs — a so-called "Lone Pine" order. The injuries "occurr[ed] over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which [uranium] facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very troublesome discovery that the cases would require." Before filing, "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries."

This preliminary sketch is nothing more than a bloodless introduction to a topic that stirs deep passions. The combination of notice pleading and searching discovery created in 1938 by the Civil Rules has transformed the meaning of the law in many areas. It is not only that real value has been given to substantive principles that would have been more difficult to enforce under earlier procedure. It also is that the substantive law itself has developed in response to the information

unearthed by discovery launched from notice-pleaded claims. It will be essential to determine whether the problem of notice pleading is that it is inadequate procedure, not that it has become an essential part of the law-enforcing and lawmaking role of the courts. If courts are managing to muddle along reasonably well, it may be better to defer this project to a day of greater need.

*Sketches of Possible Rules Approaches*

Several approaches might be taken to depart from the relaxed "notice" pleading now in place. They cannot be ranked in clear order from least to greatest departure. Among the possibilities are these:

(1) Add a verification requirement. This approach would entail substantial revision of Rule 11, particularly the provision in Rule 11(b)(3), added in 1993, that permits allegations "if specifically so identified," that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *."

(2) Republish present Rule 8(a)(2), with a Committee Note stating that it is time to give meaning to the dead-letter requirement that the short and plain statement show that the pleader is entitled to relief.

(3) Revise Rule 8(a)(2). Three obvious variations would be:

[a] A pleading * * * must contain * * * (2) a short and plain statement of the claim in sufficient detail to showing that the pleader is entitled to relief * * *; or

[b] A pleading * * * must contain * * * (2) a short and plain statement of the facts constituting a claim * * *; or

[c] A pleading * * * must contain * * * (2) a short and plain statement of the claim, stating with particularity facts showing that the pleader is entitled to relief * * *.

(4) Revise [Style] Rule 8(d)(1) by adding a new sentence at the end:

Each allegation must be simple, concise, and direct. No technical form is required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

(5) Revise Rule 9 by adding a catalogue of claims that must be pleaded with particularity. Many entries in the catalogue could be found by regularizing the tendency of many courts to require heightened pleading of many claims now.

(6) Revive the motion for a bill of particulars by scrapping Style Rule 12(e) and substituting the following:

**(1)** On motion or on its own, the court may order a more definite statement of a pleading:

**(A)** If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a party cannot reasonably prepare a response; or

**(B)** If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

**(2)** A motion for a more definite statement must be made before filing a responsive pleading and must point out the deficiencies in the pleading and the details desired.

**(3)** If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.

(7) Revise Rule 7 to encourage use of a reply. The most extensive requirement, short of requiring a reply to all new matter in the answer, would be to allow a defendant to impose a reply obligation simply by including in the answer a request for a reply. Short of that, Rule 7 might identify specific circumstances calling for a reply. The narrowest version would focus on specific types of litigation; cases in which the defendant pleads some form of official immunity are a familiar example.

# ADVISORY COMMITTEE
# ON
# CIVIL RULES

**Washington, DC**
**May 22-23, 2006**
**Volume II**

# AGENDA
# ADVISORY COMMITTEE ON CIVIL RULES
# MAY 22-23, 2006

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

   A. Supreme Court approved proposed rules amendments
   B. Minutes of January 6-7, 2006, Standing Rules Committee meeting

2. **ACTION** – Approving minutes of October 27-28, 2005, Committee meeting

3. Comprehensive Style Project

   A. **ACTION** – Approving proposed "style" amendments to Rules 1-86 and transmitting them to the Standing Rules Committee

   B. **ACTION** – Approving proposed amendments to "stylized" Rules 16, 26, 33, 34, 37, and 45 to account for e-discovery amendments that are expected to take effect in December 2006 and transmitting them to the Standing Rules Committee

      i. Analysis of supersession concerns raised about the effect of amended "stylized" rules on conflicting statutory provisions
      ii. Memorandum on guiding principles governing style project
      iii. Charts listing recurring "global" issues and renumbered subdivisions

   C. **ACTION** – Approving proposed "style-substance" amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40, 71.1, and 78 and transmitting them to the Standing Rules Committee

   D. **ACTION** – Approving proposed revisions to Forms 1-35 to become Forms 1-82 and transmitting them to the Standing Rules Committee

   E. Summary of comments on proposed "style" and "style-substance" amendments

   F. Notes on November 18 University of Chicago hearing on style project

4. **ACTION** – Approving publication of proposed new Rule 62.1 or, alternatively, amendments to Rule 60(c), dealing with indicative rulings

5. **ACTION** – Approving publication of proposed new Rule 5.2, implementing E-Government Act of 2002 to provide privacy protection for filings electronically transmitted to a court

6. **ACTION** – Approving publication of proposed amendments to Rule 48 on jury polling

7. Report on proposed uniform rules amendments governing time computation

8. Report of subcommittee on Rule 30(b)(6) and Rule 26, dealing with depositions of witnesses testifying on behalf of an organization and disclosure of expert witness testimony

9. **ACTION** – Approving publication of proposed amendments to Rules 15 and 13 governing relation back of amended pleadings

   A. Subcommittee report

   B. Background information

10. Report on proposed amendments to Rules 54 and 58 in conjunction with proposed amendments to Appellate Rule 4, dealing with effect of a motion for attorney's fees on the time to appeal

   A. Report from Professor Steven Gensler on research of and recommendations on proposed amendments to Rules 54 and 68

   B. Federal Judicial Center report on motions filed for attorney fee's awards and time to appeal

   C. Background information

11. New Evidence Rule 502 proposed by Advisory Committee on Evidence Rules, protecting against waiver of attorney-client privilege and work-product protection

   A. Draft Rule 502 submitted to Standing Rules Committee by Advisory Committee on Evidence Rules with a recommendation to publish it for public comment

   B. Advisory Committee on Evidence Rules report accompanying new rule

   C. Public comments submitted on proposed new rule bearing on Civil Rules

   D. Memorandum from Gregory Joseph describing proposed new rule

12. Report on proposed amendments to Rule 56, dealing with summary judgment

13. Report on proposed amendments dealing with "notice" pleading

   A. Memorandum on survey of case law dealing with pleadings requirements

   B. Background information from agenda material prepared for October 2005 Committee meeting

14. Next meeting in Nashville, Tennessee, on September 7-8, 2006

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

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May 5, 2006

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *The Style Project*

At the May 2006 meeting, we will take up the Proposed Style Revision of the Federal Rules of Civil Procedure and consider the changes made since publication for comment. If we approve the proposed amendments, the Standing Committee will in turn consider them in its June meeting.

As you know, the proposed Style Revision of the Rules and the proposed "Style-Substance" Revisions were published for comment in February 2005, and the proposed Style Revision to the Forms was published for comment in August 2005. A summary of the comments received is included at Tab E of this Agenda Book. We held a hearing in Chicago on November 2005, giving us additional opportunity to hear comments. Since then, much work has been done to improve the proposed Style Rules and Forms and the e-discovery amendments have been "stylized." The two Style Subcommittees of this Committee have had extensive telephone conferences to work through issues raised by the comments and the proposed changes made since publication. This Agenda Book presents the results of that work.

There are four specific action items before us. The first, at Tab 3A, is to approve proposed Style amendments to Rules 1-86. The second is to approve proposed Style amendments to Rules 16, 26, 33, 34, 37, and 45, to account for e-discovery amendments that are expected to take effect in December 2006, one year before the Style Rules. Following the procedure that has worked so well in the past, specific issues are identified in footnotes to the proposed amendments. With each layer of review and discussion, the number of footnotes has decreased.

The memorandum at Tab 3Bi is an analysis of supersession concerns raised during the comment period about the potential effect of the amended Style Rules on any conflicting statutory provisions. The memorandum concludes that while an argument that the Style Rules would supersede any conflicting statute in effect on December 1, 2007 is both unlikely and unlikely to be successful, it is helpful to have an explicit statement that there is no supersession effect. A new Rule 86(b) is recommended to make explicit the relationship between the Style amendments and existing statutes.

The final attachments to Tab 3B are the same memorandum on guiding principles for the project and the charts listing recurring global issues and renumbered subdivisions that were in the proposed amendments published for comment. This memorandum and the charts will be revised to take into account the changes made since publication after this Committee meeting. Those documents have not yet been revised because the changes have not yet been approved.

The third Style-related action item, at Tab 3C, is to approve the proposed "Style-Substance" amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40, 71.1, and 78. The final action item, at Tab 3D, is to approve proposed revisions to Forms 1-35 to become Style Forms 1-82.

In reviewing the remaining issues and discussing the proposed Style amendments, it is useful to recall the protocol we have observed throughout. If an issue is purely one of style, the decision of the Style Subcommittee controls, although we may make recommendations. If an issue is one of substance, the decision of the Rules Committee controls, although the Style Subcommittee may make recommendations.

If, as we hope, the Standing Committee, the Judicial Conference, and the Supreme Court approve the proposed Style amendments to the rules and forms, this meeting will conclude our Committee's work on this project. It is fitting that we acknowledge and thank those who inspired it, persisted in it, and accomplished it. The work began in 1992 with Judge Robert E. Keeton and his vision of revising all the rules to make them clearer and easier to understand. Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to agree to undertake the work. Bryan A. Garner, a nationally-recognized legal-writing scholar, prepared a first draft of the Civil Rules and also prepared drafting guidelines to serve as a common set of style preferences and conventions. Judge Sam C. Pointer, then chair of the Civil Rules Committee, refined that draft. The project was put aside for a time until Judge Anthony J. Scirica, then chair of the Standing Committee, and Judge David A. Levi, then chair of the Civil Rules Committee, resumed the work. Judge J. Garvan Murtha was appointed chair of the Standing Committee's Style Subcommittee, and Judge Thomas W. Thrash, Jr. and Dean Mary Kay Kane as members. These individuals have

worked tirelessly to review and analyze the implications of every proposed Style change. Their work required countless meetings and conference calls. They reviewed hundreds of email drafts. This project could not have been completed without them.

The decisionmakers relied heavily on the expertise of a trio of law professors with unparalleled knowledge of procedural law. The Civil Rules Committee reporter, Professor Edward H. Cooper of the University of Michigan Law School, the Committee's special reporter Professor Richard L. Marcus of Hastings College of Law, and Professor Thomas D. Rowe, Jr., of Duke Law School analyzed every significant change in the rules, researched caselaw, and proposed drafting alternatives. Their knowledge, judgment, and expertise provided a reliable basis for the drafting decisions.

This project, more than any other in the Rules Committees, depended heavily on excellent staff support. Peter G. McCabe, Standing Committee Secretary and Assistant Director, made sure that we had the administrative support needed, even borrowing staff from other parts of his divisions that were already understaffed. John K. Rabiej, Chief of the Rules Committee Support Office, coordinated the work among the various subcommittees and committees, kept us all on the ambitious timetable necessary to keep the project on schedule, and on top of that work, provided invaluable insight and suggestions on many difficult drafting issues. Jeffrey A. Hennemuth, Robert P. Deyling, James Ishida, and Jeffrey Barr faithfully recorded and tracked the flow and exchange of suggestions, reactions, drafts, and redrafts, documenting every significant step in the process and often suggesting drafting refinements. Judith W. Krivit and Anne P. Rustin of Peter McCabe's staff provided necessary administrative help.

Professor R. Joseph Kimble of the Thomas Cooley Law School is recognized nationally as a leading scholar and expert in legal writing. His passion for good legal writing is well reflected in his work on this project. Professor Kimble devoted endless hours over several years, drafting alternatives and refinements, reorganizing entire sections of rules, and agonizing over specific words and phrases to ensure the rules' clarity, consistency, and simplicity. Joseph F. Spaniol, Jr., consultant to the Style Subcommittee, ably assisted Professor Kimble. Joseph Spaniol brought a wealth of experience to the project from his years as the Administrative Office's Deputy Director and United States Supreme Court Clerk. The Committee has truly been blessed to work with these two highly regarded and esteemed professionals.

Those who provided public comments deserve our thanks. In particular, Professor Stephen Burbank and Gregory Joseph, Esq., and the members of the committee they assembled to scrutinize the published rules, provided an invaluable service, taking the time

to give us detailed and thoughtful reactions that in turn allowed us to improve the rules even more.

The members of this Committee, from 2003 to today, selflessly devoted many hours undertaking the unglamourous but crucial review of innumerable drafts. Judge Paul J. Kelly, Jr. and Judge Thomas B. Russell were appointed as chairs of Civil Rules Subcommittees and worked faithfully and diligently to organize the subcommittees' work and bring it to the full Committee. All the members of this Committee reviewed countless documents, emails, and footnotes and worked through delicate and difficult drafting decisions.

Most of all, the members of this Committee understood the value of this project and remained committed to it. This project is a wonderful use of the Rules Committees and the Rules Enabling Act. We have improved the civil justice system. Had we not done this work, the rules would have become progressively more difficult to understand and use and more removed from practice. The irony is that if we did our work well – and we have – the new rules will seamlessly take the place of the old and in five years, the bench and bar will have forgotten that there ever was a style revision project.

I am grateful to those who made this work possible and, despite the time and effort required, grateful for the opportunity to have been involved. And I certainly will be grateful to have this Committee's work on the project completed.

L.H.R.

## THE STYLE CIVIL RULES

Attached is the package of restyled Civil Rules.

Most of the changes indicated in the restyled Rules have been approved by the Standing Committee Style Subcommittee (SCSSC). All changes that have not been approved by the SCSSC are identified and discussed in the footnotes accompanying the restyled Rules.

To indicate changes from the published February 2005 version of the Style Rules, deletions are overlined (i.e., struck through) and additions are underlined.

Because Style Rule 5.1 is new and was not part of the published February 2005 proposed Style Rules, the conventions for Style Rule 5.1 are slightly different. To indicate changes from the draft Style Rule 5.1 that went to the SCSSC, deletions are overlined (i.e., struck through) and additions are underlined. In a single instance (the word "sued" in Style Rule 5.1(a)(1)), a word is both double-underlined and struck-through to indicate that the word was inserted by the SCSSC, but that the Reporter nonetheless urges the Advisory Committee to delete it.

# AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

## TITLE I. SCOPE OF RULES; FORM OF ACTION

### Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions ~~and proceedings~~[1] in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action ~~and proceeding~~.

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[1] Footnote 1 before Style Subcommittee (SCSSC). Subcommittee A adopted the SCSSC recommendation to delete "and proceedings" from the first sentence and "and proceeding" at the end. There was concern that this word might expand the reach of the Civil Rules, violating Style Project limits.

Since the Subcommittee A meeting, a further observation has been made that may support further consideration whether to restore "and proceedings". Evidence Rule 1101(b) says that the Evidence 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 * * *." There was little apparent risk that confusing inferences might be drawn from this reference to civil "proceedings" so long as Civil Rule 1 applied the Civil Rules to "suits of a civil nature." But now that Style Rule 1 refers instead to "civil actions," the close parallel will invite speculation whether there is a species of "civil proceedings" governed by the Evidence Rules but not by the Civil Rules. The comparison also renews long-back speculation on application of the Civil Rules to civil contempt proceedings, including those that may be incident to a criminal "case." Finally, Criminal Rule 1(a)(1) applies the Criminal Rules to "all criminal proceedings," subject to a list of exceptions in 1(a)(5). This Rule also is different from the Evidence Rule, but comes much closer. Restoring "and proceedings" to Civil Rule 1 would bring it much closer to the Criminal and Evidence Rules, one of the objects of the Style Project. (Finally, one of the Criminal Rules exceptions, 1(a)(5)(F), provides an illustration of an important event that may be a "proceeding" but not an "action." 28 U.S.C. section 1783 authorizes a federal court to issue a subpoena requiring the appearance of a "national or resident of the United States who is in a foreign country." Appearance may be required before the court "or before a person or body designated by it." An order issued as part of a civil action could easily be governed by the Civil Rules as they govern a civil action. But what of an order issued as the sole object of an application to require attendance before some other body?)

Yet another illustration is provided by *Encyclopaedia Universalis v. Encyclopedia Brittanica*, 2d Cir.2005, 403 F.3d 85, 89 n. 2. "It was not necessary to EUSA to have attempted to enforce its award by commencing an original action by complaint. The 'confirmation of an arbitration award is a summary proceeding,' * * * and legislation implementing the New York convention calls for the party to 'apply to' the court for an 'order confirming the award;' it does not envision an original action by complaint." "civil action" is narrowed by Rules 2 and 3. If Rule 1 is limited to "civil actions," we may be foreclosing use of the Rules where they may serve a purpose.

### COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions ~~and proceedings~~." This change does not affect the question whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

## Rule 2. One Form of Action

There is one form of action — the civil action.

### COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

# TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

## Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

**COMMITTEE NOTE**

The caption of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 4. Summons**

**(a) Contents; Amendments.**

**(1) Contents.** ~~The~~ A summons must:

**(A)** name the court and the parties;

**(B)** be directed to the defendant;

**(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff;

**(D)** state the time within which the defendant must appear and defend;

**(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

**(F)** be signed by the clerk; and

**(G)** bear the court's seal.

**(2) Amendments.** The court may permit a summons to be amended.

**(b) Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.

**(c) Service.**

**(1) In General.** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

**(2) By Whom.** Any person who is at least 18 years old and not a party may serve a summons and complaint.

**(3) By a Marshal or Someone Specially Appointed.** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

**(d) Waiving Service.**

**(1) Requesting a Waiver.** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

**(A)** be in writing and be addressed:

**(i)** to the individual defendant; or

**(ii)** for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

**(B)** name the court where the complaint ~~has been~~ was filed;

**(C)** be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

**(D)** inform the defendant, using text prescribed in Official Form 1A, of the consequences of waiving and not waiving service;

**(E)** state the date when the request is sent;

**(F)** give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and

**(G)** be sent by first-class mail or other reliable means.

**(2) Failure to Waive.** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

**(A)** the expenses later incurred in making service; and

**(B)** the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

**(3) Time to Answer After a Waiver.** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States.

**(4) Results of Filing a Waiver.** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

**(5) Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

**(e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual

— other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

**(1)** following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

**(2)** doing any of the following:

**(A)** delivering a copy of the summons and of the complaint to the individual personally;

**(B)** leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

**(C)** delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States:

**(1)** by any internationally **agreed** means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

**(2)** if there is no internationally **agreed** means, or if an international **agreement** allows but does not specify other means, by a method that is reasonably calculated to give notice:

**(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

**(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or

**(C)** unless prohibited by the foreign country's law, by:

**(i)** delivering a copy of the summons and of the complaint to the individual personally; or

**(ii)** using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

**(3)** by other means not prohibited by international **agreement**, as the court orders.

**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

**(1)** in a judicial district of the United States:

**(A)** in the manner prescribed by Rule 4(e)(1) for serving an individual; or

**(B)** by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or

**(2)** at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

**(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.**

**(1) United States.** To serve the United States, a party must:

**(A)** **(i)** deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

**(ii)** send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

**(B)** send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

**(C)** if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

**(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity.** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

**(3) Officer or Employee Sued Individually.** To serve 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 (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

**(4) Extending Time.** The court must allow a party a reasonable time to cure its failure to:

**(A)** serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

**(B)** serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

**(j) Serving a Foreign, State, or Local Government.**

**(1) Foreign State.** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

**(2) State or Local Government.** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

**(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or

**(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

**(k) Territorial Limits of Effective Service.**

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

**(A)** who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

**(B)** who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued;

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

**(D)** when authorized by a federal statute.

**(2) Federal Claim Outside State-Court Jurisdiction.** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

**(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

**(B)** exercising jurisdiction is consistent with the United States Constitution and laws.

**(l) Proving Service.**

**(1) Affidavit Required.** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

**(2) Service Outside the United States.** Service not within any judicial district of the United States must be proved as follows:

**(A)** if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

**(B)** if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

**(3) Validity of Service; Amending Proof.** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

**(m) Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within

a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

**(n) Asserting Jurisdiction over Property or Assets.**

**(1) Federal Law.** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

**(2) State Law.** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

**COMMITTEE NOTE**

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

## Rule 4.1. Serving Other Process

**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

### COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 5. Serving and Filing Pleadings and Other Papers

### (a) Service: When Required.

**(1) In General.** Unless these rules provide otherwise, each of the following papers must be served on every party:

**(A)** an order stating that service is required;

**(B)** a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

**(C)** a discovery paper required to be served on a party, unless the court orders otherwise;

**(D)** a written motion, except one that may be heard ex parte; and

**(E)** a written notice, appearance, demand, or offer of judgment, or any similar paper.

**(2) If a Party Fails to Appear.** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

**(3) Seizing Property.** If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim~~, or appearance~~ must be made on the person who had custody or possession of the property when it was seized.

### (b) Service: How Made.

**(1) Serving an Attorney.** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

**(2) Service in General.** A paper is served under this rule by:

**(A)** handing it to the person;

**(B)** leaving it:

**(i)** at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

**(ii)** if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

**(C)** mailing it to the person's last known address — in which event service is complete upon mailing;

**(D)** leaving it with the court clerk if the person~~'s address is unknown~~ has no known address;

**(E)** sending it by electronic means if the person **consented** in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

**(F)** delivering it by any other means that the person **consented** to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

**(3) Using Court Facilities.** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

**(c) Serving Numerous Defendants.**

**(1) In General.** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

**(A)** defendants' pleadings and replies to them need not be served on other defendants;

**(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

**(C)** filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

**(2) Notifying Parties.** A copy of every such order must be served on the parties as the court directs.

**(d) Filing.**

**(1) Required Filings; Certificate of Service.** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

**(2) How Filing Is Made — In General.** A paper is filed by delivering it:

**(A)** to the clerk; or

**(B)** to a judge who **agrees** to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

**(3) Electronic Filing, Signing, or Verification.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require ~~filing by~~ electronic ~~means~~ filing only if reasonable exceptions are allowed. A paper filed ~~by electronic means~~ electronically in compliance with a local rule is a written paper for purposes of these rules.

**(4) Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

## COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

## Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

**(a) Notice by a Party.** A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

**(1)** file a notice of constitutional question stating the question and identifying the paper that raises it, if:

**(A)** a federal statute is questioned and ~~neither~~ the parties do not include the United States, ~~nor any~~ one of its agencies, or one of its officers, ~~,~~ or employees ~~is a party~~ ~~sued~~ in an official capacity[2]~~,~~ ;or

**(B)** a state statute is questioned and ~~neither~~ the parties do not include the state, ~~nor any~~ one of its agencies, or one of its officers, ~~,~~ or employees ~~is a party~~ ~~sued~~ in an official capacity[3]; and

**(2)** serve the notice and paper on the Attorney General of the United States if a federal statute is ~~challenged~~ questioned — or on the state attorney general if a state statute is ~~challenged~~ questioned — either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

**(b) Certification by the Court.** The court must, under 28 U.S.C. § 2403, certify to the appropriate ~~A~~attorney ~~G~~general ~~of the United States~~ that ~~there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute~~ a statute has been questioned.[4]

**(c) Intervention; Final Decision on the Merits.** Unless the court sets a later time, the attorney general may intervene within 60 days after the notice ~~of constitutional question~~ is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

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[2] Footnote 7 before Style Subcommittee. The SCSSC approved revisions to avoid the appearance of referring to the United States or a United States agency as a party "in an official capacity." Its action was not reviewed by an Advisory Committee Subcommittee. But it mistakenly reinserted a word that was deliberately removed in drafting new Rule 5.1. There is no need for notice when the United States, etc., is a party; it makes no difference whether the United States, etc., sues or is sued. "Sued" must go.

[3] Footnote 8 before Style Subcommittee. These changes parallel the changes in subparagraph (A).

[4] Footnote 9 before Style Subcommittee. The SCSSC approved these style changes. Because Rule 5.1 was not included in the published Style Rules, neither Subcommittee A nor B reviewed these questions.

**(d) No Forfeiture.** A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

**Rule 6. Computing and Extending Time; Time for Motion Papers**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:

**(1) Day of the Event Excluded.** Exclude the day of the act, event, or default that begins the period.

**(2) Exclusions from Brief Periods.** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

**(3) Last Day.** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

**(4) "Legal Holiday" Defined.** As used in these rules, "legal holiday" means:

**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.

**(b) Extending Time.**

**(1) In General.** When an act may or must be done within a specified time, the court may, for good cause, extend the time:

**(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

**(B)** on motion made after the time has expired if the party failed to act because of excusable neglect.

**(2) Exceptions.** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

**(c) Motions, Notices of Hearing, and Affidavits.**

**(1) In General.** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions:

**(A)** when the motion may be heard ex parte;

**(B)** when these rules set a different ~~period~~ time; or

**(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different ~~period~~ time.

**(2) Supporting Affidavit.** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.

**(d) Additional Time After Certain Kinds of Service.** When a party ~~must or~~ may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

**COMMITTEE NOTE**

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and

to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## TITLE III. PLEADINGS AND MOTIONS

### Rule 7. Pleadings Allowed; Form of Motions and Other Papers

**(a) Pleadings.** Only these pleadings are allowed:

**(1)** a complaint;

**(2)** an answer to a complaint;

**(3)** an answer to a counterclaim designated as a counterclaim;

**(4)** an answer to a crossclaim;

**(5)** a third-party complaint;

**(6)** an answer to a third-party complaint; and

**(7)** if the court orders one, a reply to an answer ~~or a third-party answer~~.

**(b) Motions and Other Papers.**

**(1) In General.** A request for a court order must be made by motion. The motion must:

**(A)** be in writing unless made during a hearing or trial;

**(B)** state with particularity the grounds for seeking the order; and

**(C)** state the relief sought.

**(2) Form.** The rules governing captions and other matters of form in pleadings apply to motions and other papers.

**COMMITTEE NOTE**

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

**Rule 7.1. Disclosure Statement**

**(a) Who Must File; Contents.** A nongovernmental corporate party must file two copies of a disclosure statement that:

**(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

**(2)** states that there is no such corporation.

**(b) Time to File; Supplemental Filing.** A party must:

**(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

**(2)** promptly file a supplemental statement if any required information changes.

**COMMITTEE NOTE**

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 8. General Rules of Pleading

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

**(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

**(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and

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

**(b) Defenses; Admissions and Denials.**

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

**(A)** state in short and plain terms its defenses to each claim asserted against it; and

**(B)** admit or deny the allegations asserted against it by an opposing party.

**(2) Denials — Responding to the Substance.** A denial must fairly respond to the substance of the allegation.

**(3) General and Specific Denials.** A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

**(4) Denying Part of an Allegation.** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

**(5) Lacking Knowledge or Information.** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

**(6) Effect of Failing to Deny.** An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

**(c) Affirmative Defenses.**

**(1) In General.** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

**(2) Mistaken Designation.** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

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

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

**(2) Alternative Statements of a Claim or Defense.** A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

**(3) Inconsistent Claims or Defenses.** A party may state as many separate claims or defenses as it has, regardless of consistency.

**(e) Construing Pleadings.** Pleadings must be construed so as to do justice.

**COMMITTEE NOTE**

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader

believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

**Rule 9. Pleading Special Matters**

**(a) Capacity or Authority to Sue; Legal Existence.**

**(1) In General.** Except when required to show that the court has jurisdiction, a pleading need not allege:

**(A)** a party's capacity to sue or be sued;

**(B)** a party's authority to sue or be sued in a representative capacity; or

**(C)** the legal existence of an organized association of persons that is made a party.

**(2) Raising Those Issues.** To raise any of those issues, a party must do so by a specific denial,[5] which must state any supporting facts that are peculiarly within the party's knowledge.

**(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred

[5] There was no corresponding footnote before the Style Subcommittee. Present Rule 9(a) directs that a party raising these issues "do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Subcommittee B concluded that "specific denial" is appropriate. Although it might seem that "specific negative averment" calls for something more detailed than a "specific denial," a specific denial must go beyond a mere negative when the initial pleading does not allege anything about capacity, authority, or legal existence. Even if the initial pleading does allege something about one of those issues, a specific denial must be supplemented by any supporting facts peculiarly within the pleader's knowledge. The question was thought appropriate for Advisory Committee review.

or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

**(d) Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

**(f) Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.

**(g) Special Damages.** If an item of special damage is claimed, it must be specifically stated.

**(h) Admiralty or Maritime Claim.**

**(1) How Designated.** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

**(2) Amending a Designation.** Rule 15 governs amending a pleading to add or withdraw a designation.

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

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 10. Form of Pleadings

**(a) Caption; Names of Parties.** Every pleading must have a caption with the court's name, a title ~~that names the parties~~, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings ~~may name~~ , after naming the first party on each side ~~and~~ , may refer generally to other parties.

**(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.

**(c) Adoption by Reference; Attached Exhibit ~~Instrument~~.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument ~~attached~~ that is an exhibit[6] to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

[6] Footnote 16 before Style Subcommittee. The SCSSC and Subcommittee B concluded that it is better to fall back on the present rule's "exhibit." Things may be attached to a pleading that should not be treated as part of the pleading — a Rule 7.1 disclosure statement is an example. It also is better to avoid any implication that an instrument must be attached to be considered in evaluating a pleading — several decisions, for example, allow consideration of undisputed contract text on a motion to dismiss even though no party has attached the contract to a pleading.

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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

**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is ~~not represented by an attorney~~ unrepresented. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

**(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~;[7]

**(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

**(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

[7] Footnote 19 before Style Subcommittee. The SCSSC and Subcommittee B agreed to go back to the more comprehensive "cost of litigation" phrase used in present Rule 11(b)(1). The same change is made in Rule 26(g)(1)(B)(ii).

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information ~~or belief~~.

**(c) Sanctions.**

**(1) In General.** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

**(2) Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

**(3) On the Court's Initiative.** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

**(4) Nature of a Sanction.** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

**(5) Limitations on Monetary Sanctions.** The court must not impose a monetary sanction:

**(A)** against a represented party for violating Rule 11(b)(2); or

**(B)** on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

**(6) Requirements for an Order.** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

**COMMITTEE NOTE**

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; ~~and~~ Waiving Defenses; Pretrial Hearing**

**(a) Time to Serve a Responsive Pleading.**

**(1) In General.** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

**(A)** A defendant must serve an answer:

**(i)** within 20 days after being served with the summons and complaint; or

**(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90

days after it was sent to the defendant outside any judicial district of the United States.

**(B)** A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.

**(C)** A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.

**(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

**(3) United States Officers or Employees Sued in an Individual Capacity.** 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 must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

**(4) Effect of a Motion.** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

**(A)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or

**(B)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

**(1)** lack of subject-matter jurisdiction;

**(2)** lack of personal jurisdiction;

**(3)** improper venue;

**(4)** insufficient process;

**(5)** insufficient service of process;

**(6)** failure to state a claim upon which relief can be granted; and

**(7)** failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

**(d) Result of Presenting Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing

a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order ~~that it considers appropriate~~.

**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

**(1)** on its own; or

**(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

**(g) Joining Motions ~~Consolidating Defenses in a Motion~~.**

**(1) Right to Join ~~Consolidating Defenses~~.** A motion under this rule may be joined with any other motion allowed by this rule.

**(2) Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

**(h) Waiving and Preserving Certain Defenses.**

**(1) When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:

**(A)** omitting it from a motion in the circumstances described in Rule 12(g)(2); or

**(B)** failing to either:

**(i)** make it by motion under this rule; or

**(ii)** include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

**(2) When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

**(A)** in any pleading allowed or ordered under Rule 7(a);

**(B)** by a motion under Rule 12(c); or

**(C)** at trial.

**(3) Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

**(i) Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

## COMMITTEE NOTE[8]

[8] Footnote 25 before Style Subcommittee. The SCSSC approved a Bankruptcy Rules Committee suggestion to add a new paragraph to the Committee Note: "Some subdivisions have been redesignated. Former subdivision 12(c) has been divided into new 12(c) and (d), while former subdivision 12(d) has become new 12(i)." The suggestion arose from concern that future researchers will be confused, particularly in framing electronic searches. There is an indication that the confusion will extend to Bankruptcy Rule 7012. Subcommittee B noted that the practice has been to identify in the Committee Notes only drastic relocations, such as the shift of present rule 25(d)(2) to Style Rule 17(d). Appendix B in the published "Preliminary Draft," pp. 220-221, identifies the subdivision changes. It does not seem likely that many researchers will look for this information either in the Style Project Committee Notes or in the appendix table. Subcommittee B recommends that language be added to the Committee Note only if the Bankruptcy Rules Committee believes there is a special danger with respect to Bankruptcy Rule 7012 that distinguishes it from general research under Rule 12.

The question was then posed to Bankruptcy Judge James Walker, liaison from the Advisory Committee on Bankruptcy Rules, who responded as follows:

"As for the references in the committee notes on the subdivision reorganization, our comments do not represent a concern unique to the bankruptcy community. The matter of consistent reference to rules subdivisions will already have been carefully considered by the various civil rule subcommittees. Our continuing concern is that the chart of subdivision and rule

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

**Rule 13. Counterclaim and Crossclaim**

**(a) Compulsory Counterclaim.**

**(1) In General.** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

**(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

**(B)** does not require adding another party over whom the court cannot acquire jurisdiction.

**(2) Exceptions.** The pleader need not state the claim if:

**(A)** when the action was commenced, the claim was the subject of another pending action; or

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reorganizations published as Appendix B with the proposed style revisions will not always be as readily available as the Committee Notes.

"For what it's worth, we also note the reference in Appendix B as follows: 'For additional information, see the Committee Notes for specific rules.' One might think such language would foretell some form of inclusion of the reference information in the final Committee Notes.

"As much as we think the reference information would be useful to a researcher, we understand the principle that the wording of the prior rule, as it might have been interpreted in a case, not the section references, will guide a future rules decision. So, our urgings should not be considered by the Civil Rules Committee as urgently import to the bankruptcy community."

**(B)** the opposing party sued on its claim by attachment or other process ~~by which the court did not acquire~~ that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

**(b) Permissive Counterclaim.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory ~~against an opposing party~~.[9]

**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.

**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

**(g) Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

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[9] Footnote 26 before Style Subcommittee. This change addresses a comment suggestion that as published, Style Rule 13(b) might be read to make all counterclaims permissive, undoing the purpose of Rule 13(a).

**(h) Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

**(i) Separate Trials; Separate Judgments.** If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

**COMMITTEE NOTE**

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

**Rule 14. Third-Party Practice**

**(a) When a Defending Party May Bring in a Third Party.**

**(1) Timing of the Summons and Complaint.** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.

**(2) Third-Party Defendant's Claims and Defenses.** The person served with the summons and third-party complaint — the "third-party defendant":

**(A)** must assert any defense against the third-party plaintiff's claim under Rule 12;

**(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

**(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

**(D)** may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

**(3) Plaintiff's Claims Against a Third-Party Defendant.** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

**(4) Motion to Strike, Sever, or Try Separately.** Any party may move to strike the third-party claim, to sever it, or to try it separately.

**(5) Third-Party Defendant's Claim Against a Nonparty.** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

**(6) Third-Party Complaint In Rem.** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who

asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) in the property arrested.

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

**(c) Admiralty or Maritime Claim.**

**(1) Scope of Impleader.** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

**(2) Defending Against a Demand for Judgment for the Plaintiff.** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

## COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the

subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

## Rule 15. Amended and Supplemental Pleadings

### (a) Amendments Before Trial.

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

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

**(B)** within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

**(2) Other Amendments.** ~~Except as allowed by Rule 15(a)(1)~~ In all other cases, a party may amend its pleading only with the opposing party's written **consent** or the court's leave. The court should freely give leave when justice so requires.

**(3) Time to Respond.** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

### (b) Amendments During and After Trial.

**(1) ~~During~~ Based on an Objection at Trial.** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

**(2) ~~After Trial~~ For Issues Tried by *Consent*.** When an issue not raised by the pleadings is tried by the parties' express or implied **consent**, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

**(c) Relation Back of Amendments.**

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

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

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

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

**(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and

**(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

**(2) Notice to the United States.** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States

attorney's designee, to the Attorney General of the United States, or to the officer or agency.

**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

**COMMITTEE NOTE**

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

**Rule 16. Pretrial Conferences; Scheduling; Management**

**(a) Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

**(1)** expediting disposition of the action;

**(2)** establishing early and continuing control so that the case will not be protracted because of lack of management;

**(3)** discouraging wasteful pretrial activities;

**(4)** improving the quality of the trial through more thorough preparation; and

**(5)** facilitating settlement.

**(b) Scheduling.**

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

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

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

**(2) Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint ~~and within~~ or 90 days after any defendant has appeared.[10]

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

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

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

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

**(ii)** modify the extent of discovery;

**(iii)** set dates for pretrial conferences and for trial; and

**(iv)** include other appropriate matters.

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[10] Footnote 29 before Style Subcommittee. It has not been easy to read the present rule, carried forward in the Style Rule as published. Careful reading, however, confirms that it means that the scheduling order must issue within the earlier of the two periods.

**(4) Modifying a Schedule.** A schedule may be modified only for good cause and with the judge's **consent.**

**(c) Attendance and Matters for Consideration at a Pretrial Conference.**

**(1) Attendance.** A represented party must authorize at least one of its attorneys to make **stipulations** and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate,[11] the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement.

**(2) Matters for Consideration.** At any pretrial conference, the court may consider and take appropriate action on the following matters:

**(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses;

**(B)** amending the pleadings if necessary or desirable;

**(C)** obtaining admissions and **stipulations** about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

**(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

**(E)** determining the appropriateness and timing of summary adjudication under Rule 56;

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[11] Footnote 30 before Style Subcommittee. Subcommittee A agreed that "if appropriate" should remain in the Style Rule as published. But it noted that the Advisory Committee might want to consider this departure from the ordinary resistance to "intensifiers." Although the Style Project generally assumes that a court will issue only appropriate orders, a direction that someone be reasonably available to discuss settlement has stirred special sensitivities. The Department of Justice, for example, reports that it may be difficult to identify anyone who can consider possible settlement.

**(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

**(H)** referring matters to a magistrate judge or a master;

**(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

**(J)** determining the form and content of the pretrial order;

**(K)** disposing of pending motions;

**(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

**(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

**(N)** ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

**(O)** establishing a reasonable limit on the time allowed to present evidence; and

**(P)** facilitating in other ways the just, speedy, and inexpensive disposition of the action.

**(d) Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

**(e) Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order ~~issued after a final pretrial~~ reciting the action taken at the conference only to prevent manifest injustice.[12]

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[12] Footnote 32 before Style Subcommittee. Rule 16(e) provoked prolonged discussion by Subcommittee A that carried over to a second meeting. Present Rule 16(e) adopts a "manifest injustice" standard for modifying "the order following a final pretrial conference." Style Rule 16(e) as published refers to "an order issued after a final pretrial conference." It was pointed out that this language literally applies not only to the final pretrial conference order but also to any other order issued after the final pretrial conference. To correct this problem, the SCSSC approved a revision that draws directly from Rule 16(d). Rule 16(d) provides that after any Rule 16 conference "the court should issue an order reciting the action taken." Rule 16(e) would read: "The court may modify an order ~~issued after a final pretrial~~ reciting the action taken at the conference only to prevent manifest injustice."

Subcommittee A concluded that the SCSSC revision is not successful because the "manifest injustice" standard may appropriately apply to action taken at a final pretrial conference but not recited in the final pretrial conference order. It is difficult to be confident that there is a uniform practice in all courts in this respect. Some courts enlist the parties in preparing a detailed order that recites everything resolved at the conference. Others may not do so, relying instead on a simpler order meant to confirm all actions taken without reciting each of them. Such an order may well fix the "manifest injustice" standard on all actions taken.

A specific application of this question arises from Rule 36(b), which establishes a general standard for withdrawal or amendment of a Rule 36 admission but is "subject to" Rule 16(e). Subcommittee A agreed that an admission adopted at a final pretrial conference should be subject to withdrawal or amendment only on satisfying the manifest injustice standard. And it was concerned that at times the final pretrial conference order may not specifically recite the action adopting the admission.

At the end of a second meeting devoted to this question, Subcommittee A recommended that this sentence read: "The court may modify ~~an order issued after~~ a final pretrial-conference order only to prevent manifest injustice." This recommendation mirrors the present rule's simple reference to "the order following a final pretrial conference." It requires whatever the present rule requires by way of honoring the Style Rule 16(d) requirement that every pretrial conference order recite the action taken, no more and no less.

Further discussion after the meeting produced a stalemate on the style question whether two hyphens must be used in "final-pretrial-conference order." Rather than compromise on that point, a further compromise has been suggested: "The court may modify ~~an~~ the order issued after a final pretrial conference only to prevent manifest injustice." This version avoids the trap created by "an" in the published Style Rule, and as compared to the revision that would refer to an order "reciting the action taken" hews close to the present rule.

**(f) Sanctions.**

**(1) In General.** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

**(A)** fails to appear at a scheduling or other pretrial conference;

**(B)** is substantially unprepared to participate — or does not participate in good faith — in the conference; or

**(C)** fails to obey a scheduling or other pretrial order.

**(2) Imposing Fees and Costs.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

**COMMITTEE NOTE**

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## TITLE IV. PARTIES

### Rule 17. ~~The~~ Plaintiff and Defendant; Capacity; Public Officers

**(a) Real Party in Interest.**

**(1) Designation in General.** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

**(A)** an executor;

**(B)** an administrator;

**(C)** a guardian;

**(D)** a bailee;

**(E)** a trustee of an express trust;

**(F)** a party with whom or in whose name a contract has been made for another's benefit; and

**(G)** a party authorized by statute.

**(2) Action in the Name of the United States for Another's Use or Benefit.** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

**(3) Joinder of the Real Party in Interest.** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows:

**(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

**(2)** for a corporation, by the law under which it was organized; and

**(3)** for all other parties, by the law of the state where the court is located, except that:

**(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

**(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

**(c) Minor or Incompetent Person.**

**(1) With a Representative.** The following representatives may sue or defend on behalf of a minor or an incompetent person:

**(A)** a general guardian;

**(B)** a committee;

**(C)** a conservator; or

**(D)** a like fiduciary.

**(2) Without a Representative.** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

**(d) Public Officer's Title and Name.** A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

**COMMITTEE NOTE**

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

## Rule 18. Joinder of Claims

**(a) In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim[13] may join, as independent or alternative claims, as many claims as it has against an opposing party.

**(b) Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

### COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

## Rule 19. Required Joinder of Parties

**(a) Persons Required to Be Joined if Feasible.**

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[13] Footnote 34 before Style Subcommittee. The SCSSC and Subcommittee A agreed that although this enumeration of types of claims was stricken from Style Rule 8(a), it should be retained in Rule 18(a) to emphasize the breadth of the freedom to join claims. Subcommittee A agreed to report a possible concern that as published, the Style Rule might imply that a counterclaim, crossclaim, or third-party claim is not a "claim." This might be addressed by substituting em dashes to set off these examples: "asserting a claim~~,~~ — including a counterclaim, crossclaim, or third-party claim — may join * * *.

**(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

**(A)** in that person's absence, the court cannot accord complete relief among existing parties; or

**(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

**(i)** as a practical matter impair or impede the person's ability to protect the interest; or

**(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

**(2) Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

**(3) Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

**(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

**(2)** the extent to which any prejudice could be lessened or avoided by:

**(A)** protective provisions in the judgment;

**(B)** shaping the relief; or

**(C)** other measures;

**(3)** whether a judgment rendered in the person's absence would be adequate; and

**(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

**(c) Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

**(1)** the name, if known, of any person who is required to be joined if feasible but is not joined; and

**(2)** the reasons for not joining that person.

**(d) Exception for Class Actions.** This rule is subject to Rule 23.

**COMMITTEE NOTE**

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

**Rule 20. Permissive Joinder of Parties**

**(a) Persons Who May Join or Be Joined.**

**(1) Plaintiffs.** Persons may join in one action as plaintiffs if:

**(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

**(B)** any question of law or fact common to all plaintiffs will arise in the action.

**(2) Defendants.** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:

**(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

**(B)** any question of law or fact common to all defendants will arise in the action.

**(3) Extent of Relief.** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

## COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

### COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 22. Interpleader

**(a) Grounds.**

**(1) By a Plaintiff.** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

**(A)** the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

**(B)** the plaintiff denies liability in whole or in part to any or all of the claimants.

**(2) By a Defendant.** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

**(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy ~~it~~ this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

**COMMITTEE NOTE**

The language of Rule 22 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 23. Class Actions**

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

**(1)** the class is so numerous that joinder of all members is impracticable;

**(2)** there are questions of law or fact ~~are~~ common to the class;

**(3)** the claims or defenses of the representative parties' ~~claims or defenses~~ are typical of the ~~class~~ claims or defenses of the class; and

**(4)** the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

**(1)** prosecuting separate actions by or against individual class members would create a risk of:

**(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

**(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

**(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

**(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

**(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

**(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

**(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

**(D)** the likely difficulties in managing a class action.

**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

**(1) Certification Order.**

**(A) Time to Issue.** At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

**(B) Defining the Class; Appointing Class Counsel.** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

**(C) Altering or Amending the Order.** An order that grants or denies class certification may be altered or amended before final judgment.

**(2) Notice.**

**(A) For (b)(1) or (b)(2) Classes.** For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

**(B) For (b)(3) Classes.** For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

**(i)** the nature of the action;

**(ii)** the definition of the class certified;

**(iii)** the class claims, issues, or defenses;

**(iv)** that a class member may enter an appearance through an attorney if the member so desires;

**(v)** that the court will exclude from the class any member who requests exclusion;

**(vi)** the time and manner for requesting exclusion; and

**(vii)** the binding effect of a class judgment on members under Rule 23(c)(3).

**(3) Judgment.** Whether or not favorable to the class, the judgment in a class action must:

**(A)** for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

**(B)** for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was

directed, who have not requested exclusion, and whom the court finds to be class members.

**(4) Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

**(5) Subclasses.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

**(d) Conducting the ~~Class~~ Action.**

**(1) In General.** In conducting ~~a class~~ an action under this rule, the court may issue orders that:

**(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

**(B)** require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

**(i)** any step in the action;

**(ii)** the proposed extent of the judgment; or

**(iii)** the members' opportunity to ~~inform the court~~ signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

**(C)** impose conditions on the representative parties or on intervenors;

**(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

**(E)** deal with similar procedural matters.

**(2) Combining and Amending Orders.** An order under Rule 23(d)(1) may be altered or amended ~~as desirable~~ from time to time and may be combined with an order under Rule 16.

**(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply:[14]

**(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposed settlement, voluntary dismissal, or compromise.

**(2)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that it is fair, reasonable, and adequate.

**(3)** The parties seeking approval must file a statement identifying any **agreement** made in connection with the proposed settlement, voluntary dismissal, or compromise.

**(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

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[14] Footnote 40 before Style Subcommittee. The SCSSC prefers the following revision suggested by Professor Kimble, but believes the Advisory Committee should resolve the question after weighing the sensitivity of Rule 23:

"**(e) Settlement, Voluntary Dismissal, or Compromise.** * * * The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

**(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposa~~led settlement, voluntary dismissal, or compromise~~.

**(2)** If it would bind class members, ~~T~~the court may approve the proposal ~~a settlement, voluntary dismissal, or compromise that would bind class members~~ only after a hearing and on finding that it is fair, reasonable, and adequate.

**(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposa~~led settlement, voluntary dismissal, or compromise~~.

**(4)** [unchanged]

**(5)** Any class member may object to the proposal if it ~~a proposed settlement, voluntary dismissal, or compromise that~~ requires court approval under this subdivision (e) * * *."

**(5)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**(g) Class Counsel.**

**(1) Appointing Class Counsel.** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

**(A)** must consider:

**(i)** the work counsel has done in identifying or investigating potential claims in the action;

**(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

**(iii)** counsel's knowledge of the applicable law; and

**(iv)** the resources that counsel will commit to representing the class;

**(B)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

**(C)** may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

**(D)** may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

**(E)** may make further orders in connection with the appointment.

**(2) Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

**(3) Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

**(4) Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.

**(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' **agreement.** The following procedures apply:

**(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2)** A class member, or a party from whom payment is sought, may object to the motion.

**(3)** The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

**(4)** The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

## COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

### Rule 23.1. Derivative Actions

**(a) Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

**(b) Pleading Requirements.** The complaint must be verified and must:

**(1)** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

**(2)** allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

**(3)** state with particularity:

**(A)** any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

**(B)** the reasons for not obtaining the action or not making the effort.

**(c) Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

**COMMITTEE NOTE**

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary

dismissal, or compromise must correspond with the procedure in Rule 23(e).

## COMMITTEE NOTE

The language of Rule 23.2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

### Rule 24. Intervention

**(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

**(1)** is given an unconditional right to intervene by a federal statute; or

**(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent ~~the movant's~~ that interest.

**(b) Permissive Intervention.**

**(1) In General.** On timely motion, the court may permit anyone to intervene who:

**(A)** is given a conditional right to intervene by a federal statute; or

**(B)** has a claim or defense that shares with the main action a common question of law or fact.

**(2) By a Government Officer or Agency.** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

**(A)** a statute or executive order administered by the officer or agency; or

**(B)** any regulation, order, requirement, or **agreement** issued or made under the statute or executive order.

**(3) Delay or Prejudice.** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

**(c) Procedure.**

**(1) Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

**(2) Challenge to a Statute; Court's Duty.** When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify:

**(A)** the Attorney General of the United States, if a federal statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and

**(B)** the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party.

**(3) Party's Responsibility.** A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

**COMMITTEE NOTE**

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

**Rule 25. Substitution of Parties**

**(a) Death.**

**(1) Substitution if the Claim Is Not Extinguished.** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent ~~may~~ must[15] be dismissed.

**(2) Continuation Among the Remaining Parties.** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but

[15] Footnote 41 before Style Subcommittee. Present Rule 25(a)(1) says that unless a motion to substitute is made within 90 days after death is suggested on the record, "the action *shall* be dismissed as to the deceased party." Style Rule 25(a)(1) as published said that the action *may* be dismissed. Comments suggested that Rule 25 establishes a mandatory duty to dismiss — that the rule should say "must." Subcommittee discussion reflected divided views. One view agreed with the comments — if there is no substitution, the action must be dismissed as to the deceased party because there is no party to carry on the litigation even though the claim survives. The other view was that "must" may cause some unnecessary confusion. Rule 6(b) clearly allows extension of the time to move to substitute, even if the request for extension and motion are made after expiration of the 90-day period allowed by Rule 25. A statement that the action "must" be dismissed may seem to conflict with Rule 6(b). A mid-range view was that the action must be dismissed as to the deceased party if there is no motion to substitute, but that even a tardy motion to substitute can forestall dismissal, so long as the motion is made before dismissal. Part of the uncertainty arises from the variety of circumstances in which the question may arise. If the decedent was the sole claimant or defendant, failure to move to substitute may reflect tacit recognition that the action is being carried on by a representative. If there are multiple parties, even service of a statement noting the death may not stir prompt reaction, particularly if the decedent had been seen as a minor participant. The Subcommittee decided to carry forward with "may," and to add to the Committee Note the paragraph underlined in the Note.

proceeds in favor of or against the remaining parties. The death should be noted on the record.

**(3) Service.** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

**(d) Public Officers; Death or Separation from Office.**

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

## COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

Former Rule 25(a) provided that "the action shall be dismissed as to the deceased party" unless the motion for substitution is made not later than 90 days after the death is suggested on the record. "[S]hall" becomes "may" in the amended rule to reflect the court's discretion to extend the time under Rule 6(b). The court may extend the time on motion made after the 90-day period has expired if excusable neglect caused the failure to move for substitution within the 90-day period.

## TITLE V. DISCLOSURES AND DISCOVERY

### Rule 26. Duty to Disclose; General Provisions Governing Discovery

**(a) Required Disclosures.**

**(1) Initial Disclosure.**

**(A) In General.** Except as exempted by Rule 26(a)(1)(B) or as otherwise **stipulated** or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

**(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

**(ii)** a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

**(iii)** a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or

other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

**(iv)** for inspection and copying as under Rule 34, any insurance **agreement** under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

**(B) Proceedings Exempt from Initial Disclosure.** The following proceedings are exempt from initial disclosure:

**(i)** an action for review on an administrative record;

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

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

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

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

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

**(vii)** a proceeding ancillary to a proceeding in another court; and

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

**(C) Time for Initial Disclosures — In General.** A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by

**stipulation**[16] or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

**(D) Time for Initial Disclosures — For Parties Served or Joined Later.** A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by **stipulation** or court order.

**(E) Basis for Initial Disclosure; Unacceptable Excuses.** A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

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

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

**(B) Written Report.** Unless otherwise **stipulated** or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is

[16] Footnote 44 before Style Subcommittee. Issue 5 in the Global Drafting Issues table, Preliminary Draft p. 206, says of "agree"/"stipulate"/"consent" that "This issue will be addressed in the top-to-bottom review." A list of these words appears in Style 442, which is attached. The emerging consensus seems to be that "stipulation" is generally preferred. But context-specific judgments may be made to substitute another word. "Agreement" is retained in Rule 35(b)(6) to emphasize the expectation that ordinarily physical examinations should be arranged among the parties in the way that most discovery is arranged. This issue will be identified separately in these footnotes only when there is some reason to ask whether "stipulate" or "stipulation" is not the best word.

one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

**(i)** a complete statement of all opinions the witness will express and the basis and reasons for them;

**(ii)** the data or other information considered by the witness in forming them;

**(iii)** any exhibits that will be used to summarize or support them;

**(iv)** the witness's qualifications, including a list of all publications authored in the previous ten years;

**(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

**(vi)** a statement of the ~~witness's~~ compensation to be paid for the study and[17] testimony in the case.

**(C) Time to Disclose Expert Testimony.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a **stipulation** or a court order, the disclosures must be made:

**(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or

[17] Footnote 47 before Style Subcommittee. This revision responds to a comment suggesting that disclosure properly includes compensation paid to people other than the expert trial witness for studies undertaken for use by the trial witness in formulating the expert testimony. "the" study does not clearly express this thought, but it has the advantage of carrying forward the present rule's "the compensation to be paid for the study and testimony." Conformity to the present rule avoids the risk of inadvertently taking sides on an issue that may remain open to dispute. It also defeats any argument that the expert witness's disclosure statement must include the compensation for study that is not related to the witness's testimony.

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

**(D) Supplementing the Disclosure.** The parties must supplement these disclosures when required under Rule 26(e).

**(3) Pretrial Disclosures.**

**(A) In General.** In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

**(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

**(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

**(iii)** an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

**(B) Time for Pretrial Disclosures; Objections.** Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not

so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

**(4) Form of Disclosures.** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

[Current Rule 26(a)(5) is deleted][18]

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

**(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(B).

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

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

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

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[18] Footnote 49 before Style Subcommittee. A comment argued that present Rule 26(a)(5) should be restored — that it is useful to defeat misguided arguments that a discovery cut-off does not apply to Rule 36 or Rule 45 because they are not "discovery" rules. The SCSSC and Subcommittee B rejected this suggestion, but agreed to revisions of the Committee Note set out below.

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

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

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

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

**(3) Trial Preparation: Materials.**

**(A) Documents and Tangible Things.** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

**(i)** they are otherwise discoverable under Rule 26(b)(1); and

**(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

**(B) Protection Against Disclosure.** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

**(C) Previous Statement.** Any party or other person may, on request and without the required showing ~~required under Rule 26(b)(3)(A)~~, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

**(i)** a written statement that the person has signed or otherwise adopted or approved; or

**(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

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

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

**(B) Expert Employed Only for Trial Preparation.** Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only[19]:

**(i)** as provided in Rule 35(b); or

**(ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

[19] Footnote 54 before Style Subcommittee. Although "only" is an intensifier that might not be necessary if we could count on tight interpretation of tight drafting, Subcommittee B concluded that restoring this word from present Rule 26(b)(4)(B) will be important in practice.

**(C) Payment.** Unless manifest injustice would result, the court must require that the party seeking discovery:

**(i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

**(ii)** for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

**(5) Claiming Privilege or Protecting Trial-Preparation Materials.** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

**(A)** expressly make the claim; and

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

**(c) Protective Orders.**

**(1) In General.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

**(A)** forbidding the disclosure or discovery;

**(B)** specifying terms, including time and place, for the disclosure or discovery;

**(C)** prescribing a discovery method other than the one selected by the party seeking discovery;

**(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

**(E)** designating the persons who may be present while the discovery is conducted;

**(F)** requiring that a deposition be sealed and opened only on court order;

**(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

**(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

**(2) Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

**(3) Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses.

**(d) Timing and Sequence of Discovery.**

**(1) Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by **stipulation**, or by court order.

**(2) Sequence.** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

**(A)** methods of discovery may be used in any sequence; and

**(B)** discovery by one party does not require any other party to delay its discovery.

**(e) Supplementing Disclosures and Responses.**

**(1) In General.** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response to include later-acquired information. The party must do so:[20]

**(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

**(B)** as ordered by the court.

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[20] Footnote 58 before Style Subcommittee. Present Rule 26(e) creates a duty to supplement or correct a disclosure or discovery response "to include information *thereafter acquired*" if a party "learns" that the disclosure or response is incomplete or incorrect. After close consideration Style Rule 26(e) omitted any part of the "thereafter acquired" element for reasons expressed in the Committee Note. The Advisory Committee concluded that these words have no meaning in actual practice — lawyers recognize an obligation to supply omitted information without pausing to determine whether it was acquired after the initial response. A duty to provide information that a party had "acquired" by the time of the initial disclosure or response is implicit in the discovery rules; explicit expression in Rule 26(e) achieves clarity without changing meaning. The very concept of "thereafter acquired" is, in addition, unclear — a party may "have" vast amounts of information in its paper and electronic files that is not known to anyone. Does the party "have" that information, or is it "acquired" only when someone becomes subjectively aware of it? Or when someone becomes subjectively aware that it bears on an earlier disclosure or discovery response?

As strong as these reasons are, comments suggested that "thereafter acquired" is an authoritative part of Rule 26(e) that cannot be discarded on the theory that actual practice has robbed it of any meaning. Subcommittee B concluded that the Advisory Committee should make one final determination whether this element should be restored: "must supplement or correct its disclosure or response to include later-acquired information. The party must do so: * * *."

The argument that practice ignores the "thereafter acquired" limit is illustrated by *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, Fed.Cir.2005, 402 F.3d 1198, 1205. The court assumes, without any elaboration, that Rule 26(e) requires supplementation of false discovery responses when counsel becomes aware that the client failed to provide information that the client knew at the time of the initial responses.

**(2) Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

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

**(1) Conference Timing.** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

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

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

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

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

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

**(D)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

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

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

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

**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**

**(1) Signature Required; Effect of Signature.** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

**(A)** with respect to a disclosure, it is complete and correct as of the time[21] it is made; and

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[21] Footnote 60 before Style Subcommittee. The SCSSC adopted a style revision that would make this read "is complete and correct ~~as of the time~~ when it is made." Subcommittee B rejected this revision as a substantive change and concluded that the matter is so clear that the Advisory Committee need not consider the matter. To say that a disclosure must be complete and correct "when" it is made seems to say that the disclosure must be complete and correct. But present Rule

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

**(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

**(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~[22]; and

**(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

**(2) Failure to Sign.** ~~The court must strike~~ Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless ~~the omission~~ a signature is promptly ~~corrected~~ supplied after ~~being~~ the omission is called to the attorney's or party's attention. ~~Until the signature is provided, the other party has no duty to respond.~~[23]

**(3) Sanction for Improper Certification.** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both.

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26(g)(1) deliberately chose "as of the time it is made." An initial disclosure need not be complete and correct when it is made. It must be made even though the party has not fully investigated its case and even though another party has made insufficient disclosures or has failed to make any disclosures. See Rule 26(a)(1)(E).

[22] Footnote 61 before Style Subcommittee. This change parallels the change made in Rule 11(b)(1).

[23] Footnote 62 before Style Subcommittee. Present Rule 26(g)(2) states that a party is "not * * * obligated to take any action with respect to" an unsigned disclosure or discovery request, response, or objection. The published Style Rule reduced this to "has no duty to respond." There is a difference — reactions to properly signed disclosures or discovery activities extend beyond "respond." The revised version also corrects an inadvertent reference to "the other party" in the published Style Rule; there may be many other parties.

The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

## COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served ~~only~~ as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial

disclosure or response. These words are deleted to reflect the actual meaning of the present rule.[24]

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

## Rule 27. Depositions to Perpetuate Testimony

### (a) Before an Action Is Filed.

**(1) Petition.** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

[24] Footnote 63 before Style Subcommittee. If Rule 26(e) is revised to restore "later-acquired information" this paragraph should be deleted.

**(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

**(B)** the subject matter of the expected action and the petitioner's interest;

**(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

**(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

**(E)** the name, address, and expected substance of the testimony of each deponent.

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

**(3) Order and Examination.** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

**(4) Using the Deposition.** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

**(b) Pending Appeal.**

**(1) In General.** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

**(2) Motion.** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

**(A)** the name, address, and expected substance of the testimony of each deponent; and

**(B)** the reasons for perpetuating the testimony.

**(3) Court Order.** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

## COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 28. Persons Before Whom Depositions May Be Taken

### (a) Within the United States.

**(1) In General.** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

**(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

**(B)** a person appointed by the court where the action is pending to administer oaths and take testimony.

**(2) Definition of "Officer."** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

### (b) In a Foreign Country.

**(1) In General.** A deposition may be taken in a foreign country:

**(A)** under an applicable treaty or convention;

**(B)** under a letter of request, whether or not captioned a "letter rogatory";

**(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

**(D)** before a person commissioned by the court to administer any necessary oath and take testimony.

**(2) Issuing a Letter of Request or a Commission.** A letter of request, a commission, or both may be issued:

**(A)** on appropriate terms after an application and notice of it; and

**(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient.

**(3) Form of a Request, Notice, or Commission.** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

**(4) Letter of Request — Admitting Evidence.** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

**(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

**COMMITTEE NOTE**

The language of Rule 28 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 29. *Stipulations* About Discovery Procedure

Unless the court orders otherwise, the parties may **stipulate** that:

**(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and

**(b)** other procedures governing or limiting discovery be modified — but a **stipulation** extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

**COMMITTEE NOTE**

The language of Rule 29 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 30. Depositions by Oral Examination**

**(a) When a Deposition May Be Taken.**

**(1) Without Leave.** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

**(2) With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

**(A)** if the parties have not **stipulated** to the deposition and:

**(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

**(ii)** the deponent has already been deposed in the case; or

**(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

**(B)** if the deponent is confined in prison.

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

**(1) Notice in General.** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

**(2) Producing Documents.** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request ~~complying with~~ under Rule 34 to produce documents and tangible things at the deposition.

**(3) Method of Recording.**

**(A) Method Stated in the Notice.** The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically.

**(B) Additional Method.** With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

**(4) By Remote Means.** The parties may **stipulate** — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

**(5) Officer's Duties.**

**(A) Before the Deposition.** Unless the parties **stipulate** otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

**(i)** the officer's name and business address;

**(ii)** the date, time, and place of the deposition;

**(iii)** the deponent's name;

**(iv)** the officer's administration of the oath or affirmation to the deponent; and

**(v)** the identity of all persons present.

**(B) Conducting the Deposition; Avoiding Distortion.** If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through ~~camera or sound~~-recording techniques.

**(C) After the Deposition.** At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any **stipulations** made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

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

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

**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.**

**(1) Examination and Cross-Examination.** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

**(2) Objections.** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

**(3) Participating Through Written Questions.** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

**(d) Duration; Sanction; Motion to Terminate or Limit.**

**(1) Duration.** Unless otherwise **stipulated** or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed ~~for a fair examination of~~ to fairly examine the deponent or if the

deponent, another person, or any other circumstance impedes or delays the examination.

**(2) Sanction.** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

**(3) Motion to Terminate or Limit.**

**(A) Grounds.** At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

**(B) Order.** The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

**(C) Award of Expenses.** Rule 37(a)(5) applies to the award of expenses.

**(e) Review by the Witness; Changes.**

**(1) Review; Statement of Changes.** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

**(A)** to review the transcript or recording; and

**(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

**(2) Changes Indicated in the Officer's Certificate.** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.**

**(1) Certification and Delivery.** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

**(2) Documents and Tangible Things.**

**(A) Originals and Copies.** Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

**(i)** offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

**(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

**(B) Order Regarding the Originals.** Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

**(3) Copies of the Transcript or Recording.** Unless otherwise **stipulated** or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

**(4) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing.

**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

**(1)** attend and proceed with the deposition; or

**(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

**COMMITTEE NOTE**

The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 31. Depositions by Written Questions**

**(a) When a Deposition May Be Taken.**

**(1) Without Leave.** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

**(2) With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

**(A)** if the parties have not **stipulated** to the deposition and:

**(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

**(ii)** the deponent has already been deposed in the case; or

**(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or

**(B)** if the deponent is confined in prison.

**(3) Service; Required Notice.** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

**(4) Questions Directed to an Organization.** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

**(5) Questions from Other Parties.** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

**(1)** take the deponent's testimony in response to the questions;

**(2)** prepare and certify the deposition; and

**(3)** send it to the party, attaching a copy of the questions and of the notice.

**(c) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing.

**COMMITTEE NOTE**

The language of Rule 31 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 32. Using Depositions in Court Proceedings

**(a) Using Depositions.**

**(1) In General.** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

**(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it;

**(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

**(C)** the use is allowed by Rule 32(a)(2) through (8).

**(2) Impeachment and Other Uses.** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

**(3) Deposition of Party, Agent, or Designee.** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

**(4) Unavailable Witness.** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

**(A)** that the witness is dead;

**(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

**(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

**(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or

**(E)** on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

**(5) Limitations on Use.**

**(A) Deposition Taken on Short Notice.** A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

**(B) Unavailable Deponent; Party Could Not Obtain an Attorney.** A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

**(6) Using Part of a Deposition.** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

**(7) Substituting a Party.** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

**(8) Deposition Taken in an Earlier Action.** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

**(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

**(d) Waiver of Objections.**

**(1) To the Notice.** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

**(2) To the Officer's Qualification.** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

**(A)** before the deposition begins; or

**(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

**(3) To the Taking of the Deposition.**

**(A) Objection to Competence, Relevance, or Materiality.** An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

**(B) Objection to an Error or Irregularity.** An objection to an error or irregularity at an oral examination is waived if:

**(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

**(ii)** it is not timely made during the deposition.

**(C) Objection to a Written Question.** An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.

**(4) To Completing and Returning the Deposition.** An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise

dealt with the deposition — is waived unless a motion to suppress is made promptly after the ~~defect~~ error or irregularity becomes known or, with reasonable diligence, could have been known.

## COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 32(a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "a hearing or trial."

### Rule 33. Interrogatories to Parties

**(a) In General.**

**(1) Number.** Unless otherwise **stipulated** or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

**(2) Scope.** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

**(b) Answers and Objections.**

**(1) Responding Party.** The interrogatories must be answered:

**(A)** by the party to whom they are directed; or

**(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

**(2) Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be **stipulated** to under Rule 29 or be ordered by the court.

**(3) Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

**(4) Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

**(5) Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

**(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

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

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

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

## COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

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

**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b):[25]

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

**(A)** any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or

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

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[25] Footnote 75 before Style Subcommittee. Professor Kimble proposes a new first sentence for Style Rule 34(a): "In these Rules, an inspection of documents, tangible things, or land includes the right to copy, test, sample, measure, survey, or photograph." Later rules could then refer simply to "inspection," without adding such words as "and copy." The SCSSC rejected this proposal as coming too late in the process. Subcommittee A does not support the proposal, but concluded that it should be presented to the Advisory Committee. Subcommittee A noted that these issues were discussed extensively during development of the current e-discovery rules; that reliance on definitions has been resisted in the Style Project; and that this suggestion illustrates the reasons for resisting definitions — a lawyer reading Rule 45, for example, might not think to look to Rule 34 for a definition of "inspection."

**(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

**(b) Procedure.**

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

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

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

**(2) Responses and Objections.**

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

**(B) Responding to Each Item.** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

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

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

**(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

**Rule 35. Physical and Mental Examinations**

**(a) Order for an Examination.**

**(1) In General.** The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

**(2) Motion and Notice; Contents of the Order.** The order:

**(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and

**(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

**(b) Examiner's Report.**

**(1) Request by the Party or Person Examined.** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may

be made by the party against whom the examination order was issued or by the person examined.

**(2) Contents.** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

**(3) Request by the Moving Party.** After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

**(4) Waiver of Privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.

**(5) Failure to Deliver a Report.** The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

**(6) Scope.** This subdivision (b) applies also to an examination made by the parties' ~~stipulation~~ **agreement**,[26] unless the ~~stipulation~~ **agreement** states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

## COMMITTEE NOTE

[26] Footnote 77 before Style Subcommittee. Despite the global preference for "stipulation," the SCSSC and Subcommittee A agreed that "agreement" is better in the context of Rule 35(b). The rule should encourage out-of-court use of Rule 35 by party agreement in keeping with the general conduct of discovery by the parties.

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 36. Requests for Admission**

**(a) Scope and Procedure.**

**(1) Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

**(A)** facts, the application of law to fact, or opinions about either; and

**(B)** the genuineness of any described documents.

**(2) Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

**(3) Time to Respond; Effect of Not Responding.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be **stipulated** to under Rule 29 or be ordered by the court.

**(4) Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of ~~information or~~ knowledge or information as a reason for failing to admit or deny only if the party

states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

**(5) Objections.** The grounds for objecting to a request must be stated.

~~**(6) Matter Presenting a Trial Issue.**~~ A party must not object ~~to a request~~ solely on the ground that ~~it~~ the request presents a genuine issue for trial. ~~The party may deny the matter or state why it cannot admit or deny.~~[27]

**(~~7~~ 6) Motion Regarding the Sufficiency of an Answer or Objection.** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16~~(d) and~~ (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.[28] An admission under this rule is not an admission for any

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[27] Footnote 80 before Style Subcommittee. The SCSSC and Subcommittee A agreed to delete the final sentence as redundant with Rule 36(a)(4), which describes the duty to answer and establishes the right to assert a lack of knowledge or information.

[28] Footnote 81 before Style Subcommittee. The problem of integrating Rule 36(b) with Rule 16(e) is discussed with Rule 16(e). It is agreed that Rule 36(b) should not refer to Rule 16(d). The Subcommittees agree that an admission adopted at a final pretrial conference should be protected by the Rule 16(e) test that allows modification of a final pretrial conference order only on showing manifest injustice. The question is whether this test should apply only to an admission specifically identified in the final pretrial conference order, or whether the protection should extend to an admission that is adopted without reciting the adoption as action taken.

other purpose and cannot be used against the party in any other proceeding.

### COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

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

### (a) Motion for an Order Compelling Disclosure or Discovery.

**(1) In General.** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

**(2) Appropriate Court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

**(3) Specific Motions.**

**(A) To Compel Disclosure.** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

**(B) To Compel a Discovery Response.** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

**(i)** a deponent fails to answer a question asked under Rule 30 or 31;

**(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

**(iii)** a party fails to answer an interrogatory submitted under Rule 33; or

**(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

**(C) Related to a Deposition.** When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

**(4) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

**(5) Payment of Expenses; Protective Orders.**

**(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).** If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

**(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

**(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or

**(iii)** other circumstances make an award of expenses unjust.

**(B) If the Motion Is Denied.** If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

**(C) If the Motion Is Granted in Part and Denied in Part.** If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

**(b) Failure to Comply with a Court Order.**

**(1) Sanctions in the District Where the Deposition Is Taken.** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

**(2) Sanctions in the District Where the Action Is Pending.**

**(A) For Not Obeying a Discovery Order.** If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under

Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

**(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

**(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

**(iii)** striking pleadings in whole or in part;

**(iv)** staying further proceedings until the order is obeyed;

**(v)** dismissing the action or proceeding in whole or in part;

**(vi)** rendering a default judgment against the disobedient party; or

**(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

**(B) For Not Producing a Person for Examination.** If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

**(C) Payment of Expenses.** Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(c) Failure to Disclose, to Amend an Earlier Response, or to Admit.**

**(1) Failure to Disclose or Amend.** If a party fails to disclose the information required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) — the party is not allowed to use ~~as~~ that information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~,[29] unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

**(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

**(B)** may inform the jury of the party's failure; and

**(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

**(2) Failure to Admit.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

**(A)** the request was held objectionable under Rule 36(a);

**(B)** the admission sought was of no substantial importance;

**(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

**(D)** there was other good reason for the failure to admit.

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[29] Footnote 83 before Style Subcommittee. As published, Style Rule 37(c)(1) carried forward a glitch in present Rule 37(c)(1) — "disclose" is used first to refer to Rule 26(a) disclosures, and then shifts meaning to refer to information not revealed as required by the Rule 26(e) duty to supplement. The SCSSC approved a revision that referred to "unrevealed information." Subcommittee A recommends the further revision shown in text.

**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.**

**(1) In General.**

**(A) Motion; Grounds for Sanctions.** The court where the action is pending may, on motion, order sanctions if:

**(i)** a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

**(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

**(B) Certification.** A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

**(2) Unacceptable Excuse for Failing to Act.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

**(3) Types of Sanctions.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(e) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

## COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## TITLE VI. TRIALS

### Rule 38. Right to a Jury Trial; Demand

**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.

**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by:

**(1)** serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and

**(2)** filing the demand in accordance with Rule 5(d).

**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

**(d) Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties **consent.**

**(e) Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h).

## COMMITTEE NOTE

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

### Rule 39. Trial by Jury or by the Court

**(a) When a Demand Is Made.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

**(1)** the parties or their attorneys file a **stipulation** to a nonjury trial or so **stipulate** on the record in open court;[30] or

**(2)** the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

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[30] Footnote 84 before Style Subcommittee. Present Rule 39(a) provides that after a demand for jury trial the parties can consent to nonjury trial by filing a written stipulation "or by an oral stipulation *made in open court* and entered in the record." Style Rule 39(a)(1) referred to a stipulation on the record, omitting "open court." The SCSSC prefers the Style Rule as published, but expressed uncertainty whether the question involves more than style. The argument for omitting "in open court" is that what is important is that the stipulation be on the record — something not generally required in the multiple provisions for stipulations. Requiring that the stipulation be made in open court adds an element of potential confusion — is a stipulation entered on the record of a pretrial conference held in chambers one made "in open court"? Is there any conceivable reason for insisting on an opportunity for the public to be present when the parties agree to waive a previously filed jury-trial demand? Professor Rowe concludes that "practice seems to differ from current phrasing" and to uphold waivers of previously demanded jury trials by something short of "oral stipulation in open court." He recommends that deletion of "in open court" be included in the Style-Substance track.

**(b) When No Demand Is Made.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

**(c) Advisory Jury; Jury Trial by *Consent*.** In an action not triable of right by a jury, the court, on motion or on its own:

**(1)** may try any issue with an advisory jury; or

**(2)** may, with the parties' **consent**, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

## COMMITTEE NOTE

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

## Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials without request — or on a party's request with notice to the other parties.[31] The court must give priority to actions entitled to priority by a federal statute.

## COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily

[31] Footnote 85 before Style Subcommittee. Present Rule 40 recognizes that a local rule may provide for scheduling trials in "such other manner as the courts deem expedient." The Bankruptcy Rules Committee asked whether omission of this clause raises doubts about the validity of "self-calendaring" systems that enable a party to pick an available trial date without prior notice to other parties. This question will be moot if Style-Substance Rule 40 is approved — it provides simply that "[e]very court must provide by rule for scheduling trials." The SCSSC and Subcommittee A agreed that there is no need to revise Style Rule 40 even if Style-Substance Rule 40 is not adopted.

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 41. Dismissal of Actions**

**(a) Voluntary Dismissal.**

**(1) By the Plaintiff.**

**(A) Without a Court Order.** Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

**(i)** a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

**(ii)** a **stipulation** of dismissal signed by all parties who have appeared.

**(B) Effect.** Unless the notice or **stipulation** states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

**(2) By Court Order; Effect.** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any

dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

**(1)** before a responsive pleading is served; or

**(2)** if there is no responsive pleading, before evidence is introduced at a hearing or trial.

**(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

**(1)** may order the plaintiff to pay all or part of the costs of that previous action; and

**(2)** may stay the proceedings until the plaintiff has complied.

## COMMITTEE NOTE

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

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

language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

**Rule 42. Consolidation; Separate Trials**

**(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may:

**(1)** join for hearing or trial any or all matters at issue in the actions;

**(2)** consolidate the actions; ~~and~~ or

**(3)** issue any other orders to avoid unnecessary cost or delay.

**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

**COMMITTEE NOTE**

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

**Rule 43. Taking Testimony**

**(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~in~~ in compelling circumstances[32] and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

[32] Footnote 88 before Style Subcommittee. The "for good cause" intensifier was restored from the present rule because it was deliberately included to emphasize, however redundantly, the need to insist on live testimony unless compelling circumstances justify transmission from a different location.

**(b) Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices.

**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

**(d) Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

**COMMITTEE NOTE**

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.[33]

**Rule 44. Proving an Official Record**

**(a) Means of Proving.**

**(1) Domestic Record.** Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

**(A)** an official publication of the record; or

**(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a

[33] Footnote 89 before Style Subcommittee. The Bankruptcy Rules Committee made a suggestion that the Committee Note should state that subdivisions (d), (e), and (f) of former Rule 43 have been redesignated as subdivisions (b), (c), and (d) to reflect the prior abrogation of sometime subdivisions (b) and (c). The SCSSC agreed to add this language to the Committee Note. A similar suggestion for Rule 12 is discussed with Rule 12. Subcommittee A decided that the Rule 12 note should be revised only if there is a special risk of confusion for future researchers in the Bankruptcy Rules. The same disposition is recommended here.

certificate that the officer has custody. The certificate must be made under seal:

**(i)** by a judge of a court of record in the district or political subdivision where the record is kept; or

**(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

**(2) Foreign Record.**

**(A) In General.** Each of the following evidences a foreign official record — or an entry in it — that is otherwise admissible:

**(i)** an official publication of the record; or

**(ii)** the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

**(B) Final Certification of Genuineness.** A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

**(C) Other Means of Proof.** If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

**(i)** admit an attested copy without final certification; or

**(ii)** permit the record to be evidenced by an attested summary with or without a final certification.

**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

## COMMITTEE NOTE

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

### Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing.[34] In determining

[34] Footnote 90 before Style Subcommittee. Present Rule 44.1 requires a party who intends to raise an issue of foreign law to "give notice by pleadings or other *reasonable* written notice." Style Rule 44.1 refers only to "a pleading or other writing." The SCSSC concluded that there is no need to restore "reasonable" to the rule text. Subcommittee A discussion identified this as a difficult issue. Notice at a reasonable time is important — it is often difficult to contest issues of foreign law, and often it is necessary to rely on expert testimony. The 1966 Committee Note emphasizes the elements to be considered in determining whether notice is reasonable, looking to the importance of the issue, the stage the case has reached, and the reasons for not raising the issue earlier. Professor Rowe's research indicates that the decision to include "reasonable" was "highly deliberate," and that the word should be retained in the Style Rule. The argument against restoring "reasonable" is the familiar argument from negative implication — most rules, including those addressing notice, do not say "reasonable." If "reasonable" is used here, it might be argued that other acts need not be reasonable. Still, few courts will waste time in rejecting arguments that a party can act unreasonably. Subcommittee A decided that the Advisory Committee should decide. One formulation would be: "must ~~give notice by a pleading or other~~ plead it or give other reasonable notice in writing."

foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

## COMMITTEE NOTE

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

### Rule 45. Subpoena

**(a) In General.**

**(1) Form and Contents.**

**(A) Requirements.** Every subpoena must:

**(i)** state the court from which it issued;

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

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

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

**(B) Command to Produce Materials or Permit Inspection.** A command to produce documents or tangible things or to permit inspection may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(C) **Notice of Method for Recording Deposition Testimony.** A subpoena commanding attendance at a deposition must state the method for recording the testimony.[35]

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

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

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

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

**(3) Issued by ~~Whom~~ the Clerk.** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service.

**(4) Issued by an Attorney.** An attorney~~, as an officer of the court, also~~ may issue and sign a subpoena ~~from~~ as an officer of:

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

**(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.[36]

**(b) Service.**

**(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.** Any person who is at least 18 years old and not a

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[35] This issue was not footnoted before the Style Subcommittee. This provision is relocated from present new (2005) Rule 45(a)(2)(B). It does not belong in paragraph (2), which otherwise deals only with identifying the court from which a subpoena issues.

[36] This issue was not footnoted before the Style Subcommittee. This addition of a new paragraph responds to a suggestion that it is awkward to speak as if an attorney issues a subpoena from a court. The same change could instead be made as a continuing part of paragraph (3).

party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

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

**(A)** within the district of the issuing court;

**(B)** outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

**(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

**(D)** that the court authorizes on motion and for good cause, if a federal statute so provides.

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

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

**(c) Protecting a Person Subject to a Subpoena.**

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

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

**(A) Appearance Not Required.** A person commanded to produce ~~designated~~ documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce ~~designated materials~~ documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the ~~designated~~ materials or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, inspection, or copying.

**(ii)** Inspection and copying may be ~~done~~ required only as directed in the order,[37] and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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[37] Footnote 95 before Style Subcommittee. The present rule says that if an objection is made "the party serving the subpoena shall not be entitled to inspect and copy." A comment expressed concern that the Style Rule implies that the parties cannot resolve the objection by agreement without court order — if inspection is to be "done," it is only as directed by the court. The SCSSC decided that this implication is too strained to cause trouble. Subcommittee A, however, recommends a change to "required" to eliminate any doubt.

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

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

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

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

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

**(iv)** subjects a person to undue burden.

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

**(i)** disclosing a trade secret or other confidential research, development, or commercial information;

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

**(iii)** a person who is neither a party nor a party's officer to incur ~~substantial~~ significant[38] expense to travel more than 100 miles to attend trial.

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[38] Footnote 96 before Style Subcommittee. Subcommittee A recommends that this change not be made — that "substantial" remain in the rule. The SCSSC decided to change "substantial" to "significant." This question was much debated before publication. Style Rule 45(c)(2)(B)(ii) carries forward the present rule: the order enforcing a subpoena to produce documents or tangible things must protect a nonparty from "significant" expense. As published, Style Rule

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

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(d) Duties in Responding to a Subpoena.**

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

**(2) Claiming Privilege or Protection.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

**(A)** expressly ~~assert~~ make the claim; and

**(B)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the

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45(c)(3)(B)(ii) carried forward the present rule's provision for quashing or modifying a subpoena to attend trial if it requires a nonparty to incur "substantial" expense. The SCSSC could see no reason for using different words in the two provisions. Subcommittee A recommends that both provisions remain as published. "Substantial" seems to involve greater expense than "significant." The distinction may not have been inadvertent. At least two reasons can be imagined for affording greater protection against the expense of complying with a discovery subpoena to produce. A nonparty's obligation to attend a trial may seem a more fundamental obligation to the cause of justice. And production in discovery can entail enormous expense — the nonparty should be protected all the way down to "significant" expense, without stopping short at "substantial" expense.

subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

### Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

## COMMITTEE NOTE

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

## Rule 47. Selecting Jurors

**(a) Examining Jurors.** The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

**(b) Peremptory Challenges.** The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

**(c) Excusing a Juror.** During trial or deliberation, the court may excuse a juror for good cause.

### COMMITTEE NOTE

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

## Rule 48. Number of Jurors; Verdict

A jury must initially have at least ~~no fewer than~~[39] 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties **stipulate** otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

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[39] Footnote 99 before Style Subcommittee. A comment suggested that as published, Style Rule 48 might imply that the parties can stipulate to begin trial with fewer than 6 jurors. The SCSSC approved a change to read: "A jury must *begin with at least* 6" members. Subcommittee A recommends the language shown in text, believing that "begin" is not a good word to describe the people who initially constitute a jury.

COMMITTEE NOTE

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

**Rule 49. Special Verdict; General Verdict and Questions**

**(a) Special Verdict.**

**(1) In General.** The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

**(A)** submitting written questions susceptible of a categorical or other brief answer;

**(B)** submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

**(C)** using any other method that the court considers appropriate.

**(2) Instructions.** The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

**(3) Issues Not Submitted.** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

**(b) General Verdict with Answers to Written Questions.**

**(1) In General.** The court may submit to the jury forms for a general verdict, together with written questions on one or more

issues of fact that the jury must decide. The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

**(2) Verdict and Answers Consistent.** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

**(3) Answers Inconsistent with the Verdict.** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

**(A)** approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

**(B)** direct the jury to further consider its answers and verdict; or

**(C)** order a new trial.

**(4) Answers Inconsistent with Each Other and the Verdict.** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

### COMMITTEE NOTE

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

## Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

**(a) Judgment as a Matter of Law.**

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

**(A)** resolve the issue against the party; and

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

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

**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a),[40] the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment or – if the motion

[40] Footnote 104 before Style Subcommittee. A change is required by the impending adoption of the 2006 amendment. The published Style Rule 50(b) did not reflect the amendment. The new rule eliminates the requirement that a renewed motion for judgment as a matter of law be based on a motion made at the close of all the evidence. Instead it allows support by any motion made under Rule 50(a). An objection to this expression has been made as a matter of style — cross-references within a rule are discouraged, in favor of an expression in words. The suggestion was that the rule refer to support in a motion for judgment as a matter of law "made before the case is submitted to the jury." The SCSSC adopted this suggestion. Subcommittee A rejected it, concluding that the rule should read: "If the court does not grant a motion for judgment as a matter of law made *under Rule 50(a)*, the court is considered * * *." The alternative "made before the case is submitted to the jury" was rejected for several reasons advanced in drafting the Rule 50(b) amendment. It must be clear that a renewed motion may be supported only by an earlier motion that meets the requirements of Rule 50(a). The most prominent consequence is that the renewed motion may rest only on grounds urged to support the earlier motion. In addition, there is a risk that a general reference to judgment as a matter of law will generate confusion with summary judgment. The Rule 56(c) standard continues to call for summary judgment when the movant "is entitled to judgment as a matter of law." Adoption of the alternative language would lead to arguments that a post-verdict motion can be based on a pretrial motion for summary judgment. That possibility was considered and explicitly rejected in amending Rule 50(b).

addresses a jury issue not decided by a verdict – no later than 10 days after the jury was discharged,[41] the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

**(1)** allow judgment on the verdict, if the jury returned a verdict;

**(2)** order a new trial; or

**(3)** direct the entry of judgment as a matter of law.

**(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.**

**(1) In General.** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

**(2) Effect of a Conditional Ruling.** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

**(d) Time for a Losing Party's New-Trial Motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

**(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.** If the court denies the motion for judgment as a

[41] Footnote 106 before Style Subcommittee. This new language incorporates another part of the 2006 amendment.

matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

## COMMITTEE NOTE

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

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

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

### Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

**(a) Requests.**

**(1) Before or at the Close of the Evidence.** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

**(2) After the Close of the Evidence.** After the close of the evidence, a party may:

**(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

**(B)** with the court's permission, file untimely requests for instructions on any issue.

**(b) Instructions.** The court:

**(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

**(2)** must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

**(3)** may instruct the jury at any time before the jury is discharged.

**(c) Objections.**

**(1) How to Make.** A party who objects to ~~a proposed~~ an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

**(2) When to Make.** An objection is timely if:

**(A)** a party objects at the opportunity provided under Rule 51(b)(2); or

**(B)** a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

**(d) Assigning Error; Plain Error.**

**(1) Assigning Error.** A party may assign as error:

**(A)** an error in an instruction actually given, if that party properly objected; or

**(B)** a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected.

**(2) Plain Error.** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

**COMMITTEE NOTE**

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

**Rule 52. Findings and Conclusions ~~in a Nonjury Proceeding~~ by the Court; Judgment on Partial Findings**

**(a) Findings and Conclusions ~~by the Court~~.**

**(1) In General.** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the

evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

**(2) For an Interlocutory Injunction.** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

**(3) For a Motion.** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

**(4) Effect of a Master's Findings.** A master's findings, to the extent adopted by the court, must be considered the court's findings.

**(5) Questioning the Evidentiary Support.** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

**(6) Setting Aside the Findings.** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

## COMMITTEE NOTE

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

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

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

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

### Rule 53. Masters

### (a) Appointment.

**(1) Scope.** Unless a statute provides otherwise, a court may appoint a master only to:

**(A)** perform duties **consented** to by the parties;

**(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

**(i)** some exceptional condition; or

**(ii)** the need to perform an accounting or resolve a difficult computation of damages; or

**(C)** address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

**(2) Disqualification.** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, **consent** to the appointment after the master discloses any potential grounds for disqualification.

**(3) Possible Expense or Delay.** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

**(b) Order Appointing a Master.**

**(1) Notice.** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

**(2) Contents.** The appointing order must direct the master to proceed with all reasonable diligence and must state:

**(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

**(B)** the circumstances, if any, in which the master may communicate ex parte with the court or a party;

**(C)** the nature of the materials to be preserved and filed as the record of the master's activities;

**(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

**(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

**(3) Issuing.** The court may issue the order only after:

**(A)** the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

**(B)** if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

**(4) Amending.** The order may be amended at any time after notice to the parties and an opportunity to be heard.

**(c) Master's Authority.**

**(1) In General.** Unless the appointing order directs otherwise, a master may:

**(A)** regulate all proceedings;

**(B)** take all appropriate measures to perform the assigned duties fairly and efficiently; and

**(C)** if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

**(2) Sanctions.** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

**(d) Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

**(e) Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

**(f) Action on the Master's Order, Report, or Recommendations.**

**(1) Opportunity for a Hearing; Action in General.** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

**(2) Time to Object or Move to Adopt or Modify.** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time.

**(3) Reviewing Factual Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, **stipulate** that:

**(A)** the findings will be reviewed for clear error; or

**(B)** the findings of a master appointed under Rule 53 (a)(1)(A) or (C) will be final.

**(4) Reviewing Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master.

**(5) Reviewing Procedural Matters.** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

**(g) Compensation.**

**(1) Fixing Compensation.** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

**(2) Payment.** The compensation must be paid either:

**(A)** by a party or parties; or

**(B)** from a fund or subject matter of the action within the court's control.

**(3) Allocating Payment.** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

**(h) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

## COMMITTEE NOTE

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

## TITLE VII. JUDGMENT

### Rule 54. Judgment; Costs

**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment ~~must~~ should not include recitals of pleadings, a master's report, or a record of prior proceedings.

**(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim —or when multiple parties are involved, the court may ~~enter~~ direct [entry of][42] a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the ~~court enters~~ entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

**(c) Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

**(d) Costs; Attorney's Fees.**

**(1) Costs Other Than Attorney's Fees.** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

**(2) Attorney's Fees.**

[42] As a matter of style, it seems better to add "entry of" to focus clearly on the distinction between directing a judgment and directing the clerk to enter the judgment so as to mark the definitive disposition of the matter and to start appeal time running.

**(A) Claim to Be by Motion.** A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

**(B) Timing and Contents of the Motion.** Unless a statute or a court order provides otherwise, the motion must:

**(i)** be filed no later than 14 days after the entry of judgment;

**(ii)** specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

**(iii)** state the amount sought or provide a fair estimate of it; and

**(iv)** disclose, if the court so orders, the terms of any **agreement** about fees for the services for which the claim is made.

**(C) Proceedings.** Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

**(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.** By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

**(E) Exceptions.** Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

## COMMITTEE NOTE

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

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

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

### Rule 55. Default; Default Judgment

**(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

**(b) Entering a Default Judgment.**

**(1) By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant

who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

**(2) By the Court.** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

**(A)** conduct an accounting;

**(B)** determine the amount of damages;

**(C)** establish the truth of any allegation by evidence; or

**(D)** investigate any other matter.

**(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

**(d) Judgment Against the United States.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

## COMMITTEE NOTE

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

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules."

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

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

**Rule 56. Summary Judgment**

**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

**(1)** 20 days have passed from commencement of the action; or

**(2)** the opposing party serves a motion for summary judgment.

**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

**(d) Case Not Fully Adjudicated on the Motion.**

**(1) Establishing Facts.** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

**(2) Establishing Liability.** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

**(e) Affidavits; Further Testimony.**

**(1) In General.** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

**(2) Opposing Party's Obligation to Respond.** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

**(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

**(1)** deny the motion;

**(2)** order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

**(3)** issue any other just order.

**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

## COMMITTEE NOTE

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

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

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material

fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

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

**Rule 57. Declaratory Judgment**

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. ~~A party may~~ Rules 38 and 39 govern a demand for a jury trial ~~under Rules 38 and 39~~. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

**COMMITTEE NOTE**

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

**Rule 58. Entering Judgment**

**(a) Separate Document.** Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

**(1)** for judgment under Rule 50(b);

**(2)** to amend or make additional findings ~~of fact~~ under Rule 52(b);

**(3)** for attorney's fees under Rule 54;

**(4)** for a new trial, or to alter or amend the judgment, under Rule 59; or

**(5)** for relief under Rule 60.

**(b) Entering Judgment.**

**(1) Without the Court's Direction.** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

**(A)** the jury returns a general verdict;

**(B)** the court awards only costs or a sum certain; or

**(C)** the court denies all relief.

**(2) Court's Approval Required.** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

**(A)** the jury returns a special verdict or a general verdict with answers to written questions; or

**(B)** the court grants other relief not described in this subdivision (b).

**(b) Time of Entry.** For purposes of these rules, judgment is entered at the following times:

**(1)** if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

**(2)** if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

**(A)** it is set out in a separate document; or

**(B)** 150 days have run from the entry in the civil docket.

**(d) Request for Entry.** A party may request that judgment be set out in a separate document as required by Rule 58(a).

**(e) Cost or Fee Awards.** Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

**COMMITTEE NOTE**

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

**Rule 59. New Trial; Altering or Amending a Judgment**

**(a) In General.**

**(1) Grounds for New Trial.** The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

**(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; ~~and~~ or

**(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

**(2) Further Action After a Nonjury Trial.** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.

**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' **stipulation**. The court may permit reply affidavits.

**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

### COMMITTEE NOTE

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

## Rule 60. Relief from a Judgment or Order

**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has

been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

**(b) Grounds for Relief from a Final Judgment, ~~or~~ Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

**(1)** mistake, inadvertence, surprise, or excusable neglect;

**(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

**(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

**(4)** the judgment is void;

**(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

**(6)** any other reason that justifies relief.

**(c) Timing and Effect of the Motion.**

**(1) Timing.** A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

**(d) Other Powers to Grant Relief.** This rule does not limit a court's power to:

**(1)** entertain an independent action to relieve a party from a judgment, order, or proceeding;

**(2)** grant relief under 28 U.S.C. § 1655 to a defendant who ~~is~~ was not personally notified of the action; or

**(3)** set aside a judgment for fraud on the court.

**(e) Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

**COMMITTEE NOTE**

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

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

## Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

**COMMITTEE NOTE**

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

**Rule 62. Stay of Proceedings to Enforce a Judgment**

**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not ~~automatically~~ stayed after being entered, even if an appeal is taken:

**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or

**(2)** a judgment or order that directs an accounting in an action for patent infringement.

**(b) Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

**(1)** under Rule 50, for judgment as a matter of law;

**(2)** under Rule 52(b), to amend the findings or for additional findings;

**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or

**(4)** under Rule 60, for relief from a judgment or order.

**(c) Injunction Pending an Appeal.** ~~After an appeal is taken~~ While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

**(1)** by that court sitting in open session; or

**(2)** by the assent of all its judges, as evidenced by their signatures.

**(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may~~,~~ obtain a stay by supersedeas bond, ~~obtain a stay,~~ except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

**(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under ~~state~~ the law of the state where the court ~~sits~~ is located, the judgment debtor is entitled to the same stay of execution the state court would give.

**(g) Appellate Court's Power Not Limited.** ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:

**(1)** to stay proceedings~~;~~

~~**(2)**~~ — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

~~**(3**~~ **2)** to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

**(h) Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

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

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

**Rule 63. Judge's Inability to Proceed**

If the judge who ~~commenced~~ conducted a hearing or trial is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE NOTE

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

**TITLE VIII. PROVISIONAL AND FINAL REMEDIES**

**Rule 64. Seizing a Person or Property**

**(a) Remedies Under State Law — In General.** At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the

potential judgment.[43] But a federal statute governs to the extent it applies.

**(b) Specific Kinds of Remedies.** The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

## COMMITTEE NOTE

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action "after it is removed."

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[43] Footnote 127 before Style Subcommittee. The Bankruptcy Rules Committee suggested this change. Although the SCSSC rejected the change, Subcommittee A recommends it for adoption. Present Rule 64(a) refers to "the purpose of securing satisfaction." This rule is forward-looking — it deals with pretrial security, not to satisfying a judgment not yet entered but to securing the opportunity to satisfy the potential judgment.

## Rule 65. Injunctions and Restraining Orders

### (a) Preliminary Injunction.

**(1) Notice.** The court may issue a preliminary injunction only on notice to the adverse party.

**(2) Consolidating the Hearing with the Trial on the Merits.** Before or after beginning ~~a~~ the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

### (b) Temporary Restraining Order.

**(1) Issuing Without Notice.** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

**(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

**(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

**(2) Contents; Expiration.** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party **consents** to a longer extension. The reasons for an extension must be entered in the record.

**(3) Expediting the Preliminary-Injunction Hearing.** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

**(4) Motion to Dissolve.** On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

**(c) Security.** ~~If t~~The court may issues a preliminary injunction or a temporary restraining order~~, the court must require~~ only if the movant ~~to~~ gives security[44] in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

**(d) Contents and Scope of Every Injunction and Restraining Order.**

**(1) Contents.** Every order granting an injunction and every restraining order must:

**(A)** state the reasons why it issued;

**(B)** state its terms specifically; and

[44] Footnote 129 before Style Subcommittee. This revision, approved by the SCSSC, brings the Style Rule closer to the present rule. The present rule says that no order shall issue "except upon the giving of security by the applicant, in such sum as the court deems proper." Although there is some disagreement about the best way to explain the result, it is well established that a court may enter an order without any security, in effect treating zero as the proper sum. This authority is regarded as particularly important to "public interest" parties who may seek to protect important abstract public values in circumstances that would defeat any interim injunction relief if meaningful security were required.

**(C)** describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

**(2) Persons Bound.** The order binds only the following who receive actual notice of it by personal service or otherwise:[45]

**(A)** the parties;

**(B)** the parties' officers, agents, servants, employees, and attorneys; and

**(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

**(e) Other Laws Not Modified.** These rules do not modify the following:

**(1)** any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

**(2)** 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

**(3)** 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

**(f) Copyright Impoundment.** This rule applies to copyright-impoundment proceedings.

## COMMITTEE NOTE

[45] This issue was not footnoted before the Style Subcommittee. As published, Style Rule 65(d)(2) carried forward the apparent meaning of present Rule 65(d) — an injunction is binding on a party and its agents even though there was no actual notice of the injunction. Research into the question by Professor Rowe suggested that the text of present Rule 65(d) was adapted from a statute, former 28 U.S.C. § 363, but inadvertently omitted a comma that made it clear that an injunction ordinarily binds a party or its agents only upon actual notice of the injunction. The text was revised as shown, but Subcommittee A did not consider the question. A new paragraph explaining the change was added to the Committee Note. The revision remains for review by the Advisory Committee.

The language of Rule 65 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made it clear that an injunction [ordinarily] binds even a party only if the party had actual notice of it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

**Rule 65.1. Proceedings Against a Surety**

Whenever these rules (including the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

**COMMITTEE NOTE**

The language of Rule 65.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 66. Receivers**

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must ~~administer an estate according to~~ accord with the historical practice in federal courts or ~~as provided in~~ with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

**COMMITTEE NOTE**

The language of Rule 66 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 67. Deposit into Court**

**(a) Depositing Property.** If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

**(b) Investing and Withdrawing Funds.** Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

**COMMITTEE NOTE**

The language of Rule 67 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 68. Offer of Judgment**

**(a) Making an Offer; Judgment on an Accepted Offer.** ~~At least~~ More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

**COMMITTEE NOTE**

The language of Rule 68 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 69. Execution**

**(a) In General.**

**(1) Money Judgment; Applicable Procedure.** A money judgment is enforced by a writ of execution, unless the court ~~orders~~ directs[46] otherwise. The procedure on execution — and in

[46] Footnote 137 before Style Subcommittee. The Bankruptcy Rules Committee suggested this change, observing that in the Bankruptcy Rules "we use 'directs' as a broader term that covers

proceedings supplementary to and in aid of judgment or execution — must ~~follow~~ accord with[47] the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

**(2) Obtaining Discovery.** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.

**(b) Against Certain Public Officers.** When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

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standing orders and local rules, so that stylistic choice may be significant if applied to our rules." The SCSSC approved the change. Subcommittee A asked for further advice from the Bankruptcy Rules Committee, noting conflicting concerns. In styling the Civil Rules, the global convention is to use "orders" in place of "directs," with a few specific exceptions. On the other hand, one purpose of the several style projects is to achieve consistent expression across all sets of Enabling Act rules.

The question was then posed to Bankruptcy Judge James Walker, liaison from the Advisory Committee on Bankruptcy Rules, who responded as follows:

"As for "order" vs "direct" language in Style Civil Rule 69(a), we understand the reasoning of the subcommittee's preference for "order." As you note, our comment reflects the emphasis we place in the Bankruptcy Courts on local rules and standing orders in addition to orders in a case. Our comment reflects a preference for a word that implies equal authority in all three situations.

"Having stated our case, it must be said that "orders," as the change would be incorporated by reference in FRBP 7069, is not likely to be disruptive to the practice in our courts. Anything I might say further in support of our comment should be heard as a reflection of the importance we place on the orderly functioning of established local procedures."

[47] Footnote 138 before Style Subcommittee. Present Rule 69 directs that the procedure on execution "shall be in accordance with" state practice. Concerns were expressed that the published Style Rule's "must follow" reduces the authority of a federal court to supplement state procedure when inadequate state procedure may frustrate effective enforcement of a federal judgment. Subcommittee A concluded that there may be gaps in some state procedures, and that it would be better to fall back to language closer to the present rule, reporting the question to the Advisory Committee.

## COMMITTEE NOTE

The language of Rule 69 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

### Rule 70. Enforcing a Judgment for a Specific Act

**(a) Party's Failure to Act; Ordering Another to Act.** If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

**(b) Vesting Title.** If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

**(c) Obtaining a Writ of Attachment or Sequestration.** On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

**(d) Obtaining a Writ of Execution or Assistance.** On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

**(e) Holding in Contempt.** The court may also hold the disobedient party in contempt.

### COMMITTEE NOTE

The language of Rule 70 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

### COMMITTEE NOTE

The language of Rule 71 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

# TITLE IX. SPECIAL PROCEEDINGS

## Rule 71.1. Condemning Real or Personal Property

**(a) Applicability of Other Rules.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

**(b) Joinder of Properties.** The plaintiff may join separate pieces of property in a single action, no matter who owns them[48] or whether they are sought for the same use.

**(c) Complaint.**

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[48] "no matter who owns them" has been criticized because it seems to imply that the owner's identity has no bearing on condemnation. In fact some classes of owners are exempt -- cemeteries are offered as an example -- and some governments cannot condemn the property of other governments. It should be clear that a rule of procedure cannot expand the substantive authority to condemn. But the implication could be defeated, at some cost in style elegance, by revising this: "no matter ~~who owns them~~ whether owned by the same persons or whether they are sought for the same use."

**(1) Caption.** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property.

**(2) Contents.** The complaint must contain a short and plain statement of the following:

**(A)** the authority for the taking;

**(B)** the uses for which the property is to be taken;

**(C)** a description sufficient to identify the property;

**(D)** the interests to be acquired; and

**(E)** for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

**(3) Parties.** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

**(4) Procedure.** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of ~~the~~ a deposit that the facts warrant.

**(5) Filing; Additional Copies.** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

**(d) Process.**

**(1) Delivering Notice to the Clerk.** On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

**(2) Contents of the Notice.**

**(A) Main Contents.** Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

**(i)** that the action is to condemn property;

**(ii)** the interest to be taken;

**(iii)** the authority for the taking;

**(iv)** the uses for which the property is to be taken;

**(v)** that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and

**(vi)** that the failure to so serve an answer constitutes **consent** to the taking and to the court's authority to proceed with the action and fix the compensation.

**(B) Conclusion.** The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

**(3) Serving the Notice.**

**(A) Personal Service.** When a defendant whose address is known resides within the United States or a territory subject to

the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

**(B) Service by Publication.**

**(i)** A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least three successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

**(ii)** Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

**(4) Effect of Delivery and Service.** Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

**(5) Proof of Service; Amending the Proof or Notice.** Rule 4(l) governs proof of service. The court may permit the proof or the notice to be amended.

**(e) Appearance or Answer.**

**(1) Notice of Appearance.** A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

**(2) Answer.** A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must:

**(A)** identify the property in which the defendant claims an interest;

**(B)** state the nature and extent of the interest; and

**(C)** state all the defendant's objections and defenses to the taking.

**(3) Waiver of Other Objections and Defenses; Evidence on Compensation.** A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.

**(f) Amending Pleadings.** Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

**(g) Substituting Parties.** If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

**(h) Trial of the Issues.**

**(1) Issues Other Than Compensation; Compensation.** In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

**(A)** by any tribunal specially constituted by a federal statute to determine compensation; or

**(B)** if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

**(2) Appointing a Commission; Commission's Powers and Report.**

**(A) Reasons for Appointing.** If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

**(B) Alternate Commissioners.** The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

**(C) Examining the Prospective Commissioners.** Before making its appointments, the court must advise the parties of

the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to ~~the appointment of~~ a prospective commissioner or alternate.

**(D) Commission's Powers and Report.** A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

**(i) Dismissal of the Action or a Defendant.**

**(1) Dismissing the Action.**

**(~~1~~ A) By the Plaintiff.** If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

**(~~2~~ B) By *Stipulation*.** Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a **stipulation** of dismissal. And if the parties so **stipulate**, the court may vacate a judgment already entered.

**(~~3~~ C) By Court Order.** At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

**(2) Dismissing a Defendant.** The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

**(4 3) Effect.** A dismissal is without prejudice unless otherwise stated in the notice, **stipulation**, or court order.

**(j) Deposit and Its Distribution.**

**(1) Deposit.** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

**(2) Distribution; Adjusting Distribution.** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.

**(l) Costs.** Costs are not subject to Rule 54(d).

**COMMITTEE NOTE**

The language of Rule 71A has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 71A has been redesignated as Rule 71.1 to conform to the designations used for all other rules added within the original numbering system.

**Rule 72. Magistrate Judges: Pretrial Order**

**(a) Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

**(b) Dispositive Motions and Prisoner Petitions.**

**(1) Findings and Recommendations.** A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' **consent**, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

**(2) Objections.** Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties **agree** to or the magistrate judge considers sufficient.

**(3) Resolving Objections.** The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

## COMMITTEE NOTE

The language of Rule 72 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 73. Magistrate Judges: Trial by *Consent*; Appeal

**(a) Trial by *Consent*.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties **consent**, conduct the proceedings ~~in a civil action~~, including a jury or nonjury trial. A record of the proceedings must be made in accordance with 28 U.S.C. § 636(c)(5).

**(b) *Consent* Procedure.**

**(1) In General.** When a magistrate judge has been designated to conduct civil actions, the clerk must give the parties written notice of their opportunity to **consent** under 28 U.S.C. § 636(c). To signify their **consent**, the parties must jointly or separately file a statement **consenting** to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have **consented** to the referral.

**(2) Reminding the Parties About *Consenting*.** A district judge, magistrate judge, or other court official may ~~again advise~~ remind[49] the parties of the magistrate judge's availability, but must also advise them that they are free to withhold **consent** without adverse substantive consequences.

**(3) Vacating a Referral.** On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.

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[49] Footnote 145 before Style Subcommittee. This change reflects concern that "again advise" might be implemented in ways that create pressure to consent. "Remind" was substituted to emphasize that the advice must be framed and delivered in neutral terms.

**(c) Appealing a Judgment.** In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

### COMMITTEE NOTE

The language of Rule 73 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 74.**

### COMMITTEE NOTE

Rule 74 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use

**Rule 75.**

### COMMITTEE NOTE

Rule 75 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

**Rule 76.**

### COMMITTEE NOTE

Rule 76 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

## TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

## Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

**(a) When Court Is Open.** Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

**(b) Place for Trial and Other Proceedings.** Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties **consent.**

**(c) Clerk's Office Hours; Clerk's Orders.**

**(1) Hours.** The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

**(2) Orders.** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

**(A)** issue process;

**(B)** enter a default;

**(C)** enter a default judgment under Rule 55(b)(1); and

**(D)** act on any other matter that does not require the court's action.

**(d) Serving Notice of an Order or Judgment.**

**(1) Service.** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on

each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

**(2) Time to Appeal Not Affected by Lack of Notice.** Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

### COMMITTEE NOTE

The language of Rule 77 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 78. Hearing Motions; Advancing an Action

**(a) Providing a Regular Schedule for Oral Hearings; Other Orders.** A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.

**(b) Providing for Submission on Briefs.** By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

### COMMITTEE NOTE

The language of Rule 78 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 79. Records Kept by the Clerk

**(a) Civil Docket.**

**(1) In General.** The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

**(2) Items to be Entered.** The following items must be marked with the file number and entered chronologically in the docket:

**(A)** papers filed with the clerk;

**(B)** process issued, and proofs of service or other returns showing execution; and

**(C)** appearances, orders, verdicts, and judgments.

**(3) Contents of Entries; Jury Trial Demanded.** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

**(b) Civil Judgments and Orders.** The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

**(c) Indexes; Calendars.** Under the court's direction, the clerk must:

**(1)** keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

**(d) Other Records.** The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

## COMMITTEE NOTE

The language of Rule 79 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

## Rule 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who ~~recorded~~ reported it.[50]

## COMMITTEE NOTE

The language of Rule 80 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

~~Former Rule 80(c) was limited to testimony "stenographically reported." It is revised to reflect the use of other methods of recording testimony at a trial or hearing.~~

[50] Footnote 147 before Style Subcommittee. The Style Rule attempt to bring Rule 80 into line with modern reporting methods was reconsidered for several reasons. There may be practical difficulties if the hearing or trial was conducted before a state court or before an administrative body. An audio or video recording often is transcribed by someone other than the person who made the recording; the published rule would require that the person who made the recording review the transcript, creating an inefficient duplication of effort. Perhaps most importantly, special care is required in revising the Civil Rules provisions that relate to the Rules of Evidence.

## TITLE XI. GENERAL PROVISIONS

### Rule 81. Applicability of the Rules in General; Removed Actions

**(a) Applicability to Particular Proceedings.**

**(1) Prize Proceedings.** These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681.

**(2) Bankruptcy.** These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

**(3) Citizenship.** These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

**(4) Special Writs.** These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

**(A)** is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

**(B)** has previously conformed to the practice in civil actions.

**(5) Proceedings Involving a Subpoena.** These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

**(6) Other Proceedings.** These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

**(A)** 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

**(B)** 9 U.S.C., relating to arbitration;

**(C)** 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior;

**(D)** 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance;

**(E)** 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;

**(F)** 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

**(G)** 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

**(c) Removed Actions.**

**(1) Applicability.** These rules apply to a civil action after it is removed from a state court.

**(2) Further Pleading.** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

**(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

**(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 5 days after the notice of removal is filed.

**(3) Demand for a Jury Trial.**

**(A) As Affected by State Law.** A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

**(B) Under Rule 38.** If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

**(d) Law Applicable.**

**(1) State Law.** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

**(2) District of Columbia.** The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia:

(A) the law applied in the District governs; and

(B) the term "federal statute" includes any Act of Congress that applies locally to the District.

### COMMITTEE NOTE

The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal.

Former Rule 81(e), drafted before the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), defined state law to include "the statutes of that state and the state judicial decisions construing them." The *Erie* decision reinterpreted the Rules of Decision Act, now 28 U.S.C. § 1652, recognizing that the "laws" of the states include the common law established by judicial decisions. Long-established practice reflects this understanding, looking to state common law as well as statutes and court rules when a Civil Rule directs use of state law. Amended Rule 81(d)(1) adheres to this practice, including all state judicial decisions, not only those that construe state statutes.

Former Rule 81(f) is deleted. The office of district director of internal revenue was abolished by restructuring under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, July 22, 1998, 26 U.S.C. § 1 Note.

## Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

### COMMITTEE NOTE

The language of Rule 82 has been amended as part of the general restyling of the Civil Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 83. Rules by District Courts; Judge's Directives**

**(a) Local Rules.**

**(1) In General.** After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

**(2) Requirement of Form.** A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

## COMMITTEE NOTE

The language of Rule 83 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 84. Forms**

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

**COMMITTEE NOTE**

The language of Rule 84 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 85. Title**

These rules may be cited as the Federal Rules of Civil Procedure.

**COMMITTEE NOTE**

The language of Rule 85 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

**Rule 86. Effective Dates**

These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

**(1)** proceedings in an action commenced after their effective date; and

**(2)** proceedings after that date in an action then pending unless:

**(A)** the Supreme Court specifies otherwise; or

(B) ~~in the district court's opinion,~~ the court determines that[51] applying them in a particular action would be infeasible or work an injustice.

## COMMITTEE NOTE

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

[51] Footnote 151 before Style Subcommittee. The SCSSC and Subcommittee B agreed to this change. Although present Rule 86(a) refers to "the opinion" of the court, "opinion" seems vague; it is better to require that the court determine that application of a new rule provision would be infeasible or work an injustice. This determination should not be limited to the district court — present Rule 86(a) is the opinion of "the court," and it seems clear that appellate courts should be able to review the district court's determination.

## STYLE RULE 86

This version of Style Rule 86 is proposed to reflect the suggestions made in the memorandum on supersession (which can be found at Tab 3Bi).

**Rule 86. Effective Dates.**

(a) ***Effective Dates.*** These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

**(1)** proceedings in an action commenced after their effective date; and

**(2)** proceedings after that date in an action then pending unless:

**(A)** the Supreme Court specifies otherwise; or

**(B)** the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) ***December 1, 2007 Amendments.*** The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

**Committee Note**

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

Rule 86(b) is added to express the relationship between the [general] restyling of all the Civil Rules and other laws. The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

## THE RESTYLED E-DISCOVERY AMENDMENTS

Attached is the package of proposed amendments to Style Rules 16, 26, 33, 34, 37, and 45 to account for the e-discovery amendments to the current Civil Rules that are expected to take effect in December 2006.

The attached document sets out proposed amendments to the Style Rules circulated for public comment in Feb. 2005. Most of the proposed changes have been approved by the Standing Committee Style Subcommittee (SCSSC). All changes that have not been approved by the SCSSC are identified and discussed in the footnotes accompanying the proposed amendments.

The changes to be made in the Feb. 2005 Style Rules by the Conference-approved e-discovery amendments are shown by single-underlinings and single-strikethroughs. The further changes proposed to be made as part of the current restyling process are shown by double-underlinings and double-strikethroughs.

The comments that lead off many footnotes are Professor Richard Marcus' explanations of style changes he initially proposed, in consultation with the other consultants. The Style Subcommittee's reactions follow and are in bold.

# AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

## Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

**(b) Scheduling.**

* * * * *

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

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

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

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

**(ii)** modify the extent of discovery;

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

**(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;[1]

**(~~iii~~ v)** set dates for pretrial conferences and for trial; and

**(~~iv~~ vi)** include other appropriate matters.

* * * * *

## Rule 26. Duty to Disclose; General Provisions Governing Discovery

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[1] Joe Kimble appears to object to the iteration: "protection as trial-preparation". Without checking, I think that "protection as trial-preparation material" is something of a term of art, and thus not a pure matter of style. If the concern is that "tion" appears too often in close proximity, it may be that this problem can be lessened by changing "after production" to "after information is produced."

**The Style Subcommittee agreed to Prof. Marcus' suggested text change, i.e., substituting "after information is produced" for "after production".**

Prof. Marcus agreed with the Style Subcommittee's change.

**(a) Required Disclosures.**

**(1) Initial Disclosure.**

**(A) In General.** Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

**(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

**(ii)** a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

**(iii)** a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

**(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

* * * * *

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

* * * * *

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

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

**(B) Electronically Stored Information.**[2] A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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

* * * * *

[2] Kimble comment: Notice how the new heading to (B) throws off the symmetry of the current headings: (A) When Permitted, (B) When Required, (C) On Motion or the Court's Own Initiative. Once again, these three provisions are more general provisions. Saying "Specific Limitations for Electronic Information" would at least signal that (B) is narrower. It would make the headings more coherent.

**The Style Subcommittee recommends moving (B) to the end of (2) as a new (D). The Style Subcommittee stated, "I agree with Joe that it is a bad fit between (A) and (BC). This makes even more sense given [foot]note [3] and the elimination of current (D)."**

Prof. Cooper and Prof. Marcus prefer the present sequence. (A) is a very general statement of limits the court may order. (B) is a very pointed statement of a limit the court may order. (C) is again very general, but addresses what a court must order. . . . We could as well have (A) General Limits; (B) Electronically Stored Information Limits; (C) Required Limits. There is a sequential difference that matters here, … and … in terms of the content of the rules themselves it argues for retaining the sequence in text. (A) deals with things the parties should worry about before propounding discovery, i.e., from the beginning of the case and before the Rule 26(f) conference. (B) deals with something responding parties should have in mind as they respond to discovery. (C) basically deals with something that matters if somebody makes a motion (although technically it applies to action by the court on its own initiative). That ordinarily comes later than the activity addressed in (B). Thus, in terms of the sequence of activity in a normal lawsuit, the provisions are now in the right order.

The e-discovery rules have received a lot of attention already. They are slated to be in effect a year before the Style Project. Perhaps the strongest argument for sticking with the current version is that it will have become familiar to many practitioners and judges by the time the Style Project takes hold; why force them to relearn it? … [W]hatever the abstract style merits may be, the present sequence is likely to have become familiar in practice, and to be built into e-searches. It could be quite disruptive to have that designation changed just as people are settling into familiarity with the new provisions. In light of that concern, and the notion that there is no inherent priority as between the contents (v. the tag lines) of current (B) and (C), it would seem that changing the tag lines would be a less intrusive step (particularly if they don't really control the application of the rule provisions).

Moreover, as to statutes, such things [as tag lines] are said not to alter the meaning of the content. If that's true of the rules, it seems that strengthens reasons to resist a change in sequence if the sequence of content makes sense. The sequence in the package before the Supreme Court makes sense, although the Advisory Committee did not spend much time considering that before (as with "form or forms," for example). So those thoughts point toward leaving the sequence as currently presented.

**(~~C~~ D) On Motion or the Court's Own Initiative.** The court may act on motion or on its own after reasonable notice.[3]

* * * * *

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

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

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

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

**(B) Information Produced.** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim[4] may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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[3] The addition of new Rule 26(b)(2)(B) in the E-Discovery package makes retention of former (C) as a new (D) inappropriate. Under (B), the responding party now has a burden in invoking the protections provided by (B). As written, (D) suggests that the court may act even when the responding party has not satisfied that burden. In the amendment package approved by the Judicial Conference, the provision about the court acting on its own is part of what is now (C), and that is where it belongs. It does not suitably apply under (B), and a separate (D) suggests that it can be applied there.

**The Style Subcommittee agreed with Prof. Marcus' and Prof. Kimble's suggestions and recommends that (D) be eliminated and (C) be revised as follows: "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:".**

Prof. Marcus agreed with the Style Subcommittee's change.

[4] **The Style Subcommittee recommends the following: "If information is produced in discovery ~~that~~ is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim . . . ."**

Prof. Marcus agreed with the Style Subcommittee's change.

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

* * * * *

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

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

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

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

**(C)** any issues ~~relating to~~ about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;[5]

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[5] **The Style Subcommittee recommends substituting "any form" for "the form or forms". That would make it clear that it could be singular or plural, rather than referring to "the form or forms". Rules 34 and 45 would also need to be changed.**

Prof. Marcus notes that the problem of how to refer to form of production arose a number of times in the public comment period, and the "form or forms" locution was the solution the Advisory Committee selected. The published version said "form of production" in Rule 16 and in Rule 34(b). This locution caused objections that it suggested that a single form would suffice for all electronically stored information sought by a Rule 34 request or otherwise. Whether "any form" adequately conveys the idea (here and in Rule 34(b)) that a party may request or use multiple forms for different types of electronically stored information could be debated.

In connection with that issue, it is worth noting that the Committee Note accompanying the proposed amendment to Rule 34(b) now before the Supreme Court includes the following: "The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. * * * The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same

(D) any issues ~~relating to~~ about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert ~~such~~ these claims after production -- whether to ask the court to include their agreement in an order;

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

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

* * * * *

**Rule 33. Interrogatories to Parties**

* * * * *

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

* * * * *

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

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

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

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form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information."

It may be that this Committee Note would make it entirely clear that "any form" includes multiple forms. On the other hand, with the removal of the "form or forms" rule language which the Note addresses, that may not be as clear as leaving in "form or forms."

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

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

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

**(b) Procedure.**

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

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

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

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

**(2) Responses and Objections.**

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**(D) Form or Forms for Production of Electronically Stored Information.** The response may state an objection to the requested form or forms for producing electronically stored information. If the responding party objects to the requested form or forms ~~for producing electronically stored information~~ -- or if no form was specified in the request -- the ~~responding~~ party must state the form or forms it intends to use.[6]

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[6] **The Style Subcommittee recommends a different tag line for new (D) -- "Responding to a Request for Electronically Stored Information." (There was no tag line in the E-Discovery package.)**
Prof. Marcus agreed to the Style Subcommittee's above change.
To avoid repetition the phrase "for producing electronically stored information" was removed as follows:

The response may state an objection to the requested form or forms for producing electronically stored information. If the responding party objects to the requested form or forms -- or if no form ~~for producing~~

**(~~D~~ E) Producing the Documents.** Unless the parties otherwise agree, or the court otherwise orders, these procedures apply to producing documents or electronically stored information for inspection:[7]

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

(ii) If a request does not specify the form or forms for producing electronically stored information, ~~a responding~~ the party must produce ~~the information~~ it in a form or forms in which it is ordinarily maintained or in a ~~form or forms that are~~ reasonably usable form or forms; and[8]

(iii) A party need not produce the same electronically stored information in more than one form. * * * * * *

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

* * * * *

**(e) Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

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~~electronically stored information~~ was specified in the request -- the party must state the form or forms it intends to use.

**In addition, the Style Subcommittee recommends the following: "The response may state an objection to ~~the~~ a requested form ~~or forms~~ for producing electronically stored information. If the responding party objects to ~~the~~ a requested form ~~or forms~~ -- or if no form was specified in the request -- the party must state the form or forms it intends to use."**

[7] **The Style Subcommittee recommends that the rule begin as in Rule 33(a)(1): "Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information for inspection:".**

The rule that was published and approved by the Judicial Conference said only "Unless the parties otherwise agree, or the court otherwise orders," and did not include the remainder. The trouble is that if you don't make this addition, you have a bad lead-in to (ii). It would read: "Unless the parties otherwise agree, or the court otherwise orders . . . if a request does not specify the form or forms for producing electronically stored information." In other words, you would have back-to-back-to-back conditions.

Prof. Marcus agreed with the Style Subcommittee's version.

[8] **The Style Subcommittee recommends the following: "If a request does not specify ~~the~~ any form ~~or forms~~ for producing electronically stored information, the party must produce it in a form ~~or forms~~ in which it is ordinarily maintained or in a reasonably usable form ~~or forms~~;".**

**(e f) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**Rule 45. Subpoena**

**(a) In General.**

**(1) Form and Contents.**

**(A) Requirements.** Every subpoena must:

**(i)** state the court from which it issued;

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

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

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

**(B) Command to Produce Materials or Permit Inspection, Copying, Testing or , Sampling.** A command to produce documents, electronically stored information, or tangible things or to permit inspection ~~, copying, testing, or sampling~~ may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

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

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

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

(C) for production, ~~or~~ inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.[9]

* * * * *

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

**(A)** within the district of the issuing court;

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

**(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, ~~or~~ inspection, copying, testing, or sampling; or

**(D)** that the court authorizes on motion and for good cause, if a federal statute so provides.

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

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

**(c) Protecting a Person Subject to a Subpoena.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to

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[9] I did not notice this before, but shouldn't this provision be further changed (as was an earlier part of the provision) to include copying, testing and sampling, as follows:

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

**The Style Subcommittee agreed to Prof. Marcus' "less wordy alternative" version, "for the district where these acts are ~~the production or inspection is~~ to be done ~~made~~."**

avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

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

**(A) Appearance Not Required.** A person commanded to produce ~~and permit inspection, copying, testing, or sampling of~~ designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce designated materials[10] or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to ~~producing~~ inspecting, ~~or~~ copying, testing, or sampling any or all of the designated materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested.[11] The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

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

**(ii)** Inspection and copying may be done only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.[12]

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[10] The pending amendment, looking to the pertinent current language in Rule 45(c)(2), is as follows:

> A person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling may, within 14 days . . .

All of this is presumably subsumed under "produce" in the restyled rule. A question for the present is whether the style version adequately conveys all those activities.

[11] **The Style Subcommittee recommends that the final clause of the first sentence read: "or to producing electronically stored information in ~~the~~ any form ~~or forms~~ requested".**

[12] The restyled rule seems to solve a problem we addressed by amendment of former Rule 45(c)(2)(B):

> Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection ~~and~~, testing, or sampling commanded.

* * * * *

**(d) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** Unless the parties and the person responding to a subpoena otherwise agree, or the court otherwise orders, these procedures apply to producing documents or electronically stored information for inspection:[13]

**(A) In General.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand;

**(B) Form for Producing Electronically Stored Information.** If a subpoena does not specify the form or forms for producing electronically stored information, ~~a~~ the person responding to ~~a~~ the subpoena must produce ~~the information~~ it in a form or forms in which ~~the person~~ it is ordinarily ~~maintains it~~ maintained or in a form or forms that are reasonably usable form or forms;[14]

**(C) Electronically Stored Information Produced in Only One Form.** A person responding to a subpoena need not produce the same electronically stored information in more than one form;

**(D) Inaccessible Electronically Stored Information.** A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably

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The style version uses "compliance" to cover all these possible tasks.

**The Style Subcommittee agreed to leave the Style Rule as shown in the text.**

[13] This provision appears in Rule 34(b)(2)(D) above and in the E-Discovery amendments to Rule 34. It did not make its way into the Rule 45 amendments, and there seems to be no reason why that should be true. It seems that it serves a similar purpose here. It is added in hopes that it is not too late to try to add this minor conformitory point.

Kimble comment: Adding a new (1) throws everything out of whack. The items at the (A), (B), (C), (D) level are a hybrid of a list and subparts. Notice how (A) and (B) end with a semicolon and (C) ends with a period, as if you were finishing a list. Then (D) looks like a subpart, with more than one sentence. It might work if you eliminated the headings and used periods instead of semicolons.

Marcus comment: My assumption was that, for purposes of parallelism to Rule 34(b)(2)(D/E), it should be added here because Joe Kimble wanted it added there. If that is wrong, the prologue can be removed.

**The Style Subcommittee agreed to delete Prof. Marcus' suggested language introducing (d)(1). In other words, the Style Subcommittee agreed to delete the following clause: "~~Unless the parties and the person responding to a subpoena otherwise agree, or the court otherwise orders, these procedures apply to producing documents or electronically stored information for inspection:~~".**

Prof. Marcus' response to the Style Subcommittee: That seems substantive to me.

[14] **The Style Subcommittee recommends the following: "If a subpoena does not specify ~~the~~ any form ~~or forms~~ for producing electronically stored information, the person responding to the subpoena must produce it in a form ~~or forms~~ in which it is ordinarily maintained or in a reasonably usable form ~~or forms~~;".**

accessible because of undue burden or cost. On motion to compel discovery or ~~to quash~~ for a protective order, the person ~~from whom discovery is sought~~ responding to the subpoena must show that the information ~~sought~~ is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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

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

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

**(~~B~~ ii)** describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; ~~and may not~~ must not use or disclose the information until the claim is resolved; ~~If the receiving party disclosed the information before being notified, it~~ must take reasonable steps to retrieve ~~it~~ the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.[15]

**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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[15] The wording here corresponds to the wording proposed for Rule 26(b)(5)(B) above.

**The Style Subcommittee recommends the following for the first sentence: "If information is produced in response to a subpoena ~~that~~ is subject to a claim of privilege or of protection as trial-preparation material, . . . ".**

## SUPERSESSION AND THE STYLE PROJECT

### *I. Introduction*

The public comments to the Style Project include expressions of concern that the Style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 2072(b), provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern is that adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date.

This issue is not new to the Style Project. It was raised and addressed in the earlier Style Amendments to the Appellate and Criminal Rules. The first two parts of this memorandum explore the reasons why the concern about supersession does not present a problem for the Civil Rules Style Project. At the same time, this memorandum recognizes that just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Rules and existing laws is unchanged. The third part of this memorandum examines alternative ways to accomplish this goal. The memorandum recommends a statement in Rule 86 that addresses and should foreclose the supersession concern.

Adoption of a new Rule 86(b) would make explicit the relationship between the Style amendments and existing statutes and address the supersession concern described at length in the memorandum that follows. The proposed rule and committee note take into account the new E-Government Act rule, Rule 5.2, which is also expected to take effect on December 1, 2007. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the

Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. The Rule 86(b) draft accommodates this by stating that the December 1, 2007 "amendments" do not "change" the effective date, and the Committee Note explicitly addresses Rule 5.2.

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

**Rule 86. Effective Dates**

* * * * *

(b) *December 1, 2007 Amendments.* The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

**Committee Note**

The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

## *II. The Supersession Concern*

The Rules Enabling Act begins with §§ 2072(a) and (b):

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The second sentence of § 2072(b) is often referred to as the "supersession" clause. By general acceptance, it operates on a last-in-time principle akin to conflicting statutes. An Enabling Act rule provision supersedes an earlier conflicting statute; a statute supersedes an earlier conflicting Enabling Act rule provision. The words "no further force or effect" can refer only to a statute existing at the time a rule is adopted.

Whether a rule conflicts with an existing statute depends on the meaning of each. The Style Project is intended to make it easier to understand the Civil Rules and to make style and terminology consistent throughout the Rules. The changes are stylistic only. Each rule will have the same substantive meaning on December 1, 2007, that it had before that date. Because substantive meaning does not change when the Style Rules take effect, the relationship between the Civil Rules and any previously-enacted conflicting statute also remains the same.

Prior experience with rule amendments fully supports this conclusion. The Rules Enabling Act rules have been amended a number of times. Those amendments range in purpose and nature from adding entirely new rules to changing the substantive meaning of portions of rules to making small or technical changes that have little if any effect on meaning. A rule does not supersede a statute with a conflicting provision whenever there is an amendment to any part of that rule, no matter how small, how technical, or how unrelated to the conflicting statutory provision. Instead, supersession is determined by looking to the nature and purpose of the amendment and comparing

the date of the statute with the date the particular substantive rule provision that is inconsistent with that statute first "took effect."

There are very few conflicts between the Civil Rules and existing statutes and the issue is unfamiliar to most lawyers and judges. There are good reasons for the scarcity of conflicts. Many procedure statutes disappeared after enactment of the Rules Enabling Act in 1934 and recodification of the Judicial Code in 1948. Since then, Congress generally has been content to entrust development of procedural rules to the Enabling Act process, and the Supreme court and the Judicial Conference have been careful to avoid knowing supersession of statutory provisions. The occasions for colorable claims of conflict between statute and rule are rare. But some do occur. The most commonly cited conflict is the relationship between Civil Rule 11 and the Private Securities Litigation Reform Act. Rule 11 was last substantively amended in 1993. The PSLRA was enacted in 1995. It includes provisions that are inconsistent with Civil Rule 11.[1] In 1995, the PSLRA superseded the inconsistent provisions of Rule 11 that took effect in 1993. If the remaining steps in the Style Project occur on schedule, Rule 11, amended only for style, will take effect on December 1, 2007. Because the Style amendments do not change the substantive meaning of Rule 11, that date does not affect the relationship between Rule 11 and the PSLRA. That relationship is determined by the time when the Rule's substantive provision that is inconsistent with the PSLRA first took effect, compared to the effective date of the PSLRA. Because the substance of the inconsistent provisions of Rule 11 took effect two years before the PSLRA, the Style amendments – which are unrelated to the substance of the conflicting provisions – do not change the supersession relationship. The statute still trumps the rule.

Stated more generally, the supersession determination depends on comparing the date the substantive rule provision that conflicts with the statute became effective with the date the

[1] The PSLRA also establishes special pleading standards and provides for a stay of discovery on terms that may be inconsistent with the Civil Rules.

conflicting statute became effective. The later date controls, not subsequent dates when the rule is again amended in some way that does not affect or have any bearing on the substance of the conflicting provision. The Style Project does not change supersession effects because the changes – including those made in the few rules that may conflict with statutory provisions in effect on December 1, 2007 – are intended to be stylistic only.

### *III. Precedents on Supersession*

Past style revisions provide supporting precedent for the conclusion that the Style Project will not change the supersession relationship between the Civil Rules and statutes in effect on December 1, 2007. Most of the Civil Rules were amended in 1987 to achieve a gender-neutral style. There is no evidence of any suggestion that those amendments had an effect on supersession. The Appellate Rules were the first to be completely restyled. As described below, the few cases that address supersession after the Appellate Rules were restyled recognize that the style changes do not affect supersession. One case appears to have adopted a different approach, but that case did not focus on the issue.

The Criminal Rules were the next to be restyled. The Rules Committees recognized that the pre-Style version of Criminal Rule 48(b) had been followed by the Speedy Trial Act, which was inconsistent in important respects. The 2002 Committee Note accompanying the Style Rules stated that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." There is no evidence of any attempt to argue that Rule 48(b) now supersedes the Speedy Trial Act. Instead, the Speedy Trial Act continues to apply over inconsistent provisions of Style Rule 48(b).

The decisions that focus on the supersession question follow the approach set out above. There are a few cases that could be read to support a different approach, but they did not actually focus on the question. The existence of these cases, however, provides another reason to make an

explicit disclaimer of any supersession effect from adopting the Style version of the Civil Rules.

*Autoskill Inc. v. National Education Support Systems, Inc.*, 10th Cir. 1993, 994 F.2d 1476, is clear. Autoskill won a preliminary injunction against NESS. Six days later NESS filed a voluntary Chapter 11 petition. Commencing the Chapter 11 proceeding constituted an "order for relief." Sixty-six days after the injunction issued and 60 days after the order for relief, NESS filed a notice of appeal. The appeal was timely under 11 U.S.C. § 108(b)(2), which allows 60 days after the order for relief to file any notice that would have been timely if filed when the order for relief entered. The appeal was not timely under the 30-day provision in Appellate Rule 4. The Rule 4 period was established in 1968 when the Appellate Rules first took effect. Section 108(b)(2) was adopted in 1978. But Appellate Rule 4 was amended in 1979. The court looked to the nature of the 1979 amendments and the Committee Note. It found that "[t]he change was made for clarity only and did not change the meaning of the rule." Thus "the two changes that have been made * * * were not substantive, and do not affect our application of § 2072." 994 F.2d at 1485 & n. 8. The statute prevailed; the style change did not alter the pre-Style supersession relationship.

*Local 38, Sheet Metal Workers v. Custom Air Systems, Inc.*, 2d Cir. 2003, 333 F.3d 345, follows the *Autoskill* decision. It agreed that "[a] statute enacted subsequently to a rule * * * trumps the rule." The 1979 Rule 4 amendments did not establish Rule 4 as the more recent enactment: "To be sure, there were minor revisions to Rule 4(a) subsequent to the enactment of § 108(b), but as the Tenth Circuit explained, those changes were not substantive and thus do not affect our analysis." 333 F.3d at 348 n. 2.

*U.S. v. Wilson*, 5th Cir. 2002, 306 F.2d 231, 235-237, is less clear, but seems to support the same approach. The government appealed a suppression order by notice filed 32 days after the order was signed and dated but only 29 days after the order was entered on the docket. 18 U.S.C. § 3731 set the time for a government appeal at 30 days after the order was "rendered." Appellate Rule 4(b)

set the time at 30 days after entry of the order. The court held the appeal timely by applying Rule 4(b). "[W]here a conflict exists between a Rule and a statute, the most recent of the two prevails." Implicit repeal is disfavored in the same way when a Federal Rule is offered to repeal a statute as when a statute is offered to repeal another statute. But there is a difference between "rendering" an order and "entering" an order. "Rule 4(b) trumps § 3731." In reaching this result, the court looked to several sets of dates. "Rendered" was first used in the Criminal Appeals Act long before the Appellate Rules were first adopted in 1968. Section 3731 was most recently amended in 1994. Appellate Rule 4(b) was last amended [by the Style amendments] in 1998. The court expressed its confidence that the Supreme Court considered the conflict between rule and statute in determining that Rule 4(b) would run appeal time from entry of the order. "In any event, the Rules were promulgated after § 3731 was enacted; the Rules, including Rule 4(b), have been amended more recently than § 3731; and, the terms rendered and entered date to the respective establishment of the Criminal Appeals Act and the Rules, the latter being the most recent." Finally, § 3731 itself says that the provisions for government appeals are to be liberally construed. The *Wilson* opinion properly looked to the respective dates on which the conflicting provisions were first adopted. Rule 4(b) with "entry" came after adoption of § 3731 with "rendered," so Rule 4(b) controls. Some ambiguity is introduced by the portion of the opinion that notes the dates of the most recent amendments, even though they did not change the respective and controlling words — and even though the 1998 Rule 4(b) amendment was part of the Appellate Rules Style Project.

*Baugh v. Taylor*, 5th Cir. 1997, 117 F.3d 197, 201, also reflects the proper approach. This case addressed 28 U.S.C. § 1915(a)(3) and Appellate Rule 24. Section 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. Appellate Rule 24 provides that a party denied leave to proceed in forma pauperis on appeal could move for permission in the court of appeals. The Fifth Circuit found no conflict and no supersession, observing that the provision set out as § 1915(a)(3) by amendment in

1996 was in § 1915(a) long before Rule 24(a) was adopted in 1967 "to spell out the procedural implementation of * * * § 1915. The [1996 statute] merely moved this provision from subsection (a) of section 1915 to subsection (a)(3). We do not view this relocation as evidence of congressional intent to abrogate procedures in Rule 24 that have coexisted peacefully for three decades with the identical provision." Although the setting presented the converse question whether a more recent statute had superseded an earlier Enabling Act rule, the principle is constant. A cosmetic or technical change that does not change meaning does not count in determining whether statute or rule is more recent.

Two cases in one circuit deserve particular attention because of inconsistency with the approach demonstrated in the cases described above. In *Floyd v. U.S. Postal Service*, 6th Cir. 1997, 105 F.3d 274, the court reached a conclusion opposite to the ruling in the *Baugh* case. It found that § 1915(a)(3) was inconsistent with Appellate Rule 24(a) and that as the later in time, § 1915(a)(3) superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir. 1999, 178 F.3d 800, 802-804, the court reversed course because Appellate Rule 24(a) was amended [as part of the Style Project] in 1998, carrying forward without change the provision for moving in the court of appeals for leave to appeal in forma pauperis. The court did not follow the approach of the cases described above and analyze the relationship of the substantive provisions of the statute and rule, or when those substantive provisions became effective. Instead, the court simply stated that Appellate Rule 24 became the newest provision upon its amendment and superseded the once superseding statute. There is no explanation, no recognition of the effect of the fact that the revisions carried forward the rule's meaning without change, and no explanation of the reason for concluding that the supersession relationship should be reversed by a style amendment that was recognized to carry forward the once-superseded meaning.

*McConville v. U.S.*, 2d Cir. 1952, 197 F.2d 680, 682 presented an appeal-time question under then Civil Rule 73(a). "[E]ffective March 19, 1948," Rule 73(a) shortened the time to appeal

but also excepted the time to consider such motions as the timely Rule 52(b) motion made in that case. As measured by Rule 73(a), the appeal was timely. The appeal may not have been timely under the provisions of 28 U.S.C. § 2107 as it stood when Rule 73(a) was amended. Section 2107, however, was almost immediately amended to reflect the Rule 73(a) period but even as amended did not reflect the provision for tolling appeal time. The court first said that the new version of § 2107 should be construed to conform with Rule 73(a) "since the new statute was so obviously 'in conformity with * * * proposed amendment to Rule 73 * * *,' as the Reviser's Note states." But the court went on to say that "the rule was reenacted (with some changes not here pertinent) on December 29, 1948, effective October 20, 1949, and, in accordance with * * * § 2072, supersedes all inconsistent statutory enactments." Although that passage may seem to suggest that any amendment of a Rule establishes superseding effect even though the amendment does not touch an existing inconsistency between the rule and a superseding statute enacted before the amendment, this suggestion is weakened by footnote 1, which adds that an amendment of May 24, 1949, before the effective date of the October 20, 1949, amendment, "had no connection with this issue."

The cases are few in number but seem to support two conclusions. First, the Supreme Court is authorized by the Enabling Act to restyle the Rules to improve and clarify expression, without changing substantive meaning, and to adopt the restyled rules without affecting the supersession relationships between those rules and previously-enacted statutes. This conclusion is squarely supported by the rule that revision and consolidation of laws change their effect only if change is clearly intended.[2] Second, an explicit disclaimer of any supersession effect will be helpful. Such a disclaimer should avoid misapplied supersession analyses that can occur because supersession is

[2] *E.g., Finley v. U.S.*, 1989, 490 U.S. 545, 553-554, 109 S.Ct. 2003, 2009. The 1948 codification of the Judicial Code did not expand supplemental jurisdiction under the Federal Tort Claims Act: "Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 * * * (1912)."

so rarely encountered and because it is easier to compare the dates a rule amendment and a statute took effect than to examine the nature and purpose of the rule amendment and to compare the dates when the substance of the conflicting rule provision and statute were first enacted. The safer course is some explicit provision to ensure that the Style Project neither expands nor contracts the supersession effects of each rule. The clear effectiveness of the explicit disclaimer in the Criminal Rules Style Project provides a model.

## *IV. Supersession Provisions*

The apparent effectiveness of the explicit disclaimer frames the question for the Civil Rules Style Project: how best to ensure that the December 1, 2007, Style Amendments do not affect the supersession relationships between any Civil Rule and any statute enacted before December 1, 2007.

The easiest to execute would be the addition of language to the Committee Note for each rule stating that the Style amendments do not affect supersession relationships. A second approach would adopt an express rule provision stating that the Style amendments do not affect supersession relationships. A third approach would be to state the proposition in the message transmitting the Style Rules from the Supreme Court to Congress. A combination is also possible, such as a new rule combined with a Committee Note in Rule 1, the Notes for the Rules that are candidates for supersession arguments (such as Rule 11), or all the Committee Notes, referring to the new rule text. Each method has some advantages and also some disadvantages, but the best solution may be to adopt an express rule text and support it by cross-references in Committee Note.

### A. Committee Note Approach

The advantage of addressing supersession in Committee Notes is that it is easy to provide a clear statement without worrying about the fine points of rule drafting. There also is some reason to hope that Committee Notes will be an obvious point of inquiry when something as exotic as a supersession question arises. The well-established "later-in-time" approach will in any event require

the parties and court to identify the time when the rule provision and statute took effect. It would seem natural to consult the contemporary Committee Note to identify the purpose of the rule or amendment. Even those who (unfairly) view Committee Notes with the skepticism that often greets legislative "history" should be willing to accept a statement of the Style Project's purposes.

One disadvantage of relying on Committee Notes is that busy courts and lawyers do not always look beyond rule text and statutory language. Another is that a statement in a single Committee Note, whether appended to Rule 1, to Rule 86, or to some other rule, may not be sufficient. The Notes repeatedly admonish that the Style Project does not affect substantive meaning, but the supersession issue is not a problem for every, or even for many, rules.

Any use of Committee Notes to address this issue should include Rule 1. The question is whether to include the Note language in every rule or only in those rules likely to raise the issue, such as Rule 11. The Note language would also be a useful way to distinguish any non-Style Rule or amendment adopted at the same time. For example, if new Civil Rule 5.2 should take effect at the same time as the Style Rules, the Rule 5.2 Committee Note would not have the "Style-only" language. If it seems useful, distinctions also could be made in the Committee Notes for the rules amended on the "Style-Substance" track.

Committee Note language for each of the rules (or for those identified as candidates for raising the issue) can be illustrated as an addition to the language that is standard for each of the Style Rules:

> The language of Rule __ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. As a result, they do not change the effect of this rule in determining whether a law that conflicts with this rule has "no further force or effect" by virtue of 28 U.S.C. § 2072. The rule's effect for this purpose is the same on December 1, 200X as it was on November 30, 200X.

An alternative might be to add a somewhat longer generic statement to the Committee Note for Rule 1, supplemented by an explicit cross-reference in the separate Committee Note for each rule or for some of the Rules. The Rule 1 Note language might look like this:

> 28 U.S.C. § 2072(b) provides that "All laws in conflict with such rules [adopted under § 2072(a)] shall have no further force or effect after such rules have taken effect." The style changes made in Rule 1 and in each of the other Civil Rules are stylistic only and do not change the effect of the Civil Rules on any other law. The existence of conflict is determined as of the original effective date of the substantive provision that raises the conflict question.

Still another alternative would be to adopt express rule text and then add a brief cross-reference either in Committee Note 1 or in all or some of the Committee Notes: "As stated in Rule 86(b), these changes do not affect the supersession relationships between this rule and any conflicting laws."

### B. Rule 86(b)

A provision negating any supersession effects from the Style amendments could be added to an existing rule or could become a new separate rule. An express rule provision has at least two advantages. One is that there can be no quibbling about the authority of a mere Committee Note. A second is that the Committee Note to a new rule provision could be somewhat more elaborate than a common statement included in all or some Committee Notes. Candidates that have been suggested from among the current rules include Rules 1, 81, and 86. Of these, Rule 86 seems the most likely. It deals with effective dates and the effect of amendments on pending actions. A "no-new-supersession" provision essentially says that earlier effective dates control for supersession purposes. That logical connection may not actually draw many readers to Rule 86, but it may bolster the case for Rule 86 over competing candidates. A separate rule could be used as an alternative. The most attractive locations are likely to be up front, as a new Rule 1.1, or at the very end as a new Rule 87.

The model sketched here is framed as a new Rule 86(b):

**Rule 86. Effective Dates.**

(a) ***Effective Dates.*** These rules * * *.

(b) ***December 1, 2007 Amendments.*** The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

**Committee Note**

The language of Rule 86 * * *.

The subdivisions that provided * * *.

Rule 86(b) is added to express the relationship between the [general] restyling of all the Civil Rules and other laws. The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

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As noted, a complicating drafting issue arises from the expectation that new Rule 5.2 will take effect on December 1, 2007. It is important to keep Rule 5.2 on the same schedule as the E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2, in its initial form, will be measured from December 1, 2007. The Rule 86(b) draft is intended to accommodate this difficulty in stating that the December 1, 2007 "amendments" do not "change" the effective date. The Committee Note is explicit. It would be possible to add an explicit exception for Rule 5.2 in the rule text: "The amendments adopted on December 1, 2007, except for [new] Rule 5.2, do not change * * *"; or perhaps at the end: ", but Rule 5.2 takes effect on December 1, 2007."

### C. Supreme Court Message

A third method of addressing supersession is to include a statement in the message that transmits the Style Rules from the Supreme Court to Congress. This method is not likely to prove effective as the sole means of making the point. It seems likely that more than a few lawyers and judges will not think to look for the message, particularly as the Style Rules come to be viewed as the way the Rules always have been. But it could be a wise precaution to repeat the no-supersession point in the Court's message. The message would reassure Congress that there is no intent to smuggle through any clandestine amendments of statutory procedure.

### *V. Conclusion*

The Supreme Court has authority to restyle the rules to improve expression and achieve easier, more consistent, and better application. Style changes do not affect the supersession relationships between the few rules that may conflict with statutes. The best way to foreclose arguments that the Style Amendments change the supersession effect of a rule is by express rule language. A new Rule 86(b) will foreclose uncertainty — on and after the date of adopting the Style amendments the Civil Rules will have the same relationship to conflicting statutes in force on the date of adoption as they had the day before adoption.

## Appendix: Authority to Avoid Supersession

Section 2072 establishes rulemaking authority and decrees that a § 2072(a) rule supersedes a conflicting law. It can be claimed that the supersession provision takes the question out of the Supreme Court's hands — that if there is a conflict, a later-adopted rule must supersede an earlier statute no matter what the Court intends. The Court, on this view, must take the Enabling Act as an integrated whole that denies authority to adopt a rule that does not supersede.

The better view is that the Supreme Court can decide whether an Enabling Act rule supersedes an inconsistent statute. The Civil Rules themselves include several provisions illustrating this point by expressly providing that a rule operates unless "a statute provides otherwise."

So too the Court should have authority to amend one part of a rule without expanding the supersession effect of other parts. Rule 11 can be used as an example. Present Rule 11(c)(1)(A) provides a "safe harbor" period of 21 days to withdraw or correct a challenged position. It is possible that consideration of this period in the Time Project might lead to a conclusion that the period should be 14 days or 28 days. If Rule 11 were amended solely by substituting "14" or "28" for "21," there would be no reason to conclude that all of Rule 11 takes effect anew, reversing the supersession effects of statutes adopted between the next-most-recent version and the new rule. It would be impossible to live with such supersession consequences. Surely the answer is that supersession is measured by the effective date of the first amendment that added the rule provision that conflicts with a statute. Nor should the answer depend on the form chosen for adopting the amendment. A mere change in the number of days for the safe harbor likely would be published and adopted without setting out all of Rule 11, nor even all of Rule 11(c). But there is no clear formula for determining how much of a rule is published to show the place and effect of a proposed amendment. The choice is made by looking for sufficient context to illustrate the amendment, and may be affected by a desire to make other small adjustments (including style improvements) at the same

time. These expository choices should not be constrained by fear of unintended supersession consequences.

The same conclusion holds for style amendments. The clear intent to carry forward present meaning mandates that the same meaning have the same supersession consequences. The Style Project cannot be made impossible by the assertion that on the effective date the entire set of Civil Rules supersedes any conflicting law that until then had superseded a Civil Rule. The Supreme Court's authority to implement the intent to achieve supersession neutrality inheres in the language, purpose, and structure of the Enabling Act.

The Enabling Act reflects a sturdy accommodation of congressional and judicial responsibilities. Congress has the authority to create the inferior federal courts, and with that the authority to regulate most matters of procedure. But this is the authority to create "courts," vested with some part of the "judicial power." The courts have some measure of inherent responsibility to function as courts acting to discharge a judicial power. Congress could not, in the name of reducing cost and delay, direct that cases be decided by tossing a coin. Apart from whatever modest constraints these concerns may impose on legislative regulation of judicial procedure, the courts have real advantages in developing and implementing rules of procedure. The central feature of the Enabling Act is the supervised delegation of rulemaking authority, subject in the first instance to acquiescence by Congress and further subject to congressional revision.

Supersession reflects a special element in this delegation. The central purpose has been to ensure that an Enabling Act rule that first undertakes to establish procedure in a particular area will displace statutes that had been necessary before then. Examples are provided by the initial Civil

Rules,[3] the Appellate Rules,[4] the merger of the Admiralty Rules into the Civil Rules,[5] and such specific matters as the 1951 adoption of Civil Rule 71A to establish uniform condemnation procedures in place of a welter of statutory provisions.[6]

Other supersession questions arise from court rules that are not part of a generalized program to substitute court rules for a procedural system generally governed by statutes. *Henderson v. U.S.*[7] is the leading Supreme Court example. The 1920 Suits in Admiralty Act directed that service be made "forthwith" on the Attorney General and the United States Attorney. In 1982 Congress enacted its own Rule 4 amendments as part of a package designed to transfer service obligations from the marshals to plaintiffs. The version in effect at the time of service in the *Henderson* case, then Rule 4(j), allowed 120 days for service and authorized an extension for good cause. Henderson served the Attorney General 47 days after filing, and — after obtaining a good-cause extension — served the United States Attorney 148 days after filing. Finding that at least the 148-day period was not "forthwith," the Court held that Rule 4(j) superseded the Act. The central point of dispute focused

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[3] Penfield Oil Co. v. §, 1947, 330 U.S. 585, 589 & nn 4, 5, 67 S.Ct. 918, 920-921 & nn. 4, 5.

[4] *American Paper Institute v. ICC*, D.C.Cir.1979, 607 F.2d 1011; *Griffith v. NLRB*, 9th Cir.1977, 545 F.2d 1194, 1197 n. 3; *Feeder Line Towing Serv. v. Toledo, Peoria & Western R.R.*, 7th Cir.1976, 539 F.2d 1107, 1108-1109; *Motteler v. J.A. Jones Constr. Co.*, 7th Cir.1971, 447 F.2d 954; *Jack Neilson, Inc. v. Tug Peggy,* 5th Cir.1970, 428 F.2d 54, 55; *Waterman S.S. Corp. v. Cottons*, 9th Cir.1969, 419 F.2d 372; *Albatross Tanker Corp. v. S.S. Amoco Delaware*, 2d Cir. 1969, 418 F.2d 248.

[5] *Hansen v. Trawler Snoopy, Inc.*, 1st Cir.1967, 384 F.2d 131, 132. (Several of the cases cited in note 4 above involved supersession by Appellate Rule 4 of statutory appeal-time provisions for admiralty cases. The shift from focus on former Civil Rule 73(a) in the *Trawler Snoopy* case reflects the short interval between the 1966 merger of admiralty practice into the Civil Rules and the 1968 effective date of the Appellate Rules.)

[6] *See Kirby Forest Indus., Inc. v. U.S.*, 1984, 467 U.S. 1, 4 n. 2, 104 S.Ct. 2187, 2191 n. 1; *U.S. v. 93.970 Acres of Land*, 1959, 360 U.S. 328, 333 n. 7, 79 S.Ct. 1193, 1196 n. 7; *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693; *Southern Nat. Gas Co. v. Land, Cullman Cty.*, 11th Cir.1999, 197 F.3d 1368.

[7] 1996, 517 U.S. 654, 116 S.Ct. 1638.

on the question whether service forthwith was a condition of the United States' waiver of immunity; the Court ruled that it was not. Going on to find an irreconcilable conflict, the Court further concluded that Rule 4(j), "as is the whole of Rule 4," is "a nonjurisdictional rule governing 'practice and procedure', * * * rendering provisions like the Suits in Admiralty Act's service 'forthwith' requirement 'of no further force or effect,' § 2072(b)." There is one special twist in the decision. Although the passage just quoted seems to rely directly on § 2072(b), the Court recognized in an earlier passage that Rule 4(j) "was not simply prescribed by this Court pursuant to the Rules Enabling Act. * * * Instead, the Rule was enacted into law by Congress * * *. As the United States acknowledges, however, a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."[8]

Many of the remaining cases involve claims that a statute has superseded a court rule. In that setting the Supreme Court has referred to "the necessary clear expression of congressional intent" to supersede.[9] Lower courts frequently look for a "clear statement,"[10] and refer to a presumption that

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[8] The Court then quoted the brief for the United States: "'We agree * * * that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction with Rule 4(j) and its interaction with other laws.'" 517 U.S. at 668-669, 116 S.Ct. at 1646.

[9] *Califano v. Yamasaki*, 1979, 442 U.S. 682, 698-701, 99 S.Ct. 2545, 2556-2558 (a class action may be maintained under Civil Rule 23 for review of determinations that Social Security benefits were overpaid; the statute does not impliedly preclude this procedure).

[10] *Jackson v. Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136 (PLRA supersedes in part Appellate Rule 24; even absent a clear statement, irreconcilable conflict requires that a later statute be followed); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 7th Cir.1986, 800 F.2d 641; *Gaubert v. Federal Home Loan Bank Bd.*, C.A.D.C.1988, 863 F.3d 59, 67; *Grossman v. Johnson*, 1st Cir.1982, 674 F.2d 115, 118-123; *U.S. v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 10th Cir.1970, 427 F.2d 539 (The requirement in 42 U.S.C. § 2000e-6(a) that complaint set forth facts pertaining to a pattern or practice of resistance to the full enjoyment of statutory rights "ought to be construed to harmonize with the Rules, if feasible"; compliance with the notice-pleading standards of Civil Rule 8 suffices, in part because an insistence on fact pleading would "directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading").

court rules apply.[11] Calls for "clear statement" also appear in decisions dealing with arguments that a rule has superseded a statute.[12]

Not surprisingly, many of the cases dealing with seeming conflicts between a court rule and a statute invoke the "implied repeal" approach to reconciling seemingly inconsistent statutes. In rejecting an argument that Civil Rule 54(d) establishes authority to award costs beyond those authorized by statute, the Supreme Court invoked the familiar axiom that "[r]epeals by implication are not favored."[13] Lower courts offer the same advice.[14]

These general approaches leave open fascinating questions whether general "implied repeal" approaches should extend to potential conflicts between court rules and statutes. The delicate relationships established by the Enabling Act delegation from Congress to the Supreme Court surely

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[11] "There is a firm presumption that the Federal Rules of Civil Procedure apply in all civil actions * * *." *Walsh v. Ford Motor Co.*, D.C.Cir.1986, 807 F.2d 1000, 1009 (the Magnuson-Moss Warranty Act's protective policies do not warrant departure from the class-certification standards in Civil Rule 23); *Weiss v. Temporary Inv. Fd.*, 3d Cir.1982, 692 F.2d 928, 936, vacated on other grounds 1984, 4365 U.S. 1001, 104 S.Ct. 989.

[12] *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278 (no clear statement, but Appellate Rule 24 and the PLRA "are not reconcilable" — recall that after Appellate Rule 24 was renewed by the 1998 Style amendments, the court concluded that the supersession was reversed, *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800).

[13] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 1987, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497-2498.

[14] *U.S. v. Wilson*, 5th Cir.2002, 306 F.3d 231, 237: The court generally disfavors implicit amendment or repeal of statutes, but where there is irreconcilable conflict, "'the later act to the extent of the conflict constitutes an implied repeal of the earlier one.' * * * We thus view a Federal Rule of Appellate Procedure the same way that we do a federal statute."

*Jackson v. Stinnett*, 5th Cir.1996, 102 F.3d 132, 135: "The second limit on Congress's power to amend the Rules is the general disfavor with which we view implicit amendment or repeal of statutes."

"Repeals by implication are not favored by the courts." *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278.

"Although repeals by implication are not favored, we do not believe that Congress must explicitly state that a procedural rule is superseded in order to 'clearly express' that proposition." The Multiemployer Pension Plan Amendments providing for prompt payment of withdrawal assessments establish a system that supersedes the stay by supersedeas bond provisions of Civil Rule 62(d).

require independent analysis before settling on an overall approach.[15] Because the outcome for the Style Project is so clear, a bare sketch should suffice here.

The first difference from an assertion of a conflict between two statutes is that the court rules flow from a particularly constrained source of authority. The rule must be a "general rule[] of practice and procedure" or "evidence," and it must not "abridge, enlarge or modify any substantive right." Even a rule that in most applications is a valid general rule of procedure may fail to supersede a particular statute because it would affect a substantive right established by the statute.[16]

The limits on the Enabling Act's delegation relate to a more complex set of questions. The relationships between subsequent Congresses (and for that matter within a single Congress) are a continuum of the same legislative powers. In the Enabling Act Congress expressed a special respect for the distinctive capacities and procedures the judiciary can bring to bear in developing rules of procedure. In return, the judiciary must show special respect for statutes. The question whether a later statute supersedes a court rule is not quite the same as the question whether a later court rule supersedes a statute. Judge Easterbrook, for example, has rejected reliance on the general disfavor

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[15] Three articles provide helpful perspectives. A fascinating exchange is provided by Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281 and Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012. A more recent article, delving deeply into supersession analysis, is Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 2002, 51 Emory L.J. 677.

[16] A clear example is *Durant v. Husband*, 3d Cir.1994, 28 F.2d 12, 15. The Virgin Islands Tort Claims Act waives sovereign immunity, but the waiver is conditional. One condition is that no judgment by default can be entered against the government. "To the extent that the Virgin Islands waiver of sovereign immunity is flatly conditioned on the non-availability of a default judgment, the matter is one of substance and not procedure. Applying Rule 55(e) to permit default judgments against the Virgin Islands government in the present case would significantly 'enlarge' the substantive rights conferred on claimants under section 3411(a) of the Tort Claims Act."

The same thought was expressed in *U.S. v. Microsoft Corp., D.C.Cir.*1999, 165 F.3d 952, 959-960. The court concluded that there is no conflict between the discovery protective-order provisions of Rule 26(c)(5) and the Publicity in Taking Evidence Act of 1913. But it observed that a statute is superseded by a later conflicting court rule "unless such supersession would 'abridge, enlarge or modify [a] substantive right.'"

of repeals by implication:

> The Rules of Civil Procedure * * * cannot "repeal" any statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress itself may decide that procedural rules in statutes should be treated as fallbacks, to apply only when the rules are silent. And it has done just this, * * * in what has come to be called the supersession clause of the Rules Enabling Act * * *[17]

A somewhat similar thought was expressed in characterizing implied repeal as arising not from conflict between the court rule and a later statute but from conflict between the Enabling Act and the statute that conflicted with an earlier rule.[18]

As a further complication, there is some lingering uneasiness about the Enabling Act structure that enables a rule prescribed by the Supreme Court to supersede an earlier statute without any affirmative act by Congress. This delegation is more than a delegation of Congressional authority because it excludes the President from the process — there is no bill enacted by House and Senate and presented to the President.

These considerations suggest at least two observations. Although a conflict once found is resolved by the later-in-time rule, the distinctions between legislating and rulemaking may require different approaches in determining whether there is a conflict. The courts have special responsibility for, and control over, the meaning of court rules. Even when rule and statute clearly affect only procedure — when the statute does not establish a specific substantive right that must not be abridged, enlarged, or modified — the courts may, by construction, subordinate a later rule to an

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[17] *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693, 694.
A similar view may be implied in *U.S. v. Kim*, 9th Cir.2002, 298 F.3d 746, 748-749. After finding that the appeal-time provisions of Appellate Rule 4(b) are inconsistent with and supersede the provision in 18 U.S.C. § 3731, Judge Noonan concluded: "The Rule trumps the statute. No conflict exists because § 2072 has abolished it." Here too reliance is placed on one Act of Congress to supersede another — albeit the superseding statute, § 2072, may have been enacted first and negates future legislation only through the mediating direction of an Enabling Act rule.

[18] *Jackson v.Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136: "To the extent that the Rules Enabling Act (as expressed in [Appellate] Rule 24(a)) actually conflicts with the PLRA, we hold that the statute repeals the Rule."

earlier statute more readily than they would subordinate a later statute to an earlier rule.

For present purposes, it is more important to consider the respect the Enabling Act process should show for statutes as court rules are developed and amended. The authority to supersede a statute should be exercised with great care. The best cases for supersession will involve matters that are clearly and purely procedural. Supersession may be further supported when confronting a statute embodying antiquated concepts of procedure, or when there is a need to establish uniform procedure in face of a welter of disparate statutory procedures, or when experience shows a clearly better way of doing things.

The responsibility to respect statutes carries with it authority to expressly disclaim supersession. An intent not to supersede controls.[19] If there is any apparent reason to defer to a known statute, or to a concern that there may be unknown or future statutes, disclaimer can be accomplished by qualifying a general rule by such terms as "unless a statute provides otherwise." But such terms are not always possible. The Style Project demonstrates the need to implement a no-supersession intent by other means. The Supreme Court must be able to improve the drafting of the Civil Rules, as it has done for the Appellate Rules and the Criminal Rules, without changing their meaning and without affecting existing supersession consequences.[20] That is the intent of the Project. The difficult task that remains is to identify the best means of implementing that intent. Part IV provides beginning sketches but should not deter efforts to develop more creative solutions.

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[19] "[T]he first inquiry should be to determine the intent of the Court and Congress in the particular case and to harmonize to avoid an irreconcilable clash of Court and congressional authority if possible." Genetin, 51 Emory L.J. 677, 732, note 16 above.

[20] A parallel to the Style Projects may be found in 1987, when 58 Civil Rules and four Supplemental Rules were amended to make them gender-neutral. The 1987 Committee Notes say blandly: "The amendments are technical. No substantive change is intended." There is no indication that anyone thought that those amendments created new effective dates for supersession purposes.

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**TO:** All Readers

**FROM:** Joseph Kimble, Style Consultant
Thomas Cooley Law School

**DATE:** February 21, 2005

**RE:** GUIDING PRINCIPLES FOR RESTYLING THE CIVIL RULES

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This memorandum is meant to introduce readers to the restyled Federal Rules of Civil Procedure. It briefly describes the process for producing the restyled rules and then highlights some of the main style considerations and constraints.

## The Style Process

This project was a style project, and the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes. Here is an outline of those steps.

First, the style consultants prepared an original working draft — the redraft of the current rules.

Second, the Committee's reporter, along with one of two other experts on civil procedure, reviewed the draft in detailed memorandums that identified possible changes in meaning.

Third, the style consultants revised the original draft in light of the experts' comments. This produced draft #2, which footnoted any outstanding issues.

Fourth, draft #2 was submitted to the Style Subcommittee of the Standing Committee on Rules, which itself included an academic expert on civil procedure. The Style Subcommittee reviewed the entire draft, including the outstanding issues. The Style Subcommittee resolved many of the issues but decided that some were better resolved by the Advisory Committee. The Style Subcommittee's work resulted in draft #3. The reporter footnoted draft #3 for review by the Advisory Committee.

Fifth, the Advisory Committee broke down into Subcommittees A and B, each of which reviewed half the rules. If a "significant minority" of Subcommittee A or B thought that certain wording created a substantive change, then the wording was not approved. One of two representatives of the ABA's Litigation Section submitted comments on the drafts, attended each Subcommittee meeting, and participated in the discussion. The work of the Subcommittees resulted in draft #4.

Sixth, the full Advisory Committee reviewed the work of the Subcommittees, concentrating on issues that the Subcommittees thought should be resolved by the full Committee. This resulted in draft #5, the final draft.

Seventh, the restyled rules were reviewed by the Standing Committee — and changed in response to its suggestions — as each set of rules was produced.

This process has taken two and a half years and produced more than 600 documents. Anyone who reviews this archive will realize how much time and care and expertise were involved in preparing the restyled rules. The Committee's watchword appears in every Committee Note: "These changes are intended to be stylistic only." Everything that applied before this style project applies after the project.

## Style Matters

### *In General*

At the outset, the Advisory Committee adopted these authoritative guides on drafting and style: for drafting, Bryan Garner's *Guidelines for Drafting and Editing Court Rules*; for usage and style, Garner's *Dictionary of Modern Legal Usage* (2d ed. 1995); for spelling, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). These sources will explain many of the Committee's decisions — everything from starting sentences with *But* to the use of hyphens and dashes to the preference for verbs rather than abstract nouns (*serve*, not *effect service*; *sued*, not *brought suit*).

Of course, it's difficult to even begin to describe the myriad style questions that arose during the project. The Committee developed a chart (see Appendix A) of more than 50 so-called global, or recurring, issues (*allege* or *aver*? *issue an order* or *make an order*?). Then there were the individual style questions — the possible edits — that every sentence, clause, and phrase in the rules seemed to present. Start with the first sentence of the rules. Should it be *all suits of a civil nature*? No: *all civil actions*. Should it be *with the exceptions stated in Rule 81*? No: *except as stated in Rule 81*. And so on, sentence by sentence.

Readers should notice, as they compare the rules side by side, that the restyled rules are usually shorter and easier to read. Some of the restyled rules may look longer on the page only because of the formatting — the breakdown into subparts and lists. Take Rule 9(a). The current rule is 127 words of text; the restyled rule is 78 words.

This is not to say that the goal of the project was to cut words; that was a natural result of the effort to clarify and simplify. Here are just two short examples:

| Rule 8(e)(2) | Restyled |
|---|---|
| When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. | If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. |

| Rule 71 | Restyled |
|---|---|
| When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party. | When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party. |

The overarching style goals were to improve consistency and clarity and to draft the rules in a plainer, modern style. The Committee believes that those goals have been met, that the improvement is readily apparent, and that judges, lawyers, and law students will find the restyled rules much easier to use.

### *Formatting*

Readers will immediately notice the difference in formatting. Look, for instance, at Rule 12(a) or 14(a). The restyled rules are better organized into subparts. They use more headings and subheadings to guide the readers. They use cascading, or hanging, left-side indents so that a rule's hierarchy is made graphic. They use more vertical lists. And the lists are always at the end of the sentence, never in midsentence the way they are in current Rules 27(a)(1), 37(d), and 45(c)(3)(B).

*Consistency*

Consistency was a difficult challenge. Consistency is the cardinal rule of drafting, but after more than 70 years of amendments, the current rules have become stylistically inconsistent. To take a trivial example, the rules use *attorney fees*, *attorney's fees*, and *attorneys' fees*. Another example: the rules use *for cause shown*, *upon cause shown*,*for good cause*, and *for good cause shown*. Another example: the rules use *costs, including reasonable attorney's fees*; *reasonable costs and attorney's fees*; *reasonable expenses, including attorney's fees*; and *reasonable expenses, including a reasonable attorney's fee*. As a last example, the rules refer in various ways to the parties' *consent* or *agreement* or *stipulation*,som etimes with the qualifier *written* or *in writing* — for a total of six possibilities.

These examples could be multiplied almost endlessly. And in every instance, the Committee had to decide whether any difference was intended — or even what that difference might be. Often, it was fairly obvious that the inconsistency had no significance. When in doubt, the Committee asked one of its experts on procedure to research the question. If the Committee was then able to conclude that no difference was intended, the Committee used a single term. If the Committee could not be sure, it did not conform the terms, to avoid changing substantive meaning.

Rule 56 is an especially important example of the benefits of consistency. The standard set out in 56(c) is, of course, *no genuine issue as to any material fact*. But then 56(d) uses several variations on *no genuine issue*: *without substantial controversy*, *actually and in good faith controverted*,*not in controversy*. Restyled 56(d)(1) fixes the inconsistency by staying with *not genuinely at issue*.

To further achieve consistency, the restyled rules try to present parallel material in a parallel way. Current Rule 4(i)(2)(A) starts by addressing service on a United States agency, corporation, officer, or employee, but it changes the order of those four in the last part of the same sentence. Current Rule 33(b) addresses the content of an answer to an interrogatory, then the time for serving it; 34(b) reverses that order when addressing a response to a request for inspection. Current Rule 71A(c)(3) talks about furnishing at least one copy for the defendants' use; 71A(f) talks about furnishing for the defendants' use at least one copy. Some rules refer to a *hearing or trial*; others refer to a *trial or hearing*. The Committee could not possibly catch all the inconsistencies, but it hunted for them.

### *Intensifiers*

Another difficult challenge was presented by what the Committee came to call "intensifiers." These are expressions that might seem to add emphasis but that, as a matter of good drafting, should be avoided for one of several reasons: they state the obvious, their import is so hard to grasp that it has no practical value, or they create negative implications for other rules. Examples (without citations):

- *the court may, in its discretion*: *May* means "has the discretion to"; *in its discretion* is a pure intensifier.

- *if the court deems it advisable, the court may*: Presumably, the court would not choose to do something inadvisable, so the *if*-clause is merely an intensifier.

- *the court may, in proper cases*: On the same theory, *in proper cases* is an intensifier.

- *unless the order expressly directs otherwise*: An order cannot implicitly direct; it means only what it says. And using *expressly* suggests that this order is somehow different from all the other orders in the rules.

- *show affirmatively*: Likewise, this rule is not meant to be different from all the other rules that require a party or a document to merely *show*.

- *substantial justice*: *Substantial* seems to add nothing — or nothing appreciable.

- *reasonable written notice*: Using *reasonable* might imply that, in every other rule that requires notice, the notice does not have to be reasonable.

- *if, for any reason*: Here, too, *for any reason* adds nothing specific and might imply that the bare use of *if* in other rules means something else. Perhaps only some reasons are good in those other rules.

Again, the current rules contain many other examples. And again, the Committee considered each one individually to determine whether the intensifier had any practical significance.

***Outdated and Repetitious Material***

As you would expect, the Committee also tried to eliminate material that was outdated, redundant, or otherwise repetitious. Many of these decisions are reflected in the Committee Notes.

Some examples of outdated material or language in the current rules: the reference to *at law or in equity or in admiralty* in Rule 1; the reference to *demurrers, pleas, and exceptions* in Rule 7(c); the reference to *mesne process* in Rule 77(c); the limitation in Rule 80 to testimony that was *stenographically reported* (thus excluding other means of recording testimony); and the reference in Rule 81(f) to the now-abolished district director of internal revenue.

The current rules also contain a number of redundant — or self-evident — cross-references. Thus, Rule 7(b)(3) requires that motions "be signed in accordance with Rule 11." But Rule 11 applies by its own terms to "every pleading, written motion, and other paper." Rule 8(b) states that a general denial is "subject to the obligations set forth in Rule 11." Of course it is; all pleadings are subject to Rule 11. Rule 33(b)(5) states that a party submitting interrogatories "may move for an order under Rule 37(a)." But Rule 37(a) allows sanctions for any failure to make disclosure or to cooperate in discovery. So why include the cross-reference to Rule 37 in just one or two discovery rules? The trouble with redundant cross-references is that there is no logical end to them.

The Committee tried to avoid or minimize repetition in various other ways as well:

- By shortening a second reference to the same thing. Thus, current Rule 72(a) allows a magistrate judge to issue an order and then refers three times to *the magistrate judge's order*. Since there is no other order in sight, the restyled rule uses *the order* for the later references. The same principle applies to successive subparts: rather than seeming to start over with each one, we can generally trust the reader to read them together. Restyled Rule 4(d)(1) allows a plaintiff to *request that the defendant waive service of a summons*; in (d)(2), (3), and (4), we shorten to *the request* or *a waiver*. Restyled Rule 16(f)(1)(A) refers to *a scheduling or other pretrial conference*; in (B), we shorten to *the conference*.

- Similarly, by adopting shorter forms of reference. Rather than repeatedly referring to *the court from which the subpoena issued* in Rule 45, we use *the issuing court*. Rather than *the party who prevailed on that motion* in Rule 50(e), we use *the prevailing party*.

- By using a list that pulls repeated terms into the introduction to the list, where the term is used just once. Compare current and restyled Rule 45(a)(2).

- By merging two provisions that are essentially the same. Current Rules 26(g)(1) and (2) have three similar sentences about disclosure and discovery; the repetitious parts of those six sentences have been merged into two sentences in restyled 26(g)(1). Likewise, current Rules 37(a)(2)(A) and (B) have a similar sentence about certifying an effort to obtain disclosure or discovery; those two sentences have been combined into one in restyled 37(a)(1). Current Rule 50(b) uses lists that repeat two items verbatim; the restyled rule merges the repeated items into one list.

- By using more pronouns. After referring to *a copy of the summons and of the complaint* in Rule 4(i)(1)(A)(i), we use *a copy of each* in the subparts that immediately follow. After referring to certain *materials* in Rule 26(b)(3)(A)(ii), we refer to obtaining *their substantial equivalent* instead of *the substantial equivalent of the materials*.

- By avoiding the purest form of repetition — saying the same thing twice. Thus, current Rule 33(d) refers to *an examination . . . or inspection.* The Committee could see no appreciable difference between those terms. The prime example may be current Rule 36, which repeats in (a) and (b) that an admission is "for purposes of the pending action only."

Once again, these examples could be multiplied.

***Syntactic Ambiguity***

The Committee tried to eliminate the syntactic ambiguities that lie hidden in the current rules. Some examples:

- Rule 11(c)(1)(B): *the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.* What does *thereto* refer to?

- Rule 34(a): it's too long to quote, but the question is whether *in the possession, custody or control of the [responding] party* modifies *any designated documents*.

- Rule 45(c)(3)(B)(iii): is the material beginning with *the court may* supposed to modify all the items in the list or only item (iii)?

- Rule 46: *the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor.* What does *therefor* refer to?

- Rule 72(a): *any portion of the . . . order found to be clearly erroneous or contrary to law.* Does *clearly* modify *contrary to law*?

***Other Kinds of Changes***

Below is a short list of some of the other style principles that the Committee followed, trying to fix the more obvious deficiencies in the current rules:

- Reorganize jumbled provisions. For some examples, compare the current rules with restyled Rules 6(c), 8(b), 16(b), 23.1, 26(e), 30(b), 37(d), 44(a)(2), 45(c)(2)(B), and 70.

- Break up overlong sentences. Compare the current rules with restyled Rules 4(m), 6(b), 26(b)(3)(A), 26(b)(4)(B), 31(b), 34(a), 56(a), and 56(g). Of course, the added vertical lists in the restyled rules automatically break up their sentences into manageable pieces. No doubt some of the sentences are still too long, and even some of the vertical lists are more complicated than we might have liked (see Rule 4(f), for instance). But readers should notice a substantial overall improvement.

- Cut down on cross-references. The experts urge drafters to minimize cross-references, and the Committee tried to eliminate as many as it reasonably could. Current Rule 51, for instance, uses eight cross-references; the restyled rule uses two. Again, a good many — perhaps too many — cross-references still remain, but many are gone.

- Minimize *of*-phrases. Garner's *Guidelines* puts it exactly like that. Thus, not *statute of the United States*, but *federal statute*. Not *must include the names of all the parties*, but *must name all the parties*. Not *after the appearance of a defendant*, but *after any defendant appears*. Not *the avoidance of unnecessary proof*, but *avoiding unnecessary proof*. Not *order of the court*, but *court order*.

- For the same reason, use possessives. The current rules use possessives rather sparingly. The restyled rules use them liberally. Not *the law of the foreign country*, but *the foreign country's law*. Not *the pleadings of the defendants*, but *the defendants' pleadings*. Not *the claims of the opposing party*,bu t *the opposing party's claims*.

- Don't state the obvious. This is one more among the many ways to omit unnecessary words. Current Rule 5(e): *The filing of papers ~~with the court as required by these rules~~ shall be made by* (i.e., *A paper is filed by*). Current Rule 6(b): *When ~~by these rules or by a notice given thereunder or by order of court~~ an act is required or allowed to be done* (i.e., *When an act may or must be done*). Current Rule 26(b)(3) (after a sentence about a party's showing a need for materials): *In ordering discovery of such materials ~~when the required showing has been made~~*. Current Rule 30(b)(1): *shall give . . . notice . . . to every other party ~~to the action~~*. Current Rule 36(b): *Any admission ~~made by a party~~ under this rule*. Current Rule 56(a): *A party . . . may . . . move . . . for a summary judgment ~~in the party's favor~~*.

- Avoid legalese. No *pursuant to*. No *provided that*. No *such* when it means "a" or "the." No *hereof* or *therefor* or *wherein*. Consider this specimen, from current Rule 56(e): "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

- Banish *shall*. The restyled civil rules, like the restyled appellate and criminal rules, use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission (*There <u>is</u> one form of action; this order <u>controls</u> the course of the action*).

## The Limits of Change

### *Renumbering*

The Committee did not change any rule numbers, even though some of the rules (4, 23, 26, 71.1) are probably too long and others might benefit from repositioning. This also means that the Committee did not convert any of the interposed rules (4.1, 7.1, 23.1, 23.2, 44.1, 65.1, and 71.1) to different numbers. Nor did it restore to active service the numbers of previously abrogated Rules 74, 75, and 76. At the rule level, the only change was from 71A to 71.1.

Any reordering was done at the subdivision level — (a), (b), (c) — or lower. (The comparison chart in Appendix B shows changes in subdivisions.) Even then, the Committee changed only when it was satisfied that the improved sequencing outweighed the possible short-term inconvenience. Throughout this project, the Committee had to balance two competing interests. On the one hand, the current designations are familiar,

and changing them will occasionally require users to make adjustments. On the other hand, this chance to set the rules in order — or better order — may not come along for another 70 years, and we should take the long view.

Consider just the first few changes on the comparison chart. Current Rule 5(e) is merged into restyled 5(d) because both subdivisions deal with filing. Current Rules 6(d) and (e) move up because current 6(c) is empty. Current Rule 8(d) moves to restyled 8(b)(6) because it fits more logically with other materials on denials; and the change is ameliorated because the rule keeps its heading even at the paragraph level, (b)(6). The last sentences of current Rules 12(b) and (c) — two long sentences — are merged into restyled 12(d) because they are almost identical; and this change, too, is ameliorated by moving current 12(d) to a new 12(i). On the whole, the Committee tried to make a modest number of sensible changes in the subparts only.

### *Dealing With Uncertainty*

As already suggested, the Committee had to repeatedly deal with ambiguities, inconsistencies, gaps, and other uncertainties in the current rules. Start with Rule 1 again — just two sentences. Should it be *These rules govern the procedure in all civil actions* or *in all civil actions and proceedings*? Should we change *inexpensive* to *economical*? Then Rule 2. One expert thought we should get rid of it entirely. Nothing in Rule 3. Rule 4(a). Would it be substantive to change *a failure to appear and defend* to *a failure to defend*? Is there a difference between *a failure to appear* and *failing to appear*? And so on.

Almost always, the Committee was able to answer these questions and clarify the rule or tighten the language. Occasionally, though, an ambiguity was so intractable that the Committee was not comfortable with changing the language. One memorable example: the two similar uses of *heretofore* in current Rule 59(a). The uses refer to the reasons for which new trials or rehearings *have heretofore been granted* in federal courts. This is classically bad drafting. Up until when? When the rule was first drafted? When the rule is applied? After research and extended discussion, the Committee decided that it could not be sure, so that ambiguity — and one piece of legalese — had to be carried forward.

### *Sacred Phrases*

This was the Committee's name for phrases that have become so familiar as to be unalterably fixed in cement. They are not exactly terms of art like *hearsay* and *bailment*. Terms of art typically are confined to a given field, consist in one or two words that are

difficult to replace with one or two other words, and convey a fairly precise and settled meaning. So-called sacred phrases do not meet these criteria.

At any rate, some of the examples below could have easily been improved without changing the meaning; in others, style improvements risked substantive change. But none were touched.

- Restyled Rule 8(b)(5): *knowledge or information sufficient to form a belief.*
- Restyled Rule 12(b)(6): *failure to state a claim upon which relief can be granted.*
- Rule 13(a)(1)(A): *arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.*
- Restyled Rule 19(b): *in equity and good conscience.*
- Restyled Rule 44(b): *no record or entry of a specified tenor.*
- Restyled Rule 56(c): *there is no genuine issue as to any material fact.*

So that's how the Committee went about restyling the civil rules. The Committee realizes that its work is not done — but it trusts that readers will see the value of all that has been done.

## Appendix A – Civil Rules Style Project Global Drafting Issues

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 1 | *"a party or a party's legal representative"* | Only in Rule 60(b). | Use "a party or its legal representative." | ✓ |
| 2 | *"of record" /*<br><br>*"on the record" /*<br><br>*"upon the record"*<br><br>*"into the record"* | 5(a), 11(a), 26(g)(1), 26(g)(2), 39(a), 43(e), 65(b), 69(a)<br><br>51(b), 51(c), 51(d)<br><br>25(a)(1), 25(a)(2), 30(b)(4), 30(c), 72(b)<br><br>72(a) | In general, use "on the record." Change 30(c)(2) from "in the record" to "on the record."<br><br>(Style rule 5(a), 39(a), and 43(c) don't use "of record." In context, the other uses of "of record" (e.g., "attorney of record") are okay. All uses of "upon the record" have been converted to "on the record" or been deleted. New 72(a) doesn't use "into the record.") | ✓ |
| 3 | *"action" / "case"* | "Case" rather than "action" is used to refer to a pending lawsuit in Rules 1, 9(h), 16(a)(2), 16(a)(5), 16(b)(6), 16(c)(13), 19(a), 26(a)(1)(E), 26(a)(2)(B), 26(a)(2)(C), 26(b)(2), 26(b)(3), 26(f), 26(g)(2)(C), 27(b) 30(a)(2)(B), 30(f)(1), 31(a)(2)(B), 32(c), 50(a)(2), 55(b)(2), 56(d), 57, 63, 65(e), 71A(h), 72(a), 72(b), 73(a), 73(b), 81(c), 83(b). | Uniformly retain "case" as it occurs in current rules.<br><br>Exceptions:<br>1) In Rule 1, the former reference to "suits of a civil nature" has been changed to "actions and proceedings."<br>2) In Rule 73(a) and (b), changed "case" to "action" | ✓ |
| 4 | *"adverse party" / "opposing party"* | "adverse party" – 8(b), 12(b), 15(a), 15(d), 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 41(a)(1), 56(a), 56(c), 56(e), 60(b), 62(b), 62(c), 65(a)(1), 65(b), 68<br><br>"opposing party" – 13(a), 13(b), 13(c), 13(i), 18(a), 37(a)(4)(A), 59(c). | Use "opposing party" unless "adverse party" is necessary for substantive reasons.<br><br>Exceptions: "adverse party" is retained in the style drafts of Rules 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 65(a)(1) and 65(b). *See* Prof. Marcus memo (Style 556) highlighting those places where it may be important to retain "adverse party." | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 5 | *"agree" / "stipulate" / "consent"* | *See* the list in STYLE 442. | **Note:** This issue will be addressed in the top-to-bottom review. | ✓ |
| 6 | *"allege" / "aver"* | *"allege"* or *"allegation"* – 11(b)(3), 11(c)(1), 23(d), 23.1, 56(e)<br><br>*"aver"* or *"averment"* – 8(b), 8(d), 8(e), 9(a), 9(b), (c), (d), (e), (f), 10(b), 22(1), 55(b)(2). | Uniformly use "allege" or "allegation" rather than "aver" or "averment."<br><br>Exceptions:<br>Rule 8(e) changes "aver" to "plead.<br>In Rule 9(a)(2), Style Subcommittee suggests changing "a specific negative averment" to "a specific denial."<br>Rule 10(b) changes "all averments of claims or defenses" to "a party must state its claims or defenses."<br>Rule 22(1) changes "the plaintiff avers that the plaintiff is not liable" to "the plaintiff denies liability." | ✓ |
| 7 | *"assert" / "state"*<br><br>Which of these verb(s) (or their variants) should be used in describing the act of putting forth in litigation a claim or defense? | *"state"* – 7(b), 8(a), 8(b), 8(e)(2), 9(b), 9(g), 10(b), 12(b), 12(h)(2), 13(a), 13(b), 13(g), 15(d), 18(b).<br><br>*"assert"* – 4(n), 5(a), 8(b), 12(a)(3)(A), 12(b), 13(d), 13(g), 14(a), 14(b), 14(c), 15(c)(2), 18(a), 19(c), 20(a), 20(b), 23(g)(1)(C)(i), 23.1(a), 24(c), 50(c), 50(d), 56(b). | Use "assert" and "state" as in the current rules.<br><br>Exception: Current Rule 13(a): "pleader is not stating any counterclaim" has been restyled as "pleader does not assert any counterclaim." | ✓ |
| 8 | *"attorney" / "counsel"* | *"attorney"* appears frequently.<br><br>*"counsel"* – 23(c), 23(g), 23(h), 26(a)(1)(E)(iii), 30(b)(4), 32(a)(3), 53(a)(2), and 56(d).<br><br>*"attorney or counsel"* – 28(c) | Uniformly use "attorney" when referring to a party's legal representative. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 9 | *"attorney's fees" / "attorneys' fees" / "attorney fees"* | 4(d), 11(c)(1)(A), 11(c)(2), 16(f), 23(g)(1)(C)(iii), 23(g)(2)(C), 23(h), 23(h)(1), 26(g)(3), 30(d)(3), 30(g)(1), 30(g)(2), 37(a)(4)(A),(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 37(g), 45(c)(1), 54(d), 54(d)(1), 54(d)(2)(A), 54(d)(2)(D), 56(g), 58(a)(1)(C), 58(c)(2) | Uniformly use "attorney's fee(s)." | ✓ |
| 10 | *"directed [by the court]" / "ordered [by the court]"* | *"directs[ed]"* – 4(c)(2), 4(f)(3), 4(g), 4(m), 5(c), 11(c)(1)(B), 11(c)(2), 12(a)(2), 16(a), 23(c)(2)(A), 23(c)(2)(B), 23(c)(3), 23(d), 23(e)(1)(B), 23(g)(1)(C)(iii), 23.1, 25(c), 26(a)(2)(B), 26(a)(2)(C), 26(a)(3), 26(c)(8), 29, 30(d)(1), 32(c), 33(b)(3), 34(b), 37(b)(1), 43(e), 43(f), 49(b), 50(b)(1)(C), 50(b)(2)(B), 50(d), 51(a), 53(b)(2), 53(c), 53(d), 53(e), 53(f), 54(b), 54(d)(1), 54(d)(2)(B), 56(d), 59(a), 62(h), 69(a), 70, 71A(h), 72(b), 73(c), 77, 79(b), 81(c) | In general, use "order" rather than "direct."<br><br>Exceptions: Do not make any change in 5(c)(2) (too clumsy); 26(c)(1)(F),(G), and (H) (the introductory words already refer to "ordering"); any of 49 ("direct" seems better for telling the jury what to do); 50(b)(3) ("direct the entry of judgment"); 53(b)(2) (again, too clumsy with "order" already in the sentence; you don't want to say the order orders); and 59(a)(2) (another one directing the entry of judgment). | ✓ |
| 11 | *"Court in the district ...." / "court for the district ...."* | *"in"* – 26(c)(1), 27(a)(1), 30(d)(4), 37(a)(1), 37(b)(1)<br><br>*"for"* – 45(a)(2) | Uniformly use "court for the district."<br><br>(Style 30 and 37 now omit the reference.) | ✓ |
| 12 | *"crossclaim" / "cross-claim"* | 5(c), 7(a), 8(a), 12(a)(2), 12(a)(3)(A), 12(a)(3)(B), 12(b), 13(g), 13(h), 13(i), 14(a), 16(a)(13), 18(a), 22(1), 41(c), 42(b), 54(b), 55(d), 56(a), 56(b) | Uniformly use "crossclaim" with no hyphen. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 13 | *"considered" / "deemed"* | *"consider[s][ed]"* – 9(f), 37(b)(1), 50(b), 52(a), 62(c), 78<br><br>*"deem[s][ed]"* – 5(c), 12(e), 15(d), 17(c), 27(a)(3), 38(c), 40, 41(a)(2), 41(d), 45(e), 47(a), 49(a), 55(b)(2), 56(d), 65(c), 68, 72(b), 77(a), | Uniformly use "considered." | ✓ |
| 14 | *"determine" / "decide"* | *"determine"* – 11(c), 12(d), 19(b), 23(c)(1)(A), 26(a)(1)(E), 26(b)(2), 36(a), 50(a)(1), 50(d), 54(b), 54(d)(2)(C), 55(b)(2), 65(b), 65(e), 68, 71A(h), 71(A)(i)(1), 71(A)(i)(3), 72(a)<br><br>*"decide"* – 53(a)(1)(B), 53(g)(3), 53(g)(4). | Retain the uses of "decide."<br><br>On the "determine" list, change the following to "decide": 12(d) [now 12(i)]; 50(a)(1)(A); 54(d)(2)(C); 65(b)(5); 65(e)(3); and 72(a). | ✓ |
| 15 | *"action ... brought in a United States district court" /*<br><br>*"district court" / "court of the United States" / "United States district court"* | 27(a)(4)<br><br>*"court of the United States"* – 17(b), 23.1, 27(a)(1), 32(a)(4), 41(a)(1)<br><br>*"United States district court"* – 1, 27(a)(1), 27(a)(4), 81(a)(4), 81(a)(5), 81(c), 82<br><br>*"district court"* – 7.1(a), 9(h), 16(b), 23(f), 27(b), 40, 52(b), 62(c), 62(f), 65(e), 66, 73(a), 73(c), 77(a), 77(c), 78, 81(a)(3), 81(a)(4), 81(a)(5), 83(a), | Rule 27(a)(4) authorizes use of a deposition in an action "subsequently brought in a United States district court." Restyled rule 27 adopts the phrase "later-filed district-court action."<br><br>The style drafts change "court of the United States" to "United States court," except in Rule 23.1 where it is simply "the court." *See* Marcus research memos on this issue. STYLE 335 and 428B<br><br>The style drafts change "United States district court" to "district court" in Rule 27, but retain United States district court in Rule 1.<br><br>The style drafts generally retain "district court," but sometimes translate it simply as "court."<br><br>Resolution: Change from "district court" to "court" in 77(c)(1) and 78. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 16 | *"entry [enter] upon land" / "entry onto land"* | 5(d)(1), 26(a)(5), 34(a) | Uniformly use "entry onto land." (Style 26 omits the reference.) | ✓ |
| 17 | *"fails to obey" / "is not obeyed" / "disobedient"*<br><br>*["disobey" does not appear in the rules]* | *"fail[s][ure] to obey"* – 16(f), 37(b)(2), 45(e)<br><br>*"is not obeyed"* – 12(e)<br><br>*"disobedient"* – 37(b)(2), 70 | Uniformly use to "fail[] to obey" as verb phrase.<br><br>Uniformly use "disobedient" as adjective.<br><br>*Note*: Style draft of Rule 12 still uses "is not obeyed" because the sentence is in passive voice. | ✓ |
| 18 | *"federal statute" / "United States statute" / "Act or act of Congress"* | 4(k)(1)(D), 4(n)(1), 4.1(a), 12(a)(1), 17(a), 24(a), 24(b), 24(c), 38(a), 39(a), 39(c), 40, 41(a)(1), 42(b), 45(b)(2), 54(d)(1), 55(b)(2), 62(c), 64, 65(e), 69(a), 71A(h), 81(a)(2), 81(a)(3), 81(e), 83(a)(1) | Uniformly use "federal statute." | ✓ |
| 19 | *"federal law" / "United States law" / "Constitution [and/or] laws of the United States"* | 4(e), 4(f), 4(h), 4(k)(2), 4.1(b), 17(b), 28(a), 28(b), 43(a), 71A(h), 83(b) | Uniformly use "federal law."<br><br>Exception:<br>Rules 4(k)(2)(B) and 17(b)(3)(A) will remain "the United States Constitution and laws." | ✓ |
| 20 | *"Federal Rules of Evidence" / "rules of evidence"* | *"Federal Rules of Evidence"* – 16(c)(4), 26(a)(2)(A), 30(c), 32(a)(1), 32(a)(4), 43(a), 44.1<br><br>*"rules of evidence"* – 32(a), 33(c), | Uniformly use "Federal Rules of Evidence." | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 21 | *"for good cause" / "for cause shown" / "for good cause shown" / "shows good cause" / "showing of good cause" / "for valid cause"* | *"for good cause"* – 26(a)(3), 26(b)(1), 32(c), 47(c), 59(c)<br><br>*"for cause shown"* – 6(b), 6(d), 31(a)(4), 45(b)(3), 78(c)<br><br>*"for good cause shown"* – 4(d)(2), 26(c), 33(b)(4), 35(a), 43(a), 44(a)(2), 55(c), 65(b), 73(b)<br><br>*"shows good cause"* – 4(m)<br><br>*"showing of good cause"* – 16(b)<br><br>*"for valid cause"* – 71A(h) | Uniformly use "for good cause."<br><br><u>Note</u>:<br><br>4(d)(2) and 4(m) have minor variants.<br><br>(43(a) omits the reference to good cause.) | ✓ |
| 22 | *"in its discretion"* | 6(b), 16(a), 23(f), 39(b), 43(f), 62(b), 62(c), 71A(h) | Uniformly omit "in its discretion." | ✓ |
| 23 | *"in/under [subdivision]["(a)", etc.]"*<br><br>*vs.*<br><br>*in/under "(a)", etc.* | Numerous rules. | **Note:** This issue will be addressed in the top-to-bottom review. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 24 | *"issue" / "make" / "enter"*<br><br>Which verb(s) (or variant) should be used in referring to a judge's creation (issuance, making, entry) of a court order? | *"enter"* – 11(c)(1)(B), 16(b), 16(e), 25(d)(1), 26(a)(1)(D), 26(f)(4), 37(a)(4)(B), 37(a)(4)(C), 37(b)(2), 53(b)(3), 53(e), 65(b)(2), 72(a),<br><br>*"issue"* – 4(b), 4(k)(1)(B), 4.1(b), 11(c)(2)(B), 16(b), 65(a), 65(c),<br><br>*"make"* – 12(e), 16(f), 17(c), 20(b), 23.2, 26(c), 27(a)(2), 27(a)(3), 27(b), 35(b)(1), 37(b)(2), 37(c)(2), 37(d), 41(d), 42(a), 53(e), 56(d), 56(f), 62(g), 71, 78, | Uniformly use "issue" rather than "make" or "enter" in reference to orders.<br><br>Exception:<br>1) use "enter" or "entry" in reference to entry of judgment. | ✓ |
| 25 | *"just" / "appropriate" / "[when] {if} justice so requires" / "which justice requires" / "in the interest of justice"* | *"just" / "justice requires" / "interest of justice"* – 8(c), 12(e), 13(f), 15(a), 15(d), 16(f), 21, 26(c), 26(d), 27(a)(2), 27(a)(3), 28(b), 35(b)(1), 37(a)(4)(C), 37(b)(2), 37(d), 56(d), 56(f), 60(b), 61, 65(b), 71A(h);<br><br>*"appropriate"* – 23(d), 23.2, 62(g), | Resolution: In 26(c)(1), omit "that justice requires"; in 28(b)(2), omit "in an appropriate case"; and in 56(f)(3), change "appropriate" back to "just".<br>*See* STYLE 462, Kimble memo on "qualifiers and intensifiers." | ✓ |
| 26 | *"make any [just?] order"*<br><br>Should "any order" always be qualified with a term such as "just"? | *"may make any order which justice requires"* – 26(c)<br><br>*"may make such orders in regard to the failure as are just"* – 37(d)<br><br>*"make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."* 62(g) | Resolution: no changes to style drafts. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 27 | *"minor" / "infant"* | *"infant"* – 4(e), 4(f), 4(g), 17(c), 55(b)(1), 55(b)(2)<br><br>*"minor"*– 27(a)(2) | Uniformly use "minor." | ✓ |
| 28 | *"file" / "make"*<br><br>(in reference to a motion) | *"make[s] a motion"* – 12(g), 27(b), 30(d)(4)<br><br>*"motion made"* – 6(b), 12(f),<br><br>*"motion filed"* – 52(b)<br><br>*"may ... move"* – 56(a), (b) | Style draft of 12(g) retains "make a motion."<br>Style draft of 27(b) adopts: "may move."<br>Style draft of 30(d)(4) translates the current rule language – "suspended for the time necessary to make a motion for an order" to "time necessary to obtain an order."<br><br>6(b) and 12(f) retain "motion made"<br><br>52(b) retains "motion filed"<br><br>Style draft of 56(a) adopts "motion may be filed" and 56(b) retains "may move"<br><br>Resolution: no changes to style drafts. | ✓ |
| 29 | *"must" / "may" / "should"*<br><br>*"must not" / "may not"*<br><br>*"must" / "should"* | The issue arises throughout the rules. | **Note:** This issue will be addressed in the top-to-bottom review.<br><br>*See* research reports from Prof. Rowe (STYLE 196) and committee staff (STYLE 209*i*). | ✓ |
| 30 | *"nonjury trial" / "trial without a jury"* | *"trial without a jury"* – 39(c), 52(c), 63<br><br>*"nonjury trial"* – 73(a) | Uniformly use "nonjury trial." | ✓ |
| 31 | *"on its own" / "on its own initiative" / "on its own motion"/ [note: "sua sponte" does not appear in the rules]* | 4(m), 5(c), 11(c)(1)(B), 11(c)(2)(B), 12(f), 16(f), 21, 26(b)(2), 26(g)(3), 39(a), 39(c), 59(d), 60(a), 73(b), 81(c) | Uniformly use "on its own." | ✓ |
| 32 | *"on motion" / "upon motion"* | The issue arises throughout the rules. | Uniformly use "on motion." | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 33 | *"On [upon] reasonable notice" / "on notice"*<br><br>There are numerous variations on these, as noted here. | *"[on] [upon] [after] notice"* – 4(m), 11(c), 12(a)(4)(A), 12(e), 14(a), 28(b), 35(a), 40, 44.1, 45(c)(2)(B), 53(b)(4), 53(h)(1), 59(d), 67<br><br>*"reasonable notice" – 16(d)*, 26(b)(2), 30(b)(1), 32(a), 37(a),<br><br>*"[with] prior notice"* – 30(b)(3), 45(b)(1),<br><br>*"prompt notice"* – 30(f)(3)<br><br>*"proper notice"* – 37(d) | Resolution: In general, preserve the language of the current rules. In some cases, however, the style drafts adopt "on notice" instead of "on reasonable notice."<br><br>One change: Delete "proper" in 37(d)(1)(A)(i). | ✓ |
| 34 | *"opportunity to be heard" / "opportunity for hearing"* | *"opportunity to be heard"* – 37(a)(4), 37(c), 53(b)(1), 53(b)(4), 53(g)(1), 53(h)(1), 59(d)<br><br>*"opportunity for hearing"* – 37(g) | Uniformly use "opportunity to be heard." | ✓ |
| 35 | *"pleader"*<br><br>Should "pleader" or "party" be used to refer to a pleading party? | *"pleader"* – 8(a), 8(b), 9(a), 12(b), 13(a), 13(e), 13(f), 19(c) | The style drafts substitute "party" for "pleader" in all instances where the current rule uses "pleader" except in Rules 8(a) and 13(a).<br><br>Resolution: No need to change. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 36 | *"permit" / "allow"* | *"allow[ed]"* – 4(a), 4(c)(1), 4(d)(2)(F), 4(f)(2), 4(i)(3), 4(l), 6(a), 6(b), 7, 14(b), 16(c)(15), 17(a), 25(b), 27(b), 30(d)(1), 30(e), 32(a)(3)(E), 32(d)(3)(C), 36(a), 37(b)(2)(B), 43(a), 45(b)(1), 45(c)(3)(A)(i), 47(b), 50(b)(1)(A), 54(d), 62(d), 68, 71A(d)(4), 71A(e), 71A(f), 71A(h), 77(c), 77(d),<br><br>*"permit[ted]"* – 5(d), 5(e), 6(b), 6(d), 8(d), 12(a)(4), 12(b), 12(e), 12(f), 12(g), 12(h)(1), 12(h)(2), 13(e), 15(a), 15(c)(1), 15(d), 16(b)(4), 22(1), 23(f), 24(a), 24(b), 26(b)(2), 26(c), 26(f), 30(c), 32(a)(1), 32(a)(4), 33(c), 33(d), 34(a), 34(b), 36(b), 37(a)(2)(B), 37(b)(2), 37(c)(1), 43(a), 44(a)(2), 45(a)(1)(C), 45(b)(2), 45(c)(2)(A), 45(c)(2)(B), 47(a), 54(d)(1), 56(e), 56(f), 59(c), 65.1, 67, 71A(h), 71A(j), 77(d) | Use "permit" rather than "allow," except in reference actions that are controlled by a rule. Change "permit" to "enable" in Rules 33(d) and 56(f). | ✓ |
| 37 | *"prescribed in" / "prescribed by" / "provided in" / "provided by"*<br><br>*"as provided" / "as prescribed" / "in accordance with" / "in the manner provided" / "pursuant to" / "under"* | various rules | **Note:** This issue will be addressed in the top-to-bottom review. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 38 | *"pretrial conference"*<br><br>To what extent can this term be used generically for all types of pretrial judge-party conferences (including scheduling, settlement, and status)? | 16, 26(a)(1), 26(f), 33(c), 36(a)<br><br>"Rule 16(b) conference" appears in 26(f)<br><br>"Rule 26(f) conference" appears in 26(a)(1) | Use "pretrial conference" when reference is generic, but not when it is specific.<br><br>Style 16 and 36(a) use "pretrial conference" in a generic sense.<br><br>Style 26 continues to refer to a "16(b)" conference and, internally, to the "26(f)" conference. These specific references were retained and seem appropriate.<br><br>(Style 33 no longer makes any reference.) | ✓ |
| 39 | *"question of law or fact"*<br><br>*"issue of fact"*<br><br>*"question of law"* | *"question[s] of law or fact"*– 20(a), 23(a), 23(b)(3), 24(b), 42(a)<br><br>*"issue[s] of fact"* – 38(c), 49(a), 49(b)<br><br>*"question of law"* – 44.1<br><br>*"factual contentions"* – 11(b)(3), 11(b)(4) | The style draft translates "question of law or fact " to "legal or factual question" in Rule 20(a), but the style draft retains "question of law or fact" in Rule 24(b), 42(a).<br><br>Style draft of Rule 38(c) translates "issues of fact" to "factual issues." Style draft of Rule 49(a) and (b) retains "issue[s] of fact."<br><br>The style draft retains "question of law" in Rule 44.1<br><br>The style draft retains "factual contentions" in Rule 11(b)(3) and (4).<br><br>Resolution: No changes to style drafts, except in Rule 20(a)(1)(B) change "legal or factual question" to "question of law or fact." | ✓ |
| 40 | *"reasonable expenses incurred ..."*<br><br>Regarding the motion? For the motion? | 11(c)(1)(A), 16(f), 26(g)(3), 30(g)(1), (2), 37(a)(4)(A), (B), and (C), 37(b)(2), (c)(1), (c)(2), (c)(d), and (g), 56(g) | Resolution: ok to vary these, but 11(c) and 26(g) should be consistent. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 41 | *"secure" / "obtain* | *The rules use "obtain[ed][ing][able]" throughout.*<br><br>*Rule 37 used both obtain and secure: "secure" at 37(a)(2)(A) and (B), but "obtain" at 37(a)(4)*<br><br>*"secure" otherwise appears only in 1, 62(c), and 62(h)* | Uniformly use "obtain."<br><br>Exception: *Rule 1*, because of tradition, and *Rule 62(c) and (h)*, which would either need to retain "secure" or use a different phrasing. | ✓ |
| 42 | *"service of summons or [other] like process" / "service of process"*<br><br>*"after service" /"after . . . is served" / "after being served" / "after . . . has been served"* | *"service of [a] summons"* – 4(d)(1), 4(g), 4(j)(2), 4(n)(2), 5(a), 27(a)(2), 81(c)<br><br>*"service of process"* – 4(d)(2)(A), 4(e)(2), 4(h)(1), 12(b)(5), 12(h)(1), 19(a),<br><br>5(d), 6(e), 11(c), 12(a)(1), 12(a)(2), 12(a)(3), 12(a)(4)(B), 12(f), 15(a), 16(b), 25(a)(1), 26(a)(1), 31(a)(4), 32(d)(3)(C), 33(b)(3), 33(d), 34(b), 36(a), 37(d), 38(b), 38(c), 41(c), 45(c)(2)(B), 53(g)(2), 56(a), 59(c), 68, 71A(d)(2) 71A(e), 72(a), 72(b), 81(c) | Resolution:<br><br>1) Change Rule 4(g) to "service of a summons."<br>2) Change Rule 59(c) from "after service" to "after being served."<br>3) Change Rule 71.1(d)(2)(A)(v) from "after service of the notice" to "after being served with the notice." | ✓ |
| 43 | *"state in which the district court is <u>located</u>" / "state in which the district court is <u>held</u>"* | *"located"* – 4(e)(1), 4(k)(1)(A), 4(n)(2), 4.1(a)<br><br>*"held"* – 6(a), 17(b), 64, 69(a), 81(e) | Uniformly use "state where the district court is located." | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 44 | *"substantial [justice] [rights]" / "substantially [justified] [impair] [verbatim] [unprepared]"* | 8(f), 16(f) (twice), 19(a), 23(b)(1)(B), 25(d)(1), 26(b)(3) (three times), 26(g)(3), 33(d), 37(a)(4)(A), 37(a)(4)(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 45(c)(3)(B)(iii)(twice), 51(d)(2), 56(d)(twice), 61(twice), | Resolution: Delete "substantial" from Rule 8(f).<br><br>(The style drafts of Rules 1-37 & 45 generally retain the current rule language (repeating "substantially" or "substantial" in the style drafts), while the Rule 38-63 style draft deletes "substantial." See STYLE 462, Kimble memo on "qualifiers and intensifiers.") | ✓ |
| 45 | *"that is" / "who is"*<br><br>Which phrase(s) should be used when discussing a party or potential party that can be either a natural person or an organization (i.e., government agency, corporation, partnership)? | *"that is"* – 4(d)(2), 4(h), 9(a),<br><br>*"who is"* – 4(c)(2), 4(k)(1)(B), 14(a), 17(b), 19(a), 25(d), 26(a)(2)(B), 26(b)(4)(B), 28(c), 31(a)(3), 37(a)(1), 45(b)(1), 45(b)(2), 45(c)(2)(B), 45(c)(3)(A), 63, 65(c), 71, 77(d)<br><br>*"party which is"* – 11(c)(5)(B)<br><br>*"defendant who"* – 4(d)(1), 4(k)(1), (2), 14(c) | Resolution: ok to vary. | ✓ |
| 46 | *"the court shall require ... unless the court finds..."*<br><br>*restyle to:*<br><br>*"the court must require ... unless ....*<br><br>*or*<br><br>*"the court must require ....But the court may not order .... if..."* | 37(a)(4), 37(b)(2), 37(c)(2), 37(d) | Resolution: ok to vary. | ✓ |
| 47 | *"trial of all issues"* | 39(a), 71(h) | Uniformly use "trial on ... issues." | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 48 | *"trial by jury" / "tried before a jury"* | *"trial by jury"* – 38(a - e), 39 (a - c), 42(b), 49(a), 50(a)(1), 55(b)(2), 57, 59(a), 65(a)(2), 71A(h), 71A(k), 79(a), 81(c)<br><br>*"tried before a jury"* – 32(c) | Uniformly use "jury trial," except for 38(a) and 39(a), which retain "trial by jury." | ✓ |
| 49 | *"waive[r]" "waiving" /* | 4(many), 8(c), 12(b), 12(h), 24(c), 26(a)(3), 32(d)(1) 32(d)(2), 32(d)(3)(A), 32(d)(3)(B), 32(d)(3)(C), 32(d)(4), 33(b)(4), 35(b)(2), 38(d), 45(c)(3)(A)(iii), 49(a), 53(b)(3), 71A(e), 81(c) | Uniformly use "waiver." | ✓ |
| 50 | *"writing" / "paper"* | *"writing"* – 4(i)(1)(A), 34(a)<br><br>*"paper"* – 5(a), 5(d), 5(e), 6(a), 6(e), 7(b)(2), 11(a), 11(b), 11(c)(1)(A), 45(c)(2)(A), 56(e), 65.1, 77(a), 77(d), 79(a) | Resolution: no changes to style drafts. | ✓ |
| 51 | *cross-references*<br><br>and<br><br>*hortatory references* | Arises frequently throughout the Civil Rules. | **Note:** This issue will be addressed in the top-to-bottom review. | ✓ |
| 52 | *geographic references: "any judicial district of the United States" / "the United States" / "the United States or a territory or insular possession subject to the jurisdiction of the United States"* | Rules 4(d)(1(E), 4(d)(2), 4(d)(3), 4(e), 4(f), 4(g), 4(h)(1), (2), 4(k)(1)(B), 4(*l*)(2), 4.1(b), 12(a)(1)(A)(ii), 25(a)(3), 28(a), 30(a)(2)(C), 32(a)(3)(B), 44(a)(1), 45(b)(2), 71A(d)(3)(A) | Resolution: No changes to style drafts.<br><br>(Subcommittee A decided that the restyled rules should continue to use the geographic terms used in the corresponding provisions of the current rules. This decision is reflected in the latest style drafts.)<br><br>Research and email exchanges on this issue include: STYLE 35, 42, 43, 48, 49, and 118. | ✓ |

| # | Issue | Occurrences in the Current Rules | Status/Recommendation (✓in far-right column means resolved as noted) | ✓ |
|---|---|---|---|---|
| 53 | *governmental agencies, officers, employees, and other instrumentalities* | Rules 4(i), 4(j), 12(a)(2), (3), 13(d), 15(c)(2), 24(b)(2), 24(c)(2), 30(b)(6), 31(a)(3), 32(a)(2), 33(a), 45(b)(1), 54(d)(1), 55(e), 62(e), 65(c), 81(a)(3), 81(f) | Resolution:<br><br>1) In Rules 4(i)(2), 4(i)(3) and (4)(i)(4)(B) change to "a United States agency or corporation" and "a United States officer or employee."<br>2) In the first clause of Rule 5(c)(2), reverse the order of "agency" and "officer." | ✓ |

## Appendix B – Current and Restyled Rules Comparison Chart

Note: This chart compares the current rules with the restyled rules (to the subdivision level). For additional information, see the Committee Notes for specific rules.

| *Current Rule* | *Restyled Rule* |
|---|---|
| 5(e) | 5(d)(2)-(4) |
| 6(d) | 6(c) |
| 6(e) | 6(d) |
| 7(c) | Deleted |
| 8(d) | 8(b)(6) |
| 8(e) | 8(d) |
| 8(f) | 8(e) |
| 12(b)(final sentence) and 12(c)(final sentence) | 12(d) |
| 12(d) | 12(i) |
| 16(d) | 16(e) |
| 16(e) | 16(d) |
| 22(1) | 22(a) |
| 22(1)(final sentence) and 22(2) | 22(b) |
| 23.1 | 23.1(a)-(c) |
| 25(d)(2) | 17(d) |
| 26(a)(5) | Deleted |
| 30(d)(1) | 30(c)(2)(second and third sentence) |
| 33(a)(part of first sentence) | 33(b)(1) |
| 33(c)(part of first sentence, second paragraph) | 33(a)(2) |
| 37(g) | 37(e) |
| 43(d) | 43(b) |
| 43(e) | 43(c) |
| 43(f) | 43(d) |
| 50(c)(2) | 50(d) |
| 50(d) | 50(e) |
| 52(b)(final sentence) | 52(a)(5) |
| 53(d) | 53(c)(1)(C) |
| 53(e) | 53(d) |
| 53(f) | 53(e) |
| 53(g) | 53(f) |
| 53(h) | 53(g) |
| 53(i) | 53(h) |
| 55(d) | Deleted |
| 55(e) | 55(d) |
| 56(c)(final sentence) | 56(d)(2) |

| *Current Rule* | *Restyled Rule* |
|---|---|
| 58(a)(2) | 58(b) |
| 58(b) | 58(c) |
| 58(c) | 58(e) |
| 60(b)(second sentence) | 60(c) |
| 60(b)(third sentence) | 60(d) |
| 60(b)(fourth sentence) | 60(e) |
| 80(c) | 80 |
| 81(e) | 81(d) |
| 81(f) | Deleted |

## THE STYLE/SUBSTANCE AMENDMENTS

Attached is the package of draft Style/Substance amendments to the Civil Rules.

Most of the changes indicated in the package have been approved by the Standing Committee Style Subcommittee (SCSSC). All changes that have not been approved by the SCSSC are identified and discussed in the footnotes accompanying the Style/Substance amendments.

In the published February 2005 version of the Style/Substance amendments, deletions from the current Civil Rules were overlined (i.e., struck through) and additions to the current Civil Rules were underlined. The attached draft retains these overlinings and underlinings to show the changes from the current Rules.

Thus a different convention is needed to indicate changes made from the published February 2005 Style/Substance amendments. Additions to the published February 2005 version are double-underlined. Deletions from the published February 2005 version are both overlined (i.e., struck through) and italicized. No doubt this is confusing, but the document is short enough (only eight pages and four footnotes) that the confusion should be manageable.

# PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE SEPARATE FROM STYLE REVISION PROJECT

## Rule 4. Summons

* * * * *

**(k) Territorial Limits of Effective Service.**

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

* * * * *

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

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

* * * * *

### COMMITTEE NOTE

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

## Rule 8. General Rules of Pleading

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

* * * * *

**(3)** a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief.[1]

* * * * *

[1] The SCSSC and Subcommittee B agreed to retract the proposed revision of Rule 8. Style Rule 8(a)(3) will continue to refer to "relief in the alternative." This traditional phrase better captures the many situations in which the pleader is uncertain as to the available forms of relief, or prefers a form of relief that may not be available. It also carries forward an explicit rejection of any pleading-based theory of "election of remedies."

**Rule 14. Third-Party Practice**

* * * * *

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

* * * * *

**COMMITTEE NOTE**

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

**Rule 16. Pretrial Conferences; Scheduling; Management**

* * * * *

**(c) Attendance and Matters for Consideration at a Pretrial Conference.**

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

* * * * *

**COMMITTEE NOTE**

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

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

* * * * *

**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.**

**(1) Signature Required; Effect of Signature.** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be

COMMITTEE NOTE

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

**Rule 9. Pleading Special Matters**

* * * * *

**(h) Admiralty or Maritime Claim.**

* * * * *

~~**(2) Amending a Designation.** Rule 15 governs amending a pleading to add or withdraw a designation.~~

**(~~3~~ 2) Designation for Appeal.** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

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

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

**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address, ~~*electronic*~~-mail address,[2] and telephone number~~, if any~~. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

* * * * *

COMMITTEE NOTE

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

[2] e-mail address has been adopted as the vernacular expression.

signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone number, ~~and electronic mail address~~. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

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

**(i)** consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

* * * * *

## COMMITTEE NOTE

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

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

## Rule 30. Depositions by Oral Examination

* * * * *

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

* * * * *

**(3) Method of Recording.**

**(A) Method Stated in the Notice.** The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition ~~that was taken nonstenographically~~.

* * * * *

**(6) Notice or Subpoena Directed to an Organization.** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, ~~or~~ a governmental agency, or other entity, and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

## COMMITTEE NOTE

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

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

## Rule 31. Depositions by Written Questions

* * * * *

**(c) Notice of Completion or Filing.**

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

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

## COMMITTEE NOTE

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

deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the Rule 30(e)(1) right of review.[3]

## Rule 36. Requests for Admission

* * * * *

**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. ~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission ~~*that has not been incorporated in a pretrial order*~~ if ~~it~~ doing so would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits, but an admission incorporated in a final pretrial order may be amended only [under] [as permitted by] Rule 16(e).[4] An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

### COMMITTEE NOTE

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

## Rule 40. Scheduling Cases for Trial

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

### COMMITTEE NOTE

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

## Rule 71.1. Condemning Real or Personal Property

* * * * *

---

[3] A comment suggested uncertainty as to what it means to say that a deposition on written questions is completed. Subcommittee B concluded that rather than force a reader to follow the Rule 31(b) incorporation of Rule 30(e)(1), language in the Committee Note will be helpful.

[4] NOTE: Depending on the outcome on Style Rule 16(e) and Style Rule 36(b), we may decide to retract this proposal. See Style Rule 16(e), note 12; Style Rule 36(b), note 28.

**(d) Process.**

* * * * *

**(2) Contents of the Notice.**

**(A) Main Contents.** Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

**(i)** that the action is to condemn property;

**(ii)** the interest to be taken;

**(iii)** the authority for the taking;

**(iv)** the uses for which the property is to be taken;

**(v)** that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

**(vi)** that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

**(vii)** that a defendant who does not serve an answer may file a notice of appearance.

**(B) Conclusion.** The notice must conclude with the name, telephone number, and e~~lectronic~~-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served.

* * * * *

## COMMITTEE NOTE

Rule 71.1(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

The information that identifies the attorney is changed to include telephone number and electronic-mail address, in line with similar amendments to Rules 11(a) and 26(g)(1).

**Rule 78. Hearing Motions; ~~*Advancing an Action*~~ Submission on Briefs**

**(a) Providing a Regular Schedule for Oral Hearings~~; Other Orders~~.** A court may establish regular times and places for oral hearings on motions. ~~But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.~~

* * * * *

**COMMITTEE NOTE**

Rule 16 has superseded any need for the provision in former Rule 78 for orders for the advancement, conduct, and hearing of actions.

## THE STYLE CIVIL FORMS

Attached is the package of restyled Official Forms.

Most of the changes indicated in the restyled Forms have been approved by the Standing Committee Style Subcommittee (SCSSC). All changes that have not been approved by the SCSSC are identified and discussed in the footnotes accompanying the restyled Forms.

To indicate changes from the published August 2005 version of the Style Forms, deletions are overlined (i.e., struck through) and additions are underlined.

**Form 1. Caption.** *(Use on every summons, complaint, answer, motion, or other document.)*

United States District Court
for the
_____District of _____

| | | |
|---|---|---|
| **A B, Plaintiff** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **Civil Action No. _____** |
| **C D, Defendant** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **E F, Third-Party Defendant** | ) | |
| **(*Use if needed.*)** | ) | |

*(Name of Document)*

**Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.**
*(Use at the conclusion of pleadings and other papers that require a signature.)*

Date _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
E-mail address)

_____
(Address)

_____
(Telephone number)

**Form 3. Summons.**

(Caption – See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney,_____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date _____

_____
Clerk of Court

(Court Seal)

*(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)*

**Form 4. Summons on a Third-Party Complaint.**

(Caption – See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____, whose address is, _____, and also on the plaintiff's attorney, _____, whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date _____

_____
Clerk of Court

(Court Seal)

**Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.**

(Caption – See Form 1.)

To (*name the defendant – or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*):

**Why are you getting this?**

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid ~~costs~~ expenses[1], you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these ~~costs~~ expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

**What happens next?**

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange ~~for formal service~~ to have the summons and complaint served on you. A~~a~~nd I will ask the court to require you, or the entity you represent, to pay the ~~costs~~ expenses of making service.

Please read the enclosed statement about the duty to ~~waive formal service~~ avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign – See Form 2.)

[1] The SCSSC agreed to substitute "expenses" for "costs" throughout Forms 5 and 6. Style Rule 4(d)(2)(A) says that a defendant who fails to waive service must pay the "expenses" incurred in making service. These expenses may extend beyond taxable costs.

**Form 6. Waiver of the Service of Summons.**

(Caption – See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the ~~cost~~ expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign – See Form 2.)

*(Attach the following to Form 6.)*

**Duty to Avoid Unnecessary ~~Costs~~ Expenses of Serving a Summons**

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary ~~costs~~ expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the ~~costs~~ expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

**Form 7. Statement of Jurisdiction.**

a. (*For diversity-of-citizenship jurisdiction.*) The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

b. (*For federal-question jurisdiction.*) This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, ___U.S.C. § ___].

c. (*For a claim in the admiralty or maritime jurisdiction.*) This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

**Form 8. Statement of Reasons for Omitting a Party.**
*(If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).)*

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

**Form 9. Statement Noting a Party's Death.**

(Caption – See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign – See Form 2.)

**Form 10. Complaint to Recover a Sum Certain.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction -- See Form 7.)

*(Use one or more of the following as appropriate and include a demand for judgment.)*

*(a) On a Promissory Note*

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $ _____ with interest at the rate of __ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

*(b) On an Account*

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

*(c) For Goods Sold and Delivered*

2. The defendant owes the plaintiff $ _____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

*(d) For Money Lent*

2. The defendant owes the plaintiff $ _____ for money lent by the plaintiff to the defendant on *date*.

*(e) For Money Paid by Mistake*

2. The defendant owes the plaintiff $ _____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

*(f) For Money Had and Received*

2. The defendant owes the plaintiff $ _____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

*Demand for Judgment*

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus interest[2] and costs.

(Date and sign – See Form 2.)

[2] A comment not reviewed by the SCSSC suggests that this should reflect the variability of rules on interest by adding a few words: "plus interest as available under applicable law." The demand for judgment in present Form 3 refers simply to "interest." On balance it seems better to refer only to interest, leaving disputes about the law to later stages.

**Form 11. Complaint for Negligence.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2).

**Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against one or both defendants for $ _____, plus costs.

(Date and sign – See Form 2.)

**Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, and costs.

(Date and sign – See Form 2.)

**Form 14. Complaint for Damages Under the Merchant Marine Act.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $ _____ a month and found, which is equal to a shore worker's wage of $ _____ a month.

4. On *date*, the vessel was at sea on the return voyage. (*Describe the weather and the condition of the vessel.*)

5. (*Describe as in Form 11 the defendant's negligent conduct.*)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign — See Form 2.)

**Form 15. Complaint for the Conversion of Property.**

(Caption — See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2.)

**Form 16. Third-Party Complaint.**

(Caption – See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. *(State grounds entitling defendant's name to recover from third-party defendant's name for (all or an identified share) of any judgment for plaintiff's name against defendant's name.)*

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign – See Form 2.)

**Form 17. Complaint for Specific Performance of a Contract to Convey Land.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A][summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $ _____, plus interest and costs, or

(b) ~~that~~ if specific performance is not ordered, the defendant be required to pay damages of $ _____, plus interest and costs~~, if specific performance is not ordered~~.

(Date and sign – See Form 2.)

**Form 18. Complaint for Patent Infringement.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells, and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

(Date and sign – See Form 2.)

**Form 19. Complaint for Copyright Infringement and Unfair Competition.**[3]

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book ~~by continuing to publish and sell the infringing book in violation of the copyright~~, thus causing irreparable damage.[4]

Therefore, the plaintiff demands that:

(a) ~~that~~ until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) ~~that~~ the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) ~~that~~ the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) ~~that~~ the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) ~~that~~ the plaintiff be awarded any other just relief.

(Date and sign – See Form 2.)

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[3] Form [19] is presented in a tentatively styled form subject to a determination whether to adopt a new form that conforms to any substantive changes in copyright law or to omit any copyright complaint from the Forms.

**The Style Subcommittee made no comment.**

[4] This paragraph has been revised at the suggestion of the Department of Justice that the published version is substantively wrong. Federal copyright law preempts any common-law remedy for simply continuing to publish and sell an infringing book.

**Form 20. Complaint for Interpleader and Declaratory Relief.**

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) ~~that~~ each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) ~~that~~ the plaintiff recover its costs.

(Date and sign – See Form 2.)

**Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).**

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $ _____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $ _____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and ~~that~~ any judgment granted be made a lien on the property.

(Date and sign – See Form 2.)

**Form 30. Answer Presenting Defenses Under Rule 12(b).**

(Caption – See Form 1.)

**Responding to Allegations in the Complaint**

1.[5] Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

**Failure to State a Claim**

4. The complaint fails to state a claim upon which relief can be granted.

**Failure to Join a Required Party**

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

**Affirmative Defense – Statute of Limitations**

6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced.

**Counterclaim**

7. (*Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

**Crossclaim**

8. (*Set forth ~~the~~ a crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

(Date and sign — See Form 2.)

[5] Numbers are added to the paragraphs to correspond to a suggestion that Forms 30, 40, and 50 should be parallel — all should number the paragraphs, or none should. The SCSSC decided to add numbers to Form 30. Rule 10 requires that the paragraphs of an answer be numbered. It is more convenient to run the numbers consecutively; beginning a new series for the counterclaim and again for the crossclaim would complicate future references to the answer. These considerations seem to outweigh the concern that some readers might conclude that the form requires that every answer include an affirmative defense, a counterclaim, and so on.

**Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.**

(Caption – See Form 1.)

**Response to the Allegations in the Complaint**
(See Form 30.)

**Counterclaim for Interpleader**

1. The defendant received from *name* a deposit of $ _____.

2. The plaintiff demands payment of the deposit because of a purported assignment from *name*, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) *name* be made a party to this action;

(b) the plaintiff and *name* be required to interplead their respective claims;

(c) the court decide whether the plaintiff or *name* or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover ~~its~~ costs and attorney's fees.

(Date and sign – See Form 2.)

**Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.**

(Caption – See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign – See Form 2.)

**Form 41. Motion to Bring in a Third-Party Defendant.**

(Caption – See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign – See Form 2.)

**Form 42. Motion to Intervene as a Defendant Under Rule 24.**

(Caption – See Form 1.)

1. *name* moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b).*)

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign – See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

**Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.**

(Caption – See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy — and to test or sample — the following tangible things:

(*Describe each thing, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(*Describe the property and each object or operation.*)

(*State the time and manner of the inspection and any related acts.*)

(Date and sign – See Form 2.)

**Form 51. Request for Admissions Under Rule 36.**

(Caption — See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days[6] to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document.*)

2. The truth of each of the following statements:

(*List each statement.*)

(Date and sign – See Form 2 )

[6] Rule 36(a)(3) sets the time to answer or object at 30 days, but also provides that a shorter or longer time can be set by stipulation or court order. Professor Marcus, quoting 8 FP&P § 2257, pp. 540-541, urges that — as suggested in another comment — the 30-day period should be used in the form. Until 1970, Rule 36 required a response within the period designated in the request, not less than 10 days after service. Form 25 was not revised when Rule 36 was amended in 1970 to adopt the 30-day response period. The treatise expresses a concern that a blank may mislead a requesting party to attempt to set a time shorter than 30 days, or innocently set a longer time and become bound by it.

**The Style Subcommittee agreed to the suggested text change.**

**Form 52. Report of the Parties' Planning Meeting.**

(Caption – See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)

(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)

(d) (Maximum number of requests for admission, along with the dates responses are due.)

(e) (Maximum number of depositions by each party.)

(f) (Limits on the length of depositions, in hours.)

(g) (Dates for exchanging reports of expert witnesses.)

(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)

(b) (Requested dates for pretrial conferences.)

(c) (Final dates for the plaintiff to amend pleadings or to join parties.)

(d) (Final dates for the defendant to amend pleadings or to join parties.)

(e) (Final dates to file dispositive motions.)

(f) (State the prospects for settlement.)

(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)

(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)

(i) (Final dates to file objections under Rule 26(a)(3).)

(j) (Suggested trial date and estimate of trial length.)

(k) (Other matters.)

(Date and sign — see Form 2.)

**Form 60. Notice of Condemnation.**

(Caption – See Form 1.)

To *name the defendant*.

1. A complaint in condemnation has been filed in the United States District Court for the _____District of _____, to take property to use for *purpose*. The interest to be taken is *describe*. The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(*Describe the property.*)

3. The authority for taking this property is *cite*.

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign – See Form 2.)

**Form 61. Complaint for Condemnation.**

(Caption – See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction – See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is (*describe in enough detail for identification — or attach the description and state "is described in Exhibit A, attached."*)

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. (*For each person include the interest claimed.*)

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign – See Form 2.)

**Form 70. Judgment on a Jury Verdict.**

(Caption – See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff *name* recover from the defendant *name* the amount of $_____ with interest at the rate of __%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name* .]

Date _____

_____
Clerk of Court

**Form 71. Judgment by the Court without a Jury.**

(Caption – See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff *name* recover from the defendant *name* the amount of $_____, with prejudgment interest at the rate of ___%, postjudgment interest at the rate of ____%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name* .]

Date_____

_____
Clerk of Court

**Form 80. Notice of a Magistrate Judge's Availability.**

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

**Form 81. Consent to an Assignment to a Magistrate Judge.**

(Caption – See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk — not to a judge or magistrate judge.)

Date_____ _____

Signature of the Party

**Form 82. Order of Assignment to a Magistrate Judge.**

(Caption – See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date _____

_____
United States District Judge

## SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

### Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner,Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the

profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

**Rules 1, 2**

Burbank-Joseph: We wrestled with the addition of "proceeding" to Rule 1. It would be possible to take up the suggestion by expanding Rule 2: "There is one form of action or proceeding — the civil action." But that would make a petition to perpetuate testimony, for example, a "civil action." Another possibility would be to rescind Rule 2 — the forms of action are dead and their graveyard influence is limited to substance, not procedure. Rule 2, however, has a dedicated constituency and there is little need to court opposition. The only obvious choice is to delete "and proceedings" from Rule 1, as well as "and proceeding" at the end. The difficulty is that the Civil Rules do apply to many events that are difficult to describe as a "civil action." "[a]nd proceeding" was adopted as one example of the theory that a Style Rule can properly describe something that the present rule means — "suits of a civil nature" may be even more restrictive than "civil action." No recommendation on this one.

**Rule 4(c)**

Alan B. Morrison, Esq., 05-CV-003: (1) * * * ~~A summons must be served with a copy of the complaint.~~ The plaintiff is responsible for having the summons and a copy of the complaint served * * *."

**Rule 4(d)**

Burbank-Joseph: For Rule 4(d)(1)(D): The comment on Rule 5 adds a note on Proposed Style Form 5 pointing out that we must change the reference to Official Form 1A.

EDNY: Suggests that (d)(1)(F), (d)(2), and (d)(3) be made parallel — now, only (d)(2) calls on the defendant to sign the waiver as well as to return it. ("sign" does not appear in any of the parallel parts of present Rule 4(d). Form 1A repeatedly calls on the defendant to sign the waiver. The most important place to include "sign" in the rule text is (d)(2). It seems an even choice whether to add it to (d)(1)(F) and (d)(3).)

**Rule 4(e)**

Burbank-Joseph: This is a neat point. The idea that "dwelling house" does not encompass an apartment, condominium that does not stand alone, mobile home, or the like, seems quaint today. But it is possible that the original intent is that there is only one suitable place — only if the defendant does not have a "dwelling house" can a "usual place of abode" be the place of leaving process. Today the central question is whether alternatives are desirable — should we have to worry whether the summer home or the winter home is the "dwelling" or "usual place"? At least if the answer seems a bit more clear than the comment lets on, we might adhere to the Style version.

**Rule 4(i)**

Prof. Bradley Scott Shannon, 05-CV-009: The letters a should be capitalized in United States Attorney and Assistant United States Attorney — see (i)(1)(A)(i) and (ii).

**Rule 4(k)**

Alan B. Morrison, Esq., 05-CV-003: (2)(A): "the defendant is not subject to jurisdiction in the ~~any state's~~ courts of general jurisdiction of any state; * * *." "State's" is ambiguous here.

**Rule 4(m)**

Alan B. Morrison, Esq., 05-CV-003: Style Rule 15(c)(1)(C) allows relation back as to a new defendant if the new defendant received notice of the required quality "within the period provided by Rule 4(m) for serving the summons and complaint." This carries forward a perplexity that exists in the present rules. Rule 4(m) does not apply to service abroad. The conclusion may be that relation back is not permitted as to a defendant who would have to be served abroad. This could be fixed by revising 4(m): "Except in calculating the time limits under Rule 15(c)(1)(C), ~~T~~this subdivision does not apply to service in a foreign country * * *."

**Rule 4.1(b)**

Prof. Bradley Scott Shannon, 05-CV-009: Although present Rule 4.1(b) refers only to a "decree or injunction," it might be better to substitute "order" for "decree," or perhaps to use all three words — "order, decree, or injunction." [This may risk a substantive change — contempt is an available sanction for failure to obey a discovery order, but it is not clear whether "decree" should be read to include discovery orders or other procedural orders enforceable by contempt.]

**Rule 5(a)**

Jack E. Horsley, Esq., 05-CV-002: This one is puzzling. It suggests adding "briefs and excerpts from the record" following "record on appeal." But "record on appeal" appears only in the present rule. It was omitted from the Style Rule because Appellate Rule 10 is a self-contained provision for the record on appeal, including service. Perhaps this is a suggestion to restore "designation of the record on appeal" to the Style Rule.

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**Rule 5(b)**

Burbank-Joseph: Rule 5(b)(2)(B)(ii): This does seem to be the same as Rule 4(e) above. (4B Federal Practice & Procedure: Civil 3d, § 1147, p. 445, says that the dwelling house or usual place of abode words have seldom been interpreted for Rule 5; Rule 4 precedents should be useful.)

Burbank-Joseph: Rule 5(b)(2)(D): The comment seems to be right. The present rule allows service by leaving a copy with the clerk only if the person "has no known address." Those words imply some obligation to attempt to find an address. The Style version, "if the person's address is unknown," does not carry that implication as forcefully. (Section 1147, pp. 445-446, is not helpful; it simply observes that Rule 11 signature requirements make it unlikely that there will be no known address. Compare the "if any" question put to Rules 11 and 26(g) on the Style-Substance Track.)

**Rule 5(d)**

Prof. Bradley Scott Shannon, 05-CV-009: Present Rule 5(e) allows a paper to be filed with "the" judge." Style Rule 5(d)(2)(B) allows filing with "a" judge. It is not clear whether the present rule allows filing only with the judge assigned to the action. The Style Rule seems to allow filing with any judge — indeed, it is not limited on its face to a judge of the court where the action is pending. The Rule should be made clear. [4B FP&P § 1153 notes that the purpose of filing with the judge is to permit immediate action in pressing circumstances. There may be situations in which action could properly be taken by a judge not assigned to the case. For that matter, it is conceivable that not every case will have been assigned to a judge when the need for action arises — indeed, individual docket systems may not persist forever.]

**Rule 6(b)**

Prof. Bradley Scott Shannon, 05-CV-009: Rule 6(b) says "may or must"; Rule 6(d), says "must or may." The same sequence should be followed in both.

**Rule 6(c)**

Jack E. Horsley, Esq., 05-CV-002: "must be served at least 5 days and not more than 10 days Before the time specified for the hearing * * *." This would "put a closure" on the time.

**Rule 7(a)**

EDNY: The response to a counterclaim should be referred to as a "reply," not as an "answer." A change from the historic usage would "engender unnecessary confusion." (The Style version, by characterizing the response to a counterclaim as an "answer," enables the court to order a reply to the response. The present rule does not authorize an order to reply to a reply. The change was deliberate.)

Burbank-Joseph: Rule 7(a)(7): There are two comments. The first is straight-forward. Present Rule 7(a) says there shall be "a third-party answer." Style 7(a)(6) changes this to "an answer to a third-party complaint." Because all first-response pleadings are now called "answer," it is redundant to refer to a third-party answer in 7(a)(7), which should be: "(7) if the court orders one, a reply to an answer ~~or a third-party answer~~." That seems right.

The second is not as clear. "[T]his" proposed change is a change of meaning and should be included in the style-substance track. It is not entirely clear which change is meant — the present rule explicitly authorizes an order to reply to a third-party answer. Changing the description from "third-party answer" to "answer to a third-party complaint" hardly seems to count. The idea probably is that present Rule 7 does not explicitly authorize the court to order a reply to an answer to a counterclaim because it characterizes the response to a counterclaim as a "reply," not an "answer." That does seem to be a change, at least on quick reading of 5 FP&P Civil 3d §§ 1183-1188. But the

purpose of the change is evident — as observed in § 1184, a counterclaim is equivalent to a complaint, and an answer is as important as an answer to a complaint even if it is called a "reply." So a response to the answer may be just as useful as a response to an initial answer. At this point in the process, redescribing this as a "style-substance" point is likely to make a difference only if a distinction is drawn in dealing with supersession questions. And even then it makes a difference only if there is some statute out there that might be superseded; it may be safer to treat it as a matter of style so that there is no possible supersession effect.

**Rule 7.1**

Burbank-Joseph: Rule 7.1(a): The tag line should be "Who Must File: Contents." This is pure style, but looks good.

**Rule 8(a)**

Burbank-Joseph: Rule 8(a)(3): The suggestion is to restore words from the present rule: "a demand for judgment for the relief sought." It is urged that "judgment is surely an integral part of the relief sought in any action." This seems pure style.

**Rule 8(b)**

Burbank-Joseph: The suggestion is to change the caption to reflect the first words of paragraph (1): "~~Defenses and Denials~~ Responding to a Pleading." Again, this seems pure style — and an improvement.

**Rule 8(d)**

Burbank-Joseph: Rule 8(d)(3): Cross-references to Rule 11 are sufficiently sensitive to be noted with individual rules as well as with the global issues.

**Rule 9(a)**

Burbank-Joseph: Rule 9(a)(2): Present Rule 9(a) calls for a "specific negative averment." Style 9(a)(2) calls for a "specific denial." The suggestion is that "denial" refers only to a response to an allegation, and does not fit this setting because 9(a)(1) says that a pleading need not allege these things. The proposed drafting remedy is "must do so by a specific ~~denial, which must state~~ statement setting out [forth] any supporting facts that are peculiarly within the party's knowledge." This change may lose part of the meaning — a "specific denial" can be made without any supporting facts if the party making the denial does not have peculiar knowledge of any supporting facts, while "statement" might imply a duty to have and state supporting facts.

**Rule 9(b)**

PLAIN, 05-CV-010: "must state with particularity the circumstances" is jargon; it should be ""must state the specific circumstances."

**Rule 9(h)**

Burbank-Joseph: Rule 9(h)(1): The suggestion is to add a comma for clarity: "for purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules * * *."

Separately, note that we must catch up with the "2006" amendments by changing the title of the Supplemental Rules.

**Rule 10(a)**

Burbank-Joseph: The suggestion: "Every pleading must have * * * ~~a title that names the parties~~, a file number * * *. The title of the complaint must name all the parties; the title of other pleadings

~~may~~ must name the first party on each side * * *." The argument: The reference to title in the first sentence is redundant with the second sentence. "Must" is necessary in the second sentence because "may" implies that no party need be named.

**Rule 10(c)**

Burbank-Joseph: There was much discussion about deleting the reference to "exhibit." The suggestion is to restore the prior heading and restore "Exhibit": "(c) Adoption by Reference; ~~Attached Instrument~~ Exhibits. * * * A copy of a written instrument attached as an exhibit to a pleading is a part of the pleading * * *." The underlying concern is that many different kinds of papers may be filed simultaneously with a pleading, and perhaps even physically attached to it (or filed by electronic means that blur the distinction physical and metaphysical attachment). There should be a clear signal of the filer's intention, accomplished by designating as an "exhibit" anything the pleader intends to incorporate in the pleading. The most likely source of confusion may lie in "attached"; it might be better to fall back closer still to the present rule if we can manage it — something like "A copy of a written exhibit to a pleading is a part of the pleading." A pleading may incorporate a writing that is not attached. That may happen because the writing already is an exhibit — it is attached to the complaint, and the answer invokes it. Or it may happen because reliance on a writing makes it part of the pleading even though no party has attached it to any pleading. So the complaint alleges breach of a contract that is not attached. The defendant may be permitted to invoke a clause in the contract by pleading without attaching the contract as an exhibit. Referring to an "exhibit" does not fully capture that phenomenon. This subject may deserve some further drafting attention.

**Rule 11(a)**

Hon. Richard E. Door, 05-CV-001: "must be signed * * * in the attorney's individual name * * *." Although "name" standing alone should be read as the real name, it is better to retain "individual" from the present rule. The suggestion is prompted by experience in an action that an attorney filed in his own name by a complaint signed in a fictitious name so "very close to his individual name that one would never think it was fictitious." There should be "no doubt about the line of responsibility for the pleading."

EDNY: "unless the omission is promptly corrected after being called to the attorney's or unrepresented party's attention."

**Rule 11(b)**

Burbank-Joseph: Rule 11(b)(1): References to "costs" and "expenses" have bedeviled the Style process from the beginning. Research may be needed. The question may not be whether there are clearly established and distinctive meanings for "cost of litigation" as compared to "litigation costs." It may be whether there is sufficient possibility of confusion to deter a change intended to be only a style change. The purpose was to carry forward the same meaning, and to include all expenses inflicted by the improper purpose. (The same point is addressed to Rule 26(g)(1)(B)(ii).)

**Rule 11(c)**

Burbank-Joseph: Rule 11(c)(2): This seems pure style. The intent is to authorize an award to the party that prevailed on the motion, no matter who wins the ultimate judgment.

Burbank-Joseph: Rule 11(c)(3), (5): Global issue — "on its own initiative."

**Rule 12**

Burbank-Joseph: Rule 12 Caption: Aside from these suggestions, is "When and How" too terse — should it be closer to the present "When and How Made [Presented]"? The suggestion here, taking

from the 12(g), is that the caption should be in this part "~~Consolidating and Waiving Defenses~~ Consolidation and Waiver." The point is that a motion for more definite statement, a motion for judgment on the pleadings, and a motion to strike [may] fall within the 12(g) consolidation requirement, but may not involve "defenses." This seems largely style, but persuasive.

Hon. Thomas S. Zilly, 05-CV-016: To help future researchers into Rule 12 and Bankruptcy Rule 7012, the Committee Note should say that present subdivision (c) has been divided between new subdivisions (c) and (d), while present subdivision (d) has become subdivision (i).

**Rule 12(a)**

Prof. Bradley Scott Shannon, 05-CV-009: As in Rule 4(i), make capital the "a" — United States Attorney.

**Rule 12(b)**

Prof. Bradley Scott Shannon, 05-CV-009: This comment renews an issue that has been discussed at some length. Rule 12(b) says that every defense must be asserted in the responsive pleading if one is required, but allows seven defenses to be made by motion. Rule 12(h)(2) and (3) then permit two of the seven enumerated defenses — failure to state a claim or to join a Rule 19(b) party — to be raised by a Rule 12(c) motion or at trial, and allows a lack of subject-matter jurisdiction to be raised at any time. It is urged that this internal inconsistency should be corrected.

**Rule 12(f)**

Burbank-Joseph: Rule 12(f)(1): Global style: on its own "initiative."

**Rule 12(g)**

Burbank-Joseph: Rule 12(g) caption: See Rule 12 caption above. Again, this seems a style question. Here the suggestion is that the caption should be "Consolidating Defenses and Objections." But a motion for judgment on the pleadings, for example, may be made by a plaintiff asserting that the answer establishes the plaintiff's claim; that hardly seems a "defense or objection." Perhaps "Consolidating Motions" would accurately capture both (1) and (2) — (1) says you may consolidate; (2) says that if you do not consolidate, you may not make a later motion except as provided in 12(h).

**Rule 12(h)**

Jack E. Horsley, Esq., 05-CV-002: There are confusing references to (b)(2) and "sub-paragraph (3)" on p. 37. Since it refers to "subject-matter jurisdiction," the most likely interpretation is that the suggestion relates to 12(h)(3). But that remains uncertain, because the suggestion is to add an inapposite reference to summary judgment: "If the court determines at any time that it lacks subject-matter jurisdiction, or summary judgment, the court must dismiss the action."

Robert MacKay, 05-CV-004: Suggests, somewhat diffidently, that Rule 12(h)(1)(B)(i) is redundant. The suggestion seems to reflect a misunderstanding. Rule 12(h)(1)(A) governs when a party has made a motion. (h)(1)(B)(i) governs when there was no motion. Both are needed.

Burbank-Joseph: Rule 12(h)(1)(B): The question of breaking the structure down as far as "(i)" items is a global style question. The cross-reference to Rule 15(a) might well be improved by making it "15(a)(1)."

Burbank-Joseph: Rule 12(h)(2): Style 12(b)(7) carries forward a motion to dismiss "for failure to join a party under Rule 19." Present Rule 12(h)(2) limits waiver by preserving a "defense of failure to join a party indispensable under Rule 19." The distinction in the present rule is deliberate. An objection based on failure to join a Rule 19(a) party is lost if not properly raised. There is no "gap," as the suggestion implies.

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Burbank-Joseph: Rule 12(h)(3): The comment is correct in suggesting that present Rule 12(h)(3) is too simple. It should be read, first, to incorporate all of the doctrines that permit jurisdiction to be established even though jurisdiction could not be supported at the time of the initial complaint or removal. And it should also be read to require remand, not dismissal, when there is no subject-matter jurisdiction to support removal. It might be possible to cure these defects either in the Style Rule or in a Style-Substance Rule. But there is no reason to believe that the present rule has created any problems in this direction, and there is reason to be cautious about attempting a correction that does not unintentionally change something.

**Rule 13(b)**

Burbank-Joseph: The suggestion is that some difficulty might arise from saying that a pleading may state any claim as a counterclaim — Rule 13(a) says that some "must" be stated. The suggested cure is to add a few words: "A pleading may also state as a counterclaim ~~any claim~~ against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)." This seems a style matter.

**Rule 14(a)**

Burbank-Joseph: Rule 14(a)(6): The present rule begins: "A third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem * * *." Style Rule 14(a)(6) begins: "If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem." The suggestion is that the Style version "implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime," while the present rule does not. It is difficult to see the differences of implication. In any event, the next step of the suggestion is that there is no problem "if the qualifications in the existing rule are inherent in an in rem action." The "qualifications" appear to be the references, omitted from the Style Rule, to "against any vessel,cargo, or other property subject to admiralty or maritime process in rem." Those words were omitted as surplusage: all they do is say "we really mean that a third-party complaint can assert an in rem claim against any property properly subject to an in rem claim." This suggestion is puzzling, but seems to involve a style matter.

Separately, the reference to Supplemental Rule C~~(b)~~(1) should be changed to conform to the 2006 amendment making this C(a)(1).

**Rule 15(b)**

Burbank-Joseph: This is style, but persuasive. The suggestion is right in observing that an argument under (b)(2) that an issue has been tried by consent can be made at trial — for example in a request for instructions or in response to a motion for judgment as a matter of law. The headings for (1) and (2) can be improved. For (1), "Evidence Objected to at Trial" might be abbreviated to "Objections at Trial." For (2), "Issues Tried by Consent" seems fine.

**Rule 15(c)**

Alan B. Morrison, Esq., 05-CV-003:(c)(1)(B): "a claim or defense that arose out of the ~~conduct,~~ transaction, or occurrence set out * * *." "conduct" does not appear in similar phrases in other rules, and has no independent meaning. [These phrases may have been varied deliberately to send a subtle message that the different rules contemplate different things. As early as 14(c)(1) "transaction or occurrence" is supplemented by "or series of transactions or occurrences." In 15(d) it is "transaction, occurrence, or event." In 20(a) it again is "transaction, occurrence, or series of transactions or occurrences." In 24(a) it is a claim related to the "property or transaction." Cf. 13(g), where property also appears. The Style Project deliberately chose not to adopt a uniform phrase for all of these different settings.]

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Burbank-Joseph: Rule 15(c)(1) Caption: This is Style, but seems right. Style Rule 15(c)(1) begins: "An amendment * * * relates back." It does not say "may" relate back. It should be "When an Amendment ~~May~~ Relates Back."

Burbank-Joseph: Rule 15(c)(1)(C): Two suggestions. The first is the global issue whether to subdivide down to items. The second goes to one aspect of the unfortunate reliance on Rule 4(m) that has beset the agenda item on Rule 15 that has again been assigned to a subcommittee for study.

EDNY: " * * * if, during the ~~stated~~ period provided by Rule 4(m), process was delivered * * *."

**Rule 16(b)**

Alan B. Morrison, Esq., 05-CV-003: Both the present rule and the Style Rule are ambiguous. The deadline for a scheduling order is "within 120 days after any defendant has been served *and* within 90 days after any defendant has appeared." Does "within * * * and within" mean "by the later of" or "by the earlier of"? Choose one. [Unless there is a clearly established reading, this is the sort of ambiguity that seems to lie outside the limits of Style.]

PLAIN, 05-CV-010: "but ~~in any event~~ within 120 days * * *." "in any event" is jargon.

Burbank-Joseph: Rule 16(b)(3)(B): Global style issue about "items."

**Rule 16(c)**

Burbank-Joseph: Rule 16(c)(1): This is one of many "intensifier" debates. The suggestion is: "~~If appropriate, t~~The court may require * * *." The argument for retaining an intensifier here is that there is a lot of sensitivity about requiring a party or its representative to be present or reasonably available by telephone to consider possible settlement.

**Rule 16(d)**

EDNY: Rule 16(d): " * * * the court ~~should~~ shall issue an order * * *." "[T]he proposed change seems to create the inference that there is discretion when, under the current Rule, there is not."

Burbank-Joseph: Rules 16(d) and (e): The suggestion is that the Style Rule simply inverts the order of present (d) and (e), and that searches will be easier if the present order is retained. But the Style Rule is a mix-and-match approach: Style (d) begins with the first sentence of present (e), directing entry of an order after any Rule 16 conference. This style choice was made deliberately.

Burbank-Joseph: Rule 16(e): This seems to be a style suggestion. The Style Rule assumed that the final sentence refers to a Style Rule 16(d) order reciting the action taken at the conference, not to an order issued after a pretrial conference but independent of it. If a style change seems indicated, it might be accomplished with fewer words: "The court may modify an order issued under Rule 16(d) after a final pretrial conference only * * *."

**Rule 16(f)**

Burbank-Joseph: Rule 16(f)(1): Global style — "on its own initiative."

**Rule 17**

Burbank-Joseph: Rule 17 Title: A style matter. The present rule's "Parties Plaintiff and Defendant" is not obviously more open to other parties than Style's "The Plaintiff and Defendant," although it more obviously refers to plural plaintiffs or defendants. The convention that we draft in the singular might be satisfied by "~~The~~ Plaintiff and Defendant."

**Rule 17(a)**

Burbank-Joseph: Rule 17(a), (c): The breaking up into separate parts is a style matter. There is a valid style concern that Style 17(c) seems to establish an exclusive list of representatives who may sue or defend on behalf of a minor, as compared to "such as" in the present rule. Recognizing "a like fiduciary" in Style (c)(1)(D) may be protection enough.

**Rule 18(a)**

Burbank-Joseph: This is style, but persuasive. Style Rule 8(a) begins by saying "a pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — * * *." Style 18(a) should preserve the distinction: "asserting an original claim * * *." Or it might not be too radical to shorten both 8(a) and 18(a): "A pleading that states a claim for relief must contain"; "A party asserting a claim may join * * *."

**Rule 19(a)**

Alan B. Morrison, Esq., 05-CV-003: The captions for both present Rule 19(a) and Style Rule 19(a) refer to persons to be joined if feasible. That term does not appear in the Rule 19(a) rule text. It is disconcerting to find the term in the Rule 19(b) rule text, referring to "a person who is required to be joined if feasible." The disconnect can be cured in either of two ways: (1) In Rule 19(a) — " * * * must be joined as a party if feasible and if: * * *."; or (2) In Rule 19(b): "If a person who is required to be joined ~~if feasible~~ under Rule 19(a) cannot be joined * * *."

**Rule 19(b)**

Alan B. Morrison, Esq., 05-CV-003: The references to an "adequate" judgment in (b)(3) and to an "adequate" remedy in (b)(4) "do not tell the court from whose perspective — plaintiff or defendant or both — the court should inquire."

Burbank-Joseph: Rule 19(b)(2): Pure style. This touches on the global issue of subdividing provisions, even though 19(b)(2) does not descend to the level of "items." The concern that subparts imply rigidity (exclusiveness) rather than flexibility is somewhat elusive, particularly since subparagraph (C) is "other measures."

**Rule 20(a)**

Alan B. Morrison, Esq., 05-CV-003: Both (a)(1)(B) and (a)(2)(B) carry forward the language of present Rule 20(a) allowing joinder of plaintiffs or defendants if a common question "*will* arise in the action." The difficulty is that no one can know at the outset whether a common question will arise. "may" seems too open-ended; is likely to seems better.

Separately (a)(3) carries forward the present rule in saying that the court "may" grant judgment for one or more plaintiffs or against one or more defendants. Why not "must"?

**Rule 21**

Burbank-Joseph: (1) A subtle argument: the present rule allowing addition or deletion of parties "at any stage of the action" means only before judgment; "at any time" in Style 21 may authorize action after judgment. Researching no further than 7 FP&P Civil 3d, § 1688.1, it appears that a motion to drop or add a party may be made on appeal, and even after an action has reached the Supreme Court. Perhaps the Style version is appropriate. (2) The global issue: "on its own initiative."

**Rule 22(a)**

Jack E. Horsley, Esq., 05-CV-002: Add to 22(a)(2): A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim, or a motion to dismiss because of failure to allege facts sufficient to constitute a prima facie case."

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**Rule 22(b)**

*Alan B. Morrison, Esq., 05-CV-003: "This rule supplements * * * Rule 20. The remedy ~~it~~ this rule provides is in addition to * * *." "it" might be misread to refer to Rule 20 as the closest antecedent.

**Rule 23(a)**

Burbank-Joseph: Rule 23(a)(3): A subtle style point. Present (a)(3) requires that "the claims or defenses of the representative parties are typical of the *claims or defenses of the class*." Style (a)(3) changes this to "typical of the class claims or defenses." The suggestion is that the present rule uses "class" to refer to all questions that inhere in the claims of each class member; while the Style Rule uses "class" to modify only the parts of the claims or defenses that are common to all class members — that is what makes them "class" claims. We deliberately chose to be very conservative in restyling Rule 23 after some initial hesitation whether to style it at all. This point deserves careful consideration.

**Rule 23(b)**

Burbank-Joseph: Rule 23(b)(1): This suggestion is similar to the (a)(3) suggestion, but less developed. The concern is that "juxtaposing 'individual' and 'class'" works a subtle change in meaning. In this context, referring to prosecution of individual actions by or against individuals comprised within the class definition, it is difficult to share the concern.

Burbank-Joseph: Rule 23(b)(1)(B): Two purely style points. (1) The suggestion prefers the present language as clearer, more idiomatic, and accurate: that "would as a practical matter be dispositive," is better than the Style "that, as a practical matter, would be dispositive." (2) "or" should be added after (1)(B). (Our style convention is to use "or," or "and," only after the next-to-last item in a series. "or" is used after (1)(A) because it is next-to-last in the (1)(A), (B) series.)

Burbank-Joseph: Rule 23(b)(3): Launches a whole series of style suggestions similar to the (a)(3) and (b)(1) suggestions. Here, the change would be "questions of law or fact common to the ~~class~~ members of the class." Again, the theory is that using "class" as an adjective to modify "members" emphasizes the constituent role of those included in the class as part of the class entity, while referring to "members of the class," and so on, emphasizes the individuality of the same people. "The risk of changing the meaning of an important rule outweighs the stylistic benefit * * *."

Burbank-Joseph: Rule 23(b)(3)(A): "the ~~class members'~~ interests of members of the class." See (b)(3) above.

Rule 23(b)(3)(B): "by or against ~~class~~ members of the class." See above.

**Rule 23(c)**

Burbank-Joseph: Rule 23(c)(2)(B): Global issue: subdivision to the (i), etc. item level.

Burbank-Joseph: Rule 23(c)(3)(B): "whom the court finds to be ~~class~~ members of the class." See (b)(3) above.

Burbank-Joseph: Rule 23(c)(3)(B): This style suggestion is subtle. It appears to suggest an improvement on the drafting of present (c)(3) that better expresses present meaning; clearly it does not suggest reverting to the present drafting. As revised, the Style Rule would require that the judgment in a (b)(3) class action "include and specify or describe those to whom the Rule 23(c)(2) notice was directed; and who have not requested exclusion, and whom the court finds to be class members." The concern is that notice and failure to request exclusion should be tightly bound in a way that separation by commas in an apparent series of independent elements does not accomplish. The only way to be bound is to be one to whom notice was directed and to fail to request exclusion.

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Burbank-Joseph: Rule 23(c)(4): Suggested restoration: "an action may be brought or maintained as a class action with respect to particular issues." The concern is that "brought" establishes the proposition that the initial request for certification need not assert a "whole" class, but may be limited to an issues class.

**Rule 23(d)**

Burbank-Joseph: Rule 23(d)(1)(B): Global issue: subdivision to items goes too far.

**Rule 23(h)**

Susan Kleimann, 05-CV-012: "The movant must serve ~~N~~notice of the motion ~~must be served~~ on all parties * * *."

**Rule 23.1(b)**

Susan Kleimann, 05-CV-012: The rule says that the complaint must be verified — who must verify it? Make it active. ["A" plaintiff must verify? "The" plaintiff?]

**Rule 25(a)**

Burbank-Joseph: Rule 25(a)(1): Present Rule 25(a)(1) says that the action "shall" be dismissed if there is no timely motion for substitution. The Style Rule says "may." The concern is that this should be treated as Style-Substance unless "there is unanimous agreement in the case law that the existing language confers discretion." This issue was considered at length, with the advice of consultants. We should resurrect the records. It is not clear at the moment whether the Style version satisfies a test of "unanimous agreement in the case law." One question is whether that is the appropriate standard. A second question is whether there is any realistic supersession concern that would justify treating this as Style-Substance, and whether treating it as Style-Substance would actually augment the risk of unintended supersession.

EDNY: Rule 25(a)(1): Makes the same point. The present rule does not give discretion — the action must be dismissed. "The Committee is not necessarily advocating that the Rule should be a mandatory one, but merely wishes to draw attention to the fact that a substantive change is being made."

**Rule 26(a)**

Burbank-Joseph: Rule 26(a)(1)(A)(iv): Suggested addition: "to satisfy all or part of a possible judgment in the action." The concern is that absent this limit, the rule might require disclosure of irrelevant insurance agreements. Pure style. [It is not clear whether the failure to object on the global issue of subdividing at the item level was deliberate. Since the same global issue is not raised as to (a)(2) or (3), it may be recognized that items help navigate this particularly long subdivision. But the eventual failure to comment on items wherever they appear suggests that the point was taken to have been made in general terms. They made it clear at the November 18 hearing: the objection to item subdivision extends to all rules.]

EDNY: 26(a)(2)(B): "~~this~~ the expert disclosure required by 26(a)(2)(A) * * *."

Burbank-Joseph: Rule 26(a)(2)(B)(vi): Another neat suggestion: add these words: "(vi) a statement of the compensation to be paid for the study and the witness's ~~compensation for study~~ testimony in the case." (I think that is how they would do it.) The concern is that "the witness's compensation for study" does not include compensation paid to others who do work to support the witness's study. "The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert's individual compensation."

Burbank-Joseph: Rule 26(a)(5): This one is fascinating. What now is (a)(5) was all of (a) until 1993, when the creation of disclosure in (a)(1) through (4) demoted it to a tag-end subdivision. It also was revised to expressly include Rule 45, albeit only one specific part; the Committee Note seems to suggest the only purpose was to "take note" of Rule 45 inspection "without the need for a deposition." It is fascinating — and sobering — to learn that some lawyers have been willing to argue that Rule 36 requests to admit and Rule 45 subpoenas are not "discovery" procedures. The idea that such arguments might be used "to elude discovery cutoff dates" is, well, surprising. But there the reported cases are; it seems likely that there are many more unreported examples. If deleting the seemingly redundant index will encourage lawyers to make such arguments, or will cause courts greater difficulty in rejecting them, we might rethink this style choice. One method of styling would be simply to list the rule numbers for the devices now described mostly by words — Rules 30, 31, 33, 34, 35, 36, and [part of] 45.

**Rule 26(b)**

Burbank-Joseph: Rule 26(b)(1): This comment notes that several rules refer to discovery of "documents and tangible things." One involves Style Rules 26(b)(5) and 45(d)(2), which refer to "documents, communications, or things not produced or disclosed." The inconsistency in terminology does not appear to be inadvertent. Rule 26(b)(5) is the privilege log rule; Rule 45(d)(2) is its analog for discovery from a nonparty, almost certainly copied from 26(b)(5) to be consistent. A response to an interrogatory, for example, could easily log as privileged a "communication" that is not a document. (Some thought should be given to the question whether this is true for nonparty discovery under Rule 45: could a subpoena duces tecum seek production of a "communication" that is not reduced to "document" form? Literally Rule 26(b)(5) applies at deposition. Style Rule 45(d)(2) applies to a person "withholding subpoenaed information"; does that read on a deposition response? Note that present Rule 45(d)(2) applies to "information subject to a subpoena [that] is withheld"; that might seem to aim at a deposition better than does the Style language.)

A second inconsistency is Style Rule 45(c)(2)(B). This rule establishes the procedure for objections by "[a] person commanded to produce designated materials or to permit inspection." The present rule applies to "a person commanded to produce and permit inspection and copying." The changes were the subject of explicit style discussion. The Style Rule's "designated materials" has no analog in the present rule. Do we need it? If we need it, would it be better to make it parallel to 45(c)(2)(A), which addresses "[a] person commanded to produce designated documents or tangible things"?

Prof. Bradley Scott Shannon, 05-CV-009: Rule 26(b)(1): A few unnecessary words can be omitted: "Unless otherwise limited by court order, ~~the scope of discovery is as follows:~~ * * *."

EDNY: Rule 26(b)(4)(B): " * * * But a party may do so only: * * *." Present Rule 26(b)(4)(B) allows discovery of a trial-preparation expert "only" in the two listed circumstances; the Style Rule should be consistent.

Susan Kleimann, 05-CV-012: "[W]hat exactly does 'manifest injustice' mean"? This is legal jargon.

**Rule 26(e)**

Burbank-Joseph: This comment tests one of the limits adopted in the Style process. Present Rule 26(e) limits the duty to supplement disclosures and discovery responses by defining it as a duty "to include information thereafter acquired." This limit was deliberately deleted in Style 26(e) on the theory, explained in the Committee Note, that in practice lawyers recognize a duty to add to prior responses whenever they learn information that makes the initial response incomplete or incorrect; it makes no difference whether the information was available at the time of the initial response or was thereafter acquired. This approach reflects the determination that a Style Rule can properly reflect what the present rule means in practice, no matter what it seems to say. The comment

suggests that in practice there is a distinction between supplementing a prior response and correcting a prior response. The "safe harbor" opportunity to correct a Rule 11 violation is pointed to as an illustration of correction. It seems all the same thing — what counts is that the correction or supplementation is made, not what it is called. But perhaps there are differences. Correction is relevant to Rule 26(g) sanctions, or may be. Correction may not come within the present Rule 37(c)(1) sanctions for failure to supplement "under Rule 26(e)(1) or (2)." These possibilities may suggest that it strains Style Project limits too far to delete "information thereafter acquired" from the rule text.

**Rule 26(g)**

Burbank-Joseph: Rule 26(g)(1)(B)(ii): (Apparently the protest about subdividing down to the item level is now going without saying.) This raises the same question about the change from "the cost of litigation" to "litigation costs" as was directed to Rule 11(b) in the same terms.

Burbank-Joseph: Rule 26(g)(2): This one is intriguing. Present Rule 26(g)(2) says that if a discovery request, response, or objection is not signed, "a party shall not be obligated *to take any action with respect to it* until it is signed." Style Rule 26(g)(2) reduces this to "the other party has no duty to respond." The suggestion is to restore the present language: "has no duty to ~~respond~~ take any action with respect to it." The explanation, however, raises issues that may not be addressed by simply restoring the present language. The suggestion is that an unsigned request, response, or objection is "inoperative." What action, after all, is taken in response to a discovery response? Or in response to an objection — there is no duty to move to compel discovery anyway? Do we mean to say that an unsigned response does not count for purposes of meeting the deadline for response or a discovery cutoff? The present rule does not say that. The conservative course would be to restore the present language and let the questions sort themselves out without attempting to reassure ourselves that the economy of words cannot affect the outcome.

**Rule 30(b)**

Alan B. Morrison, Esq., 05-CV-003: Present Rule 30(b)(5) provides that the notice to a party deponent may be accompanied by a Rule 34 request for the production of documents and tangible things at the taking of the deposition, concluding: "The procedure of Rule 34 shall apply to the request." Style Rule 30(b)(2) says that the notice to a party deponent may be accompanied by "a request complying with Rule 34 to produce documents and tangible things at the deposition." The comment observes that some subparts of Rule 34 are inconsistent with parts of Rule 30, particularly the time to respond. "It may be easier to specify the parts of Rule 34 that do apply — such as the description requirement under (b)(1)(A) — and not get involved with the rest of Rule 34." [To the extent there is a problem, it is not much aggravated by the Style Rule, although the specificity of the present rule is a help — Rule 34 procedures apply, including the time to "respond." The response may be production, or it may be an objection, or it may be a statement inspection and related activities "will be permitted." It is plain that these control — a response cannot be forced within 20 days by noticing the deposition for 20 days hence, and so on. "complying with Rule 34" in the Style Rule should be read the same way; whether the compression effected by Style is worth the potential misreading deserves attention.]

Jack E. Horsley, Esq., 05-CV-002: Style Rule 30(b)(5)(A)(v) requires the officer conducting a deposition to begin with a statement that includes the identity of all persons present. "[I]t would be advisable to add * * * a statement communicating why the identity of persons present should be part of the officer's observation."

Burbank-Joseph: Rule 30(b)(3)(A), 30(b)(5)(B): Present Rule 30(b)(2) refers to recording by "sound, sound-and-visual" means. This appears in Style Rule 30(b)(3)(A)(3) as "audio, audiovisual." Present Rule 30(b)(4) inveighs against distorting the demeanor or appearance of witnesses or

attorneys "through camera or sound-recording techniques." Style Rule 30(b)(5)(B) carries forward "camera or sound-recording techniques"; it should be conformed to 30(b)(3)(A). That sounds right. There are at least two choices. Style (b)(5)(B) could refer to "camera or ~~sound-~~ audio recording techniques," or it could be simply: "camera or ~~sound-~~ recording techniques."

**Rule 30(f)**

Burbank-Joseph: Rule 30(f)(1), 31(b): Present Rule 30(f) requires that the officer taking a deposition "promptly send it to the attorney who arranged for the transcript or recording." Style Rule 30(f)(1) carries these words forward without change. Present Rule 31(b), addressed to a deposition on written questions, directs the officer to "file or mail the deposition." Style Rule 31(b)(3) instead directs the officer to "send it to the party." (In the structure of the rule, this means "the party who noticed the deposition.") Deletion of filing from Style 31(b)(3) reflects the amendment of Rule 5(d) that directs filing of discovery materials only when "used in the proceeding or the court orders filing." It is suggested that these provisions should be made identical; a preference is expressed for mailing to the "party" to take account of pro se cases. This suggestion presents two questions. The first is the scope of the Style Project. Rule 31 needed to be revised to account for Rule 5(d), and in a way that surmounts the possible ambiguity of the present rule by reading it to direct mailing to the party who noticed the deposition. Should the desire to make these directions uniform bring a clear change in Rule 30(f) within the reach of Style? That question in turn leads to the question whether the change should simply substitute "party" for "attorney." It might make sense to direct that a copy of the oral deposition be sent to the party who arranged for the transcript or recording, not to the party who noticed the deposition. (Who is in charge when different parties designate different modes of recording?) And to provide differently in Rule 31. In the end the suggestion is to refer these issues to the Style-Substance track. There is no likely supersession question here. Calling it style-substance now makes no difference unless the question is put off for a further round of public comment — and then the question would be whether to delay the entire Style Project, or to let it go forward with the most satisfactory current approximation and address the larger change separately.

Burbank-Joseph: Rule 30(f)(4), 31(c): Present Rule 30(f)(3) directs the party taking the deposition to give prompt notice of its filing. Present Rule 31(c) says "when the deposition is filed the party taking it shall promptly give notice thereof." These rules reflect former Rule 5(d), which directed that discovery materials be filed unless the court ordered otherwise. Rule 5(d) was amended in 2000 to direct that discovery materials not be filed until used in the proceeding or the court orders filing. One question may be whether the Style Project can be the occasion for correcting the failure to make conforming amendments of Rules 30 and 31 in 2000. The present suggestion, aimed toward the Style-Substance track, is that the "notice of filing" should be deleted. Other rule provisions "cover the notice requirements" when transcripts are filed in connection with motion practice or similar events. That fairly puts the question: is there any value in requiring separate notice of filing? Suppose a party makes a motion for summary judgment, with appropriate notice, and then remembers to file the supporting discovery materials, or makes additional filings in response to the arguments against summary judgment: is there a clear independent notice requirement? And if a modified notice requirement seems desirable — or the conservative thing to do in the Style Project — can it properly be done as a matter of Style?

**Rule 33(a)**

Burbank-Joseph: Rule 33(a)(2): The suggestion fairly joins the issue. Is it really proper to decree that it is only a matter of style to correct the lamentable drafting that gave us present Rule 33(c): "An interrogatory otherwise proper is not ~~necessarily~~ objectionable merely because an answer * * * involves an opinion or contention that relates to fact or the application of law to fact"? The suggestion is that an opinion interrogatory may indeed be objectionable, as when it is addressed to a nonexpert and asks for an expert opinion. There will be arguments that the objection is "merely

because" an opinion is sought, and that the subject is relevant, so the party must answer. There was a strong view earlier that correction is clearly called for, but that it is better not to test the limits of the Style Project in this way. This suggestion invites further consideration of that view.

**Rule 34(a)**

Burbank-Joseph: The comment renews the suggestion to adopt consistent usages of "document" and "tangible thing." It is noted again here as a reminder that the addition of "electronically stored information" to several rules in the amendments still on track to take effect on December 1, 2006, requires careful attention to all of the related rules to make sure that there are no unintentional oversights.

**Rule 36(a)**

Burbank-Joseph: Rule 36(a)(5), (6): Pure Style: paragraphs (5) and (6) should be combined. Both deal with objections. Fewer paragraphs are better than more.

**Rule 37(a)**

Prof. Bradley Scott Shannon: Present Rule 37(a)(2)(B) refers only to a failure to respond to a request for inspection under Rule 34 and an order compelling inspection. Style Rule 37(a)(3)(B) should not be expanded to include in the introduction an order compelling "production."

**Rule 37(b)**

Burbank-Joseph: Rule 37(b)(2)(A)(i): This suggestion is similar to one made with Rule 11(c)(2) and again with Rule 50(e), but the context of each rule invites different reflections. Present Rule 37(b)(2)(A) authorizes as a sanction for disobeying a discovery order that facts be taken to be established "in accordance with the claim of the party obtaining the order." Style Rule 37(b)(2)(A)(i) renders this as established "as the prevailing party claims." In this setting it seems nearly impossible that anyone would contend that the "prevailing party" means the party that ultimately wins judgment. It can mean only the party that prevailed by obtaining the discovery order and then by winning the sanction for violating the discovery order. But the Style question remains: is it somehow safer to fall back on the present language — "as the ~~prevailing~~ party obtaining the order claims"?

**Rule 37(c)**

Burbank-Joseph: Rule 37(c)(1): This is a suggestion to improve an ambiguity that exists equally in the present rule and in the Style Rule. It seems to be well within the limits of the Style Project. Present Rule 37(c)(1) begins by addressing failure "to *disclose* information as required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2)," and as a sanction says that the party is not "permitted to use as evidence * * * information not so *disclosed*." Style Rule 37(c)(1) is similar. The problem is that "disclose" in its first appearance seems to be aimed at Rule 26(a) disclosures, while "disclosed" in the second appearance clearly embraces both failure to supplement discovery responses and also failure to correct an incomplete disclosure by way of discovery or other writing. This is not good drafting. One way to revise the Style Rule might be:

> **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information or a witness required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) — the party is not allowed to use the information or witness to supply ~~as~~ evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~ * * *.

(This may not be an improvement. We might seek a substitute for "disclosed" in the second appearance. "Revealed,""supplied," or something like that.)

**Rule 38(e)**

Burbank-Joseph: Rule 38(e): This is pure style, but I like it. So much for "under." The point is that Style Rule 9(h) says that a claim cognizable only in the admiralty or maritime jurisdiction is governed by Rules 14(c), 38(e), 82, and the Supplemental Rules "whether or not so designated." A claim that could be brought either under the savings clause or in admiralty is governed by those rules only if designated as an admiralty or maritime claim. Style Rule 38(e), by referring to "a claim designated as an admiralty or maritime claim under Rule 9(h)," may seem to leave out an inexorably admiralty or maritime claim that does not depend on designation. To be sure, little is likely to turn on this — Style Rule 38(e) will not be read to create a right to jury trial on a pure admiralty or maritime claim; Style Rule 38(a) pretty much takes care of that. The suggestion is to restore the present language: "issues in ~~a claim designated as~~ an admiralty or maritime claim ~~under~~ within the meaning of Rule 9(h)." Or we could preserve our fond affection for "under": "issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h)."

**Rule 39(a)**

Burbank-Joseph: Rule 39(a)(1): This is a variation on the global issue of "written stipulation." Here present Rule 39(a) provides for waiver of jury trial after demand " by an oral stipulation made in open court and entered in the record." Style Rule 39(a)(1) reduces this to "so stipulate on the record." The suggestion notes some uncertainty as to the meaning of "open court," and also observes that a party can waive a prior jury demand through conduct (apparently suggesting that a stipulation on the record may be conduct that effects a waiver even though it is not in "open court"). But as a style matter it suggests restoring "so stipulate on the record in open court" to avoid any risk.

**Rule 40**

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 40 includes a third method for placing an action on the trial calendar — "such other manner as the courts deem expedient." This is omitted from Style Rule 40. The omission may create confusion as to self-calendaring systems that enable a party to select an available date without prior notice to other parties. The Style-Substance Track version of Rule 40 seems to erase any doubt — it does not impose any implicit limits on the means a court may provide for scheduling trials. There is no need for change if the Committees believe it useful to permit self-calendaring systems. [Presumably a self-calendaring system does provide notice of the date selected, and likely a means for challenging the date.]

**Rule 41(c)**

Burbank-Joseph: Rule 41(c)(2): Present Rule 41(c) provides that the claimant on a counterclaim, crossclaim, or third-party claim can take an involuntary dismissal under 41(a)(1) "before a responsive pleading is served, or if there is none, before the introduction of evidence at *the* trial or hearing." Style Rule 41(c)(1)(2) changes "the" to "a": "before evidence is introduced at *a* hearing or trial." The suggestion is that "a hearing" could refer to a pretrial hearing at which evidence is introduced. Surely that is right. So the question is whether, as suggested, "the" hearing in the present rule looks only to a trial on an equitable claim. This question ties to a problem that was considered to be beyond the reach of a Style Project. As observed in 9 FP&P: Civil 2d, § 2374, the right to dismiss an action without court order terminates on the filing of an answer or of a motion for summary judgment. It appears to be absent-mindedness, not deliberate choice, that a motion for summary judgment does not cut off the right to dismiss a counterclaim, crossclaim, or third-party claim. (The Treatise cites a 1940 district-court decision that submission of an affidavit by the plaintiff on a motion for summary judgment is not the introduction of evidence at a trial or hearing.) "[T]he trial or hearing" is itself ambiguous. Suppose the claim is tried ahead of the counterclaim: does introduction of evidence at that trial cut off the right to dismiss the counterclaim without court order? "a" could easily change the answer. This is a matter of style, but in all the suggestion to revert to "the" deserves serious consideration.

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**Rule 42(a)**

PLAIN, 05-CV-010: "join * * * any ~~or all~~ matters * * *."

EDNY: "and" between paragraphs (2) and (3) should become "or." "[C]ourts have traditionally viewed these options in the disjunctive, even though they were set forth in the original Rule in the conjunctive."

Prof. Bradley Scott Shannon, 05-CV-009: The same suggestion as EDNY above.

**Rule 43(a)**

Burbank-Joseph: This style suggestion is another round in the debate about "intensifiers." The 1996 Rule 43(a) amendment was deliberately drafted with intensifiers to signal the exceptional character of testimony by contemporaneous transmission from a different location. "for good cause shown in compelling circumstances" was not a mere reflex of ingrained habit. Style Rule 43(a) deleted "for good cause shown." As a global convention, "shown" is not likely to be restored. That leaves the style question: will users of the rule understand that the rules do not use intensifiers, and that "compelling circumstances" means the same as "for good cause [shown] in compelling circumstances"?

**Rule 43(b), etc.**

Hon. Thomas S. Zilly, 05-CV-016: Reflecting the prior abrogation of subdivisions (b) and (c), present subdivisions (d), (e), and (f) are redesignated as (b), (c), and (d). This change could create confusion for future researchers into Rule 43 and Bankruptcy Rule 9014. As with Rule 12, the Committee Note should point to the change.

**Rule 44.1**

EDNY: " * * * give notice by a pleading or other reasonable written notice ~~writing~~ * * *." "We believe that the elimination of the word 'reasonable' from the proposed Rule might lead some to argue that any written notice — even if unreasonable — would satisfy the Rule."

**Rule 45(a)**

Burbank-Joseph: This question troubled us during the style process. Present Rule 45(a)(3) authorizes an attorney to issue a subpoena "on behalf of" a court. Style Rule 45(a)(3) refers to it as a subpoena "from" a court. The comment suggests that "from" implies that the "attorney must obtain the subpoena from" the court. "The entire point of this provision is just the opposite." The comment seems to fear that "from" means the attorney must persuade the court to issue the subpoena. But the rule says that the "attorney * * * may issue and sign a subpoena from." There is no room to doubt that the attorney issues the subpoena. Unless the comment means something else, change may not be indicated.

**Rule 45(b)**

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 45(b)(1) requires service on each party of "prior notice" of a subpoena commanding production of documents or things. Style Rule 45(b)(1) directs that before the subpoena is served "a notice must be served on each party." This is ambiguous — how long "before"? 30 seconds? A sufficient time to afford other parties an opportunity to act before the subpoena is served? The consensus of the Bankruptcy Rules Advisory Committee was that service on the parties should be "with" or "contemporaneously with" service on the subpoenaed person. In addition, the Committee Note indicates that the Style Rule resolves some level of uncertainty and disagreement in the cases; it may be more than merely "stylistic."

Burbank-Joseph: Rule 45(b)(1): This one also is puzzling. Present Rule 45(b)(1) says that notice of a subpoena commanding production of documents or things must be served on each party "in the

manner prescribed by Rule 5(b)." Those words are omitted from Style Rule 45(b)(1). The comment suggests concern that "Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4." But there should be no confusion. Rule 4 governs service of the summons. Rule 4.1 governs service of "[p]rocess — other than a summons under Rule 4 or a subpoena under Rule 45 * * *." Rule 5(a)(1)(E) says that a "written notice" must be served on every party. Rule 5(b) establishes the manner of service under Rule 5. Absent more explanation, this one does not seem to indicate a need for change.

**Rule 45(c)**

Burbank-Joseph: Rule 45 (c)(2)(B)(ii): A fine style point. Present Rule 45(c)(2)(B) says that if a person commanded to produce objects, the party serving the subpoena "shall not be entitled to inspect and copy * * * except pursuant to an order of the court." Style Rule 45(c)(2)(B)(i) says that the serving party may move for an order compelling production, etc.; 45(c)(2)(B)(ii) says: "Inspection and copying may be done only as directed in the order." The concern is that under the present rule it is clear that a party not "entitled" to inspect and copy can inspect and copy if the dispute is resolved without court order, while the Style version may imply that the parties cannot resolve the objection by agreement. It would be a rare court that insisted that a discovery dispute could not be resolved without its order. At any rate, the suggested revision would read: "(ii) ~~Inspection and copying may be done only~~ The serving party shall not be entitled to inspect or copy except as directed in the order * * *." [Our style would be "is not entitled."] There are other possible drafting approaches, to be explored if the subject is taken up.

**Rule 48**

Burbank-Joseph: The point seems to be a matter of style. Present Rule 48 begins: "The court shall seat a jury of not fewer than six * * *." It goes on to allow the parties to stipulate to a verdict "taken from a jury reduced in size to fewer than six members." This seems clear: the jury must be at least six at the outset, and can be reduced by stipulation only when the jury is "reduced" by some event after it is seated. Style Rule 48 begins "A jury must have no fewer than 6 * * *." It concludes that "unless the parties stipulate otherwise" the verdict must "be returned by a jury of at least 6 members." That might imply that the parties can stipulate at the outset to a jury of fewer than 6 members. Of course the intent of the Style rule is the same as the present rule: there must be at least 6 at the beginning, and also at the end unless the parties stipulate to fewer than 6.

Prof. Bradley Scott Shannon, 05-CV-009: Finds a different ambiguity. The opening statement that a jury must have no fewer than 6 members seems to contradict the second sentence statement that the parties can stipulate to a verdict returned by a jury reduced to fewer than 6 members. "At the start of trial" could be added go the first sentence to correct this problem.

PLAIN, 05-CV-010: "Unless the parties stipulate otherwise, the verdict must be unanimous ~~and must be returned by a jury of at least 6 members~~." The concept of "at least 6" need not be repeated. [This comment seems to read the rule as if a stipulation can authorize a less-than-unanimous verdict, but cannot authorize a verdict by a jury reduced to fewer than 6 members. Is this a plausible misreading?]

**Rule 49(a)**

Burbank-Joseph: Rule 49(a)(2): Style suggestions. "The court must ~~instruct the jury~~ give the instructions and explanations that are necessary to enable ~~it~~ the jury to make ~~its~~ findings on each submitted issue." (1) "[E]xplanation" is restored from the present rule because it may mean more than instructions — for example, responding to jury questions. This suggestion parallels concerns expressed earlier. The present rule seems to reflect a concern that submission of a special verdict may be improved by explaining to the jury the nature of their task in ways that do not involve instructions on the substantive law. The suggestion deserves renewed consideration. (2) "[T]o enable it to make its findings" in the Style Rule is criticized because "it" might refer to the court rather than

the jury. This criticism ignores the style convention of the last antecedent, and in any event suggests an implausible reading of the Style Rule.

Burbank-Joseph: Rule 49(a)(3): Present Rule 49(a): "[E]ach party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." This can be read to say that if the plaintiff objects but the defendant does not and the plaintiff wins the verdict on other issues, or the court decides the issue to the plaintiff's satisfaction, the defendant has waived the right to jury trial. (Surely this result would follow if the defendant argued that the issue should not be submitted to the jury.) Style Rule 49(a)(3) begins by stating that "A party waives the right to a jury trial on any issue of fact * * * unless, before the jury retires, *the* party demands its submission to the jury. If *the* party does not demand submission, the court may make a finding * * *." This more clearly expresses the meaning attributed to the present rule above. But the suggestion is that the present rule means something else: If the plaintiff objects to omission of the issue, the court may not make a finding and the defendant is entitled to jury trial of the issue. If that is right, revision is in order; the suggestion is "If ~~the party does not~~ no party demands submission, * * *." (Compare Rule 51(d)(1)(A): during the recent revision of Rule 51, it was suggested that any party should be allowed to raise on appeal an objection to the instructions that was made by any other party, so long as it is the same objection. That suggestion was rejected in favor of the view expressed in the rule — only the party that made the objection can assert error on appeal.)

**Rule 49(b)**

Burbank-Joseph: Rule 49(b)(1): This suggestion is similar to the first suggestion for Rule 49(a)(2) above. Present Rule 49(b) requires the court to give the jury "such explanation or instructions" as may be necessary. Style Rule 49(b)(1) omits any reference to explanation. Communicating to the jury the thought that they must both return a general verdict and also answer the written questions may well be better described as "explanation" than as "instruction." The specific suggestion is: "The court must ~~instruct the jury to enable it to render a general verdict and~~ direct the jury to answer the questions in writing and to render a general verdict, and must ~~direct~~ give the instructions and explanations that are necessary for it to do ~~so~~ both." [A streamlined version might be: "The court must give an explanation and instructions that enable the jury to render a general verdict and answer the questions in writing."]

**Rule 50(a)**

Jack E. Horsley, Esq., 05-CV-002: Suggests adding — just where is not clear — "and make a prima facie case."

**Rule 50(e)**

Prof. Bradley Scott Shannon, 05-CV-009: **(1)** Present Rule 50(d) says only that "nothing in this rule precludes [the appellate court] from determining that the appellee is entitled to a new trial." That is not the same as the Style Rule's statement that the appellate court may order a new trial. This part should be rewritten to reflect the present rule or should be deleted. **(2)** Present Rule 50(d) does not say that an appellate court can order judgment as a matter of law after the trial court denies the motion. It is a mistake "to codify some perceived ability, based only on pragmatism, on the part of appellate courts to decide issues not first decided by trial courts."

**Rule 51(c)**

Burbank-Joseph: Rule 51(c)(1): This suggestion seems right on. "A party who objects to an ~~proposed~~ instruction * * * must do so on the record * * *." Present (c)(1) is "an instruction." The suggestion correctly observes that an objection is timely under (c)(2)(B) if the party first learns of the instruction when it is given. And the objection should be made on the record.

**Rule 52**

Burbank-Joseph: A persuasive style suggestion for the Rule title. Rule 52(a)(1) includes actions tried with an advisory jury. So: "Findings and Conclusions by the Court ~~in a Nonjury Proceeding~~; * * *."

**Rule 54(a)**

Burbank-Joseph: A sensible style suggestion, with a possible variation, that also points to an internal absurdity of Rule 54(a). (1) The suggestion is that "shall" in the present rule should become "may" in the Style Rule, not "must." The dilemmas that arise from "shall" are familiar. Here the point that a judgment "should still be given effect" despite a violation of Rule 54(a) seems persuasive. Perhaps the best outcome would be: "A judgment ~~must~~ should not include recitals * * *." (But note that Rule 58(a) requires that a judgment must be set out in a "separate document" that cannot include anything else. "Must" might after all be appropriate but for the next problem.) (2) Rule 54(a) defines a judgment as any order from which an appeal lies. That includes all sorts of things other than final judgments. The most likely sort of self-contradiction arises from collateral-order doctrine. As one familiar example, an order denying an official-immunity motion to dismiss or for summary judgment might well explore — "recite" — the pleadings. It would be foolish to say that because Rule 54(a) transforms the order into a judgment the court cannot explain its decision in this way. More generally, the margins of collateral-order appeal are uncertain; the district judge may have no reason to suppose that an order that recites pleadings or the like is a "judgment" because it is appealable.

**Rule 54(b)**

Burbank-Joseph: Style: "the court may ~~enter~~ direct the entry of a final judgment." The suggestion points out that under Rule 58(b)(1) the clerk enters judgment, and under 58(b)(2) the court approves judgment "which the clerk must promptly enter." So in Rule 59(a)(2) it is provided that on motion for a new trial in a nonjury case the court may "direct the entry of a new judgment."

**Rule 54(d)**

Alan B. Morrison, Esq., 05-CV-003: Present Rule 54(d)(2)(C) provides for a hearing on a request for attorney fees "on request * * * of a class member." Style Rule 54(d)(2)(C) begins "Subject to Rule 23(h) * * *." The Committee Note is clear, but the rule text is not. It would be better to delete this from (d)(2)(C) and add it to the exceptions in (e): "Subparagraphs (A)-(D) do not apply to claims for fees and expenses * * * subject to [governed by? under?] Rule 23(h)." (Style Rule 54(d)(2)(C) was deliberately drafted after extensive discussion; it is intended that most of the (d)(2) procedure apply to fee motions in class actions.)

Burbank-Joseph: Rule 54(d)(1): Several style suggestions.

(1) Present Rule 54(d)(1) is: "Except when *express provision* therefor is made" by statute or rule. Restore "expressly provide otherwise." Courts recite "express provision," and this is not surplusage.

(2) Present Rule 54(d)(1) is "unless the court otherwise directs." This should be restored. The Style Rule is "Unless * * * a court order provides otherwise." That might be interpreted to allow a court to provide otherwise by standing order.

The suggestion that combines (1) and (2) is:

Unless a federal statute or these rules ~~or a court order~~ expressly provides otherwise or the court directs otherwise, costs * * *.

(3) A familiar problem of translating "shall." Present Rule 54(d)(1) begins with exceptions, then says "fees shall be allowed as of course to the prevailing party." It is wrong to Style this as "should be allowed." As a matter of logic, providing exceptions and then saying "shall" implies "must" unless the exceptions apply. And "as of course" "was meant to create a mandatory presumption in favor of allowing costs in the absence of the court's specific explanation to the contrary, according to 10 Moore § 54.101[1][a]." A contrasting sense seems to be expressed in 10

FP&P: Civil 3d, § 2668: Allowing costs to the prevailing party "is not a rigid practice * * * inasmuch as the rule itself empowers the court to direct otherwise. Other then when the matter is controlled by a federal statute or rule, Rule 54(d) vests the court with a sound discretion, which extends to all civil actions and embodies a practice long recognized in equity. * * * In keeping with the discretionary character of the rule, the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." Apart from the seeming differences of treatise views, one of the considerations in translating "shall" has been to avoid "must" when the "must" is qualified by significant discretion.

Burbank-Joseph: Rule 54(d)(2)(D): A style suggestion that seems right. The tagline should be expanded: " * * * Reference to a Master or a Magistrate Judge." The rule expressly includes a magistrate judge.

**Rule 55(b)**

Burbank-Joseph: Rule 55(b)(2): Again two suggestions.

(1) "the party must apply to the court for a default judgment." So says the present rule. Although the caption is "By the Court," the caption is "not supposed to carry weight." The balance of the rule does not supply any indication that it is the court, not the clerk, that directs entry of judgment in the circumstances covered by (b)(2).

(2) "The court may conduct evidentiary hearings or make referrals * * *." The present rule requires service of notice "at least 3 days prior to *the* hearing on" the application for default judgment. The implication that there must be a hearing is lost in the Style Rule. (In considering this style point, there may be a need for further research. 10A FP&P: Civil 3d, § 2688, begins: "Rule 55 does not require that testimony be presented as a prerequisite to the entry of a default judgment, and thus several courts have determined that a hearing is not required before entering a default." If there is a hearing, it "is not considered a trial, but is in the nature of an inquiry before the judge.")

**Rule 56(a)**

Burbank-Joseph: This suggestion ties to the Time Counting Project: "A party claiming relief may move * * * after * * * (1) 20 days have passed from commencement of the action." The present rule is "after the expiration of 20 days from the commencement of the action." This creates a "dead zone of twenty days." As distinguished from most time periods, the 20th day — although the last day of the designated period — is not the last day for doing something but the last day before something can be done. The style question is whether there is any doubt about the meaning of the Style Rule.

**Rule 56(c)**

EDNY: In Style Rules 56(c), (d), and (e)(2), "should" should be replaced by "'shall,' as in the current Rule, because otherwise it would appear that a substantive change would result." (This particular problem of translating "shall" was resolved in favor of "should" because of the well-established proposition that a district court has discretion to deny summary judgment even though the required showing has been made. The Committee Note addresses the change.)

**Rule 56(d)**

Burbank-Joseph: Rule 56(d)(1): The suggestion: "If on motion summary judgment is not rendered on the whole action * * *." The concern: without "on motion," which is in the present rule, the Style Rule may seem to impose a duty on the court to act sua sponte to enter "partial summary adjudication."

Prof. Bradley Scott Shannon, 05-CV-009: Rule 56(d)(2): Rule 56(d)(1) makes (d)(2) "redundant and therefore unnecessary." [Style Rule 56(d)(2) is taken from the final sentence of Present Rule 56(c). It may serve some purpose, in part to reassure that a court may not only establish "facts" but also may establish liability, and in part to solidify the rule that a Rule 56 order establishing liability is not ordinarily an appealable judgment. That it may also carry forward some tension with collateral-order

appeal doctrine seems inevitable — an order granting summary judgment on liability for a plaintiff, rejecting an official-immunity defense, is appealable as if a "final" decision.]

**Rule 56(e)**

Alan B. Morrison, Esq., 05-CV-003: " * * * an opposing party ~~may~~ must not rely ~~merely~~ on allegations or denials in its own pleading * * *." "Merely" adds nothing. "may" is inadequate because failure to submit counter evidence forfeits the right to claim the facts are in dispute. ["merely," adapted from the present rule, does serve a role. Without it, the rule would say that a party may not rely on its own allegations or denials — but the allegations or denials are essential to identify the materiality of facts. As to the choice between "may" and "must," the dilemma is familiar. "may" seems to work. And it may be better in this setting — this sentence comes into play only if the moving party has "supported" a motion for summary judgment in the sense that its showing has carried the summary judgment burden and it wins summary judgment unless the nonmoving party fights back.]

**Rule 57**

Burbank-Joseph: A style suggestion: "A party may demand a jury trial under the circumstances and in the manner provided in Rules 38 and 39." This is another challenge to our beloved "under." The concern is that simply saying "under" may imply that Rule 57 creates a right to jury trial that can be perfected by making a timely demand under Rule 38. The Style response is that Rule 38 only sets out the procedure for asserting a jury trial right that arises from another source. But the Style conventions may not deter lawyers from making the argument, and even might fail the court confronted with the argument.

**Rule 58(a)**

Burbank-Joseph: Rule 58(a)(2): The comment on Rule 62(b), described below, might best be resolved by this change: "to amend or make additional findings ~~of fact~~ under Rule 52(b)."

**Rule 59**

Hon. Thomas S. Zilly, 05-CV-016: The caption might better reflect the rule if it read: "New Trial; Altering or Amending a Judgment"

**Rule 59(a)**

Burbank-Joseph: (1) Both (1)(A) and (B): "for any reason for which a new trial ~~has~~ could have been properly granted in * * *." It is asserted that present Rule 59(a) "clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial." The source for that assertion in the present rule text is not clear. Clearly it says "have heretofore been granted," without "properly." (This language should not be read to mean that if one court grants a new trial for an improper reason all later courts may grant new trials for the same reason — that it is made "proper" by the first court's erroneous grant "heretofore.") Changing to "could have been" seems to open it up — never mind whether it ever has been done, so long as it could have been done. More importantly, this language was vigorously contested during the Style process. The maddeningly obscure language of the present rule was carried forward from a sense of at least two things — it has not actually required that specific precedent be found, and it has not impeded flexible development of new-trial standards.

(2) A style "and" "or" choice. Present Rule 59 separates (1) and (2) by "and." The suggestion is that "or" fits better — it was either a jury trial or a nonjury trial. Of course it might be both — a single trial may be tried in part to a jury, in part to the court. In that setting "and" actually fits better, or may seem to. But "or" is likely to cause less confusion to casual readers, and fits better with the common preference for "or" in Style Rule lists of alternatives.

**Rule 59(c)**

Burbank-Joseph: Another global issue on "written" stipulation.

**Rule 60(a)**

Burbank-Joseph: Change the tag line: "Corrections ~~Based on~~ of Clerical Mistakes; and of Oversights and Omissions."

**Rule 60(b)**

Alan B. Morrison, Esq., 05-CV-003: Present and Style Rule both refer to granting relief from a judgment to a party or its "legal representative." This term appears nowhere else in the rules; it adds nothing; and it may cause confusion in comparison to the reference only to a party in the Rule 60(d)(1) recognition of an independent action for relief from a judgment.

Burbank-Joseph: Add to the tag line: "Grounds for Relief From a Final Judgment, ~~or~~ Order, or Proceeding." Whatever a "final proceeding" might be, they added "final" in 1948 deliberately to describe all three — judgments, orders and proceedings. (The question whether to retain "proceeding" in the rule text was fought in the Style process; it was deliberately retained, so why not add it to the tag line?)

**Rule 60(d)**

Burbank-Joseph: Rule 60(d)(2) A good style suggestion: "grant relief * * * to a defendant who ~~is~~ was not personally notified * * *."

**Rule 61**

Alan B. Morrison, Esq., 05-CV-003: Both present and Style Rules are captioned "harmless error," but that phrase does not appear in either rule text. The present rule is verbose and to some extent internally inconsistent. The Style Rule is less clear, but still substantially redundant. Why bother to say "at every stage of the proceeding"? Begin: "The court must disregard ~~all~~ harmless errors and defects * * *." Append "unless the interest of justice otherwise requires" to that. [This part is unclear. But remember other suggestions that Rule 61 at least should conform to Evidence Rule 103. We may want to think further about this one; the current Style version inherits a lot from the present rule, and reflects a conservative approach to change.]

Burbank-Joseph: The suggestion is that "the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track." Evidence Rule 103(a) begins: "Error may not be predicated upon a ruling * * * unless a substantial right of the party is affected * * *." The first sentence of present Rule 61 concludes by saying that no error is ground for relief unless refusal to act on the error "appears to the court inconsistent with *substantial* justice." Style Rule 61 inverts the order of the sentence, and begins "Unless justice requires otherwise." No "substantial." But the second sentence concludes by stating that the court must disregard all errors and defects "that do not affect any party's substantial rights." So the Style question is twofold, beginning with the common grounds that Rule 61 should be consistent with Evidence Rule 103 and that the same words should be used to express the same thought in different sets of rules. First, "substantial" was no doubt dropped from "justice" as an "intensifier" — what other sort of justice do we seek? Insubstantial? Absolute? Second, "substantial" does appear in the Style Rule, and in a position that clearly applies to all errors, including errors in admitting or excluding evidence. Is that parallel enough?

**Rule 62(a)**

Burbank-Joseph: "But unless the court orders otherwise, the following are not ~~automatically~~ stayed * * *." The first sentence establishes a 10-day period before execution may issue. The second sentence excepts two situations from the 10-day stay. The suggestion is that "automatically" is distracting. The 10-day stay results from Rule 62(a), not from court order; there is no stay in three sets of circumstances unless the court orders a stay.

**Rule 62(b)**

Burbank-Joseph: Rule 62(b)(2): This Style comment finds inconsistencies of expression that trace to the present rules. Both present and Style Rule 52(a) direct the court to "find the facts specially." Present and Style Rule 52(b), addressing amended or additional findings, refer only to "findings" and "additional findings," without adding "fact." Present and Style Rule 58(a)(2), although referring to Rule 52(b), speak of "additional findings of fact." Present Rule 59 on new trial motions says the court may "amend findings of fact * * * or make new findings." That accurately reflects the terminology of 52(a) and (b) — the originals are referred to as findings of fact, and the new or amended ones are referred to as findings. Finally, both present and Style 62(b) accurately refer to a Rule 52(b) motion as one "to amend the findings or for additional findings." If consistency is to be achieved, the best approach may be to amend Rule 58(a)(2).

**Rule 62(c)**

Burbank-Joseph: (1) The suggestion: "After an appeal is taken from an interlocutory ~~order~~ or final judgment that grants * * * an injunction." The reason: Present Rule 62(c) is "interlocutory or final judgment." Rule 54(a) describes any order from which an appeal lies as a "judgment." And Rule 62(a)(1), governing stays, refers to "an interlocutory or final judgment in an action for an injunction." But "order" may be defended: The underlying statute, § 1292(a), governs appeals from "interlocutory orders." Rule 54(a) makes it a judgment only if an appeal lies; Rule 62(c) seems to apply even if the order is not in fact appealable (fine lines are drawn, for example, in determining whether an order "denies" and injunction). And "order" could not be added to Rule 62(a)(1) because there are many interlocutory orders in injunction actions that are not involved with execution or stays. Finally, Rule 54(a)'s "definition" is a wreck that remains uncorrected because of the difficulty of repair. So a nice style choice.

(2) The suggestion: " * * * the court may suspend, modify, restore, or grant an injunction while the appeal is pending on terms * * *." The present rule is "during the pendency of an appeal." Compare Style Rule 60(a): "after an appeal has been docketed and while it is pending," a district court can correct a clerical mistake only with appellate leave. This same question is caught up in drafting an "indicative ruling" procedure, where similar language has been suggested.

(3) The suggestion: "on terms for bond or other terms that appropriately secure the opposing party's rights." The argument: Present Rule 62(c) is "terms * * * it considers proper for the security of the rights of the adverse party." Style Rule 62(b) begins "on appropriate terms for * * * security." If an intensifier is proper in 62(b), why not also 62(c)?

**Rule 62(d)**

Alan B. Morrison, Esq., 05-CV-003: [This comment seems to overlook Appellate Rule 5(d)(2). Both present and Style Rule 62(d) allow an appellant to file a supersedeas bond "after filing the notice of appeal or after obtaining the order allowing the appeal." The comment appears to assume that a notice of appeal is required when an appeal is not available as a matter of right but instead requires permission of the court of appeals, as under § 1292(b) or Rule 23(f). But a notice of appeal is required by Appellate Rule 3 only for an appeal as a matter of right; Appellate Rule 5(d)(2) states that a notice of appeal need not be filed after a court of appeals grants a petition for permission to appeal.]

Burbank-Joseph: The suggestion: "the appellant may, by supersedeas bond, obtain a stay, ~~except in an action described~~ subject to the exceptions contained in Rule 62(a)(1) or (2)." The argument: A stay may be obtained by court order in the 62(a)(1) or (2) cases. Rule 62(d) means only to say that a stay may not be obtained in those cases by posting a supersedeas bond. "except in an action" may carry the wrong implication that no stay at all is available. The same result might be obtained, retaining the Style preference for "except," by rearranging: "the appellant may obtain a stay by supersedeas bond, except in an action described * * *."

**Rule 62(f)**

Burbank-Joseph: A recurrent style question: "under ~~state~~ the law of the state where the court sits." The court does not sit in state law, it sits in a state.

**Rule 62(g)**

Burbank-Joseph: This suggestion draws from reading the present rule to recognize appellate court authority "to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered" outside the period when an appeal is pending. It is pointed out that the All Writs Act authorizes a court of appeals to act without an appeal — before an appeal can be taken, or after the mandate issues. In related fashion, it is suggested that it "sounds a bit silly" to begin the rule "While an appeal is pending" — there is an implication that the rule *does* limit appeal power outside the time when an appeal is pending. Combining the style suggestions, the revised rule might look like this:

> **(g) Appellate Court's Power Not Limited.** ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:
>
> **(1)** while an appeal is pending, to stay proceedings, or to suspend, modify, restore, or grant an injunction; ~~(2)~~ or
>
> (~~3~~2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

**Rule 63**

Jack E. Horsley, Esq., 05-CV-002: " * * * any other judge may proceed with it upon certifying familiarity with the record and any pending motions * * *." (This version is an approximation of the apparent suggestion.)

Burbank-Joseph: An apparently correct suggestion: "If the judge who ~~commenced~~ conducted a hearing or trial is unable to proceed * * *." The present rule is "If a trial or hearing has been commenced and the judge is unable to proceed * * *." This language includes the situation in which one judge commences the proceeding, a successor is named, and the successor becomes unable to proceed. The Style language does not, at least not without strain.

**Rule 64(a)**

Burbank-Joseph: The suggestion renews an issue that provoked extensive discussion earlier: "every remedy ~~is available~~ that, ~~under the law of the state where the court is located~~ provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located." The Style version was drafted on the assumption that "is available that, under the law of the state * * * provides for" means "is available under the circumstances and in the manner provided by the law of the state." Pure style.

Hon. Thomas S. Zilly, 05-CV-016: " * * * provides for seizing a person or property to secure satisfaction of ~~satisfy~~ the potential judgment." This would make it clear that seizure of the person does not satisfy the judgment, but is designed to secure satisfaction.

May 5, 2006

**Rule 64(b)**

Burbank-Joseph: This revisits the global issue about subdividing to the point of items in a different guise: "bullets" are described as "irksome practical problems." How is a bullet rule quoted — are ellipses required? Must the bullet point appear? (Note that present Rule 23(c)(2)(B) uses six bullets; the Style Rule converts them to romanet items (i) through (vii).)

**Rule 65(a)**

Burbank-Joseph: Many references are provided to explore the question whether a preliminary injunction can issue only after a "hearing," or whether notice and an opportunity for hearing suffice. The change from "Before * * * *the* hearing" in the present rule to "Before * * * *a* hearing" in the Style Rule is suggested to dilute the implication of "the" that a hearing is required. Rather than change back to "the," it is suggested that the proposed change be placed on the Style-Substance track.

**Rule 65(b)**

Burbank-Joseph: Rule 65(b)(1): The suggestion: "without written or oral notice." The argument: present Rule 65(b) is "without written or oral notice." The 1966 Committee Note says that "informal notice * * * is to be preferred to no notice at all." In the other direction, the Style Rule's simple reference to "notice" might be read to refer to notice that is served. The present rule, moreover, refers to injury that will result "before the adverse party or that party's attorney can be heard." That further weakens the encouragement to give notice to the attorney.

**Rule 65(c)**

Burbank-Joseph: The central concern is that present Rule 65(c) is commonly read to allow a court to waive security despite saying that "[n]o * * * injunction shall issue except upon the giving of security * * * in such sum as the court deems proper." Style Rule 65(c) says "the court must require the movant to give security in an amount that the court considers proper." The style fear is that "must require" is stronger than "no injunction shall issue except." The published Style draft reflects the belief that discretion in setting the amount of security includes discretion to set it at zero, carrying forward present practice. Whether or not that is right, the concern is carried further in the suggestion that the rule should be redrafted to make explicit the extent of the court's discretion. That may be more than Style-Substance, better a project for independent consideration and publication as a substantive change. A supersession concern is also suggested: if the Style Rule restricts discretion more than the present rule, it might supersede statutes that imply greater discretion. This concern needs to be developed further, apart from the general supersession concerns addressed to the entire enterprise. By the look of the descriptions, the statutes that have been involved in the cases do not speak directly to injunction bonds. Instead, they evince policies that favor enforcement in the public interest. Supersession in relation to general policies is a rather slippery concept. But there well may be statutes that provide for preliminary injunctions without bond. If so, the present rule may have unintended supersession consequences (depending on the date of the statute), and a Style Rule should recognize that statutes control (surely there is no intent to supersede such statutes, whether old or contemporary).

**Rule 65(d)**

Burbank-Joseph: Rule 65(d)(2): The Style Rule correctly translates the present rule if the present rule was properly punctuated. The suggestion raises an important question whether the present rule was indeed properly punctuated. The present rule uses a series separated by commas to describe the persons bound by an injunction. The final item in the series is "those persons in active concert or participation with them who receive actual notice of the order." Absent a comma, this limits the notice requirement to persons in active concert or participation. But the suggestion points to substantial evidence that an injunction does not bind a party until the party has notice, and does not bind a party's officer, etc., until that person has notice. That is an attractive proposition. If further

research bears it out, the notice requirement can be worked into (d)(2), something like: "The order binds only the following persons who receive actual notice of the order by personal service or otherwise:"

Burbank-Joseph: Rule 65(d)(2)(C): This one certainly is a research project. Present Rule 65(d) says that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with *them* * * *." This language is thought to be ambiguous: does "them" refer to parties and their officers etc., or only to "parties"? Style Rule 65(d)(2)(C) is unambiguous — the injunction binds anyone acting in concert with a party's officers, etc. Alternative cures are suggested: eliminate "or (B)" from C, expressly limiting the binding effect to a person who acts in concert with a party; or move to the style/substance track. The first alternative changes meaning if, as the suggestion notes, there is substantial authority that an injunction binds a person acting in concert with a party's officers, etc. The suggestion then speculates that if the Style rule expands the court's authority to bind a nonparty, "it might run afoul of the substantive rights limitation of the Rules Enabling Act." Perhaps a rule that contracts the court's authority runs the same risk — it abridges or modifies the underlying substantive rights.

**Rule 65(e)**

Hon. Thomas S. Zilly, 05-CV-016: Is it necessary to carry forward the descriptions of 28 U.S.C. §§ 2361 and 2284 in (e)(2) and (3)? Those statutes "contain nothing beyond the matters included in the Rule's description."

**Rule 66**

Alan B. Morrison, Esq., 05-CV-003: The second sentence begins "But." There is no reason of principle to avoid that, but "but" serves no use here.

Burbank-Joseph: In the end, the first suggestion seems to be one of style. It points out that Rule 66 applies only to a receiver appointed by a federal court. The capacity of a state-court receiver to sue or be sued is governed by Rule 17(b). If the Style Rule creates confusion on this score, it should be revised. The first sentence says that these rules govern an action in which a receiver sues or is sued. That is fully consistent with Rule 17(b) applying to a state-court receiver, and no less clear than the final sentence of present Rule 66. The second sentence manifestly applies only to a federal-court receiver. And the third sentence applies only to an action in which a receiver has been appointed — a state-court receiver is not appointed in the action.

The second suggestion relies on decisions that put a fine gloss on the second sentence of present Rule 66: "The *practice in the administration* of estates by receivers * * * appointed by the court shall be in accordance with the *practice* heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts." It is asserted that "practice" refers to the procedures by which a receiver obtains authority to act as an owner would, while "administration" refers to the receiver's dealings with the property. This distinction leads to the fear that the second sentence of Style Rule 66 blurs this distinction by saying only that a receiver "must *administer* an estate according to the historical *practice* in federal court * * *." The authorities relied upon to support the suggestion clearly confirm the proposition that federal rules govern the decision whether to appoint a receiver, even in a diversity action. 12 FP&P § 2983; 13 Moore's § 66.09. But they do little to support the attribution of a distinction between appointment as "practice" and administration as something else. 12 FP&P § 2982 at p. 18 suggests that appointment "is part of the 'practice in the administration of estates.'" Phelan v. Middle States Oil Corp., 2d Cir.1954, 210 F.2d 360, rules that an accounting in a federal equity receivership is governed by the federal rules, not "local rules." In all, the Style Rule may adequately capture the meaning of the present rule.

**Rule 67**

Burbank-Joseph: Pure style. The suggestion: "must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 ~~and~~ or any like statute." The argument: "and" suggests you must comply with all statutes. "or" allows compliance with one or the other. The counterargument: you must comply with any statute that applies — if more than one applies, you must comply with all, while if only one applies there is no problem.

**Rule 68**

Burbank-Joseph: (1) Points out a real need to revise Style Rule 68(a). The present rule requires an offer to be made "more than 10 days before the trial begins." The Style Rule is "at least 10 days before the trial." Not only is this one day less, but it also has a reverse effect: a period "more than 10 days" escapes the rule that excludes intervening Saturdays, Sundays, and legal holidays in calculating a period less than 11 days. (1.1) In addition, the present rule "before the trial begins" may be different from the Style Rule "before the trial." The suggestion cites a case ruling that for purposes of Rule 68 a trial begins when the court actually commences to hear the case, not with jury selection.

(2) This one is more style, but troubling. Present Rule 68 describes an offer of judgment "for the money or property or to the effect specified in the offer." Style Rule 68(a) shortens this to "judgment on specified terms." The concern is that the present rule is more ambiguous with respect to a defendant's freedom to specify conditions — for example, what are the consequences if the offer is conditioned on acceptance by all plaintiffs, some plaintiffs accept but others do not: can costs be shifted to a plaintiff that did accept? (2.1) The change to "specified terms" makes it more difficult to argue that a Rule 68 offer cannot be made for judgment for equitable relief. The suggestion notes that there is support for using Rule 68, but notes that it seems to be agreed that the court cannot be required to enter an equitable decree simply because a Rule 68 offer is accepted. (2.2) Similarly, it is noted that although recent authority rejects use of Rule 68 in a class action, the matter is not free from doubt, but at the same time an accepted offer can be made a judgment only if the court approves it as a settlement under Rule 23(e). The upshot of these several concerns is the suggestion to add language at the end of Style Rule 68(a): "Except in cases where court approval of the judgment is required, ~~T~~the clerk must then enter judgment."

(3) A supersession concern specific to Rule 68 is expressed. There are conflicting decisions, but the current trend is to rule that a defendant cannot moot a class action by making a precertification offer of judgment for the full relief available to the individual class-representative plaintiffs. This conclusion may rely in part on finding that a specific statute contemplates class remedies. The fear is that a Style Rule 68 will supersede the implications of such statutes.

(4) Another specific supersession concern is addressed to Style Rule 68(d). It carries forward verbatim the language of present Rule 68: the offeree must pay the costs incurred after" [the making of the offer][the offer was made]." Nonetheless, the general supersession concern is offered: adoption of the Style Rule will supersede statutes enacted in the interval between adoption of the original and adoption of the new. A case is cited for a statute that invokes Rule 68 but also includes an exception — to that extent the statute supersedes Rule 68, and the supersession tables might be turned by adopting a Style Rule 68.

**Rule 68(c)**

Hon. Thomas S. Zilly, 05-CV-016: "~~It~~ The offer of judgment must be served * * *." The first sentence refers to things other than the offer of judgment; the change improves clarity.

**Rule 69(a)**

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 69(a) calls for enforcement by writ of execution "unless the court *directs* otherwise." Style Rule 69(a)(1) changes "directs" to "orders." "In the bankruptcy rules, we use 'directs' as a broader term that covers standing orders and local rules, so

that stylistic choice may be significant if applied to our rules." Although the Civil Rules Committee generally prefers "orders," the change here may leave open some question about the application of local rules or other directives by courts when the rule refers only to orders as compared to the language in the existing version of Rule 69(a)(1)."

Burbank-Joseph: Rule 69(a)(1): The suggestion: "must follow the procedure of the state where the court is located, but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies." The argument: present Rule 69(a) says procedure on execution "shall be in accordance with" state practice and procedure. But this is interpreted to require only substantial compliance — technical state requirements should not prevent enforcement of a federal judgment. Style Rule 69(a)(1) threatens to diminish flexibility, increasing the risk that unwise state procedure will thwart enforcement of a federal judgment, by saying that the procedure on execution "must follow" state procedure. This seems a question of style — does "must follow" imply greater fealty to the details of state practice than "be in accordance with"?

**Rule 71**

Burbank-Joseph: The suggestion: "When an order ~~grants relief for~~ is made in favor of a nonparty * * *." The argument: The present rule says "is made in favor of." "It is not obvious * * * that orders in favor of purchasers, witnesses, or masters constitute 'relief,' at least as that term is used in Rule 8."

**Rule 71.1(b)**

Gregory R. Mowe, 05-CV-: "No matter who owns them" may seem to imply disregard of the substantive rules that a state cannot condemn federally owned property, some owners such as cemeteries are generally exempt, and so on. It would be safer to say "whether or not in common ownership."

**Rule 71.1(c)**

Burbank-Joseph: Rule 71.1(c)(4): The suggestion: "order any distribution of ~~the~~ a deposit * * *." The argument: There may not be a deposit. See Style Rule 71.1(j).

**Rule 71.1(e)(3)**

Gregory R. Mowe, 05-CV-: When more than one person has an interest in the condemned property, the hearings progress in two stages. First is a hearing on the total to be paid for the taking. Next is a hearing on allocation among the defendants with interests in the same property. This distinction would be better reflected by restoring three words: "evidence on the amount of compensation to be paid for the property and may share * * *."

**Rule 71.1(h)(2)(A)**

Gregory R. Mowe, 05-CV-: The court has power to appoint a commission whether or not a jury has been demanded. Subparagraph (A) should begin: "Whether or not a party has demanded a jury, the court may appoint a three-person commission * * *."

**Rule 71.1(i)**

EDNY: The subheading for subdivision (i) should be revised to correspond to the present rule: "(1) ~~By the Plaintiff~~ As of Right." The change will "make it clear that the plaintiff has this right and that it is not subject to the discretion of the court."

**Rule 71.1(j)(2)**

Gregory R. Mowe, 05-CV-: It would help to preserve the standard phrase by restoring "just" in the first sentence: "so as to distribute the deposit and pay just compensation." And the second and third

sentences should be revised "to retain identification of the party in whose favor money judgments run."

**Rule 72(a)**

Alan B. Morrison, Esq., 05-CV-003: The next-to-last sentence ends in "to." That can be avoided by deleting the sentence and incorporating it in the last sentence: "~~A party may not assign as error a defect in the order not timely objected to.~~ The district judge ~~in the case~~ must ~~consider timely objections and~~ modify or set aside any part of the order that is clearly erroneous or is contrary to law, provided that a timely objection to the order was made to the magistrate judge." [If we go this way, the conclusion should be revised — the objection is addressed to the district judge, not to the magistrate judge. Something like: "must modify or set aside any part of the order to which timely objection was made and that is clearly erroneous * * *." Or, if we stick by using "to" at the end, "any part of the order {that was} timely objected to and that is clearly erroneous * * *."]

Burbank-Joseph: The suggestion: "referred to a magistrate judge to hear and ~~decide~~ determine * * * and * * * issue a written order stating the ~~decision~~ disposition." The argument: Rule 72 is intended to track the statute. § 636(b)(1)(A) is "hear and determine"; (b)(1)(B) is recommendations "for the disposition, by a judge of the court." It is better to retain the statute's words. (This question was actively discussed in the Style process. This independent reaction warrants further consideration.)

**Rule 72(b)**

Alan B. Morrison, Esq., 05-CV-003: As with Rule 72(a), protests the conclusion of the first sentence in (b)(3) with "to."

Burbank-Joseph: Rule 72(b)(1), (b)(3): These suggestions mirror the Style Rule 72(a) suggestion, apparently suggesting that in (b)(1) "recommended disposition" be changed to "recommendation for disposition," and in (b)(3) "disposition" be changed to "recommendation for disposition." As compared to Style Rule 72(a), this is a suggestion for improving on the language of the present rule, which uses "recommended disposition" and "disposition" in the same places that those words are used in the Style Rule.

**Rule 73(a)**

Alan B. Morrison, Esq., 05-CV-003: Raises the perennial question whether it is useful to cross-refer to a statute that governs of its own force. Rule 73(a) concludes with a reminder of the statute that requires a record of the proceedings.

Burbank-Joseph: The suggestion: "a magistrate judge may, if the parties consent, conduct ~~the~~ any or all proceedings in a civil action * * *." The argument: "any or all" is the language of § 636(c)(1) and the present rule.

Prof. Bradley Scott Shannon, 05-CV-009: Rules 1 and 2 establish that these rules apply only to civil actions: " * * * may * * * conduct the proceedings in an ~~civil~~ action * * *."

**Rule 73(b)**

Alan B. Morrison, Esq., 05-CV-003: (b)(2): "may ~~again advise~~ remind the parties of the magistrate judge's availability * * *." "Again advise" carries the possibility of coercion by repeated advice.

**Rule 73(c)**

Alan B. Morrison, Esq., 05-CV-003: As with Rule 73(a), questions the need to cross-refer to the statute authorizing appeal to the court of appeals from a judgment entered at a magistrate judge's direction.

**Rule 77(a)**

Jack E. Horsley, Esq., 05-CV-002: "Every district court is considered always open on any business day for filing any paper * * *."

**Rule 77(c)**

Alan B. Morrison, Esq., 05-CV-003: Questions the need for (b)(2), reminding of the clerk's responsibility to enter a default under Rule 55(a). [The separation of (b)(2)(B) and (C) was deliberate; it is useful to reinforce the sharp distinction between the initial default and the subsequent default judgment.]

Burbank-Joseph: Rule 77(c)(2): The suggestion: "the clerk ~~may~~ shall as of course grant motions and applications to * * *." The argument: Present Rule 77(c) begins "All motions and applications," and concludes "are grantable of course by the clerk." That describes ministerial duties requiring that the clerk must act on a motion or application that is properly presented, and must not act on one that is not properly presented. "may" implies an improper degree of discretion. 12 FP&P, § 3083, sheds no light. (I think this question was discussed at some point in the Style process and that it was concluded that discretion should be reflected in the Style Rule. At any event, the point should be researched.)

**Rule 78**

Burbank-Joseph: Present Rule 78 says that each district court "shall" establish regular times and places to hear and dispose of motions, "unless local conditions make it impracticable." Although that seems closer to "must" than "should" or "may," Style Rule 78(a) translates "shall" as "may." The reduction was chosen purposefully, from a feeling that this command (or near-command) is obsolete. The suggestion is that the change should be put on the Style-Substance Track.

**Rule 79(a)**

Alan B. Morrison, Esq., 05-CV-003: This is essentially a suggestion that Present Rule 79(a) has it wrong. The present rule, carried forward in Style Rule 79(a)(3), directs the clerk to enter "jury" on the docket "[w]hen in an action trial by jury has been properly demanded or ordered." The objection is that the clerk should not be charged with determining whether a jury demand is proper — the rule should provide that the clerk note "jury" on the docket whenever a jury demand is made, leaving it to the parties to object and the court to decide. [This may or may not be right. The demand may be obviously untimely, or made in an action that clearly does not include jury trial. In any event, a change is warranted in the Style Project only if the present rule is uniformly read against its meaning.]

**Rule 80**

Burbank-Joseph: The suggestion is that Rule 80 not be restyled at all, and that the question be referred to the Evidence Rules Committee. Many reasons are advanced; it is better to read them than to summarize. Some seem to read the reference to trial and hearing in both the present rule and the Style Rule as including a deposition. And several point to several ways in which a transcript may come into existence, apparently on the assumption that Rule 80 somehow requires a separate transcript — or, perhaps, on the assumption that unnecessary duplication will result from the requirement that the transcript be certified by the person who recorded [reported] the testimony. There also is a specific supersession argument that involves the long-delayed effort to undertake a joint reconciliation of all of the Civil Rules evidence provisions with the Evidence Rules — most of the Evidence Rules carry on in the form initially adopted by statute, making this a specific variation on the general supersession concern addressed to all of the Style Project.

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National Court Reporters Assn., 05-CV-013: The Style rule works if a stenographic reporter took testimony. "However, in trials or hearings where the testimony is recorded electronically, oftentimes the individual who takes/records the testimony will not be the individual to transcribe and certify the record. The proposed changes to Rule 80 do not reflect these realities and may cause unintentional issues with compliance."

**Rule 81(a)**

Burbank-Joseph: Rule 81(a)(6)(B): A nice style point. Rule 81(a)(6) begins by applying the Civil Rules to "proceedings under the following *laws*." Subparagraph (B) is "9 U.S.C., relating to arbitration." The suggestion is that "9 U.S.C." is not a "law"; it is a Title in the U.S. Code. The specific recommendation is to say "all laws codified in 9 U.S.C. relating to arbitration." [Perhaps this could be "all those in 9 U.S.C. relating to arbitration."]

**Rule 81(d)**

Burbank-Joseph: Rule 81(d)(1): The suggestion is to abrogate the analogous part of present Rule 81(e). Present 81(e) says that when a Civil Rule refers to state law, the reference "includes the statutes of that state and the state judicial decisions construing them." Recognizing that this was drafted before Erie, Style Rule 81(d)(1) changes this to include state statutes and state judicial decisions. The concern is that "includes" does not exclude other manifestations of state law such as court rules or state constitutional provisions. The rule is unnecessary and potentially misleading. [This is a fair question. The point of Rule 81(d)(1) is to provide interpretive guidance to the Rules. It is not an attempt to restate Erie. But a Civil Rule that incorporates state law surely may incorporate a state court rule, as noted in the Committee Note, and state constitutional provisions as well. Possibly someone could be misled. And perhaps there is no need to describe the sources of state law. Abrogation may be within reach of the Style Project.]

Prof. Bradley Scott Shannon, 05-CV-009: As Burbank-Joseph, urges that Rule 81(d)(1) be deleted — expanding the definition of state law to include all the state's judicial decisions "is arguably substantive and in any event remains underinclusive (and perhaps also somewhat overinclusive)."

**Rule 82**

Prof. Bradley Scott Shannon, 05-CV-009: Rule 4(k)(2) clearly affects personal jurisdiction. Rule 82 should be: "These rules do not extend or limit the subject-matter jurisdiction of the district courts * * *."

**Rule 86**

Prof. Bradley Scott Shannon, 05-CV-009: "opinion" in (2)(B)is not the right word, although it appears in Present Rule 86(a): "~~in~~ the district court~~'s opinion,~~ determines that applying them in a particular action would be infeasible or work an injustice." [This suggestion points up another question: Present Rule 86(a) reads "in the opinion of the court." That should include the opinion of an appellate court — we do not want to establish an unreviewable district-court discretion, nor should we seek to broaden whatever discretion is now read into Rule 86(a). Why not "the ~~district~~ court determines * * *."?

## Style-Substance Track

### Rule 8(a)(3)

Burbank-Joseph: It seems better to restore "relief in the alternative." The suggested tie to Form 10 illustrates the point: the plaintiff seeks relief against one defendant, the other defendant, or both defendants as the facts may justify. That is relief in the alternative; it is not at all clear that it is an "alternative form[] * * * of relief." To be sure, at least Rules 8(e)(2), 18(a) [and perhaps (b)], and 20(a) clearly authorize joinder and pleading of demands for relief in the alternative. That may be all the more reason for a clear reflection in 8(a)(3).

### Rule 11(a)

Burbank-Joseph: It is equally true that not everyone has a telephone number or an address. Restoring "if any" may be useful to reassure pro se litigants that they can file even though they lack one or more of these means of contact. (It seems a bit more than style-substance can bear to try to add something that requires a homeless person to designate a means of service other than Rule 5(b)(2)(C) (leaving it with the court clerk).)

EDNY: Rather than "electronic-mail address," say "e-mail address." This is current usage, and corresponds with the expression in the Committee Note.

### Rule 16(c)

EDNY: Rule 16(c)(1): restore "telephone": "* * * be present or reasonably available by telephone or other means." "This would make clear that the telephone is a reasonable and acceptable means."

### Rule 26(g)(1)

Burbank-Joseph: See Rule 11 above. But note that present Rule 26(g)(1) requires only an address and does not say "if any." At least at first blush, it seems desirable to say "if any" in both rules or in neither.

EDNY: Rule 26(g)(1): as with Rule 11: " * * * must state the signer's address, e-mail address, and telephone number~~, and electronic-mail address~~."

EDNY: Rule 26(g)(1)(B)(i): To make this consistent with Style Rule 11(b)(2): " * * * for extending, modifying, or reversing existing law, or for establishing new law."

### Rule 30(b)(3)(A)

National Court Reporters Assn., 05-CV-013: The pure Style rule, tracking Present Rule 30(b)(2), says that the noticing party bears the recording costs, and that any party may arrange to transcribe a deposition *that was taken nonstenographically*. The Style-Substance Track version deletes "that was taken stenographically." This may change the impact of the rule for a deposition taken stenographically by obliging "the noticing party to pay attorney's fees as well as pay the cost of an original even if they don't want the transcript simply because the other party orders a copy." [This was not the intended meaning; the change was designed only to make it clear that any party should be able to arrange transcription of a deposition recorded stenographically as well as of one recorded by other means. The thought was that "recording costs" means just that — the party who notices the deposition pays the stenographic reporter for recording. Whichever party wants a transcript pays the cost of a transcript. Is there room for misreading?]

### Rule 30(b)(6)

EDNY: The caption should be expanded: " * * * to an Organization or Entity." In each of the three places where "organization" appears after the first sentence, it should be supplemented by adding "or entity." "We make this suggestion because the terms 'organization' and 'entity' are not coterminous, and we agree * * * that the coverage of Rule 30(b)(6) should encompass both."

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**Rule 31(c)**

Burbank-Joseph: We had difficulty with this one from the beginning. We cannot say "transcript" because the deposition may have been recorded by audio or visual means. But "completed" is made ambiguous by its use in Style Rule 30(e)(1), which uses it to refer to completion of the original testimony; the deponent's review and changes come after that. Perhaps, with suitable changes in the tag lines, Style 30(c)(1) could read:

> (1) ***Notice of receipt.*** The party who noticed the deposition must notify all other parties when it ~~is completed~~ receives the deposition under Rule 31(b)(3).

(This may be rough. What happens under 31(b)(3) is that the officer taking the deposition sends it; literally, receipt is not "under" 31(b)(3). But we are not allowed to say "pursuant to." We cannot tell the party to notify other parties that the deposition was sent because the party may not know of the sending and may not receive it.)

**Rule 36(b)**

Burbank-Joseph: This comment is puzzling. Perhaps it inadvertently relies on present Rule 16(d). Style Rule 16(d) does say that any pretrial order "controls the course of the action unless the court modifies it." That does not describe a standard for modification, but it does state controlling effect and it does authorize modification. The suggestion is not persuasive. [The suggestion was amplified at the November 18 hearing. The problem is that Style Rule 16(d) says only that a pretrial order controls unless it is modified; it does not make sense to say that a Rule 36 admission controls unless it is modified without providing any standard that permits but also limits modification. The Rule 36 standard should govern modification of any Rule 36 admission except one that is incorporated in a final pretrial order. If incorporated in a final pretrial order, the demanding Rule 16(e) standard for modification should control.]

**Rule 71.1(d)(2)(B)**

EDNY: As with Rules 11 and 26(g), change "electronic-mail address" to "e-mail address."

**Rule 78**

EDNY: Revise the Caption: "Hearing Motions; ~~Advancing an Action~~ Submission on Briefs The provision for advancing an action is being deleted. And subdivision (b) is devoted to submission on briefs.

## Style Forms

### General

Jack E. Horsley, Esq., 05-CV-006: Looks with favor on these materials.

United States Department of Justice, 05-CV-031: "The draft forms represent a careful and thoughtful analysis of the existing forms * * * [T]he revisions should help simplify and clarify the forms * * *." The restyled Appellate and Criminal Rules seem to work well. "The Department strongly supports the current initiative to restyle the civil forms and believes that Committee has done valuable work."

### Form 3

*Linda M. Schuett, Esq., 05-CV-005: "(Use 60 days if the defendant is the United States, ~~or~~ a United States agency, or ~~is~~ an officer or employee of the United States ~~allowed 60 days by~~ sued in the capacities provided for in Rule 12(a)(3)(A) ~~or~~ and (B).)" **NOTE** we must delete "(A) or (B)." Style Rule 12(a)(3) does not have subparagraphs. [Capacity is not the best emphasis in referring to 12(a)(3) — the focus is on suit for an act or omission occurring in connection with duties performed on the United States' behalf. Going back to the Rule text is necessary under either version.]

### Form 5

Burbank-Joseph: Several comments are provided with Style Rule 5.

(1) Style Rule 4(d)(1) states a duty "to avoid unnecessary expenses of serving the summons." The second paragraph of Style Form 5 twice refers to avoiding "costs." This should be "expenses" not only because that conforms to Style Rule 4, but also because "expenses" better conveys the idea.

(2) Style Rule 4(d)(4) says that when the plaintiff files a waiver of service "these rules apply as if a summons and complaint had been served at the time of filing the waiver." Style Form 5 draws from present Rule 4(d)(4) in saying that "the action will then proceed as if you had been served on the date the waiver is filed." The suggestion seems to be that Form 5 should be revised to track Rule 4. But this may be a case where the more colloquial expression works better in the form, while the more precise expression works better in the rule.

(3) The fourth paragraph says "I will arrange for formal service" and ask for an order that the defendant pay "costs." "Formal service" may be puzzling. "Expenses" should be substituted for "costs": "I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service." (This looks like an improvement.)

(4) Drawing from present Form 1A, the fifth paragraph asks the defendant to read the enclosed statement about the duty to waive formal service. This invokes Style Form 6, which includes two parts — a waiver of service and an attached statement of the duty to avoid unnecessary "costs." The statement is described in Form 6 as the Duty to Avoid Unnecessary Costs. The reference here should invoke that description, changing "costs" to "expenses": "Please read the enclosed statement about the duty to avoid unnecessary expenses." (This seems right.)

Burbank-Joseph: See item (4) in the comments on Form 5: The statement of duty should be "to Avoid Unnecessary ~~Costs~~ Expenses of Serving * * *."

### Form 6

Linda M. Schuett, Esq., 05-CV-005: Suggests a different arrangement of the paragraphs and a deletion:

> * * * A * * * defendant * * * who fails to return a signed waiver * * * will be required to pay the costs of service, unless the defendant shows good cause for the failure. [here brings up the first sentence of the next paragraph:] "Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an

improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property. [here breaks the paragraph]

If the waiver is signed and returned, you can still make ~~these and other~~ all defenses and objections * * *.

**Form 10**

Linda M. Schuett, Esq., 05-CV-005: Two general observations. (1) "[I]t is time to delete all or most of the complaint forms. The forms sanction a method of pleading that may not comply with existing pleading rules," and that in any event is "out of sync with existing practice." (2) Overall, the manner of dealing with interest in the forms is appropriate. It is better not to add a phrase such as "as available under existing law."

**Form 11**

Linda M. Schuett, Esq., 05-CV-005: Today it sounds odd to say that the defendant drove a motor vehicle "against" the plaintiff. "into" might be better.

**Form 17**

Linda M. Schuett, Esq., 05-CV-005:

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $____, plus interest and costs; or

(b) ~~that~~ the defendant be required to pay damages of $____, plus interest and costs, if specific performance is not ordered ~~, the defendant pay damages of $____, plus costs~~.

**Form 18**

Linda M. Schuett, Esq., 05-CV-005: Delete a comma " * * * notice * * * on all electric motors it manufactures and sells; and has given * * *." In addition:

Therefore, the plaintiff demands: * * *

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

**Form 19**

Linda M. Schuett, Esq., 05-CV-005: In the demand for relief, bring up "that" before the colon and delete it from each of (a), (b), (c), (d), and (e): "the plaintiff demands that: (a) ~~that~~ until this case * * *," etc. Also would delete a comma in (b): " * * * all profits * * * in selling the defendant's book; and all profits * * *."

**Form 20**

Linda M. Schuett, Esq., 05-CV-005: (1) Bring up "that" before the colon and delete it from (a){recommends deleting all of (c), so no need to delete "that" separately}: "plaintiff demands that: (a) ~~that~~ each defendant be restrained * * *." [If this is done, (b) will have to be rewritten to accommodate the "that" introduction; see (2).] (2) revise (b): "a judgment, plus costs, be entered declaring that no defendant is entitled to the proceeds of the policy or any part of it; but if the court determines * * *." The comma is thought to introduce an ambiguity — "Without the comma, it is clear that a discharge of the plaintiff occurs only if the court has determined that the policy was [sic — means was not] in effect at the time of the insured's death. [The comma seems to have the intended effect, clearly separating the alternative requests for judgment.]

**Form 21**

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the plaintiff demands that: * * * (b) the conveyance to defendant name be declared void and ~~that~~ any judgment granted be a lien on the property.

**Form 30**

*Linda M. Schuett, Esq., 05-CV-005: (1) "(Set forth any counterclaim against an opposing party in the same way that a claim is pleaded * * *.)" (2) "Set forth ~~the~~ any crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded * * *.)" [Both of the revisions in (2) should be adopted.]

**Form 31**

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the defendant demands that: * * * (d) the defendant recover ~~its~~ costs and attorney's fees."

**Form 50**

Linda M. Schuett, Esq., 05-CV-005: The form begins with a blank, allowing the requesting party to specify the number of days allowed to respond. So does present Form 24. But here, and in Form 51, it should be "respond within the time provided in Rule 34." [Rule 34(b)(1)(B) says that the request must specify a reasonable time for inspection and for performing the related acts. That seems to fit better with a blank to be filled in by the requesting party.]

**Form 51**

Linda M. Schuett, Esq., 05-CV-005: As with Form 50, suggests that the blank for the number of days to respond should be replaced by a specified period. This is different from Form 50 and Rule 34 because Rule 36 sets 30 days for a written answer or objection. But it also says that "A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court." Perhaps a blank works here as well. But Professor Marcus also has suggested that "the time periods provided in the rule should always be inserted," quoting from 8A FP&P § 2257, pp. 540-541. The treatise suggests that present Form 25 should have been revised in 1970 when Rule 36 was amended. Before 1970, Rule 36(a) required a response "within a period designated in the request, not less than 10 days after service * * *." The treatise also expresses the fear that a requesting party might ignorantly attempt to set a time shorter than the 30-days set by Rule 36, or innocently set a longer time with the result that the longer time is viewed as binding in the way that a Rule 29 stipulation is binding.

**Form 70**

Linda M. Schuett, Esq., 05-CV-005: Two suggestions:

(1) "[the plaintiff name recover from the defendant name the amount of $____ with pre-judgment interest at the rate of _%, ~~along with~~ post-judgment interest, and costs.] Looking only to Maryland law, explains that the rate of pre-judgment interest varies according to the nature of the case, while post-judgment interest is set by statute.

(2) "[the plaintiff recover nothing, ~~the action be dismissed on the merits~~ a judgment be entered in favor of the defendant, and the defendant name recover costs from the plaintiff name.]" [This depends on actual practice; if courts continue to enter judgment that the plaintiff take nothing, rather than a judgment that the defendant "wins," the change should not be made.]

## Global Style Issues

Burbank-Joseph: "On its own [initiative]." The first appearance is in the comment on Rule 4(m). The comment suggests that the strong custom of adding "initiative" to this expression should prevail — lawyers will waste time puzzling whether there is a difference. It also is suggested that everything a court does is its "own" act, even when there is a motion; that there is a reason for the tradition. See also Rule 11(c)(3) and (5); 12(f)(1); and many others.

Burbank-Joseph: Cross-references: The first time this is raised is with Style Rule 8(d)(3), where it is suggested that we should restore "Subject to the obligations set forth in Rule 11." The importance of cross-references to Rule 11 has been discussed vigorously. It may deserve further thought.

Burbank-Joseph: Romanet "items": This suggestion first appears with Rule 12(a)(1)(A). It is that the practice of dividing and insetting should not go beyond the subparagraph level: (a)(1)(A), but no further parts that we have called "items." The comment recognizes that using "bullets" is even less attractive — "fifth bullet" is harder than "(v)," easier to miscount, and harder to search. So it recommends more comprehensive subparagraphs. This is a style choice. The Criminal Rules use items; the style choice may be well entrenched. And some of us like it.

Burbank-Joseph: "Written" Stipulation: Considerable energy was spent in deciding that it was proper to reduce "written stipulation" in several rules to "stipulation." The comment is that the present rules do not authorize oral stipulations, while the Style Rules do. "[T]his restyling is more than mere simplification or clarification * * *." The change is identified in Rules 29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c).

Prof. Bradley Scott Shannon, 05-CV-009: "may": Suggests that "may" should be "might" when it is used to express probability or likelihood -- Rules 14(a)(1), 24(a)(2), and 26(a)(1)(A), (2)(A), and (3)(A) are offered as examples. In Rule 33(a), "may" should become "can." (Of these, "might" deserves serious consideration in 24(a)(2).)

Prof. Shannon: "action"/"case": "Action" should be used consistently throughout; other terms — most notably "case" — should not be substituted when there is no difference of meaning. Style Rules 26(b)(1)(B)(iii) and 50(a)(2) and (b) are particularly troubling. But "case" is acceptable when there is a different concept, as in Style Rule 9(h)(3)'s reference to an "admiralty case." And a different word should be substituted when "action" is used as a verb or in reference to other steps — see Rules 16(d), 23.1(b)(3); 26(c); 37(a)(5)(A)(i); 37(d)(1)(B); 53(f); 54(d)(1); 77(c)(2). 16(d) and 23.1(b)(3) are particularly annoying because they use "action" in two different senses.

Prof. Shannon: "court"/"judge"/"clerk": generally it is better to refer to the court as an institution, not to individuals such as the judge or clerk. See Rules 16(b), to be compared to 16(a); 23(f).

Prof. Shannon: "Issue" as a verb: As a noun, "issue" has a well-established meaning in the Rules. It should not be used as a verb. The choice to avoid "enter" and "make" seems reasonable, but "render" would be a better choice.

Prof. Shannon: "Claim" as a verb: "Claim" also has a well-established meaning as a noun. It should be used as a verb only in the same context. Better choices might be "assert" or "argue." See Rules 26(b)(5), 37(b)(2)(A)(i); 45(d)(2).

Prof. Shannon: "Shall" to "must": "[I]t is not at all clear that 'shall,' as used throughout the Current Rules, has any meaning other than "must." In every Rule, present "shall" must be rendered as "must." E.g., Rules 1; 15; 16(d); 25; 33(a)(1); 54(d)(1); 56. The change to "should" in Rule 56 is particularly suspect in light of the 1986 Supreme Court decisions on summary judgment.

PLAIN, 05-CV-010: Passive Verbs: Still more verbs should be changed from passive to active. Examples: 26(e)(2) could begin "The party must disclose"; Rule 39(b) could be "The court tries any issues"; Rule 52(a)(6) could be "The court must not set aside findings of fact."

PLAIN: Nominalizations: Words are wasted when verbs are turned into nouns. Examples: Rule 16(e) could be "facilitate admitting evidence"; Rule 24(b)(3) could be "the court must consider whether intervening will"; Rule 49(a)(3) could be "the party demands that it be submitted to the jury."

PLAIN: "is commenced": Should be "is begun," see Rules 3, (4)(1), 17(a), 63, "elsewhere."

PLAIN: "Knowledge and information": Should be simply "information." For example, Rules 8(b)(5), [11(a)], 26(g)(1).

PLAIN: "so": In Rule 5(b)(3), "if a local rule ~~so~~ authorizes it; in Rule 8(b)(5), "must say so ~~state~~."

PLAIN: "statute": "statute" should be "law" — as in Rules 38(a), 45(b)(2)(C), 54(d)(2)(B)(ii), and elsewhere.

PLAIN: "Compensation": "compensation" should be "payment" — Rules 43(d),53(b)(2)(E), 71.1(d)(2)(A)(iv), and elsewhere.

PLAIN: Long Sentences: A few long sentences slipped through, as in Rules 13(b) and 14(c)(1).

## SUBCOMMITTEE A & B CONFERENCE CALLS: APRIL 3, 10, 18, 2006

Style Subcommittee A met by conference call from 11:00 A.M. Eastern Daylight Time to 4:15 p.m.. Judge Thomas B. Russell chaired the meeting. The members who participated were Hon. David G. Campbell; Frank Cicero, Jr., Esq.; Prof. Steven S. Gensler; Daniel C. Girard, Esq.; Hon. C. Christopher Hagy; and Hon. Theodore Hirt. Judge Lee H. Rosenthal, Chair of the Advisory Committee, also participated. Professors R. Joseph Kimble and Thomas D. Rowe, Jr., participated as consultants. Jeffrey Barr represented the Administrative Office. Edward H. Cooper joined the meeting as Advisory Committee Reporter.

A second conference call was held at 2:00 P.M. Eastern Daylight Time on April 18 to conclude consideration of Rules 16(e) and 38(b). Thomas B. Russell chaired the meeting. The members who participated were Hon. David G. Campbell; Prof. Steven S. Gensler; Daniel C. Girard, Esq.; Hon. C. Christopher Hagy; and Hon. Theodore Hirt. Judge Lee H. Rosenthal also participated, as did Professors R. Joseph Kimble and Thomas D.Rowe, Jr. Jeffrey Barr represented the Administrative Office. Edward H. Cooper joined as well.

Style Subcommittee B met by conference call from 2:00 P.M. Eastern Daylight Time to 5:00 P.M.. Judge Paul J. Kelly, Jr., chaired the meeting. The members who participated were Hon. Nathan L. Hecht, Robert C. Heim, Esq., Hon. Theodore Hirt, and Chilton Davis Varner, Esq.. Judge Lee H. Rosenthal, Chair of the Advisory Committee, also participated. Professors R. Joseph Kimble and Richard L. Marcus participated as consultants. John Rabiej and Jeffrey Barr represented the Administrative Office. Edward H. Cooper joined the meeting as Advisory Committee Reporter.

Judge Rosenthal noted that the first order of business should be to thank Jeffrey Barr for the incredible work done to keep the Style Project organized and to present the current package into organized form.

Discussion of the Rules assigned to each subcommittee was led by the individual members assigned initial responsibility for each rule. Subcommittee A studied Rules 1-7.1, 16-23, 32-53, and 64-71.1. Subcommittee B studied the remaining rules, as well as the "Style-Substance" Track.

### Rule 1

Discussion focused on the question whether Rule 1 should include a statement that the Rules govern "all civil actions and proceedings." Present Rule 1 refers to "civil suits." "Civil actions" was substituted as the predominant expression in contemporary usage, and as corresponding better with the "one form of action" provided by Rule 2. It also is used more than any other expression in the subject-matter jurisdiction provisions of the Judicial Code beginning with § 1330. "Proceedings" has no such pedigree. It was added because the Civil Rules may govern some district-court events that do not seem readily defined as "actions." The example most often used is a Rule 27 petition to perpetuate testimony.

The Standing Committee Style Subcommittee [**SCSSC**] voted to remove "and proceedings" from the first sentence and to remove "and proceeding" from the second sentence. But it suggested that it would relent if the Advisory Committee feels strongly about retaining these references to proceedings.

Discussion focused on the shared uncertainty whether adding "and proceedings" would extend the reach of the Rules to events not now covered, and thus exceed Style Project limits. No one doubts that the Civil Rules govern Rule 27 petitions. "Civil suits" in the present rule may be more capacious than "civil actions"; one suggestion was that perhaps we should revert to "civil suits."

It was observed that the final paragraph of the Committee Note can remain, whatever decision is made about "and proceedings." The only change would be to remove the reference to "and proceedings"; the caution that the change from civil suits to civil actions does not affect application of the Rules to summary proceedings created by statute would remain.

The question will be reported to the Advisory Committee with a recommendation to adhere to the SCSSC determination to delete "and proceedings."

**Rule 2**

There were no suggestions to revise Rule 2.

**Rule 3**

There were no suggestions to revise Rule 3.

**Rule 4**

There were no suggestions to revise Rule 4.

**Rule 4.1**

There were no suggestions to revise Rule 4.1.

**Rule 5**

The subcommittee agreed with the SCSSC determination to change the sequence in (a)(3): "any service required before the filing of an appearance, answer, or claim ~~or appearance~~ must be made * * *."

Style Rule 5(d)(2)(B) allows filing to be made by delivering a paper to "a" judge. Present Rule 5(e) provides for delivery to "the" judge. On the face of the two rules, there might seem to be a change in meaning for the nearly universal situation in which each case is assigned to a particular judge. But it was agreed that even under the present rule, one judge may in appropriate circumstances accept a paper for filing in an action assigned to a different judge. Unavailability of the assigned judge would be the most common reason. The change to "a" judge clarifies present meaning, and should remain.

The subcommittee also agreed with another change adopted by the SCSSC in 5(d)(3): "A paper filed electronically ~~by electronic means~~ in compliance with a local rule is a written paper * * *."

**Rule 6**

Present Rule 6(d) sets the time for serving a written motion and notice of the hearing unless the court sets a different "period." Style Rule 6(c) was published with "period," but the SCSSC approved a suggestion that this be changed to "time." "Time" is used in other rules, but so is "period." It was observed that "time" seems broader than "period" — a court can set a time either by specifying a period to act or by specifying a particular day or moment. With a "period," it is

necessary to calculate the point that begins the period and the point that ends it. And the change seems desirable. A court might well want to set the time for serving a motion and notice of hearing on a specified day rather than within a period. The pending Time Project will consider all of the time provisions in the Rules. For the present, it seems better to adhere to "time" in this rule.

**Rule 7**

A question that was extensively explored during earlier Subcommittee and Advisory Committee discussions was brought back. Present Rule 7(a) does not seem to contemplate authority to order a reply to a reply to a counterclaim. It purports to be a complete list of permitted pleadings. Style Rule 7(a) recharacterizes the pleading that responds to a counterclaim as an "answer," 7(a)(3), and authorizes the court to order a reply to an answer, 7(a)(7). The Committee Note explains that a reply to a counterclaim answer "may be as useful * * * as a reply to an answer, a third-party answer, or a crossclaim answer." The member who reopened the question did not find any cases that either refuse to order a reply in this setting or that order a reply. The question seems to be approached only when a party seeks to escape a failure to make a timely jury demand by filing a belated "pleading." There is at least Treatise authority for the proposition that a court may allow a party to file any document the court thinks will be helpful. There may be some additional support in Rule 16(c), which among other matters authorizes appropriate action to formulate and simplify the issues, to adopt special procedures to manage difficult actions, and to facilitate in other ways the just, speedy, and inexpensive disposition of the action. It was agreed that the Style Rule should remain as it is.

**Rule 7.1**

There were no suggestions to revise Rule 7.1.

**Rule 8**

Style Rule 8(a) changes present Rule 8(a)'s reference to a pleading that "sets forth" a claim for relief to a pleading that "states" a claim for relief. It has been suggested that "states" may provoke confusion with Rule 12(b)(6) — that Rule 8(a) applies only to a pleading that satisfies the test for stating a claim upon which relief can be granted. The Subcommittee concluded that "states" should be retained. If anything, it is desirable to provide a subtle reminder that a pleading is subject to dismissal if it fails to state a claim upon which relief can be granted.

The Subcommittee approved elimination of several words from Rule 8(a) as unnecessary: "A pleading that states a claim for relief ~~— whether an original claim, a counterclaim, a crossclaim or a third-party claim —~~ must contain * * *."

The Subcommittee also approved rejection of a suggestion that Style Rule 8(a)(3) restore two words from the present rule: "a demand for judgment for the relief sought * * *." There is no need to require that the pleading specifically demand "judgment," nor to enter the conceptual thicket to determine whether every demand for relief necessarily contemplates a "judgment," even as defined in Rule 54(a).

It was observed that the Rule 8(c) list exemplifying affirmative defenses lends unnecessary dignity to many antiquated concepts, but agreed that the Style Project is not the occasion for addressing these issues.

## Rule 9

Present Rule 9(a) directs that a party raising an issue as to another party's legal existence, or authority or capacity to sue, "shall do so by *specific negative averment*, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Style Rule 9(a)(2) changes "specific negative averment" to "*a specific denial.*" The Style convention is to abandon the use of "aver" and "averment." It was urged that "specific negative allegation" would be little different from "specific denial." To be sure, if the initial pleading includes an allegation about capacity, authority, or legal existence, "a specific denial" might be nothing more than the Rule 8(b)(3) direction that a party who does not make a general denial "must either specifically deny designated allegations or generally deny all except those specifically admitted." The point of Rule 9(a), however, is that the initial pleading need not allege anything about these matters. When nothing is alleged, a "specific denial" must at least identify the contested issue — lack of capacity, or whatever. And both present and Style Rule 9(a) require the pleader to state any supporting facts that are peculiarly within the pleader's knowledge. If the pleader has none, a specific negative averment should be satisfied by a specific denial. The Subcommittee decided to retain "specific denial," but to bring this question to the Advisory Committee.

## Rule 10

The styling of Rule 10(c) provoked initial uncertainty about the references to "exhibits" in the present rule. The Style Rule referred instead to instruments attached. The Subcommittee agreed with the SCSSC action approving revision of the second sentence to read: "A copy of a written instrument ~~attached~~ that is an exhibit to a pleading is a part of the pleading for all purposes." This change avoids treating as exhibits things attached to a pleading but not exhibits — a Rule 7.1 disclosure statement, for example, may be attached to a pleading. The change also avoids any negative implication that a court cannot treat as part of the pleading an instrument that is not attached to the pleading — many cases, for example, treat an uncontested contract referred to in the pleadings as part of the pleadings even though no party actually attaches the contract. The change in the rule text will be carried through in the tagline: "(c) Adoption by Reference; Attached Exhibit ~~Instrument~~."

## Rule 11

A comment, based on experience with tactical name-shifting by an attorney, suggested that Rule 11(a) should require signature "in the attorney's individual name." The Subcommittee rejected this suggestion, concluding that the word would not add any effective control of conduct better regulated by the rules of professional responsibility — it is the individual name that would be fiddled.

Rule 11(a) calls for signature by a party who is not represented, and at the end provides for correction after omission of a signature is called to the "party's attention." The Subcommittee agreed that there is no need add a word to repeat that this provision refers to the "unrepresented party's attention."

Style Rule 11(b)(1), as published, referred to needlessly increasing "the litigation costs." Present Rule 11(b)(1) refers to "the cost of litigation." Comments suggested that there may be a difference between these concepts — "the cost of litigation" clearly extends beyond taxable costs, while "litigation costs" may be read to include only taxable costs. The Subcommittee agreed to this change: "needlessly increase the cost of litigation ~~costs~~."

The Subcommittee also agreed to shift two words in Style Rule 11(b)(4): "are reasonably based on belief or a lack of information ~~or belief~~." As published, the rule literally referred to a lack of belief.

**Rule 12**

Earlier deliberations concluded that the Style Project is not the occasion to attempt to reconcile the tension between Rule 12(b)'s assertion that every defense must be asserted in a responsive pleading and Rule 12(h)'s permission to raise some defenses not asserted in a responsive pleading. That decision was confirmed.

An SCSSC-approved revision of Style Rule 12(e) was adopted: "or issue any other appropriate order ~~that it considers appropriate~~." Although the requirement that the order be appropriate might seem to restrict district-court authority more tightly than a mere requirement that the court consider the order appropriate, this usage conforms to standard style conventions.

The Subcommittee approved changes in the taglines for Rule 12(g) and paragraph (g)(1): "(g) Joining Motions ~~Consolidating Defenses in a Motion~~." and "(1) Right to Join ~~Consolidating Defenses~~." Misgiving was expressed on the ground that "joinder" is a concept peculiarly used for claims and parties, but this concern was obviated on reflecting that the text of (g)(1) says that motions may be "joined."

The Bankruptcy Rules Committee suggested that the Rule 12 Committee Note should include a paragraph stating that former subdivision (c) was divided into Style Rule subdivisions (c) and (d), while former subdivision (d) has become Style Rule subdivision (i). They feared that without this pointer, future researchers — and even readers of cases — might be confused. Confusion would extend beyond Rule 12 to Bankruptcy Rule 7012. The Note paragraph would be brief: "Some subdivisions have been redesignated. Former subdivision 12(c) has been divided into new 12(c) and (d), while former subdivision 12(d) has become new 12(i)." Discussion of this suggestion began with concern that the Committee Notes have been used to flag only a small number of the redesignations — the Note for Rule 25, for example, notes transfer of part of Rule 25 to Rule 17. If these explanations proliferate, it may be necessary to translate the chart of redesignations into Committee Notes. Faced with uncertainty whether there would be special problems with Bankruptcy Rule 7012, the Subcommittee decided not to add language to the Committee Note, but to notify the Advisory Committee that the Note might be expanded if the Bankruptcy Rules Committee can point to distinctive features of the Bankruptcy Rules that make this change especially suitable for express Note language.

The Subcommittee approved making a reference in the Committee Note more specific: "Former Rule 12(a)(4)(A) referred to an order * * *."

**Rule 13**

Published Style Rule 13(b) provided that "A pleading may state as a counterclaim any claim against an opposing party." A comment expressed concern that this might be read to undo the compulsory provision of Rule 13(a), making all counterclaims permissive. The SCSSC approved a revision that the Subcommittee adopted: "A pleading may state as a counterclaim against an opposing party any claim that is not compulsory ~~against an opposing party~~."

**Rule 14**

There were no suggestions to revise Rule 14.

**Rule 15**

There were no suggestions to revise Rule 15.

**Rule 16**

Note 29 of the discussion draft asks how the separate 120-day and 90-day periods in (b)(2) relate to each other. It was agreed to accept the suggestion approved by the SCSSC: "but in any event within the earlier of 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared."

Subdivision (c)(1) carries forward a qualification from the present rule: "*If appropriate,* the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement." SCSSC agreed to retain "if appropriate." It was recognized that generally the Style Project has deleted references to "appropriate" judicial actions, since the Rules should not be interpreted to authorize inappropriate actions. It also was recognized that there may be less need now than formerly to emphasize the sensitivity of mandating that a party be available to consider possible settlement. But some litigants legitimately reject any possibility of settlement, while large organizations may be structured in ways that make it difficult to authorize any individual to do anything meaningful with respect to settlement. The United States often encounters this difficulty. It was agreed to carry forward "if appropriate," but to report this departure from common drafting standards to the Advisory Committee.

Present Rule 16(e) says that after any Rule 16 conference "an order *shall* be entered reciting the action taken." The Style Rule changes this to "should issue an order." Rule 16 provided the occasion for a lengthy discussion of the approach to substituting "must," "may," or "should" for "shall." This "shall" was rendered as "should," not "must," because it often happens that a pretrial conference is held without a reporter, a record, or an order. A settlement conference, for example, may not be an appropriate occasion for entering an order to recite "action taken." It was agreed that "should" will remain in the Style Rule.

Present Rule 16(e) addresses the effects of an order entered after a pretrial conference by distinguishing between two types of conference. An order "following a final pretrial conference shall be modified only to prevent manifest injustice." An order after any other pretrial conference controls "unless modified by a subsequent order." Style Rule 16(e) carried forward language close to the present rule in addressing an order entered *after* a final pretrial conference. A comment observed that this language might be read to apply to any order entered during the period following a final pretrial conference, not only an order reciting the action taken at the conference. The SCSSC approved a change to say that an order "reciting the action taken at the conference" may be modified only to prevent manifest injustice." The difficulty with this language, however, is that an order embodying the results of a final pretrial conference may not "recite[] the action taken," but still should be modified only to prevent manifest injustice. It was decided that better wording should be developed and recommended to the Advisory Committee. The thought will be that the special standard should apply to an order implementing the action taken at the conference.

Discussion at the April 18 meeting focused again on the level of specificity required to invoke the "manifest injustice" standard for modifying a final pretrial conference order. Present Rule 16(e) refers simply to "the order following a final pretrial conference." These words do not speak

clearly to the relationship between things done at the final pretrial conference and the order. Although present Rule 16(e) also says that any pretrial conference order "shall * * * recit[e] the action taken," the present rule can be read to apply the manifest-injustice-action standard to actions taken at the final pretrial conference but not explicitly recited in the order. It also could be read to apply the standard only to matters actually recited in the order, as the SCSSC revision of Style Rule 16(e) would do.

Discussion of Rule 16(e) was tied to discussion of Rule 36(b). The currently proposed version of Style Rule 36(b) adopts a Rule 36 standard for withdrawal or amendment of an admission, but is "[s]ubject to Rule 16(e)." The effect of a final pretrial conference order on an admission will depend on the choice made in drafting Style Rule 16(e). If Rule 16(e) applies only to things specifically recited in the final pretrial conference order, a Rule 36 admission is subject to the Rule 16(e) standard only if recited in the order. If Rule 16(e) refers only to modifying a final pretrial conference order, specific recital may or may not be necessary; whatever interpretation the present rule bears will carry forward. But it is possible to separate Rule 36(b) further from Rule 16(e) by dropping the reference to Rule 16(e) and adding a specific new sentence: "But the court may permit withdrawal or amendment of an admission adopted at a final pretrial conference only to prevent manifest injustice."

It was noted that some courts direct the parties to prepare a final pretrial conference order that includes stipulations and exhibits; Rule 36 admissions commonly are identified as one or the other. Responsibility for ensuring that the final pretrial conference order actually recites admissions that are to be bound by the manifest injustice standard might fairly be placed on the parties and shared by the court in this way.

Another observation was that a final pretrial order may be adopted by means that do not involve an actual meeting or conference call with the judge. It would be possible to address the Rule 16(e) standard to a "final pretrial order." But Rule 16, and Rule 16(e) specifically, deal with pretrial conferences. An informal process still may be a pretrial conference; if so, Rule 16(e) properly applies. But there may be other orders that are pretrial orders, are intended to be final, but probably should not be subject to revision only for manifest injustice. It was concluded that Rule 16(e) should not refer generally to a "final pretrial order."

Concern was expressed, on the other hand, that we should not venture into these uncertainties in the name of Style. The conclusion at the end was that Style Rule 16(e) should read: "The court may modify ~~an order issued after~~ a final pretrial conference order only to prevent manifest injustice." Rule 36(b) will remain as published, minus the mistaken reference to Rule 16(d): "Subject to Rule 16~~(d) and~~ (e), the court may permit withdrawal or amendment * * *."

**Rule 17**

Present Rule 17(a) provides that "no action shall be dismissed" because not prosecuted by the real party in interest unless specified conditions are met. Style Rule 17(a)(3) says "the court may not dismiss." It was agreed that "'may not' works as words of authority." The Subcommittee agreed with the SCSSC determination to leave the Style Rule as published.

**Rule 18**

The SCSSC rejected a suggestion that words could be saved, in parallel with a change recommended in Style Rule 8(a): "A party asserting a claim~~, counterclaim, crossclaim, or third-party~~

~~claim~~ may join * * *." That choice was accepted — it is useful to spell out the details because the breathtaking freedom of joinder allowed by Rule 18(a) is not always appreciated by infrequent users. The narrow limits on a permissible crossclaim, for example, may distract attention from the effect of Rule 18(a) — once a permissible crossclaim is asserted, the crossclaimant may add any additional claims it has without regard to the absence of any relationship to anything else in the action. But it was asked whether the published version confusingly implies that a counterclaim and the other identified items are not a "claim." This potential implication could be dispelled by adding em dashes and two words: "a claim~~;~~ — including a counterclaim, crossclaim, or third-party claim — may join * * *." This alternative will be presented to the Advisory Committee in a footnote.

**Rule 19**

Rule 19(b) presents a question that plagued the Subcommittee. Rule 19(a)'s caption, both present and Style, refers to persons to be joined "if feasible." Rule 19(a) does not use these words. Present Rule 19(b) also does not use these words; it directs the decision to be made if it is not possible to join a person "described in subdivision (a) * * *." But its caption does refer to the determination to be made "Whenever Joinder Not Feasible." It was suggested that Style Rule 19(b) should be revised so as not to use a word absent from the text of Rule 19(a): "If a person who is required to be joined ~~if feasible~~ under Rule 19(a) cannot be joined * * *." The SCSSC rejected this proposed amendment, relying on the general aversion to cross-references within a Rule. The Subcommittee agreed with the SCSSC determination.

**Rule 20**

Both present Rule 20(a) and Style Rule 20(a)(1)(B) refer to common questions that "will" arise in the action. A comment suggested that "may" would be more accurate — party joinder is usually accomplished at the beginning of an action when the existence of common questions is only a prediction. The Subcommittee agreed with the SCSSC determination that "will" accurately expresses the forward-looking character of the thought.

**Rule 21**

There were no suggestions to revise Rule 21.

**Rule 22**

The Subcommittee approved the SCSSC's style revision: "The remedy ~~it~~ this rule provides is in addition to * * *."

**Rule 23**

The Subcommittee determined to make one additional change to supplement a change approved by the SCSSC. Style Rule 23(a)(3) will read: "The claims or defenses of the representative parties[2] are typical of the ~~class~~ claims or defenses of the class;" The SCSSC considered and approved the change from "class claims" in order to restore present Rule 23(a)(3)'s "claims or defenses of the class." This change was recommended by the Burbank/Joseph group on the view that "class claims or defenses" seems to focus on the claims or defenses that are common to class members, without regard to the fact that class members may have many additional claims that the representative parties' claims do not typify. Focus on the claims or defenses of the class, as in the present rule, suggests more strongly that all members of the class must have like claims. The

subcommittee concluded that it would be better to restore all of the current rule's language. There is a lot of case law interpreting the rule. A change, however convenient possessive-form drafting may be, will lead to wasteful reargument. It was further agreed, however, that references later in the rule to "class members" and the like can remain.

The Burbank-Joseph group made a complex suggestion to modify Style Rule 23(c)(3)(B). The suggestion, described in the next sentence, was rejected by the SCSSC and the Subcommittee, as were variations. It would make the rule say that the judgment in a Rule 23(b)(3) class action must "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." This suggestion corresponds to the use of "and" to join these three elements in present Rule 23(c)(3) which says that the judgment "shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." The concern is that it must be clear that a putative class member who has requested exclusion is not included in the judgment. But it was concluded that the comma in the Style Rule series of three items does not confuse that issue. It is as if romanette numbers were used to separate the items: "those (i) to whom the Rule 23(c)(2) notice was direct, (ii) who have not requested exclusion, and (iii) whom the court finds to be class members." As a practical matter, most judgments are prepared by the parties upon settlement and scrupulously include these required elements.

Style Rule 23(d) began without a word that would be supplied by a suggested edit: "In conducting a class action * * *." Discussion of the edit raised the question whether the reference to a "class action" might be read to limit this subdivision to the period after certification is granted. The present rule, "in the conduct of actions to which this rule applies," does not create that difficulty. It is clear that the general powers recognized in subdivision (d) apply to the period before certification. The court may need to enter orders protecting putative class members or to address any number of other issues. It was concluded that the rule text should be simplified: "In conducting ~~a class~~ an action under this rule * * *." The heading for subdivision (d) will be changed in parallel: "Conducting the ~~Class~~ Action."

Footnote 40 of the materials set out a proposed revision of Rule 23(e) that would strip out many words. One Subcommittee member observed that it had been difficult to follow this more compact version — the repeated reliance on "it" to refer to a proposed settlement, voluntary dismissal, or compromise forced repeated references back. The SCSSC left this question to the Advisory Committee. The Subcommittee recommends against adoption.

A proposed edit to Style Rule 23(h)(1) added words to specify that it is the movant for attorney fees who must serve notice of the motion: "The movant must serve ~~N~~notice of the motion ~~must be served~~ on all parties * * *." The change was challenged on the ground it need not always be the movant who serves notice. The motion may be served in conjunction with other notices. Often the notice of a motion for attorney fees goes out with the Rule 23(e) notice of settlement — typically it is the defendant who sends out the Rule 23(e) notice, not the person moving for fees. It was agreed that the passive voice should be restored: "Notice of the motion must be served on all parties * * *."

**Rule 23.1**

There were no suggestions to revise Rule 23.1.

**Rule 23.2**

There were no suggestions to revise Rule 23.2.

**Rule 24**

There were no suggestions to revise Rule 24.

**Rule 25**

Present Rule 25(a)(1) says that unless a motion to substitute is made within 90 days after death is suggested on the record, "the action *shall* be dismissed as to the deceased party." Style Rule 25(a)(1) as published said that the action *may* be dismissed. Comments suggested that Rule 25 establishes a mandatory duty to dismiss — that the rule should say "must." Subcommittee discussion reflected divided views. One view agreed with the comments — if there is no substitution, the action must be dismissed as to the deceased party because there is no party to carry on the litigation even though the claim survives. The other view was that "must" may cause some unnecessary confusion. Rule 6(b) clearly allows extension of the time to move to substitute, even if the request for extension and motion are made after expiration of the 90-day period allowed by Rule 25. A statement that the action "must" be dismissed may seem to conflict with Rule 6(b). A mid-range view was that the action must be dismissed as to the deceased party if there is no motion to substitute, but that even a tardy motion to substitute can forestall dismissal, so long as the motion is made before dismissal. Part of the uncertainty arises from the variety of circumstances in which the question may arise. If the decedent was the sole claimant or defendant, failure to move to substitute may reflect tacit recognition that the action is being carried on by a representative. If there are multiple parties, even service of a statement noting the death may not stir prompt reaction, particularly if the decedent had been seen as a minor participant. The Subcommittee decided to carry forward with "may," and to add a paragraph to the Committee Note:

> Former Rule 25(a) provided that "the action shall be dismissed as to the deceased party" unless the motion for substitution is made not later than 90 days after the death is suggested on the record. "[S]hall" becomes "may" in the amended rule to reflect the court's discretion to extend the time under Rule 6(b). The court may extend the time on motion made after the 90-day period has expired if excusable neglect caused the failure to move for substitution within the 90-day period.

This question is recommended for consideration by the Advisory Committee.[1]

Both present and Style Rule 25(a)(2) refer to a claim that survives only "to" a remaining party. Brief discussion agreed that "to" is better than "for" or "in."

**Rule 26**

The dispositions reflected in footnotes 42 through 46 of the draft were all approved. Several of these addressed the global use of "stipulation." Note 42 approves an addition to 26(a)(1)(A)(iv): "to satisfy all or part of a possible judgment in the action * * *."

Discussion turned to a revision that was not discussed in a footnote. Rule 26(a)(1)(C) refers to the Rule 26(f) conference. The revision would have made it "the Rule 26(f) parties' conference." Professor Kimble wants to put an identifying name with the reference; simply using a rule number as an adjective does not give a sufficient cue. Rule 26(f)(4) refers to it as "the parties' conference." It was agreed that "parties'" should be transposed — it will be "the parties' Rule 26(f) conference." (It was later agreed that the tagline for Rule 26(f) would be changed to "Parties' Conference.")

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[1] The draft considered by the Advisory Committee before publication said "must." See Style 429F, in the agenda materials for the October 2003 meeting. The minutes for that meeting do not reflect any discussion of this problem, see pp. 12-13 in the April 2004 agenda book.

Rule 26(a)(2)(B) provoked a comment based on fear that the Style draft did not capture the interpretation in several cases that an expert-witness disclosure report must reveal not only the compensation paid to the witness but also the compensation paid to others who undertake studies to support the witness's testimony. The present rule refers to "the compensation to be paid for the study and testimony." The proposed revision would have had the Style Rule read: "a statement of the ~~witness's~~ compensation to be paid for study and the witness's testimony in the case." It was agreed that it would be better to fall back closer to the present rule, deleting any reference to the witness: "a statement of the ~~witness's~~ compensation to be paid for the[2] study and testimony in the case."

The Subcommittee rejected the suggestion that paragraph 26(a)(2)(D) should be deleted as redundant. The reminder of the Rule 26(e) duty to supplement expert-witness disclosures is important enough to justify the redundancy, in part because the duty to supplement an expert trial witness's deposition may be forgotten in reflection of the general rule that Rule 26(e) does not require supplementation of deposition testimony.

Comments suggested that present Rule 26(a)(5) should be restored, preferably to become a new Style Rule 26(b)(1)(A). The comments rested on the theory that some lawyers argue that Rule 36 requests to admit and Rule 45 nonparty subpoenas are not discovery devices and are not subject to the close of discovery periods. This argument was put aside on the ground that the court can control such questions in the scheduling order. But it was urged that Rule 26(a)(5) is more than an index of the discovery methods. It was all of Rule 26(a) when disclosure was added in 1993, and was carried forward as paragraph (5) — displaced downward by the new disclosure provisions — to protect against arguments that disclosure had somehow displaced the right to discovery. The Subcommittee agreed to revise the Committee Note. The first sentence of the second paragraph will be revised: "Former Rule 26(a)(5) served ~~only~~ as an index of the discovery methods provided by later rules. It was deleted as redundant." A new third sentence will be added, subject to Advisory Committee approval: "Deletion does not affect the right to pursue discovery in addition to[3] disclosure."

Style issues presented by footnotes 50, 51, and 52 were resolved by accepting the SCSSC decisions to leave the Style Rule provisions as published.

A proposal was made to revise Style Rule 26(b)(3)(C) to eliminate an explicit cross-reference, substituting an implicit cross-reference: "Any party or other person may, on request and without ~~the~~ any showing ~~required under Rule 26(b)(3)(A)~~ obtain * * *." The Subcommittee, agreeing with the SCSSC, approved an alternative revision: "may, on request and without the required showing ~~required under Rule 26(b)(3)(A)~~, obtain * * *."

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[2] My notes are unclear. I think we did not talk about restoring "the." It is in the present rule, and bears on the question whether disclosure includes compensation paid not to the witness but to others. Omission of "the" reinforces the conclusion that all related study must be disclosed, but the result may go too far. All study? Including that not considered by the witness?

[3] These words are sensitive. Disclosure may affect discovery practice. Production of documents by disclosure, for example, should affect resort to Rule 34, enforced if need be by 26(b)(2)(B) or 26(c) orders. We might say something like "disclosure does not displace discovery," but that could be read to imply greater limits on discovery than should be.

Present Rule 26(b)(4)(B) provides that discovery of experts consulted in preparation for trial and not to be used as trial witnesses can be had "only" as follows. "Only" was omitted from the Style Rule. Restoration of "only" was urged. It is not necessary on fine interpretation of fine drafting. But there is a risk that fine drafting will not command fine interpretation. Without "only," the statement that discovery can be had either as provided by Rule 35(b) or on showing exceptional circumstances might be read as an illustration of examples, not an exclusive set. The Style Draft is a good job of untangling a very long sentence in the present rule. And the structure should imply exclusivity: the rule begins "ordinarily may not," and concludes "but may" in two instances. This is similar to Style Rule 26(b)(3), but with one difference — (b)(3)(A) says "but * * * those [work-product] materials may be discovered if:" The Subcommittee concluded that "only" should be restored: "But a party may do so only: * * *" While drafting purists would agree that "only" is unnecessary, practicing lawyers would agree that it provides an important protection against misreading.

Style Rule 26(b)(5)(B) carries forward the present rule's requirement that a "privilege log" describe the nature of "communications" withheld as privileged. The Subcommittee agreed with the SCSSC that "communications" should be retained. Discovery and privilege extend beyond the other categories, "documents" and "tangible things," included in the rule.

The Subcommittee approved addition of one word to 26(b)(5)(B): "describe the nature of * * * tangible things not produced."

A much-debated question addressed to Rule 26(e) was renewed by public comments. The present rule defines the duty to supplement as one "to include information thereafter acquired." The Committee Note states that the "thereafter acquired" limit was deleted from the Style Rule because actual practice ignores it. When a lawyer becomes aware of relevant and responsive information not included in an earlier discovery response, the response is supplemented. People do not pause to determine when the information was acquired. And there are real problems in any approach that attempts to apply the rule that a duty to supplement arises only when a party "learns" that the response is incomplete or incorrect. The "learns" element is carried forward in the Style Rule, as it must be; the Style Project could not expand the duty to supplement by creating a duty to inquire further. "Thereafter acquired" further complicates the problem, however. A bit of information may have been in a party's paper or electronic files all along, only to be found after the initial discovery response. Is the information "thereafter acquired"? So long as the party recognizes that it makes the initial response incomplete or incorrect, should there not be a duty to supplement? But can it be said, with the confidence required by the Style Project, that eliminating the uncertainty created by "thereafter acquired" does not change the meaning of Rule 26(e)? The Subcommittee decided to refer this possible revision to the Advisory Committee: "must supplement or correct its disclosure or response to include later-acquired information. The party must do so: * * * The thought was expressed that the Style Rule was desirable as published, but care must be taken in deciding whether it is faithful to Style Project constraints.

The Subcommittee approved a style revision of the Rule 26(f) tagline: "(f) Parties' Conference ~~of the Parties~~; * * *."

Style Rule 26(g)(1)(A) carries forward the present rule's provision that the signature on a disclosure certifies that the disclosure is complete and correct "as of the time it is made." The Subcommittee rejected as substantive a change approved by the SCSSC that would have changed this to a certification that the disclosure is complete and correct "when" it is made. "When" could be misread to require that an initial disclosure be complete and correct. But Rule 26(a)(1)(E)

expressly limits the disclosure duty to "the information then reasonably available." A party must make initial disclosures even though it has not fully investigated its case, and even though another party has made inadequate disclosures or has failed to make any disclosures. It is clear that an initial disclosure need not be complete and correct when it is made. The Subcommittee further concluded that rejection of this revision does not require consideration by the Advisory Committee.[4]

Style Rule 26(g)(1)(B)(ii) was revised to conform to a parallel change made in Rule 11: "not interposed for any improper purpose, such as to * * * needlessly increase the ~~litigation costs~~ cost of litigation."

The Subcommittee approved a revision of Style Rule 26(g)(2) earlier approved by the SCSSC. The problem arises from translating the present rule's statement that a party is "not * * * obligated to take any action with respect to" an unsigned disclosure or discovery request, response, or objection. The Style Rule says "has no duty to respond." But reactions to properly signed disclosure or discovery activities extend beyond "respond." It also is useful to correct the inadvertent reference in the Style Rule to "the other party" — there may be plural parties who need not act: "~~The court must strike~~ Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless ~~the omission~~ a signature is promptly ~~corrected~~ supplied after ~~being~~ the omission is called to the attorney's or party's attention. ~~Until the signature is provided, the other party has no duty to respond.~~"

**Rule 27**

There were no suggestions to Revise Rule 27.

**Rule 28**

There were no suggestions to revise Rule 28.

**Rule 29**

The Subcommittee noted the global issue underlying the use of "stipulate" in Style Rule 29.

**Rule 30**

Present Rule 30(b)(5) provides that a deposition notice may be accompanied by a request "made in compliance with Rule 34," and then concludes with a sentence stating that "[t]he procedure of Rule 34 shall apply to the request." Style Rule 30(b)(2) compressed this to a statement that the notice "may be accompanied by a request complying with Rule 34." A comment suggested that this economical statement may not accurately convey the message that Rule 34 controls the request. The Subcommittee agreed to this change: "may be accompanied by a request ~~complying with~~ under Rule 34 * * *."

The global-convention use of "stipulate" in Rule 30(b)(4) and (5)(A) was noted.

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[4] That is indeed what the Subcommittee decided. But the discussion did not, at that point, account for the fact that substitution of "when" was approved by SCSSC. We owe it to SCSSC to include an explicit footnote describing the Subcommittee action.

Style Rule 30(b)(5) directs that at a deposition recorded nonstenographically the officer "must repeat the items in Rule 30(b)(5)(A)(i)-(iii)" at the beginning of each unit of recording medium. The Subcommittee discussed a suggestion that rather than expressly refer to these three items in subparagraph (A) the rule should refer to the "first three listed items." It was agreed that the explicit cross-reference works better than an implicit backward reference. The reference to 30(b)(5)(A)(i)-(iii) will remain.

Rule 30(b)(6) provides that a party "may" designate an organization as deponent "and describe with reasonable particularity" the matters for examination. The Subcommittee agreed to add one word "and must describe with reasonable particularity." Although "must" has no counterpart in the present rule, practice clearly establishes the mandatory character of this requirement. An organization can designate and prepare witnesses only as to matters described with reasonable particularity.

**Rule 31**

The global use of "stipulated" in rule 31(a)(1)(A) was noted.

Another global convention was noted in Rule 31(a)(5). Present Rule 31(a)(4) allows extensions of time "for cause." The Style Rule allows extensions "for good cause." Although "good" seems an intensifier, this is the formula that has been adopted for global use.

**Rule 32**

It was agreed that for the sake of consistent expression, Rule 32(d)(4) would be changed as follows: "made promptly after the ~~defect~~ error or irregularity becomes known * * *."

**Rule 33**

It was noted that Style Rule 33(a)(1) is another instance of the global issue — "stipulated" is used without adding "in writing."

It has been suggested that by eliminating the present rule's "necessarily," Style Rule 33(a)(2) goes too far: "An interrogatory is not ~~necessarily~~ objectionable merely because it asks for an opinion * * *." The concern is that an interrogatory may improperly seek opinions — as one example, a party might seek the opinion of an expert whose opinions are protected against discovery by Rule 26(b)(4)(B). It was agreed that this is not a problem. "[M]erely" draws the distinction: it is proper to ask for opinions in many circumstances, so an objection is not available merely because an opinion is sought. But if there are other grounds to object to discovery of an opinion, they remain available.

Accepting the SCSSC action, the Subcommittee joined in rejecting an edit that would have removed a few words from Style Rule 33(b)(4): "The grounds for objecting ~~to an interrogatory~~ must be stated * * *."

A longstanding problem was briefly reopened by the question whether an improper change is made by Style Rule 33(c). Present Rule 33(c) allows use of interrogatory answers "to the extent permitted by the rules of evidence." Style Rule 33(c) changes this to the "Federal Rules of Evidence." Earlier discussions, mostly focused on Rule 32, suggested that the Federal Rules of

Evidence are not all-inclusive, that there are some settings in which matters of evidence are answered outside the formal rules. And of course there are inevitable *Erie* problems, even as to matters that seem to be addressed by the Federal Rules of Evidence. But both in Rule 33 and Rule 32 it was decided that the Style Rules should refer only to the Federal Rules of Evidence. This question is part of the larger question of better integrating the evidence provisions that remain in the Civil Rules with the Federal Rules of Evidence. It seems better not to attempt further resolution as part of the Style Project.

**Rule 34**

As noted with Rule 45, Professor Kimble proposes a first new sentence for Style Rule 34(a): "In these Rules, an inspection of documents, tangible things, or land includes the right to copy, test, sample, measure, survey[,] or photograph." The purpose of this definition would be to enable a simple reference to "inspection" throughout the discovery rules that invoke Rule 34, displacing the many and inconsistent descriptions that have survived into the Style Rules. It was agreed that this proposal would be presented to the Advisory Committee, but that it is not supported. The SCSSC concluded that it is too late to make this change. The question was considered extensively in drafting the e-discovery amendments. And reliance on definitions has been resisted throughout the Style Project. So it was suggested that the infrequent practitioner should not be obliged to understand on reading Rule 45 that a reference to "inspection" carries all of the meaning to be found only in Rule 34(a).

Professor Kimble also sought to reopen the choice made to define electronically stored information separately from the definition of "documents" in Rule 34(a)(1)(A). This choice was vigorously debated in the Advisory Committee, rehearsed for the Standing Committee, and resolved. The e-discovery version of Rule 34 is scheduled to take effect on December 1, 2006. A change one year later with the Style Rules would disrupt implementation of the 2006 rule. The subcommittee agreed with the SCSSC that it is too late to attempt to reopen this question now. At the same time, great appreciation was expressed for Professor Kimble's contributions to making the discovery rules much easier to use.

**Rule 35**

Present Rule 35(b)(3) refers to an examination "made by agreement of the parties." It was agreed that whatever global resolution is finally achieved in referring to "stipulations," it is better to revert to "agreement" here. The emphasis is on informal, out-of-court agreement to a Rule 35 examination, bringing actual practice close to the general conduct of discovery among the parties without need for a court order. The change from the published version will be: " * * * applies also to an examination made by the parties' ~~stipulation~~ agreement, unless the ~~stipulation~~ agreement states otherwise." But this change should be discussed by the Advisory Committee. The present rules are "wildly inconsistent" in referring to agreements, stipulations, and other equivalents. The general Style choice has been to refer to a "stipulation," without the common "written" or "in writing" or "on the record." It has been recognized, however, that specific contexts may justify a different word. The recommendation for "agreement" in Rule 35 rests on the belief that the context makes "agreement" a better concept. An effort will be made to determine what other contextual substitutions have been made for "stipulation" in different rules. Each application should be considered anew.

## Rule 36

Rule 36(a) now provides that a request to admit the genuineness of a document must include a copy of the document unless a copy is "otherwise furnished or made available for inspection and copying." Style Rule 36(a)(2) carries forward "inspection and copying." The SCSSC determined to retain "and copying," in face of the family of suggestions that a means should be found to establish a uniform and non-repetitive formula throughout the rules. Discussion agreed that copying is an important part of the process, and ought not be left to implication from "inspection." "and copying" will remain in the Style rule.

A small change in 36(a)(4) adopted by the SCSSC was approved. The rule will track the familiar sequence better if it reads: "may assert lack of ~~information or~~ knowledge or information as a reason * * *."

The SCSSC approved a revision that combines paragraphs (5) and (6), renumbering (7) to become (6), with some editing. Professor Kimble suggested some further editing. Revised paragraph (5) is recommended as follows:

> **(5) Objections.** The grounds for objecting to a request must be stated. ~~**(6) Matter Presenting a Trial Issue.**~~ A party must not object ~~to a request~~ solely on the ground that ~~it~~ the request presents a genuine issue for trial. ~~The party may deny the matter or state why it cannot admit or deny.~~

Deletion of the final sentence was approved on the ground that it is redundant with paragraph (4), which describes the duty to answer and establishes the right to assert a lack of knowledge or information. The Advisory Committee will be informed of this recommendation.

Published Style Rule 36(b) addressed the court's authority to permit withdrawal or amendment of a matter admitted, "Subject to Rule 16(d) and (e)." Comments pointed out that Rule 16(d) does not establish any limit — it allows modification of a pretrial order as the court wills. Rule 16(e), on the other hand, permits modification of an order issued on the basis of a final pretrial conference "only to prevent manifest injustice." The SCSSC approved an amendment striking the reference to Rule 16(d), so Rule 36(b) would read: "Subject to Rule 16~~(d) and~~ (e) * * *." Discussion observed that this drafting accomplishes the desired limit — an admission adopted at a final pretrial conference should be amended or withdrawn only under the "manifest injustice" standard of Rule 16(e). But this sort of drafting clearly forces readers back to Rule 16(e), and may confuse some readers as to the interplay between the two rules. An alternative suggested in the materials was to authorize the court to permit withdrawal or amendment, "but an admission incorporated in a final pretrial order may be amended only under Rule 16(e)." This version uses more words, but clearly conveys the thought. It was objected, however, that an admission may be adopted at a final pretrial conference without incorporating it in a final pretrial order. One reaction was that the drafting choice should be postponed until Rule 16(e) is redrafted in line with the suggestions made at this meeting. The general suggestion is that Rule 16(e) should be amended to apply to modification of an order "implementing" the action taken at a final pretrial conference. That might suggest a different approach in Rule 36(b) — something like "but an admission adopted at a final pretrial conference may be withdrawn or amended only under Rule 16(e)." The current draft revision may be more attractive — "Subject to Rule 16(e) * * *." The question will be submitted to the Advisory Committee. (The Subcommittee agreed at the April 18 conference call meeting that Rule 36(b) should remain: "Subject to Rule 16~~(d) and~~ (e) * * *." See Rule 16 above.)

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**Rule 37**

Published Style Rule 37(a)(3)(B) adds a word not found in present Rule 37(a)(2)(B). It includes a motion to compel "production"; the present rule refers only to an order compelling inspection. Concern was expressed that adding "production" may imply that a party holding discoverable documents may be required to pay for duplication and transportation. The SCSSC agreed to retain "production," but observed that the Advisory Committee might want to decide whether this is no more than a style matter. Some arguments were made to retain "production." "Produce" appears in Rule 34(a)(1); it is understood that this means production on terms that comply with the Rule 34(b)(1)(B) part of the request that specifies a reasonable time, place, and manner for performing the inspection. "Production," moreover, will occur only as directed by the Rule 37(a) order; the terms can be worked out in the order process. "Production" also helps to enforce the pending Rule 34 amendment that provides for testing and sampling documents. The subcommittee nonetheless concluded that "production" should be omitted. It is not in the present rule. Style Rule 37(a)(3)(B)(iv) says only that the motion to compel may be made if a party fails to respond that inspection will be permitted, the same condition as in present Rule 37(a)(2)(B). "Production for inspection" was suggested, but resisted because inspection may be sought of things that are not really "produced" — physical premises. It also was observed that "inspection" has a special meaning that suffices without any need for "production"; inspection follows from production. The Subcommittee agreed to delete "production."

Both present Rule 37(c)(1) and Style Rule 37(c)(1) use "disclosed" in two senses that may cause confusion. The first sense is failure to "disclose" within the meaning of Rule 26(a) disclosure. The second is to failure to supplement discovery, not a matter of Rule 26(a) disclosure. A proposed correction was: "the party is not allowed to use ~~as~~ any unrevealed information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~, unless * * *." The SCSSC approved this change. It was agreed that the new words dispel the confusion, but "unrevealed" is not a pleasing word. It was concluded that Style Rule 37(c)(1) instead should be revised as follows: "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~, unless * * *." This revision will be recommended to the Advisory Committee.

**Rule 38**

The Subcommittee approved this revision in the published Style Rule: "These rules do not create a right to a jury trial on issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h)." This change conforms to present Rule 38(e), which refers to "issues in an admiralty or maritime claim within the meaning of Rule 9(h)." As published, the Style rule omitted any provision for claims that are inescapably admiralty or maritime regardless of designation.

**Rule 39**

The Burbank/Joseph group suggested that style Rule 39(a)(1) should restore an omitted part of present Rule 39(a). The present rule says that after jury trial is demanded the issues must be tried by a jury unless the parties file a stipulation to a nonjury trial "or so stipulate on the record in open court." Published Style Rule 39(a)(1) would be supplemented: "the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record in open court." The SCSSC favored omitting "in open court," responding to observations suggesting that there is no apparent reason to require anything more than a stipulation on the record. Requiring that the stipulation be "in open court" will create uncertainty because it is not clear just what events are in open court. Is a pretrial

conference in chambers attended only by the parties or counsel in open court? Is anything done by a court after notice in the case file done in open court, no matter that it is held in a place not open to the public? It was agreed that the question should be referred to the Advisory Committee.

**Rule 40**

The Bankruptcy Rules Committee asked whether "self-calendaring" systems would be put in doubt by omitting from Style Rule 40 the present rule's authorization of scheduling trials by "such other manner as the courts deem expedient." Style Rule 40 requires "notice to the other parties." Apparently self-calendaring systems do not require notice before the case is set for trial, only after it is set. Adoption of the Style-Substance version of Rule 40 would moot this issue — it provides simply that "[e]very court must provide by rule for scheduling trials." Even if the Style-Substance rule is not adopted, the Subcommittee agreed with the SCSSC determination that no change should be made in Style Rule 40.

**Rule 41**

Present Rule 41(c) allows voluntary dismissal by the claimant alone of a counterclaim, etc., under Rule 41(a)(1) "before the introduction of evidence at *the* trial or hearing." Style Rule (c)(2) describes the cutoff as "before evidence is introduced at *a* hearing or trial." A comment suggested that substituting "a" for "the" may change the meaning — "the" trial or hearing suggests the "main event," a single trial designed to resolve everything. "a hearing or trial" could describe the first evidentiary proceeding, even if it is confined to limited issues. But the present rule must confront the circumstance of bifurcated or still further divided proceedings, and perhaps more pointedly a trial that focuses solely on the claim rather than a counterclaim, crossclaim, or the like. The SCSSC approved "a," and the Subcommittee concurs.

**Rule 42**

Style Rule 42(a) lists three actions the court may take, joining paragraphs (2) and (3) by "or." Present Rule 42(a) lists each of the three actions separated by semicolons, and introducing each by "it may order" or "it may make." The SCSSC responded to a question whether "and" should be substituted for "or" by determining to retain "or." Professor Kimble observed that after "may," "and essentially equals or." It was agreed to retain "or."

**Rule 43**

Published Rule 43(a) omitted words from present Rule 43(a) that would be restored by a suggestion approved by the SCSSC: "For good cause ~~in~~ compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." These words seem redundant. But they were adopted as a deliberate redundancy when this provision was added in 1996; the Committee Note describes the importance of live testimony at length. It was agreed that these words should be restored.

**Rule 44**

There were no suggestions to revise Rule 44.

**Rule 44.1**

Rule 44.1 was added in 1966 to govern the determination of foreign law. It requires a party who intends to raise an issue of foreign law to "give notice by pleadings or other reasonable written notice." Style Rule 44.1 says only "notice by a pleading or other writing." Fearing that omission of any reference to "reasonable" notice may dilute the notice requirement, violating Style Project limits, the Eastern District of New York group recommended restoration: "give notice by a pleading or other reasonable written notice." An alternative might be "must plead [it] {the issue} or give reasonable notice in writing." It was pointed out that the 1966 Committee Note devoted several paragraphs to the reasonable notice requirement; the need to retain "reasonable" was urged forcefully during earlier deliberations. The argument against adding "reasonable" here is the regular argument from negative implications in many other rules that do not qualify requirements by adding "reasonable." It is not so much that the Style Project has rigorously stripped out "reasonable" as that "reasonable" is seldom used in the rules. If it is used here, it will be argued that literal compliance with other requirements in other rules suffices, however unreasonable in the circumstances. But it was pointed out that timely notice of foreign-law issues may be important. Often it is necessary to obtain expert testimony on the issue. What happens if a notice superficial in content is given the day before the hearing? Can the judge, even without being able to point to "reasonable" in the rule, grant a continuance or simply deny the right to raise the issue? Is the risk of curtailing reasonable judicial control of unreasonable behavior augmented by the risk that — ignoring the source in the Style Project — litigants will argue that "reasonable" was taken out of the rule for a reason? It was concluded that this question should be resolved in the Advisory Committee. It will help to be able to present a comprehensive account of the use or nonuse of "reasonable" in other rules.

**Rule 45**

Professor Kimble has suggested that Rule 34(a) should be amended by adding a definition: "In these Rules, an inspection of documents, tangible things, or land includes the right to copy, test, sample, measure, survey, or photograph." This definition then would be invoked in all other discovery rules. In Style Rule 45(a)(1)(A)(iii), for example, it would be "produce and permit the inspection ~~and copying~~ of designated documents." These questions were discussed extensively in deliberating and drafting the 2006 e-discovery amendments. The SCSSC decided to leave the Style Rule as it is. The Subcommittee determined that this question can be presented to the Advisory Committee as a global issue.

It was suggested that the 2005 amendment of present Rule 45(a)(2)(B) put the obligation to state the method for recording testimony in the wrong part of the subpoena rule. Style Rule 45(a)(2), as the present rule, otherwise deals only with designating the court from which the subpoena issues. This would fit better as a new item (iv) in 45(a)(1)(A): "Every subpoena must * * * (iv) if it commands attendance at a deposition, state the method for recording the testimony." Several Subcommittee members thought this a good idea. An alternative might be to make this provision into a new Rule 45(a)(1)(C): "**(C) Command to Attend a Deposition.** A subpoena commanding attendance at a deposition must state the method for recording the testimony." It was protested, however, that subparagraph (A) is too general to fit in this specific detail. There is no other good location; it is better to retain this provision in (a)(2)(B). The subcommittee concluded that Professor Marcus should be consulted. If change seems desirable, it will be recommended to the Advisory Committee.

Another suggestion also was marked for submission to the Advisory Committee without recommendation. The suggestion was inspired by the Burbank-Joseph group's distaste for the style

rule description that has a subpoena issued from a court, not "on behalf of" the court, when dealing with attorney-generated subpoenas. The suggestion would revise Rule 45(a)(3), limiting it to the first two sentences devoted to a subpoena issued by the clerk. The tag line would become "Issued by [the] Clerk." The remainder would become a new 45(a)(4):

> **(4) Issued by an Attorney.** An attorney may issue and sign a subpoena as an officer of:
>
> **(A)** a court in which the attorney is authorized to practice; or
>
> **(B)** a court for a district where the deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

Professor Kimble will be asked to review this question. He preferred an alternative version that continues to include both court-issued and attorney-issued subpoenas in a single paragraph:

> **(3) Issued by Whom.** The clerk must issue a subpoena, signed by otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:
>
> **(A)** a court in which the attorney is authorized to practice; or
>
> **(B)** a court for a district where the deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

A suggestion by the Bankruptcy Rules Committee renewed a question that was debated at length in recommending Style Rule 45(b)(1). Present Rule 45(b)(1) requires "prior notice" to each party of a subpoena to produce before trial. There has been some confusion as to the event that notice must precede. The general view is that notice must be given before service of the subpoena, so that other parties can challenge the subpoena, seek a protective order, argue that it should be broadened, or serve parallel subpoenas to make the process more efficient. Style Rule 45(b)(1) incorporates this general practice by specifying that notice must be served on each party before the subpoena is served. The Bankruptcy Committee observed that the Style Rule does not specify the interval before service of the subpoena; literally 30 seconds would comply with the rule. It suggested that notice to each party be required "[contemporaneously] with" service of the subpoena. Discussion observed that although it seems proper within Style Project limits to adopt the general and better view of "prior to," it would test the limits severely to specify a specific period. At the same time, service on the parties at the same time as service of the subpoena would diminish the effect of the rule. The Style Rule will remain as published, in accord with the SCSSC disposition.

It was noted that the heading of Style Rule 45(c)(2) and the words used in (2)(B) are illustrations of settings in which a definition of "inspection" in Rule 34 would enable simpler drafting.

Style Rule 45(c)(2)(B)(ii) states that when an objection is made to a Rule 45 subpoena, "[i]nspection and copying may be done only as directed in the order * * *." A comment suggested that these words might mislead a court, and are likely to confuse some parties, by implying that an objection cannot be withdrawn or worked out by agreement. The present rule says that if an objection is made, the party serving the subpoena "shall not be entitled to inspect and copy * * * except pursuant to an order of the court." Simply saying that the party is not entitled leaves the way open to withdraw or resolve the objection without court order. Discussion initially showed some

interest in restoring some version of "is entitled only," or even making explicit reference to agreement. Further discussion, however, concluded that it would be better to respond to this concern by revising the rule as follows:
"Inspection and copying may be ~~done~~ required only as directed in the order * * *." This change will be recommended to the Advisory Committee.

Another much-deliberated issue is posed by two words. Style Rule 45(c)(2)(B)(ii) carries forward the word in the present rule: the order enforcing a subpoena must protect a nonparty from "significant" expense. As published, Style Rule 45(c)(3)(B)(iii) directs that the court must protect a party directed by subpoena to travel more than 100 miles to attend trial against "substantial" expense. The SCSSC approved an editorial suggestion that "significant" should be substituted for "substantial" in (3)(B)(iii), accepting the argument that the language in the present rule results from sloppy drafting. But subcommittee discussion reflected concern that there may be a difference. It may have been decided that there is a higher obligation to attend trial, or that trial attendance is more important, or that trial attendance is not likely to impose burdens that even approach the costs that can be imposed by mammoth discovery requests. Although the matter is far from certain, it seems better to resolve the uncertainty by adhering to the present rule's wording. Unless Professor Marcus has different views, the recommendation to the Advisory Committee will be to adhere to the published rule, carrying forward the present rule.

Two changes were approved in Style Rule 45(d)(2). In subparagraph (A): "expressly ~~assert~~ make the claim." This change adopts the wording of the parallel provision in Rule 26(b)(5). In subparagraph (B): "describe the nature of the withheld documents, communications, or tangible things * * *." This will adopt a parallel change in Rule 26(b)(5). A suggestion that "communications" should be deleted was rejected on the grounds used to reject the same suggestion for Rule 26(b)(5). Finally, it was agreed that it is within the scope of the Style Project to add "without revealing information itself privileged or protected," as done in the published version, to conform to the parallel provision in Rule 26(b)(5).

**Rule 46**

There were no suggestions to revise Rule 46.

**Rule 47**

There were no suggestions to revise Rule 47.

**Rule 48**

A comment suggested that Style Rule 48 might be read to imply that the parties can stipulate to an initial jury with fewer than 6 members. The SCSSC agreed to a proposed change: "A jury must ~~have no fewer than~~ begin with at least 6 and no more than 12 members * * *." It was agreed that "begin with at least 6" dispels any contrary implication, but protested that "begin" is not a good word to describe the people who initially constitute a jury. It was agreed to suggest a different revision to the Advisory Committee: "A jury must initially have at least 6 and no more than 12 * * *."

**Rule 49**

The subcommittee approved the SCSSC's approval of this change in Style Rule 49(a)(2): "The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to

enable the jury to make its findings on each submitted issue." "[T]o enable" was accepted as the language of the present rule, and at least for that reason better than "as necessary for the jury to * * *." And a comment that "its findings" might be read to refer to findings of the court was put aside.

Style Rule 49(a)(3) says that if "the" party does not demand submission of an issue to the jury, the court may make a finding. Present Rule 49(a) says "each party * * * waives * * * unless the party demands * * * submission." A comment asks whether a demand for submission by one party can be relied upon by another party — if, for example, the plaintiff demands submission of an issue that is not submitted but the plaintiff wins, can the defendant then argue that the issue should have been submitted to the jury? Although the present rule is somewhat opaque, such authority as there is rules that one party cannot rely on another party's request for submission. A similar question was resolved in the recent revisions of Rule 51 by deciding that a party should not be able to rely on another party's instruction requests and objections — each party must independently comply with Rule 51. The Subcommittee decided to adhere to "the" as in the published draft.

Style Rule 49(b)(1) will be revised in parallel with the revision of 49(a)(2): " * * * The court must ~~instruct the jury to enable it~~ give the instructions necessary to enable the jury to render a general verdict and * * *." The Subcommittee agreed the SCSSC decision to reject an alternative arrangement of these words.

**Rule 50**

The published Style Rule 50(b) did not reflect the pending amendment that is scheduled to take effect December 1, 2006. The new rule eliminates the requirement that a renewed motion for judgment as a matter of law be based on a motion made at the close of all the evidence. Instead it allows support by any motion made under Rule 50(a). An objection to this expression has been made as a matter of style — cross-references within a rule are discouraged, in favor of an expression in words. The suggestion was that the rule refer to support in a motion for judgment as a matter of law "made before the case is submitted to the jury." The SCSSC adopted this suggestion. Subcommittee A rejected it, concluding that the rule should read: "If the court does not grant a motion for judgment as a matter of law made *under Rule 50(a)*, the court is considered * * *." The alternative "made before the case is submitted to the jury" was rejected for several reasons advanced in drafting the Rule 50(b) amendment. It must be clear that a renewed motion may be supported only by an earlier motion that meets the requirements of Rule 50(a). The most prominent consequence is that the renewed motion may rest only on grounds urged to support the earlier motion. In addition, there is a risk that a general reference to judgment as a matter of law will generate confusion with summary judgment. The Rule 56(c) standard continues to call for summary judgment when the movant "is entitled to judgment as a matter of law." Adoption of the alternative language would lead to arguments that a post-verdict motion can be based on a pretrial motion for summary judgment. That possibility was considered and explicitly rejected in amending Rule 50(b). It was agreed that the rule should continue to say "made under Rule 50(a)," but that this question should be reported to the Advisory Committee.

Having rejected substitution of "before the *case* is submitted to the jury," the subcommittee thought it proper to carry forward without change the words that follow: "is considered to have submitted the *action* to the jury * * *."

Another change is required to adapt the published Style Rule to the 2006 amendment. These words will be added, with one of two alternative punctuations: "No later than 10 days after the entry of judgment or — if the motion addresses a jury issue not decided by a verdict — no later than 10

days after the jury was discharged, the movant may file a renewed motion * * *." [Professor Kimble suggested alternative punctuation: "No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion * * *." This relocation of the em dashes adds two commas, but it was recognized that the choice is a matter of style to be decided by the SCSSC.]

**Rule 51**

There were no suggestions to revise Rule 51.

**Rule 52**

Style Rule 52(a)(6) was published to say that the "reviewing" court must regard the trial court's evaluation of witness credibility. The SCSSC agreed with a proposed edit that substituted "appellate" for "reviewing." The edit was suggested because Rule 50(c)(1) refers to an "appellate" court. But Rule 50(c)(1) applies only in the setting of appeal from a district court to a court of appeals. There is some possibility that Rule 52(a)(6) will be invoked in the district court as a reviewing court. Rule 72(a), for example, invokes clear-error review when a district court reviews a magistrate judge's decision on a nondispositive matter. It was agreed that "reviewing" should be restored.

**Rule 53**

There were no suggestions to revise Rule 53.

**Rule 54**

Text changes in Style Rule 54(a) and (b) were approved without discussion. In Rule 54(a): "A judgment ~~must~~ should not include recitals of pleadings * * *." The Rule 54(a) definition of "judgment" includes many acts that the court may not recognize as a judgment and that — for good reason — may not comply with this requirement. In rule 54(b): " * * * the court may ~~enter~~ direct entry of[5] a final judgment * * *. * * * and may be revised at any time before the ~~court enters~~ entry of a judgment * * *."

Two other changes were considered and rejected. The first would have omitted the enumeration in rule 54(b) of claims to include "a claim, counterclaim, crossclaim, or third-party claim," to parallel the deletion of a similar list from Style Rule 8(a). The Subcommittee agreed with the view that the reminder serves a purpose here, just as in Rule 18(a). The other change would have revised Style Rule 54(d)(1) to emphasize the strength of the presumption that a prevailing party wins costs, primarily by changing "should be allowed" to "must be allowed." This particular problem of translating "should" in the present rule was resolved in favor of "should" because the trial court has vast discretion to "otherwise direct" on a case-by-case basis.

**Rule 55**

A comment suggested that Rule 55(b)(2) be amended by adding one word: "[t]he court may conduct evidentiary hearings * * *." The argument was that present Rule 55(b) requires a hearing

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[5] We did not decide whether to retain "entry of," shown in the revised text in brackets. Probably it is better to keep it.

by directing that notice be served on the party in default "at least 3 days prior to *the* hearing on such application" for a default judgment. The SCSSC thought that there is some confusion now on the need to hold a hearing before entering a default judgment, and expressed concern that adding "evidentiary" would compound the confusion. There is authority that because Rule 55 does not require that testimony be presented a hearing is not required. The Subcommittee agreed on rejecting the change.

**Rule 56**

The Subcommittee approved adding two words to Style Rule 56(a)(1): "20 days have passed from commencement of the action."

Although a comment suggested that "shall" in present Rule 56(c) means "must," the Subcommittee remained firm in the view explained in the Committee Note — the well-established discretion to deny summary judgment despite satisfaction of the "no genuine issue" test means that the only accurate expression of present meaning is that the court "should" grant summary judgment.

Comments suggested that Style Rule 56(d)(1) might be interpreted to mean that the court has a duty in every case to act on its own to determine what fats are not genuinely in issue. The recommended cure was to add two words: "If on motion summary judgment is not rendered on the whole action * * *." Discussion pointed out that subdivision (d) is headed: "Case Not Fully Adjudicated on the Motion." No change is needed; it is clear that Rule 56(d) applies only when a motion has been made.

Present Rule provides that the order specifying the facts that appear without substantial controversy also "direct[] such further proceedings in the action as are just." After some discussion, the Style Rule was drafted without carrying forward the style-language equivalent, "and directing further proceedings." After considering a suggestion that these words be restored, the Subcommittee affirmed the Style Rule as published. Present active case-management practices make these words unnecessary.

**Rule 57**

As published, Style Rule 57 said that a party to a declaratory-judgment action may demand a jury trial under Rules 38 and 39. The Subcommittee agreed with a comment that this language might be misinterpreted to create a jury-trial right where none now exists. It approved this change: "~~A party may~~ Rules 38 and 39 govern a demand for a jury trial ~~under Rules 38 and 39~~."

**Rule 58**

The Subcommittee tacitly agreed with the SCSSC revision that makes Rule 58(a)(2) consistent with Rules 52, 59, and 62: "additional findings ~~of fact~~ under Rule 52(b)."

**Rule 59**

The Subcommittee adopted a suggestion by the Bankruptcy Rules Committee that the Rule 59 caption reflect the traditional reference to Rule 59(e): "New trial; Altering or Amending a Judgment."

A long-contested question was resurrected by a comment suggesting that Rule 59(a)(1)(A) drop the antique-sounding "heretofore" in favor of providing that a new trial may be granted "for any reason for which a new trial could have been properly granted in an action at law." Support for this suggestion was expressed by again insisting on the awkwardness of "heretofore." But the suggestion

was rejected on the same grounds that earlier supported retaining "heretofore." This expression traces back to the First Judiciary Act, and ties to the Seventh Amendment preservation of the common-law right to jury trial. It also may address *Erie* concerns about new trials as to claims governed by state law.

The SCSSC approved a suggestion to add one word to the Rule 59(c) provision for extending the time to file affidavits opposing a motion for a new trial "by the parties' written stipulation." This change renews the global issue noted with many other rules. The global resolution to omit "written" is noted in the preliminary draft as published, see item 5 as to "agree," "stipulate," and "consent," Appendix A, p. 206. The Subcommittee determined to omit "written" from Rule 59(c) but to bring the global question to the Advisory Committee. The issue should be supported by a computer search of the Style Rules for every appearance of "stipulate," "agree," and "consent" along with such variations as "stipulation" and "agreement." Style 442 will provide some additional insight.

The Subcommittee also noted, without further action, that Rule 59(d) illustrates the global use of "on its own" to refer to a court's acting without a motion.

**Rule 60**

A comment asked why Rule 60(b), alone among the rules, refers to relief for a party's "legal representative." It was agreed that this term from the present rule should be retained, perhaps to ensure survival of the right to relief in the compelling circumstances covered by Rule 60.

**Rule 61**

Comments expressed grave dissatisfaction with Rule 61, and urged substantial revisions. The comments, however, seemed to challenge the present rule rather than the Style Rule's rendition of the present rule. The Subcommittee decided to carry forward Style Rule 61 as published.

**Rule 62**

The Subcommittee approved the SCSSC determination to retain "order" in the first sentence of Style Rule 62(c), and also the determination not to add "appropriate." In addition, it approved restoration of words to reflect the provision in the present rule that expressly limits the district court's injunction authority to the period while an appeal is pending. As further styled, the first sentence of Rule 62(c) will read:

> While an appeal is pending ~~After an appeal is taken~~ from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

**Rule 63**

The Subcommittee approved one change in Style Rule 63: "If the judge who ~~commenced~~ conducted a hearing or trial is unable to proceed * * *." The rule should apply if a trial is commenced by one judge and then carried on by another who becomes unable to proceed.

## Rule 64

The SCSSC rejected a suggestion by the Bankruptcy Rules Committee that Rule 64(a) should be clarified to make it clear that seizing a person does not satisfy a judgment: "provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the potential judgment." Present Rule 64(a) refers to "the purpose of securing satisfaction." This rule is in some sense forward-looking — it deals with pretrial security, not to satisfying a judgment not yet entered but to securing the opportunity to satisfy the potential judgment. The Subcommittee agreed to recommend the change for these reasons, despite rejection by the SCSSC.

## Rule 65

The Burbank-Joseph group suggested that three words should be restored to Style Rule 65(b)(1): "The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if * * *." These words were added to the present rule to emphasize the importance of notice — oral notice is better than no notice. The SCSSC accepted the change, and the Subcommittee concurred.

Present Rule 65(c) says that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper." Although difficult to reconcile with this language, it is well established that a district court may issue a preliminary injunction or temporary restraining order without an injunction bond — "security" — in appropriate circumstances. This authority is particularly important to "public interest" parties who may seek to protect important abstract public values in circumstances that would defeat any interim injunction relief if meaningful security were required. Published Rule 65(c) said that "the court must require the movant to give security in an amount that the court considers proper to pay the costs and damages sustained * * *." The Burbank-Joseph group expressed concern that "must require" may be read to restrict the authority to set security at zero. The Subcommittee agreed with the SCSSC determination that Rule 65(c) should be revised to say: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper * * *."

A comment on Style Rule 65(d)(2) raised a question addressed by a memorandum to the Subcommittee but not discussed at the meeting. As published, Rule 65(d)(2) seemed to make an injunction binding on a party and its agents even though there was no actual notice. Research into the question suggested that the text of present Rule 65(d) was adapted from a statute, former 28 U.S.C. § 363, but inadvertently omitted a comma making it clear that an injunction ordinarily binds a party or its agents only upon actual notice of the injunction. The result is to suggest this revision of Style Rule 65(d)(2):

> The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Explanatory Committee Note language also is proposed. This revision remains for review by the Advisory Committee.

April 17 draft

**Rule 65.1**

The only question was whether to add a hyphen to the title of the Supplemental Rules — Asset-Forfeiture Actions. The answer will be provided by the text transmitted by the Supreme Court to Congress this month.

**Rule 66**

Revisions in Rule 66 were proposed in response to a comment noting the special meaning that attaches to "practice in the administration of estates" in the present rule. The revisions were accepted.

**Rule 67**

The Subcommittee agreed with the SCSSC determination that the Style Rule should adhere to present Rule 67, which directs that money paid into court be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 *and* 2042. Section 2041 governs deposit; 2042 governs withdrawal.

**Rule 68**

As published, Style Rule 68 inadvertently changed the time allowed for making an offer of judgment. Present Rule 68 sets the time as "more than 10 days before the trial begins." The published Style Rule set the as "at least 10 days" — confusingly enough, the apparent expansion of the time to make an offer actually abbreviated the time, since intervening Saturdays, Sundays, and legal holidays would be excluded in counting a 10-day period but not in counting a period more than 10 days. The Subcommittee agreed to correct the oversight: "More than ~~at least~~ 10 days before the trial begins, a party defending against a claim may serve" an offer of judgment.

Comments on Rule 68 pointed out that actual practice departs in at least one dimension from the statement that "the clerk must * * * enter the judgment." If Rule 68 is applied at all in class actions, the court must approve the settlement before it can become a judgment. In addition, it is clear that the court should remain free to refuse to enter a judgment for specific relief that the court finds to be illegal or too burdensome to administer. This problem could be addressed by adding a few words: "The clerk must then enter judgment, unless the court must first approve it." The SCSSC rejected this revision, concluding that it comes too late in the process and should have been proposed on the Style-Substance Track. The Subcommittee concurred — the underlined words will not be added.

The Subcommittee also concurred in the SCSSC's rejection of a Bankruptcy Rules Committee suggestion that the second sentence of Style Rule 68(c) should begin: "~~It~~ The offer of judgment must be served * * *." Professor Kimble advised that there could not be any confusion, that "it" must refer back to the offer of judgment.

**Rule 69**

The Bankruptcy Rules Committee asked for a change from the general style convention: "A money judgment is enforced by a writ of execution, unless the court ~~orders~~ directs otherwise." In the Bankruptcy Rules, "directs" is used to describe at least three things — an order in a specific

proceeding, a standing order, or a local rule. Present Rule 69 says "directs." They fear that a seeming matter of style would cause difficulty if applied to the Bankruptcy Rules, which often attempt to follow the Civil Rules verbatim. The SCSSC approved the change. Discussion expressed uncertainty as to the nature of the difficulty that might be encountered in the Bankruptcy Rules. But it was noted that one of the central purposes of the Style Project is to adopt uniform conventions for all of the five sets of Enabling Act Rules that come within the Standing Committee's responsibility. The change will be carried forward for consideration by the Advisory Committee. Judge Walker, the liaison to the Civil Rules Committee from the Bankruptcy Rules Committee, will be invited to discuss the question.

A separate question arises from present Rule 69(a), which directs that the procedure on execution "shall be *in accordance with* the practice and procedure of the state in which the district court is held." The published Style Rule says "must follow" state procedure. The Burbank-Joseph group expressed concern that "must follow" may imply a greater obligation to adhere to state law, even in circumstances where inadequate state procedures might frustrate effective enforcement of a federal judgment. Looking back to the present rule, it was suggested that "accord with" might be safer; the word seems to mean "agree with." It also was noted that the Supreme Court once said that "in accordance with" in Rule 69 means "consistent with." A related question is whether this "shall" is better rendered as "must" or as "should." There may be gaps in the procedures of some states that should be open to supplementation by federal principles that ensure effective enforcement. The general sense, however, was that interpretation of Rule 69 requires close adherence to the details of state law. It was concluded that the rule should be revised to say that the procedure on execution "must accord with the procedure of the state," reporting the question to the Advisory Committee.

**Rule 70**

There were no suggestions to revise Rule 70.

**Rule 71**

A comment suggested this revision: "When an order ~~grants relief for~~ is made in favor of a nonparty * * *." The concern was that "relief for" may resonate too strongly with Rule 8(a) and be read as limited to relief on the merits. An order in favor of a purchaser, witness, or master might not seem to qualify as "relief." The Style Subcommittee decided against the change.

**Rule 71.1**

Professor Kimble has suggested that the subdivisions of Style Rule 71.1 should be rearranged to follow a more natural pattern. The SCSSC recognized that the rearrangement may be right in principle, but concluded that it is too extensive to consider at this stage of the Style process. The Subcommittee agreed.

A comment urged that the tagline of subdivision (i)(1)(A) should be restored to the present rule: "(A) As of right ~~By the Plaintiff~~. "as of right" does not appear in the text either of present Rule 71A(i) or in the Style Rule. Its absence from the rule text was urged to show its importance in the tagline, but also raises the question whether a tagline should suggest principles not apparent in the rule text. It was decided to retain the present tagline, in part because of the symmetry of the taglines for successive subparagraphs (A), (B), and (C).

**Rule 72**

Present Rule 72 was deliberately written to incorporate words used in 28 U.S.C. § 636 defining a Magistrate Judge's authority and responsibilities. Style Rule 72 departs from the statute on the view that the statute was poorly drafted. The Subcommittee rebuffed renewed suggestions that the Rule should conform to the statute.

**Rule 73**

The Subcommittee approved deletion of four unnecessary words in Rule 73(a): "a magistrate judge may, if all parties consent, conduct the proceedings ~~in a civil action~~."

A change in Rule 73(b)(2) also was approved: "may remind ~~again advise~~ the parties of the magistrate judge's availability." The change was suggested by a comment that focused on the great sensitivity about possibly undue pressure to relieve docket burdens by pressing parties to consent to trial before a magistrate judge. "[R]emind" better conveys the sense that the communication should be neutral.

**Rule 77**

Present Rule 77(c) enumerates motions and applications that "are grantable of course by the clerk." Style Rule 77(c)(2) lists actions the clerk "may" take. The Subcommittee agreed to retain "may," in face of a comment suggesting that "may" implies an improper degree of discretion not found in the present rule. It is not clear that "grantable of course" establishes a ministerial duty to grant, and any such duty would be troubling. Rule 55(b), for example, is clear that some applications to enter judgment on a default are granted by the court, not the clerk — a distinction not found in present Rule 77(c) but made explicit in Style Rule 77(c)(2)(C).

**Rule 78**

There were no suggestions to revise Rule 78.

**Rule 80**

Style Rule 80 was published with revisions intended to bring it into conformity with modern court reporting methods. The public comment process, however, suggested that real problems could emerge. Testimony may be taken at "a hearing or trial" before a wide variety of tribunals, including not only state courts but also administrative agencies. Proof by a certified transcript may involve difficult and uncertain practical problems. In addition, it was observed that the person who transcribes video or audio recordings often is not the person who made the recording; requiring a certification by the person who recorded the testimony may involve undesirable duplication of effort. Finally, revision of the Civil Rules provisions that bear on the admissibility of evidence is bound up with the need to accomplish a sensitive further integration of the Civil Rules with the Evidence Rules. It was agreed that Rule 80 should be revised back to reach only stenographically reported testimony:

> If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who ~~recorded~~ reported it.

**Rule 81**

Style Rule 81(a)(6)(B) applies the Civil Rules to proceedings under "the following laws * * *: (B) 9 U.S.C., relating to arbitration." A comment suggested that Title 9 is not a "law." But all of the provisions in Title 9 relate to arbitration. The Subcommittee decided to make no change.

Style Rule 81(d)(1) expands present Rule 81(e) by defining state law as used in the rules to include not only state judicial decisions interpreting state statutes, as in the present rule, but all state judicial decisions. Comments suggested that this definition remains incomplete — state law may be drawn from court rules, constitutions, or other sources. The comments further suggested that this provision should be abrogated. The Subcommittee agreed with the SCSSC determination to retain the Style Rule as published, expressing concern that abrogation would be a change of meaning beyond Style Project limits.

**Rule 82**

A comment suggested that present and Style Rule 82 are inaccurate because Civil Rule 4(k)(2) manifestly extends personal jurisdiction. The comment proposed to add two words: "These rules do not extend or limit the subject-matter jurisdiction of the district courts * * *." The SCSSC rejected this proposal, citing the law of unintended consequences. The Subcommittee agreed.

**Rule 83**

There were no suggestions to revise Rule 83.

**Rule 84**

There were no suggestions to revise Rule 84.

**Rule 85**

There were no suggestions to revise Rule 85.

**Rule 86**

The Subcommittee approved the SCSSC-approved revision of Style Rule 86(2)(B): ~~in the district court's opinion~~ the court determines that applying them in a particular action would be infeasible or work an injustice." "opinion" is too soft; the court should determine whether applying a new or revised rule to pending litigation is infeasible or unjust. And the determination may be made by an appellate court; the rule should not seem to confide sole discretion to the district court.

## STYLE-SUBSTANCE TRACK

Comments on the Style-Substance Track Rules were assigned to Subcommittee B for review.

### Rule 8

Rule 8(a)(3) was published to assure that only a style improvement would be effected by this change: "a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief." A comment suggested that "relief in the alternative" better describes many circumstances. One illustration is provided by present Form 10, to become Style Form 12 — the plaintiff is uncertain whether defendant A or defendant B or both A and B drove the vehicle that struck the plaintiff and demands relief against one or both. The complaint also expresses uncertainty whether the driver acted willfully, recklessly, or negligently — choices that could affect the nature and extent of the relief. "Relief in the alternative" clearly captures this; "alternative forms of relief" may not. Choices between, or a combination, of such traditional remedies as specific performance and damages, may present similar ambiguities. And "relief in the alternative" clearly abolishes election of remedies as a pleading doctrine. The Subcommittee agreed with the SCSSC recommendation to withdraw this proposal, leaving Style Rule 8(a)(3) as published with "relief in the alternative."

### Rule 11

The SCSSC and Subcommittee agreed with a suggestion to simplify the reference to e-mail: "~~electronic~~ e-mail address * * *." (Discussion suggested that the hyphen may eventually be dropped in popular writing, but concluded that it should be retained to conform to present usage.)

Rule 11(a) struck "if any" as a qualifier of the requirement that a paper "state the signer's address, [e-]mail address, and telephone number~~, if any~~." A comment expressed concern that without these words, pro se litigants who have no address will be deterred from filing. The SCSSC determined that "if any" should not be restored. Without further revision, the "if any" could be read to refer to telephone numbers only, leaving a requirement that the signer state both "address" and e-mail address even if there is none. Revision to add " — or as many of them as the signer has" might be overkill, implying that a person state every one of multiple addresses, e-mail addresses, and telephone numbers. The Subcommittee agreed that "if any" should not be restored.

### Rule 16

Rule 16(c)(1) omits specific reference to telephones in stating that the court may require that a party or its representative be present at a pretrial conference or be reasonably available "by other means." A comment suggested that this should be "by telephone or other means" to make it clear that availability by telephone suffices. The Subcommittee concurred with the SCSSC determination to carry the rule forward without "telephone or."

### Rule 26

The Subcommittee approved a reordering of part of Rule 26(g)(1): "and must state the signer's address, e-mail address, and telephone number~~, and electronic mail address~~."

The Subcommittee approved adding a word to Rule 26(g)(1)(B)(i) to make it fully consistent with Rule 11(b)(2): "nonfrivolous argument for extending, modifying, or reversing existing law, or

for establishing new law." Rule 26(g) is the discovery analogue of Rule 11, making exact consistency suitable.

**Rule 30**

Rule 30(b)(3)(A) was published to strike four words: "Any party may arrange to transcribe a deposition ~~that was taken nonstenographically~~." A comment suggested that if a deposition was recorded stenographically, this change could have an unintended consequence: the party who noticed the deposition would be required to pay for the transcription even though a different party arranged the transcription. The Subcommittee agreed with the SCSSC that there is no need to change the proposed rule nor to address this concern in the Committee Note. The purpose of the proposal is to make it clear that a party who did not notice the deposition can arrange a transcription no matter what the means of recording the testimony. There is no real risk that it will affect other obligations.

Rule 30(b)(6) was published to ensure that it reaches all forms of intangible association: "may name as the deponent a public or private corporation, a partnership, an association, ~~or~~ a governmental agency, or other entity." A comment suggested that "or entity" be added to the tag line and also in the second, third, and fourth sentences. The Subcommittee concurred in the SCSSC conclusion that no further references to "entity" are needed.

**Rule 31**

Rule 31(c)(1) was published to add a requirement that the party who noticed a deposition on written questions notify all other parties when the deposition is completed. A comment reflected uncertainty as to what "completed" means. The SCSSC left it to the Advisory Committee to determine whether it would be useful to add an explanation to the Committee Note. The Subcommittee recommends adding this sentence at the end of the Committee Note: "A deposition is completed when it is recorded and the deponent has either waived or exercised the Rule 30(e)(1) right of review."

**Rule 36**

As published, Style-Substance Rule 36(b) referred to amendment of an admission "that has not been incorporated in a pretrial order." The Committee Note explained that an amendment incorporated in a pretrial order can be amended only under Rule 16(d) or (e). The effort was to provide a clearer explanation of the thought expressed in the Style Rule as "Subject to Rule 16(d) and (e)." Comments pointed out that Style Rule 16(d) sets no standard or limit at all for revising a pretrial order. Rule 16(e), which applies only to an order after a final pretrial conference, does establish a demanding standard — the order may be modified "only to prevent manifest injustice." A drafting change was suggested in the Subcommittee materials: "The court may permit withdrawal or amendment of an admission ~~that has not been incorporated in a pretrial order~~ * * * , but an admission incorporated in a final pretrial order may be amended only [under][as permitted by] Rule 16(e)." This suggestion, however, has been superseded by Subcommittee A's consideration of Rule 36. Rule 36(b) is to be revised to make it clear that the Rule 16(e) standard applies to admissions adopted at a final pretrial conference, whether or not "incorporated" in the final pretrial order. That revision is likely to supersede any need for a Style-Substance revision of Rule 36. If some need remains, the Style-Substance revision will incorporate the Style Rule in its final form.

**Rule 71.1**

The Subcommittee agreed to change to "e-mail address" in Rule 71.1(d)(2)(B) to parallel the changes in Rules 11 and 26.

**Rule 78**

The Subcommittee adopted a suggestion to change the caption to reflect the contents of Rule 78 as published: "Rule 78. Hearing Motions; ~~Advancing an Action~~ Submission on Briefs."

The Civil Rules Advisory Committee met and held a public hearing on November 18, 2005, at the University of Chicago Law School. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Former Committee Member Judge Schira Ann Scheindlin also attended. Dean Mary Kay Kane, member of the Standing Committee and the Style Subcommittee, was present. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Professor R. Joseph Kimble, Style Consultant, attended. Elizabeth Shapiro, Esq., Department of Justice, also attended. Professor Stephen B. Burbank and Gregory P. Joseph, Esq., appeared to present the work of a team of 21 professors and practicing lawyers that worked together under their leadership to study the Style Rules and the Style Forms published for comment in 2005. John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center.

## SUMMARY OF HEARING

Judge Rosenthal opened the hearing. She noted that the several hearings on the recent proposals to amend Rule 23 and to adapt the discovery rules to developing practice in discovering electronically stored information elicited testimony from a great many witnesses. The subject of this hearing, the Style Project, provides a marked contrast. Only true believers in the importance of finegrained rule language are interested. They understand the difficulty of the challenges posed by a project designed to make the rules clearer, simpler, more consistent, without changing their meaning.

The importance of the Style Project arises in part from the observation that too many lawyers fail to read rule text with the careful attention required to master often complex meaning. Indeed some skeptics would assert that too many lawyers fail to read the rules at all. Redrafting to achieve greater clarity, to bring meaning home more readily to those who read on the run, will help. Those who have mastered the meaning of present rule language will have no difficulty in finding the same meaning translated into better language and structure. And those who have not bothered to read the present rules carefully will benefit to the extent that they recognize the need to read the rules at least once again after they have been restyled. As Professor Gensler put it, "it's like falling in love for the second time."

The Style Project began in 1991. After a tentative beginning with the Civil Rules, it switched focus. First the Appellate Rules and then the Criminal Rules were restyled. Those projects are widely viewed as successfully. Now the Civil Rules are taking their turn.

Professor Burbank and Mr. Joseph have performed a great service to the Rules Committees and to the profession by putting together their working group. Their collected comments show close examination of the published draft "at the cellular level." Their willingness to come to this hearing for further discussion of the comments is deeply appreciated. They are the sole occasion for holding the hearing; the other two scheduled hearings have been cancelled for want of anyone interested in appearing.

Discussion will begin with general comments, turn to exploration of the rules that seem to raise the most significant questions, open up to discussion of many finer points, and conclude with remarks on the overall enterprise.

Professor Burbank opened the discussion by noting that the memorandum summarizing the working group's recommendations is in some ways an understatement. He and Gregory Joseph

edited the body of recommendations extensively. Many comments that seemed to be matters of style only were left on the cutting room floor. But the recommendations do retain style issues that seem to involve meaning and style suggestions for improving the rule headings as cues to content. Nor was an attempt made to identify every instance of changes that would be made if the "global" recommendations were adopted; for example, acceptance of the recommendation to avoid substructuring the rules down to the level of romanet "items" below the subparagraph level would require many more changes than listed. The overall approach reflected the guiding rule that a change that arguably affects meaning falls outside the boundaries set for the Style Project. And if there is a close question whether a style change also affects meaning, or generates a risk of unintended supersession effects, the change should be separated out from the Style Project for independent treatment.

Judge Rosenthal welcomed law students who had appeared for the hearing. She then noted that it will be profitable to consider the large questions first. The Advisory Committee has discussed the question of how best to avoid any risk that a restyled rule might be read to expand the effects of the present rule in superseding inconsistent statutes enacted before the effective date of the Style amendments. The intent is clear: each rule should have the same supersession effect the day it was adopted as the present rule had the day before. In restyling the Criminal Rules this issue was approached primarily through Committee Note language. What is the best way to ensure that there is no supersession effect?

Professor Burbank responded that supersession is not an easy question "because intent does not trump the statute." A later-enacted rule supersedes a statute enacted before the rule was adopted. An example is provided by the Private Securities Litigation Reform Act. The statute, adopted in 1995, includes several provisions inconsistent with present Rule 11. Readoption of Rule 11 without change makes it later in time, so that it might come to replace the inconsistent statutory provisions. One approach would be to do what the original Advisory Committee did, expressing the lack of supersession intent in Committee Notes. But that is no more than a "pious hope." Since 1938, indeed, many courts have become less and less inclined to look to Committee Notes for guidance. Another approach would be to express the Committees' intent in a rule, but that could not supersede § 2072(b) — it would be circular to attempt to rely on the supersession power to supersede supersession. Or there might be a rule provision stating that no new inconsistency should be deemed to arise between the rule provisions adopted on December 1, 200X and any statute as it existed on the same day.

In response to a question, Professor Burbank suggested that probably no thought was given to the parallel supersession issues that might have been thought to arise from the sweeping amendments of almost all the Civil Rules when they were made gender-neutral in 1987. He was separately asked why the 2003 Rule 23 amendments did not supersede the Private Securities Litigation Reform Act, and responded that there is no serious problem — the rule and statute can be read to find there is no conflict. That cannot be done with Rule 11, which is inconsistent with the PSLRA. The uncertainties about supersession are aggravated because, for whatever reason, there are few reported cases interpreting § 2072(b).

Supersession will, in any event, present archeological problems. To ensure that the restyled rule does not change supersession effects it will be necessary to consult the language of the rule as it was immediately before restyling.

Again, in response to a question, Professor Burbank noted the suggestion in the cover memorandum transmitting the working group's suggestions: one approach may be to include a "no new supersession" provision in Rule 81, preserving the supersession effects of the current rules

without change. At any event, he suggested that the supersession effects will present a "relatively rare" transaction cost in the array of transaction costs presented by the project. Supersession issues do not appear to arise frequently.

Separately, Professor Burbank observed that despite the frequent comments that the restyling of the Appellate and Criminal Rules has been successful, there has been no indication that any data actually support these observations.

Rule 65: Professor Burbank summarized the comments on Rule 65. Professor Edward Hartnett did much of the work on Rule 65. The comments do not reflect all of his research; the balance will be provided to the Committee. Several problems appear.

Present Rule 65(a)(2) begins: "Before or after the commencement of the hearing" on an application for a preliminary injunction. Style Rule 65(a)(2) changes "the" to "a." This is an important and dangerous change. To be sure, rule references to a "hearing" are imprecise. Everyone recognizes that a hearing may not be a live appearance. But the change could have a dramatic impact on the opportunity to be heard. "the" should be restored.

Present Rule 65(b) describes limits on a temporary restraining order granted "without written or oral notice to the adverse party." Style Rule 65(b)(1) shortens this to "without notice." "written or oral" should be restored to emphasize that informal notice is better than no notice.

The Rule 65(c) provisions for security present a set of problems. Although the present rule says that no restraining order or preliminary injunction shall issue except on the giving of security "in such sum as the court deems proper," it is not read to require adequate security. Courts fear that an adequate security requirement would defeat the opportunity to grant important relief to parties who cannot afford security. Some courts rely on a strained reading of the rule to conclude that it is appropriate to order less-than-adequate security, or even to require no security at all. Other courts rely on finding policies in statutes that do not explicitly say that no security is required but that embody protective principles that should not be defeated by requiring security. But it is not clear that requiring security in the amount of $0 is a good interpretation of the present rule, and the Style Rule provision that the court "must require" security "in an amount that the court considers proper to pay the costs and damages sustained" may make this reading even more difficult. The style language seems to confine discretion by directing a focus on an amount that seems reasonably calculated to compensate.

Professor Burbank further observed, in response to a question, that the Style Rule presents a supersession problem with respect to statutes that might be relied upon to show a policy that defeats injunction-bond security. The problem would arise when the statute was enacted between the time of present Rule 65(c) and the adoption of the Style Rule.

It was observed that courts indeed have taken a variety of approaches in concluding that injunction-bond security can be set at a figure that is not calculated to compensate, or even at zero. But the Style Project is not designed to decide whether this is the proper result.

Professor Burbank responded that since these problems are apparent, it may be better to remove Rule 65(c) from the Style Project entirely. Rather than restyle it, or included it in the package of Style Rules without change, it could be omitted entirely. Further consideration would occur in the ordinary process, leading to a substantively revised rule expressed in current Style conventions. We should not risk adopting a rule that requires an indigent or public-interest group to post security. Although courts do not struggle now — they simply evade the apparent command of present Rule 65(c) — and although no court has said that "the rule compels me to require adequate

security although I think the rule wrong," the Style language will make it more difficult to achieve desirable results.

Rule 65(d)(2)(C) points up two ambiguities in present Rule 65(d). The rule says that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with *them who receive actual notice of the order by personal service or otherwise.*" There is no comma after "them," seeming to suggest that actual notice is required only as to persons acting in concert or participation — actual notice is not required as to a party or its officers, et cetera. And "them" is itself ambiguous — does it refer to concert or participation only with a party, or also with a party's officers — even its attorneys?

Professor Rowe noted that he had researched this question in response to the working group's comments and had discovered that this part of Rule 65 was adapted from former 28 U.S.C. § 363, a statute that disappeared with the 1948 codification of the Judicial Code. Section 363 had a comma after "them"; the most likely inference is that the original Advisory Committee simply made a mistake in carrying forward the statutory terms. It was suggested that the comma should be restored, with an explanation. The result is that even a party can be held in contempt only after actual notice of an injunction. There was no conclusion whether this step could be taken as part of the Style Project, so long as the Committee Note explains the restoration. It is important to mark this change and other changes in some manner so that people will be alerted to the fact that they can no longer rely on precedents construing the earlier rule language.

In terms of the Style Rule, the result would be to transpose words from subparagraph (C) to the introduction, something like this:

> **(2)** ***Persons Bound.*** The order binds only the following who receive actual notice of the order by personal service or otherwise:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

The second question posed by Style Rule 65(d)(2) arises from the final "or (B)." Does the present rule mean that an injunction is binding on a person who acts in concert or participation with a party's officer or like representative? Professor Burbank noted that Professor Hartnett's research will be sent along to the Committee. Professor Rowe noted that initial research had turned up nothing on the question whether an injunction binds a person acting in concert with a party's agent. There is a famous 1972 Fifth Circuit decision, U.S. v. Hall, 472 F.2d 261, 267, that relies on inherent power to bind a stranger to the injunction who is not acting in concert with a party or anyone related to a party. The court found that Rule 65(d) is only a partial codification of the contempt power. Apart from that decision, there is rhetoric in some opinions suggesting that concert with a party's officer is not enough, but no case that actually faces the question in a context that did not involve concert with a party's officer.

Further discussion briefly explored the question of inherent power in relation to an Enabling Act Rule. If a rule takes away a common-law or equitable power, that eliminates reliance on inherent power to thwart the power. But the interpretive question remains whether the rule was intended to do that. The binding reach of an injunction is an important question. It was generally agreed that a person who acts in concert with a party's agents should be bound. If the party is an artificial entity, indeed, the only way to act in concert with the party is through its agents — the

distinction between concert with a party and concert with its agents vanishes, at least as to many of its agents. (It is not as clear whether the distinction vanishes in the more remote reaches of Rule 65(d)(2) — a party's attorney, for example, presents questions quite different from a party's officer.)

Professor Burbank and Mr. Joseph seemed to agree that the Style Rule should say clearly that an injunction binds a person in active concert or participation with a party's agent. The important thing will be to adopt this provision in a way that makes it clear that the Style Rule resolves an ambiguity in the present rule. Resolving an ambiguity eliminates the possibility of divergent interpretations, an important step that should be made explicit.

Rule 66: Present Rule 66 governs administration of an estate by a receiver "appointed by the court." Clearly this applies only to a receiver appointed by the federal court. Style Rule 66 refers to a receiver "or a similar court-appointed officer"; it might be read to say that a state-court receiver must administer an estate according to the historical practice in federal courts or as provided in a local federal-court rule.

More importantly, present Rule 66 uses "practice" as a concept distinct from "administration." When it says that "[t]he practice in the administration of estates by receivers" accords with "the practice heretofore followed in the courts of the United States," it means that federal courts can apply federal standards for appointing a receiver, even in diversity cases. "Administration," on the other hand, refers to the receiver's dealing with the property. The Style Rule confuses this distinction by saying only that a receiver "must administer an estate according to the historical practice in federal courts." The distinction should be restored by falling back on most of the present second sentence: "The practice in the administration of estates by receivers or by other similar officers appointed by the court ~~shall~~ must ~~be in accordance~~ accord with the historical practice ~~heretofore followed~~ in ~~the courts of the United States~~ federal courts or as provided in ~~rules promulgated by the district courts~~ a local rule."

Rule 68: Professor Burbank pointed out that it seems to be agreed that Style Rule 68 inadvertently changed the time allowed for making a Rule 68 offer.

Professor Burbank further pointed out that Style Rule 68 may affect some of the existing uncertainties that surround Rule 68 offers of judgment. Can an offer be accepted without court approval in a class action? Must a court enter whatever equitable relief is proposed by an accepted offer? What happens when an offer is subject to conditions — for example, it is conditioned on acceptance by all plaintiffs, some plaintiffs accept while others reject, and judgment is then entered against all plaintiffs on terms less favorable to them than the offer terms? People will be looking for language that gives them an advantage in maintaining whatever position they prefer on these issues. Rule 68 "affects access to courts. Any change is troubling." Arguable changes of meaning also affect supersession questions with respect to statutes. One improvement might be to change the final sentence of Style Rule 68(a) to read: "Except in cases where court approval of the judgment is required, the court must then enter judgment." These words would make clear that Rule 23(e) still requires court approval to settle a class action, and that a court cannot be compelled through Rule 68 to enter and enforce an equitable decree that it would not approve on its own. Anyone who considers the question would agree that these propositions are correct. The only question, apart from further style attention to the suggested revision, is how to send notice that these questions are addressed by the Style Rule. Beyond those issues, however, the Style Project should not attempt to clarify Rule 68. Some see Rule 68 as a foundering ship. Others prefer a quicksand analogy. The Committee should be wary.

Concern was expressed that the proposed language referring to court approval might be interpreted to mean that a defendant can moot a plaintiff class action by making Rule 68 offers to representative plaintiffs. We must be careful that the Style language does not affect this question. Professor Burbank suggested that the Committee Note might address this issue. He also noted again that there is a supersession question with respect to statutes that courts have relied upon to oust Rule 68.

Rule 23: Professor Burbank began by noting that the academic member of the team that focused on Rule 23 was Professor Janet Cooper Alexander. Many of her suggestions focus on the concern that such expressions as "class claims," replacing "claims of class members," will tend to focus on the class elements of the claims, as distinguished from the individual claims, with undesirable results. The shift of direction is subtle, but may cause a shift in understanding. One Committee member agreed with the suggestion — "there is a lot of practice" that should be preserved by going back to "members of the class."

It was noted that the restyling of Rule 23 had been approached with great restraint.

The next observation was similar to the "class claims" suggestion. Present Rule 23(a)(2) refers to "questions of law or fact common to the class." This language is not particularly important in (b)(3) classes because of the requirement that common questions predominate over questions affecting only individual class members. But it is important in (b)(1) or (2) classes. And the Style version, "questions of law or fact are common to the class," may invite an interpretation that requires that all questions be common to the class. It would be better to go back to the present language. Professor Burbank agreed.

Another comment agreed with the working group's suggestion that Style Rule 23(c)(4) should restore two words from the present rule: "an action may be brought or maintained as a class action with respect to particular issues." Additional agreement was expressed for this restoration.

A new issue was raised by the further suggestion that Style Rule 23(d)(1)(B) should change the form of "conduct." In the present rule, notice may be ordered "for the fair conduct of the action." "fairly conduct" in the Style Rule may not fully capture this. "fairly conducting" or some other form might be better.

Style Rule 23(d)(1)(B)(iii) refers to notice to class members of the opportunity "to inform the court" about representation. It would be better to revert to "signify to the court," drawing from the present language. A class member can signify by not opting out, by refraining from challenges or objections, and so on.

Style Rule 23(d)(2) was addressed by a similar comment. The present rule says that a Rule 23(d) order may be altered "from time to time." Although these words may seem redundant, they add a temporal dimension that should not be dropped.

A question of pure style also was asked: present Rule 23(c)(2)(B) refers to the best notice practicable. Style Rule 23(c)(2)(B) refers to the best notice "*that is* practicable." Do we need to add "that is"? Professor Kimble responded that there is no difference of meaning, but that the added words make it more readable.

Rule 26: Mr. Joseph began the report on Rule 26 by raising two global themes. The practice of subdividing Style rules down to romanet items as a level below subparagraphs was criticized, along with the practice of using bullets, as making citation and abbreviation unnecessarily difficult. This problem arises in many of the Style Rules. In addition, the structure is changed from the present rule — what was Rule 26(a)(1)(A) has become 26(a)(1)(A)(i), and so on. Although the new structure

may be more satisfying in some ways, the redesignations will make computer searches more difficult.

Style Rule 26(a)(1)(A)(ii) was offered as an illustration of the failure to achieve exactly parallel wording in related provisions. Initial disclosure here includes "data compilations"; some of the parallel discovery rules do not.

The next specific point Mr. Joseph raised addresses Style Rule 26(a)(1)(A)(iv). The present rule requires disclosure of insurance agreements to "satisfy part or all of a judgment which may be entered in the action." The Style rule refers only to "a possible judgment." This change may invite disputes. A plaintiff will assert that it should see all of the defendant's policies so it can decide for itself whether it can argue that any of them cover the possible judgment. On the other hand, "a possible judgment" may be understood to refer only to a judgment on the claim in the present action. Such matters of style are raised to illustrate the ways in which seemingly innocuous changes may lead to unfounded assertions. "I don't want to get the phone calls."

Present Rule 26(a)(5), slated for abrogation, serves a real purpose. Although it seems no more than an index of discovery methods, it makes clear the status of Rule 36 and parts of Rule 45 as discovery devices. Several reported cases confirm the prevalence of arguments that Rule 36 requests to admit and Rule 45 subpoenas are not discovery devices and may be pursued after the close of the discovery period. Those are stupid arguments, but Rule 26(a)(5) helps to fend them off. It should be restored. It seems a matter of indifference whether it should be redrafted to refer to the discovery rules only by number, or instead should carry forward in its present word descriptions.

Mr. Joseph continued by noting that Style Rule 26(a)(2)(B)(vi) changes the meaning of present 26(a)(2)(B). The present rule requires that a trial expert witness's report include "the compensation to be paid for the study and testimony." This includes compensation paid for study by others that is used by the expert. The Style Rule refers only to "the witness's compensation for study and testimony in the case." That does not seem to cover compensation paid to others for studies in aid of the expert's testimony. The present meaning should be restored. One possibility would be to drop "witness's" from the Style Rule, but other adjustments would have be to made.

The Rule 26(e) duty to supplement disclosures and discovery responses now extends only to information "thereafter acquired." Deleting this limit from the Style Rule glosses over the distinction between the duty to correct and the duty to supplement. The duty to correct a response incorrect when given arises from Rule 26(g)(2). "Discovery always happens over time." The Style Rule "can be an invitation to produce at a later time," rather than produce at the first occasion a party recognizes the relevance and responsiveness of information. These problems arise constantly. One expression of agreement was that it is helpful to be able to point to "thereafter acquired" to show that a tardy response is not acceptable.

Mr. Joseph then pointed to Style Rule 26(g)(1)(B)(ii) as an example of a problem that occurs elsewhere as well, as in Rule 11. The present rule refers to increases "in the cost of litigation." The Style Rule refers to an increase of "the litigation costs." It is not clear that "cost of litigation" carries the same meaning as "litigation cost." Professor Rowe agreed that both phrases are used variably in statutes and in other settings. Professor Kimble noted that there is no semantic difference between these modes of expression, and asked whether the shorter formula would lead to misinterpretations. It was suggested that if the Style Rules continue to refer to litigation costs, the Committee Notes might note that usage is variable and that — at least for the Civil Rules — there is no difference of meaning.

Mr. Joseph noted a separate problem with Rule 26(g)(2). The final part of the present rule says that a party "shall not be obligated to take any action with respect to" an unsigned discovery request, response, or objection. The Style Rule changes that to "has no duty to respond." "[R]espond" fairly covers the obligation to react to a discovery request. But it does not clearly cover action with respect to a discovery objection or response. The unsigned objection or response should be treated as a nullity; if, for example, there is a time limit to reply to an objection, the limit is not triggered by an unsigned objection.

*Written* Stipulation: Professor Burbank and Mr. Joseph then presented another global issue. At many points the Style Rules substitute "stipulation" for "written stipulation." There is a difference. People stipulate orally. And there may later be disagreement as to the existence of any stipulation, or as to the terms of the stipulation. It is good to require a writing to reduce transaction costs that arise both from good-faith disagreements and from deliberate maneuvering. In response to a question, they agreed that an e-mail message is a writing. The recommendation was that although there are a lot of variations in the present rules, it is better to stick to the present rule, whatever it may be. But perhaps if a rule requires that something be filed, it is unnecessary to remind that it need be a writing.

Rule 30(b)(5): There is no need to refer to camera or sound-recording techniques in Style Rule 30(b)(5); it is better to say that appearance or demeanor "must not be distorted through ~~camera or sound~~ recording techniques."

Rule 30(f): Rule 30(f) presents two questions. One inheres in the present rule, which requires the officer to send the deposition "to the attorney who arranged for the transcript or recording." The Style Rule does not change this, but it does not work. Should it be sent to the attorney or to the party? What happens if a party arranges for a different mode of recording than that designated by the party who noticed the deposition — which recording is the deposition? Mr. Joseph answered that the deposition is the recording made by a court officer — there has to be someone who administers the oath. In his experience, video depositions are always transcribed; the transcription is considered the record — indeed, the reporter watches the video and produces a better transcript than emerges from a stenographically recorded deposition. A separate problem arises from the adoption of present Rule 5(d), which prohibits filing discovery materials until ordered by the court or used in the action, without changing the requirements in Rules 30 and 31 that the party taking a deposition give prompt notice of its filing.

Rule 30(a)(2): Present Rule 33(c) says that an interrogatory is "not necessarily" objectionable merely because an answer involves an opinion or contention. Style Rule 30(a)(2) says that it "is not" objectionable merely because. Having raised the issue, Mr. Joseph suggested that "maybe" the change is proper within the Style Project.

Rule 36(a)(5) and (6): As a matter purely of style, it was suggested that these two paragraphs should be combined into a single paragraph in order to reduce the proliferation of paragraphs.

Rule 37(b)(2)(A)(i): Mr. Joseph noted that other rules present the same issue. One of the sanctions for disobeying a discovery order under present Rule 37(b)(2)(A) is an order that facts are taken as established "in accordance with the claim of the party obtaining the order." The Style Rule changes this to "as the prevailing party claims." In context no one could actually misread this to refer to the party who ultimately prevails in the final judgment. "But they will argue anything." It is better to refer to the party who prevails on the motion.

Rule 37(c)(1): Two issues were identified. One is a problem simply carried forward from the present rule — "disclosed" is used twice in the first sentence to refer to different things. In the first appearance it refers to Rule 26(a) disclosures, while in the second appearance it refers both to Rule

26(a) disclosures and also to failure to supplement a discovery response. Various drafting solutions are possible; some have been suggested already. The other issue also carries forward from the present rule. One sanction bars use as evidence on a motion, at a hearing, or at trial. Care must be taken in drafting to ensure that the information may be used at a hearing to determine whether a Rule 37(c)(1) sanction should be imposed and to decide what the sanction should be.

Rule 45(a)(3): The present rule authorizes an attorney to issue a subpoena "on behalf of" a court. The Style Rule says "from" a court. "From" may suggest that the attorney must persuade the court to issue it, contrary to the rule's purpose. It was pointed out that "in" behalf of the court has a different meaning from "on" behalf of the court. "For" was suggested, but resisted on the ground that it sounds awkward to say that the attorney is acting for the court.

Rule 45(b)(1): This Rule raises the general issue of cross-references. The present rule calls for service "in the manner prescribed by Rule 5(b)." Rule 5 itself makes clear that it governs service; the cross-reference is not necessary. But the cross-reference saves time by answering a question that otherwise might require a search.

Rule 45(c)(2)(B)(ii): The present rule says that when a person commanded by a subpoena to produce materials objects, the party serving the subpoena is "not entitled to inspect and copy" until it obtains a court order. Style Rule 45(c)(2)(B)(ii) says that "inspection and copying may be done only as directed in the order." That may carry an implication that the parties cannot resolve the dispute by agreement. One acceptable change would be: "(ii) ~~inspection and copying may be done only~~ The serving party is not entitled to inspect or copy except as directed in the order * * *."

Rule 7(a)(7): Present Rule 7(a) characterizes the pleading that responds to a counterclaim as a "reply." It authorizes a court to order a "reply" to an "answer," but does not authorize an order to reply to a reply. By changing the characterization of the response to a counterclaim to "answer," the Style Rule authorizes the court to order a reply to the response to the counterclaim. This is a change of practice. It is not "earth-shaking."

Rule 8(a): A Committee member observed that present Rule 8(a) applies to a pleading that "sets forth a claim for relief," while Style Rule 8(a) applies to a pleading that "states a claim for relief." "sets forth" may sound old-fashioned, but "states" invites confusion with the Rule 12(b)(6) focus on failure to "state a claim upon which relief can be granted." Some other word should be found; perhaps "makes a claim" would do.

Rule 8(a)(3): Professor David Shapiro, who was the academic on the team that reviewed Rule 8, believes that "for judgment" should be restored from the present rule: "a demand for judgment for the relief sought. Judgment is what counts. Separately, he believes the Style-Substance change is a mistake. "relief in the alternative" is a term of art that encompasses an important proposition that should not be reduced to "alternative forms * * * of relief."

Rule 8(c)(2): Mr. Joseph pointed out that the 19 enumerated affirmative defenses are set out by so many "bullets," and expressed abhorrence for bullet designations.

Rule 8(d)(3): Professor Burbank urged that the reference to Rule 11 should be retained. It is particularly important to have this reminder in a rule that authorizes inconsistent claims or defenses.

Rule 9(a)(2): The first suggestion was that "denial" is not a good choice for a pleading that raises the question of an adversary's capacity, authority to sue in a representative capacity, or legal existence. The initial pleading need not plead these things, so there is nothing to "deny." The present rule describes the response as a "specific negative averment." Beyond that, Professor Shapiro is clear that the rule should recognize that the party questioning any of these elements may not have any

supporting facts. The proposed solution: "must do so by a specific ~~denial, which must state~~ statement setting out any supporting facts that are peculiarly within the party's knowledge."

A Committee member raised a pure style question. Style Rule 9(a)(1) lists a number of matters that need not be alleged. (a)(2) then says "to raise any of *those* issues." "those" requires the reader to go back to (1); it may be better to repeat the list in (2). "This" and "those" are inherently ambiguous. An alternative might be to cross-refer to (1), but that too makes the reader go back.

Rule 10(c): The present rule refers to a writing "which is an exhibit." Mr. Joseph suggested that "exhibit" should be restored, and noted the difficulty of discerning what is "attached" to a pleading in electronic filing.

Rule 11(c)(3): Mr. Joseph raised another global style issue: the Style Rules refer to action taken by the court without motion as "on its own," deleting the common "initiative." It would be better to restore "initiative." But it was observed that in most of the Style Rules the phrase is "on motion or on its own," leaving no doubt about the meaning. In the end it was agreed that this is a style choice.

Rule 12(h)(2): The present rule clearly preserves only an objection of failure to join a party indispensable under Rule 19(b); the Style Rule faithfully carries that forward. But Professor Burbank observed that at least one treatise says that this is a mistake — that failure to join any Rule 19 party should be preserved despite omission from a motion or responsive pleading. Perhaps this question should be added to the "reform" agenda.

Rule 12(h)(3): Professor Burbank suggested that present Rule 12(h)(3) is a mess; the mess is carried forward in the Style Rule. It does not recognize the doctrines that permit jurisdiction to be established even though it could not be supported at the time of the initial filing or removal. It implies that an improperly removed action should be dismissed, not remanded. Professor Shapiro suggested that the Style Rule may raise supersession issues, but Professor Burbank thinks not — Enabling Act Rules cannot affect jurisdiction, as recognized by Rule 82. Perhaps the Committee Note could recognize that there are problems not addressed by the Style Project. A response was that it might be better to note these problems in the memorandum transmitting the Style Project — Committee Notes ordinarily are not used to describe problems that are not addressed by the associated rule amendment.

Rule 13(b): The working group comment suggests that Style Rule 13(b), by stating that a pleading may state any claim as a counterclaim, may undermine the compulsory counterclaim provisions of Rule 13(a). Neither Professor Burbank nor Mr. Joseph share this concern.

Rule 15(c)(3): Professor Burbank noted that there are real problems with Rule 15(c)(3), but that they likely are beyond the reach of the Style Project.

Rules 61, 80: Mr. Joseph noted that Rules 61 and 80 present problems of the relationships between the Civil Rules and statutes. Both address evidence issues. But the Evidence Rules are for most part statutes, originally enacted by Congress. So Evidence Rule 103(a) says that error may not be predicated on a ruling unless a "substantial right" is affected. Style Rule 61 begins by stating that no error in admitting or excluding evidence is a ground for relief "[u]nless justice requires otherwise." It is only the second sentence of Style Rule 61 that says that the court must at every stage disregard all errors "that do not affect any party's substantial rights." There are linguistic differences, even if there is no intended change of meaning. So too, Evidence Rule 103(d) embodies a "plain error" standard that is not referred to in present or Style Rule 61. One Committee member suggested that Criminal Rule 52, a plain-error rule, may have looked to Evidence Rule 103(d) in restyling. Mr. Joseph concluded by observing that the working group was simply identifying the issue.

Mr. Joseph then suggested that Style Rule 80 really does not work. The person who recorded the testimony may not be competent to certify the transcript. There is no real need for this provision. Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing

the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

Mr. Joseph added that the transaction costs include even such mundane things as changes in the designations of rule subparts — every time there is a search, there is an extra cost in connecting the search to the former designations.

A first response was that the Style Project was sensitive to the problems of changing designations. The numbers of the rules were left unchanged, even though that means retaining decimal numbers, and the most famous designations — such as Rule 12(b)(6) — were retained. And an effort was made to ensure that such changes as were made were justified. Those changes will continue to be reviewed as the Project carries forward.

In response to a question, Professor Burbank said that the opportunity cost of the Style Project is loss of the resources to consider the adequacy of the Civil Rules as a whole. The loss is not merely a loss of Committee time and energy. The bar cannot be asked to adapt to a complete rewriting of the rules more than once in a generation. Adoption of the Style Project will foreclose the opportunity to engage in a second massive rewriting, this time for substantive reasons, in the close-term future. Of course that is not a cost if such a broad project would not be undertaken in any event.

Judge Rosenthal concluded the hearing by noting that the immediate task is to make the Style Rules as good as can be. The best possible product can then be compared to the concerns about implementation costs and a judgment made whether the improvements are so clear as to justify the costs. She repeated that the Committee is immensely grateful to the working group, and particularly to Professor Burbank and Mr. Joseph, for the immense work they have devoted to this project.

## RECOGNITION OF JUDGE SCHEINDLIN

Judge Rosenthal presented to Judge Scheindlin a plaque recognizing and appreciating her service as an Advisory Committee member. Committee members regularly live up to and earn these expressions of appreciation, but Judge Scheindlin has earned them as completely as anyone can.

## NOTES ON COMMITTEE MEETING

Judge Rosenthal opened discussion of the approach to be taken in adapting the published Style Rules to public comments. The comments provided by the working group organized by Professor Burbank and Gregory Joseph are likely to be at least as complete and thorough as any. Only a few other comments have been provided at present. A bar group in New York is working on the rules and may provide a comprehensive report. Other comments may appear as well, but it remains difficult to predict their sources or character.

It remains necessary to adapt the Style Rules to incorporate the rules changes that are now pending in the Supreme Court, on track to take effect on December 1, 2006. Professor Marcus did this for the electronic discovery rules as they stood in the early stages, and will be responsible for the first draft that adjusts for the rules that were transmitted to the Court.

A tentative schedule for further work by the Reporter and consultants was discussed, recognizing that the schedule will be affected by the final choice of the dates for the spring meeting. If the spring meeting is scheduled for late April or early May, it may be possible to go as late as January 30 to get a comprehensive draft to the Style Subcommittee. The next step, by mid-February, will be transmission to the Advisory Committee Subcommittees A and B. By mid-March the Subcommittee reports and the research that may remain to be done by Professors Marcus and Rowe

should be delivered to the Reporter, for preparation of a final package for the Advisory Committee by the beginning of April. The hope will be to prepare a package that will leave few issues to be resolved by the full Advisory Committee, and to leave enough time before the spring meeting to gather reactions on the issues that remain to be resolved. A final timetable will be prepared after setting the date for the spring meeting.

A cover memorandum must be prepared to address the larger issues, exploring the balance between the advantages of clearly written rules and the cost of adjusting to clarity. The arguments for and against proceeding toward final adoption of the Style Package must be developed in full and weighed with care.

Many of the working group comments on the Style Rules suggested that some issues should be taken out of the general Style package and included in the "Style-Substance" track. Discussion began by asking just what would this move affect? The two tracks have been published, but for simultaneous public comment. As the project moves forward, the value of separate presentation will diminish continually. There would be a real difference if a rule or subdivision were withdrawn entirely from the Style Project, leaving it for separate development later in the ordinary course of rules amendments. There also might a difference if distinctions were to be drawn by some device that identifies the Style Rules amendments as changes that do not affect the supersession consequences of any of the rules. It would be possible to say that the pure Style Rules do not affect supersession, while the Style-Substance Rules do. But there is no point in saying it. The Style-Substance Rules are not intended to affect supersession, and there is no plausible reason to suspect that they might. These changes were proposed now primarily because they seemed so simple and insignificant that they would not be likely to be addressed separately in the future. The practice with the Criminal Rules was to combine the separate tracks into a single package after the Judicial Conference approved the rules for transmission to the Supreme Court. It was agreed that nothing is likely to be gained now by transferring proposals originally made in the Style Rules into the Style-Substance package for consideration in tandem as part of what in any event will become a single package.

The work of the other Subcommittees appointed after the October meeting also was discussed. It seems likely that they will begin work in January, aiming toward reports to the Committee at the spring meeting. The reports, however, need not be in the form of draft rules proposed for publication in 2006. The questions often present difficult issues, whether as focused as Rule 15 or as general as summary judgment and notice pleading. It may prove that publishable proposals can be developed on some of these issues by spring, but the immediate task is to develop a better-focused sense of the issues that are likely to support workable proposals.

It was noted that various bar groups will be consulted for views on the possible need to revise the Rule 30(b)(6) provisions for deposing an organization.