

MINUTES
CIVIL RULES ADVISORY COMMITTEE
NOVEMBER 8-9, 2007

1 The Civil Rules Advisory Committee met on November 8 and 9, 2007, at the Administrative
2 Office of the United States Courts. The meeting was attended by Judge Mark R. Kravitz, Chair;
3 Judge Michael M. Baylson; Hon. Jeffrey Bucholtz; Judge David G. Campbell; Professor Steven S.
4 Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Judge Paul J.
5 Kelly, Jr.; Judge John G. Koeltl; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and Judge
6 Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard
7 L. Marcus was present as Special Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood,
8 Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing
9 Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee.
10 Peter G. McCabe, John K. Rabiej, James Ishida, Jeffrey Barr, and Monica Fennell represented the
11 Administrative Office. Joe Cecil, Emery Lee, and Thomas Willging represented the Federal Judicial
12 Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Thomson, Rules Clerk for
13 Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Jeffrey Greenbaum,
14 Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers
15 liaison); and Ken Lazarus.

16 Judge Kravitz opened the meeting by noting that it is a “humbling pleasure” to become Chair
17 of the Advisory Committee. He has reviewed the Advisory Committee’s work over a 6-year period
18 as a member of the Standing Committee. Viewed from that perspective, the Advisory Committee
19 has done great work. His first encounter was a class-action conference convened by the Advisory
20 Committee at the University of Chicago Law School; it was a masterful performance. The work on
21 class actions, discovery of electronically stored information, and Style has been demanding but the
22 results are rewarding. It will be hard to fill the shoes of Judge Rosenthal and her predecessor, David
23 Levi, as chair. To paraphrase a politician, “I know Judge Rosenthal, I’ve worked with her, she’s my
24 friend. I am no Lee Rosenthal.” Working with the Discovery and Rule 56 Subcommittees over the
25 summer has been a good introduction to the Committee’s work. The Rule 56 miniconference
26 convened the day before this meeting was masterfully directed by Judge Baylson.

27 Gratitude was expressed for the work of Committee members whose terms have expired or
28 who have moved out of the office establishing ex officio membership. Judge Cabranes was not able
29 to attend this meeting. Acting Attorney General Peter Keisler was occupied with his other
30 responsibilities. But Judge Kelly was present and was recognized. Judge Rosenthal said that all
31 members of the Committee are deep, fascinating, complex people. Judge Kelly is a fine example,
32 and unique in his own special ways. In addition to remaining current on his appellate docket he
33 carries a substantial district-court docket; “I cannot tell you how that warms my heart.” He does
34 both jobs, trial and appellate, continually and very well. He also is a full-time volunteer fireman.
35 And a sailor. “He is a remarkable guy.” The Committee has been fortunate to have him bring all
36 these qualities and insights to the Committee’s work. “We have enjoyed our time with you.” Judge
37 Kelly responded that he has never worked with another committee that gives such intellectual
38 stimulation, nor found such fun and companionship. “I have enjoyed it very much.”

39 Judge Kravitz also noted that three Committee members, Baylson, Girard, and Varner had
40 been appointed to renewed 3-year terms.

41 Two new members have been appointed. He described the backgrounds of Judge Filip and
42 Judge Koeltl. He also noted the background of Judge Wood, the new liaison from the Standing
43 Committee, and Jeffrey Bucholtz from the Department of Justice.

44 *April 2007 Minutes*

45 The draft minutes for the April 2007 meeting were approved, subject to correction of
46 typographical and similar errors.

47 *Agenda Items*

48 Pending agenda items were briefly described. Expert trial witness disclosure and discovery
49 and summary judgment will occupy most of the agenda for this meeting. The effects of the
50 Twombly opinion on notice pleading practice will be discussed, but without any immediate prospect
51 of drafting possible amendments to Rules 8 or 9. The Standing Committee has appointed a
52 Subcommittee on case sealing, chaired by Judge Harris Hartz. Judge Koeltl is the Civil Rules
53 member of the Subcommittee; Professor Marcus is the reporter. The topic began with a request that
54 something be done to correct the programming that led the electronic case-filing system to report
55 that "there is no such case" when an inquiry is made about a case that has been sealed in its entirety.
56 That problem has been addressed. The topic then expanded to study at least the practice of sealing
57 an entire case; it is possible that it may also consider whether to study practices in sealing specific
58 items in a case file.

59 The Appellate Rules Committee has begun consideration of the problems that arise when a
60 litigant loses the opportunity to take a timely appeal by relying on erroneous advice from the district
61 court. If the Appellate Rules project goes to the point of framing specific rules proposals, it may
62 prove useful to consider whether the Civil Rules should be amended to accommodate the Appellate
63 Rules proposals.

64 Legislation is pending that includes a provision that would exclude application of part of
65 Civil Rule 45 that might interfere with efforts to ensure that witnesses from around the country can
66 be subpoenaed by the federal court in New York for "9/11" proceedings.

67 *June 2007 Standing Committee Meeting*

68 Judge Rosenthal reported briefly on the June 2007 Standing Committee meeting, in part as
69 a preface to the work on Rule 56 that carries forward at the present meeting. The June agenda was
70 presented in five books. That was too much material, with too many important topics, to permit a
71 deliberate focus on Rule 56. As Advisory Committee chair she and Judge Levi agreed that it would
72 be better to defer consideration of Rule 56 for publication so that the Standing Committee could
73 consider it carefully and in depth. This coming January will be a good opportunity for a first
74 presentation to the Standing Committee. The January meeting ordinarily is used in large part as a
75 period of reflection, considering long-range questions or taking a first look at topics that will be
76 brought back for action in June. Of course it is proper to present action items as well, taking
77 advantage of the common circumstance that all of the advisory committees together typically present
78 few action items. But the opportunity for a first careful look, allowing considered reaction by the
79 advisory committees, is particularly valuable.

80 Judge Rosenthal also reported that the Standing Committee had considered and approved
81 work by Professor Capra, Reporter for the Evidence Rules Committee, on standing orders. The use
82 of standing orders is a subject for concern, in much the same way as local rules continue to cause
83 concern. Standing orders are "the level below local rules." They are used in very different ways
84 by different courts and judges. They are made available on court web sites in different ways. The
85 report will be sent to the chief district judges, asking them to consider development of common
86 standards on the allocation of subjects between local rules, court standing orders, and individual
87 judge standing orders.

88 *Rule 26(a)(2), (b)(3), and (b)(4): Expert Witnesses*

89 Judge Kravitz introduced the report of the Discovery Subcommittee. He noted that the
90 Subcommittee has worked hard — while he was a member of the Standing Committee he sat in on
91 the miniconference held in Arizona after the January Standing Committee meeting. Since then there
92 have been another miniconference with New Jersey lawyers and many conference calls. Hard work
93 has uncovered the difficulty of many issues that did not seem so complex on first acquaintance.
94 Judge Kravitz and Professor Marcus attended an American Bar Association session on expert
95 discovery. The session attracted a standing-room-only crowd of 285. “People are really interested”
96 in these questions. And it was agreed by those present that the problems with present practice affect
97 both plaintiffs and defendants; this is not a one-sided issue.

98 Judge Campbell began the Discovery Subcommittee report. He noted that this is the third
99 time the Subcommittee has brought these issues to the Committee for discussion. The continued
100 exploration and development reflect “how thorny the issues are.” The purpose of the present report
101 is to describe the Subcommittee’s tentative suggestions and to get the Committee’s views.

102 The Subcommittee’s work began with two different sets of suggestions. One raised the
103 rather narrow issue framed by the Rule 26(a)(2)(B) distinction that requires disclosure reports by
104 expert witnesses whose duties as employees of a party regularly involve giving expert testimony,
105 but not from employees whose duties do not. More than a few courts have ignored this distinction,
106 reasoning that a report is useful in preparing to cross-examine and to rebut without regard to the
107 frequency with which the employee witness acts as a witness. Related questions were raised,
108 particularly by Judge Kravitz in Standing Committee discussions, about the problems that have
109 emerged from discovery of treating physicians who appear as witnesses. Treating physician
110 testimony is often challenged at trial on the theory that the physician has crossed the line from
111 treating physician to expert retained or specially employed to give expert testimony, so that the
112 testimony must be excluded for want of a disclosure report.

113 The other suggestions were framed by an ABA Litigation Section proposal to limit discovery
114 of attorney-expert communications and to bar discovery of draft reports. The present system,
115 fostered by the Committee Note to the 1993 amendments that added Rule 26(a)(2) disclosure, is seen
116 as imposing extensive costs in time and money without revealing much useful information. And the
117 prospect of discovery causes artificial behavior — experts do not make notes, they do not prepare
118 drafts, they discuss their approaches orally with the lawyers, they scrub their hard drives to eliminate
119 any trace of discoverable matter, and so on. Lawyers who want to protect communications with
120 experts often are driven, when the client can afford it, to retain two sets of experts: consulting
121 experts, protected against discovery by Rule 26(b)(4)(B), and trial-witness experts. Parties who
122 cannot afford this expense are left at a disadvantage.

123 The Arizona miniconference attracted a good cross-section of the bar from different parts
124 of the country. The April miniconference with New Jersey lawyers attracted lawyers from all
125 aspects of practice, both private and public; the consensus was uniform enthusiasm for the New
126 Jersey rule that sharply curtails discovery of expert witness exchanges with counsel. Practice,
127 indeed, was said to go beyond the rule by recognizing still greater protection.

128 Since the miniconferences the Subcommittee has held seven conference calls. Each was
129 long, and each could have run longer still. Four sets of issues have emerged:

130 Employees who are not required to make a disclosure report under Rule 26(a)(2)(B) and
131 treating physicians — as well as other experts not retained or specially employed to give testimony
132 in the case — are addressed in the draft Rule 26(a)(2)(A) set out at p. 109 of the agenda materials.

133 This draft requires disclosure by the lawyer, not by the expert. The disclosure would describe the
134 subject matter of the expected testimony and give the substance of the facts and opinions. The other
135 side could then depose the witness under Rule 26(b)(4)(A). Plaintiff lawyers have made it clear that
136 there is a risk of losing treating physicians as witnesses if they are required to prepare reports. Nor
137 should the “drill-press operator” be required to prepare a report. The attorney disclosure will enable
138 effective depositions if the other side wishes, and will avoid surprise at trial. The Subcommittee is
139 comfortable with this recommendation.

140 The second and third issues run together. They involve discovery of attorney-expert
141 communications and draft expert reports. The Subcommittee is satisfied that some protection is
142 warranted. The challenge is to draw the lines of protection. What should be protected? How
143 stringent should the protection be? The drafts begin the protection by adding one word to Rule
144 26(a)(2)(B): the expert must disclose a “final” report. Then a new subparagraph would be added
145 to the work-product rule as Rule 26(b)(3)(D). This would say that draft reports and attorney-expert
146 communications are not discoverable unless the requesting party makes the showing required by
147 Rule 26(b)(3)(A) to obtain work product; even then the protection for “core” work product provided
148 by 26(b)(3)(B) would apply, barring discovery of mental impressions, conclusions, opinions, or legal
149 theories of the attorney or other representative concerning the litigation. Alternative approaches and
150 levels of protection have been explored and remain open for further consideration. These provisions
151 are both supported and offset by an amendment of Rule 26(a)(2)(B)(ii) to eliminate the source of
152 broad discovery that has taken root there. The expert’s report must contain “(ii) the facts or data or
153 ~~other information~~ considered by the witness in forming” the opinions. The upshot is that facts and
154 data communicated by the lawyer to the expert would remain discoverable. But beyond that the
155 communications and draft reports would be discoverable only on the need and hardship showings
156 required to defeat work-product protection.

157 The fourth issue involves expert work papers, as described at pp. 117-118 of the agenda
158 materials. This is the area least thoroughly explored by the Subcommittee. Discovery of work
159 papers will generate the same artificial behaviors that have emerged with respect to draft reports.
160 For that matter, it is difficult to define a line between “work papers” and “draft reports.” If a line
161 is defined, it is safe to predict that all working papers will be stamped as “draft report.” Fear of
162 discovery could also lead to continuing the practice of retaining two sets of experts, one as
163 consultants and another as witnesses. On the other hand, the need to test development of the opinion
164 requires access to the facts or data considered — both those considered and relied upon and those
165 considered and rejected.

166 **(1) Treating Physicians, Employees Not Regular Witnesses**

167 Professor Marcus launched more detailed discussion of the proposal for “lawyer disclosure.”
168 The Committee was advised of a rather common practice of misconstruing Rule 26(a)(2)(B) to
169 require disclosure reports by employee expert witnesses whose duties do not regularly involve giving
170 expert testimony. The theory seems to be that in framing the original rule the rulemakers did not
171 realize what a good thing the report is. That frames the question whether there are good reasons for
172 drawing the distinction between four categories of expert witnesses: those retained or specially
173 employed to give testimony; those whose duties as employees regularly involve giving expert
174 testimony; those whose duties as employees do not regularly involve giving expert testimony; and
175 other experts who are not a party’s employees and who are not retained or specially employed to
176 give expert testimony. One possible concern seems to have been put aside — lawyers say that they
177 do not forgo choosing the most useful expert because of the burden of preparing a report. If the best
178 witness is an employee who has never testified as an expert, that employee would still be used even

179 if a report had to be prepared. But there is frustration with respect to treating physicians, and
180 perhaps also fact witnesses who are also able to give expert opinions. The problems tend to surface
181 at trial, when an objection is made that the witness cannot offer an opinion because there was no
182 disclosure report.

183 The Subcommittee decided that there is no need to require a disclosure report by those who
184 are experts in a particular topic but not professionally engaged in giving expert testimony. Rule
185 26(a)(2)(A) would be revised to require disclosure by the lawyer as to the subject matter of the
186 opinion testimony and the substance of the facts and opinions. This disclosure will suffice to inform
187 other parties' decisions whether to depose the witness, and how to examine the witness at deposition
188 or trial. The draft Committee Note on this topic has not been considered by the Subcommittee. The
189 Note identifies treating physicians as one of the categories of experts who often will fall into this
190 lawyer disclosure. It was decided, however, that the rule text should not single out treating
191 physicians for special attention.

192 Judge Campbell noted that the Subcommittee had decided to delete a further requirement that
193 the lawyer disclosure state a summary of the grounds for each opinion. There was no great apparent
194 need for this kind of summary, and a fear that treating physicians might refuse to spend enough time
195 with the lawyer to support the summary.

196 Discussion began with the observation that trial often degenerates to a "gotcha" in opposing
197 treating physician testimony. Similar problems arise with respect to such witnesses as a state police
198 officer who investigated an accident. These problems are addressed vaguely in the 1993 Committee
199 Note. "The case law is punishing." Often these witnesses have been disclosed under 26(a)(1)(A)(i),
200 but not under (a)(2)(A), much less made to report under (a)(2)(B). Their testimony is often
201 excluded.

202 The next observation was that at both miniconferences the lawyers thought that full opinions
203 are not needed. In most of these cases there will be abundant discovery materials to support
204 preparation for the deposition.

205 Then came a question: suppose records — for example medical care records — are attached
206 to the lawyer's summary disclosure. Will the attachment limit the opinions that can be expressed?
207 An answer was: "I've never seen a response saying only 'see attached.' Lawyers provide at least
208 a few paragraphs." A further response was that a treating physician will have records or notes, but
209 that often the notes do not address causation or prognosis. Opinions on these subjects may be
210 excluded unless they are included in the summary. The lawyer knows what she wants from the
211 witness and can include it in the summary. The other side can depose the witness if they want.

212 The next question asked how often do lawyers in fact follow up a summary disclosure with
213 a deposition. The first response was that in Arizona, which has a similar disclosure rule, lawyers
214 do not bother with a deposition if the witness is disclosed only for treatment. But if the witness will
215 offer opinions beyond the treatment, depositions are taken. An additional response was that one of
216 the expectations behind adoption of the Rule 26(a)(2)(B) disclosure report in 1993 was that the
217 detailed report often would forestall the need for any deposition; that expectation does not seem to
218 have been realized.

219 There are many technical issues surrounding the attorney disclosure. Suppose the witness
220 has already been deposed: is permission needed for a second deposition? Or suppose the side has
221 already taken ten depositions? These problems exist now. The Committee considered a timing rule
222 related to depositions, but decided any workable rule would be too complicated. It seems likely that
223 a second deposition will be allowed if the disclosure identifies an opinion that was not explored at

224 the first deposition. And the Subcommittee expects that an opinion not identified in the disclosure
225 will be excluded at trial. These topics might be addressed in the Committee Note; work on the Note
226 will continue.

227 **Draft Reports**

228 Draft language dealing with expert reports appears at pages 111 and 114 of the November
229 agenda materials. The first changes appear in Rule 26(a)(2)(B). One word is added in the first
230 sentence, describing the report that accompanies the expert witness disclosure as a “written final
231 report.” Item (ii) in the list of report contents is then changed as noted above: the report must
232 contain “the facts or data ~~or other information~~ considered by the witness in forming” the opinions.
233 The word “final” may be resisted as an unnecessary “intensifier,” but the common discovery quest
234 for draft reports may make this useful.

235 The provision directly addressing draft reports is combined with attorney-expert
236 communications in a new Rule 26(b)(3)(D) addressing communications between counsel and a
237 person identified as an expert by a Rule 26(a)(2)(A) disclosure and also “a draft report prepared by
238 such a person.” Discovery is limited to “facts or data considered by the expert in forming the
239 opinions the expert will express. The court may order further discovery only on a showing that
240 satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule
241 26(b)(3)(B) applies * * *.” This draft extends the protections accorded work product to attorney-
242 expert communications and draft expert reports. Discovery is allowed only on showing substantial
243 need for the materials and inability to obtain the substantial equivalent without undue hardship.
244 Even if these standards are met, the court — by virtue of (b)(3)(B) — “must protect against
245 disclosure of the mental impressions, opinions, or legal theories of a party’s attorney or other
246 representative concerning the litigation.” Treating these expert materials as if work product is not
247 the same as labeling them work product. Rule 26(b)(3) of itself protects only documents and
248 tangible things; protection of such things as oral communications by a lawyer in anticipation of
249 litigation or preparation for trial continues to depend on the “common-law” doctrine developed by
250 Hickman v. Taylor. It has seemed better to postpone any effort to redraft (b)(3) in a way that would
251 facilitate direct incorporation of these expert materials into work-product protection.

252 The agenda materials include at p. 114, note 13, a shorter alternative (b)(3)(D) that states that
253 the communications and draft reports “are protected as trial preparation material under Rule
254 26(b)(3)(A) and (B).” This version has been displaced because of concern that it might create
255 apparent conflicts by extending work-product protection beyond the documents and tangible things
256 protected by (b)(3). This approach, further, might exacerbate problems that trace back to the 1970
257 drafting of (b)(3) and (b)(4). In the 1970 Rules, (b)(4) provided that discovery as to experts could
258 be had “only as follows.” Because (b)(3) was then, as now, “subject to” (b)(4), it was clear that
259 experts were governed by a separate set of standards, independent of work-product theory. The
260 words “only as follows” were deleted from (b)(4) in the 1993 amendments. The desire to protect
261 attorney-expert communications in any form led to the longer draft version.

262 Drafting issues remain. The suggested version that applies the “core work-product”
263 protection of Rule 26(b)(3)(B) to expert materials includes in brackets: “applies [to counsel’s mental
264 impressions, opinions, or legal theories].” If the bracketed words are omitted, the expert’s mental
265 impressions, opinions, or legal theories also are protected. The choice is not an easy one.

266 One question has been protection of supplemental reports. Drafts leading to a final
267 supplemental report would be protected under the rule protecting draft reports.

268 The draft report questions lead directly to a difficult set of questions regarding “work
269 papers.” Can a meaningful line be drawn between work papers that should be subject to discovery
270 and draft reports that are protected? What is to stop an expert from stamping every paper as a draft
271 report?

272 The first question asked how it has come to be that discovery is widely obtained with respect
273 to attorney-expert communications and draft reports? The practice seems to have grown out of the
274 1993 creation of the new Rule 26(a)(2)(B) expert witness disclosure report. The rule directed that
275 the report “contain * * * the data or other information considered by the witness in forming the
276 opinions.” The Committee Note says that given the obligation to disclose data and other information
277 considered by the expert, “litigants should no longer be able to argue that materials furnished to their
278 experts to be used in forming their opinions — whether or not ultimately relied upon by the expert
279 — are privileged or otherwise protected from disclosure when such persons are testifying or being
280 deposed.” The “other information” phrase has been seized upon to include attorney-expert
281 communications that have nothing to do with “data.” It is not at all clear whether the Committee
282 intended this result. It is surprising to think that the Committee might so casually defeat even the
283 protections of privilege without clearly identifying the issue and invoking the special Enabling Act
284 procedures that 28 U.S.C. § 2074(b) imposes on any rule “creating, abolishing, or modifying an
285 evidentiary privilege.” A casual inquiry directed to the Committee Reporter for the period in which
286 Rule 26(a)(2)(B) was developed elicited no clear recollection of attention to this issue. All that can
287 be said with confidence is that the 1993 amendments as a package were designed to move beyond
288 the 1970 version of Rule 26(b)(4) to establish deposition of a trial witness expert as a routine right.
289 This version confirmed practices that had become widespread in some, but not all, federal courts.
290 Overall, including the newly devised disclosure report, “which is intended to set forth the substance
291 of the direct examination,” it is clear that the Committee intended to establish a much more open
292 process with respect to trial-witness experts. It is clear that it did not want the witness to be able to
293 conceal the factual basis assumed in forming an opinion by invoking the work-product argument that
294 counsel had suggested the fact be assumed. Beyond that point, matters remain uncertain. Some
295 participants from the time believe that the Committee never intended the practices that have grown
296 out of the Committee Note.

297 Discussion turned to the question whether Evidence Rule 612 addresses the question,
298 however indirectly or awkwardly. It provides for production “at a hearing” “if a witness uses a
299 writing to refresh memory for the purpose of testifying, either (1) while testifying, or (2) before
300 testifying, if the court in its discretion determines it is necessary in the interests of justice.” A
301 famous ruling several years ago relied on Rule 612 to direct production of volumes of work-product
302 materials an attorney had given to an expert. But what is the line between information given to
303 create an opinion and information used to refresh memory — including “memory” of an opinion
304 never before formed? And for that matter, how far is it practicable to win a court ruling that the
305 interests of justice require production of materials considered by the expert before testifying at
306 deposition?

307 The draft refers to discovery of “facts or data.” What, it was asked, is the difference between
308 a fact and a datum? Referring to “data” alone might carry an untoward limitation by somehow
309 implying a rigorously collected set of anonymous facts, perhaps divorced from the immediate events
310 in litigation. There can be no doubt that “facts” includes all of the historic facts surrounding the
311 action. “‘Facts or data’ works in the New Jersey rule.”

312 A perennial question has been whether disclosure and discovery should be narrowed to facts
313 or data “relied upon” by the expert, foreclosing discovery of facts or data considered but put aside

314 in framing the opinion. Limitation to facts “relied upon” was rejected as too narrow. It is important
315 to be able to cross-examine the expert by asking whether fact X was considered, why it was not
316 considered if it was not, why it was not relied upon if it was considered, and so on. One of the
317 examples that recurred during Subcommittee discussions was the expert who ran the same test 37
318 times. It failed to produce the desired result 36 times, but did produce (or seem to produce) the
319 desired result once. Should the expert be able to express an opinion based on the one test he chose
320 to rely upon, and to bury the 36 other tests considered but not relied upon because unfavorable?
321 “Considered” appears to have been deliberately chosen in 1993, and continues to be the right choice.
322 An observer suggested that 90% of the problems arise from “or other information,” not from
323 “considered.” “Facts or data” are the heart of the opinion testimony and the heart of what should
324 be discoverable.

325 The same observer further suggested that there should be an absolute prohibition on
326 disclosure or discovery of draft reports. Present discovery practice has spurred many artificial
327 practices designed to prevent the emergence of anything that looks like a draft “report.” If there are
328 any escape routes that will allow discovery, the same practices will continue. The response noted
329 that the Subcommittee had considered this possibility. But it concluded that adopting the work-
330 product standards for discovery would afford an effective protection that would abolish the
331 incentives to communicate by artificial and awkward means, scrub computer drives, and so on. It
332 will be difficult to show substantial need for discovery of a draft report, and it may also be difficult
333 to show an inability to obtain the substantial equivalent without undue hardship by turning to your
334 own experts. It seemed better nonetheless to hold open the possibility that some circumstances
335 might support these showings and thus warrant discovery. A draft report, for example, might reflect
336 facts or data that cannot be duplicated; destructive testing of evidence is the example most frequently
337 suggested. If a lawyer’s “documents” are not absolutely protected by Rule 26(b)(3), why should an
338 expert’s drafts be afforded greater protection?

339 This theme was expanded. “We’re looking at a problem driven by practitioners.” The
340 problem arises from the artificiality of forcing lawyers to communicate with experts in ways that do
341 not endure, to ensure that there are no “draft reports.” Lawyers representing both plaintiffs and
342 defendants agree that everyone would be better off without this discovery. It is increasingly
343 common for lawyers to agree on a case-by case basis that they will not pursue discovery of draft
344 reports or attorney-expert communications. Raising protection to the level of work-product
345 protection is so effective that the artificial behaviors will disappear. “The destructive testing
346 example is very rare. There will seldom be occasions for discovery.” The Committee Note makes
347 it clear that “substantial need” cannot be shown simply by arguing that discovery is needed to
348 support effective cross-examination.

349 Attention turned back to the Rule 26(a)(2)(B) reference to a “final” report. The amendment
350 would not change the time for disclosure set by (a)(2). It would simply emphasize that the
351 disclosure obligation is only a report that anticipates the direct examination, not all preliminary
352 approaches considered in framing the direct testimony. What we want at the time for disclosure is
353 a “final” report, and that is what judges require. At the same time, further consideration is required.
354 Rule 26(e)(2) explicitly recognizes a duty to supplement the (a)(2)(B) report — the report is not
355 “final” in a sense that relieves the obligation to supplement when the expert’s trial testimony will
356 change. Nor is it intended to cut off the right to supplement the report. If the only purpose for
357 saying “final” is to emphasize the explicit later rule limiting discovery of draft reports, it may be
358 better to drop “final.”

359 The Committee agreed that it is sensible to protect against discovery of draft reports by

360 invoking the work-product discovery tests of Rule 26(b)(3)(A)(i) and (ii), as well as the core work-
361 product protection of (b)(3)(B). The Subcommittee remains free to refine the drafting as appropriate
362 and to consider further the issues left open.

363 **Attorney-Expert Communications**

364 Because a single draft provision embraces both draft reports and attorney-expert
365 communications, discussion of the communications issues was opened with the draft-report issues.
366 The origin and genesis of the issues seems to be the same — the 1993 Rule 26(a)(2)(B) Committee
367 Note. But it is possible that different drafting approaches are desirable, including different locations
368 within Rule 26.

369 The overall orientation of the draft responds to the sense expressed by participants in the
370 August ABA meeting: unbridled discovery of attorney-expert communications has many more bad
371 consequences in the development of expert testimony than it has good consequences in other
372 discovery or at trial.

373 As with draft reports, it would be possible to create an absolute protection. Or different
374 levels of protection could be invoked — a rule could protect only “core opinion” work-product, or
375 adopt the “exceptional circumstances” test applied to experts retained or specially employed to
376 consult but not testify, or the general substantial need and undue hardship test of Rule 26(b)(3)(A)(i)
377 and (ii). Or present practice could be left where it is. Among these choices, it again seemed best
378 to allow discovery only on satisfying the need-and-hardship test, and even then to protect mental
379 impressions, opinions, and legal theories. Protection of opinions and the like, however, must be
380 subject to the basic need to disclose and discover the opinions that will be expressed in testimony.

381 There are similar choices to be made in locating any new provision within Rule 26. The
382 problem began with the Committee Note to Rule 26(a)(2)(B), but the problem is one of discovery,
383 not the disclosure report. Locating a new provision here would invite casual disregard by occasional
384 federal-court practitioners. (b)(4), addressing expert-witness discovery, is a more likely possibility.
385 But (b)(4)(A) addresses only discovery by deposition; the protection should extend to all forms of
386 discovery. So (b)(3) was chosen for the draft.

387 The first question asked whether the scope of the present project should be expanded to
388 reconsider all of the rules addressed to expert-witness discovery. Although the present rules are
389 drafted with precision in a way that is helpful in some cases, perhaps it would be better to craft
390 simpler rules that leave more to the trial judge’s discretion. An answer was that discretion makes
391 it impossible to predict with any confidence what the ruling will be. The uncertainty would be
392 multiplied in litigation of topics that may become involved in different federal courts. Lawyers
393 would have to anticipate discovery according to the most expansive views that might be adopted.
394 “The result will be continuation of the problems we encounter now.” General propositions may not
395 afford an effective degree of protection. This answer was expanded by an observation that “it is
396 important to stop the mickey-mouse behavior that’s going on now. It gets in the way, and turns up
397 nothing of use.”

398 Still, there might be some advantage in developing a single rule that governs all aspects of
399 expert-witness disclosure and discovery. As Rule 26 has expanded over the years to far outstrip the
400 length of any other rule, and to become interdependent with other discovery rules, the structure more
401 and more resembles a tax code.

402 The discussion of locating protection of attorney-expert communications in the rules
403 expanded. Initially attention turned to the “facts or data” phrase that would be substituted in Rule

404 26(a)(2)(B)'s direction for the disclosure report. There is strong support for making this change
405 there. But it is critical to maintain discoverability in the provisions that address discovery, wherever
406 located. Those provisions could be located in (b)(4), working from the view that people will
407 naturally look to (b)(4) for the limits on expert-witness discovery. At the same time, it must be
408 remembered that the protection at deposition that might be provided in (b)(4)(A) also should
409 continue at trial — it would be a step backward to prohibit discovery of material that could be the
410 subject of examination at trial. Trial examination would then encounter all of the problems that led
411 to the 1970 addition of (b)(4) discovery. Although there is no present occasion to reexamine work-
412 product doctrine in general, protection of attorney-expert communications involves the attorney as
413 well as the expert. The focus on the attorney is even more clear if the eventual rule extends core
414 work-product protection only to the mental impressions, opinions, and legal theories of the attorney
415 and not those of the expert. (b)(3), to be sure, is incomplete as it stands; reliance on *Hickman v.*
416 *Taylor* remains necessary as to matters not covered as documents or tangible things. The choice is
417 further complicated by the need to choose the standard of protection — if it is to be the “exceptional
418 circumstances” standard of (b)(4)(B), perhaps (b)(4) is the better location. On the other hand, (b)(3)
419 extends protection to a party’s “consultant” and “agent.” The now ambiguous relationship between
420 (b)(3) and (b)(4) may mean that even now the expert witness’s documents fall directly into work-
421 product protection.

422 A still further complication was recognized. The draft protects all attorney-expert
423 communications, without attempting to distinguish among those that seem to involve something like
424 work-product and those that do not. One horrid example might be that an attorney tells the expert
425 that “if you do well in this case, I have 50 more; you can earn a lot of money.” We are
426 uncomfortable with paid witnesses in an intensely adversarial system. “If impeachment testimony
427 that comes through the lawyer is off limits, we may get awkward lawyer behavior.” The draft rule
428 seems to put all aspects of negotiating compensation off limits. This example, however, may serve
429 primarily to show that a rule cannot be drafted to cover all bad conduct. Rule 26(a)(2)(B) requires
430 disclosure of the compensation to be paid for the study and testimony in the case. Perhaps the
431 suggestion of future rewards falls within that. But more importantly, it is unlawful to arrange a fee
432 for expert testimony contingent on the outcome. Something like the crime-fraud exception should
433 justify discovery, and that may fit more readily within established work-product doctrine than within
434 a new expert-discovery rule.

435 More general discussion noted that the draft does not put off-limits all communications.
436 Facts or data communicated by the lawyer and considered by the expert remain discoverable without
437 any required showing of substantial need or undue hardship. And there are many ways to cross-
438 examine a witness. “We cannot write a rule without creating loopholes.” But we do need to shield
439 attorney-expert communications. We want a rule that people can rely on without attempting to
440 create loopholes. And the loss from affording this protection is *de minimis*. It is possible that the
441 disclosure report will be drafted by the lawyer, not the expert. That is rare. And that expert is likely
442 to fail on cross-examination. As soon as exceptions are recognized, the ability to rely on the rule
443 will diminish. The counter-productive behavior we have now will continue. “We need to enable
444 dealing with the expert comfortably.”

445 These themes were explored further. “Why limit discovery short of what is allowed at trial”?
446 At trial you can ask about compensation. It is in the disclosure report. Does the draft rule permit
447 inquiry on deposition? So of the question of who actually wrote the disclosure report. In one recent
448 trial the expert testified that the lawyer wrote the report. After the verdict, the jury revealed an
449 assumption that it is always the lawyer that writes the report.

450 Returning to the question of location within the rules, it was observed that the rule drafts
451 address discovery, not trial. “Putting it all in one place may not be possible.” But will people look
452 to (b)(3)? And “if this all can come in at trial, what do we gain”?

453 The question of trial examination prompted the statement that although the discovery rule
454 will address only discovery, it must be anticipated that the same protection will carry over to trial.
455 If the protection does not carry over, none of the gains sought by limiting discovery will be realized.
456 The same artificial behaviors will continue. And so will the problems arising from the imbalance
457 between parties who can and those who cannot retain two sets of experts, one set to consult and
458 remain free from discovery, the other to testify and be subject to discovery. There continues to be
459 a substantial “common law” of work-product protection, and it applies at trial as well as in
460 discovery. So in criminal cases, without a work-product Criminal Rule, work-product is protected
461 at trial. There may be an advantage in situating the new provisions with the work-product
462 provisions in (b)(3) because courts are familiar with the concept that although there is no Evidence
463 Rule to parallel Rule 26(b)(3), work-product protection applies at trial.

464 This puzzle was developed further by asking what reason there might be to distinguish an
465 expert witness from other witnesses. It is fair to ask an ordinary witness what the witness discussed
466 with counsel. How is an expert different? Is it because we tacitly recognize an adversary dimension
467 of advocacy in the sworn truthful testimony of the expert that we do not recognize with a fact
468 witness? What should be done about an employee witness or, for example, a treating physician:
469 should examination be permitted at trial as to their communications with counsel? The draft
470 proposal extends discovery protection to any person identified under Rule 26(a)(2)(A), whether or
471 not a disclosure report is required under (a)(2)(B), although it may be relevant that the parallel
472 proposal will require attorney disclosure as to any (A) expert not required to give a disclosure report
473 under (B). Is it intended also to cut off examination at trial? If possible, it would be helpful to
474 articulate the reasons for closing off inquiry into communications between counsel and all these
475 experts, and for hoping to extend the bar to examination at trial.

476 The question of protecting oral communications then arose. Rule 26(b)(3), standing alone,
477 protects only documents and tangible things. The proposal to protect oral communications with
478 expert witnesses thus reaches further. Why should that be? One answer was that it would be
479 difficult to draw a line that distinguishes between communications that distinguish an attorney’s
480 thinking about the case from other communications. The line that allows discovery of
481 communications about facts or data considered by the expert in forming an opinion is the most
482 workable line that can be drawn. The first response was that the line between an attorney’s thought
483 processes and other matters is drawn at depositions now, but this response was qualified by agreeing
484 that the other side’s theories and mental impressions are being disclosed now and that this practice
485 should be stopped if possible.

486 The role of expert witnesses was considered again. They are “unique creatures, one part
487 witness and another part helpers in preparing and presenting the case.” Protection of attorney-expert
488 communications need not rest on characterizing them as closer kin to lawyers than to witnesses.
489 Protection simply reflects “practical reality.”

490 The costs of present practice were recalled by observing again that sophisticated lawyers opt
491 out of this discovery. They agree not to ask for communications or drafts. And good people feel
492 bad about the way the practice makes them behave in dealing with experts, instructing them not to
493 prepare drafts, hedging communications, perhaps retaining a set of nontestifying experts. “These
494 are good reasons to change the rule.”

495 A similar observation was that communications between attorney and expert witness are
496 different from communications with other witnesses. This proposition should be made clear in
497 advancing the proposals. “This is a set of problems that lawyers understand better than judges do.
498 Judges see the disputes cleaned up, not in raw form.” The meeting with New Jersey lawyers offered
499 persuasive reasons for believing that although an occasionally useful bit of information will elude
500 discovery under the proposed protections, the tradeoff is desirable. “What you lose is a cost well
501 worth bearing.” A rule that barred only questions going “solely” to an attorney’s theories and
502 impressions sounds nice, but it would be hard to implement in practice.

503 The problem of extending the protection to trial was brought back for discussion. Can a
504 Civil Rule on discovery control evidence at trial? Can a sensible system be developed only by
505 parallel Civil and Evidence Rules? And again it was answered that one advantage of incorporating
506 the protection in Rule 26(b)(3) is that courts are accustomed to carrying work-product protection
507 over to trial, and will understand the need to carry over as well the parallel protections for attorney-
508 expert communications and draft reports. To be sure, the protection will extend beyond
509 communications that would now be protected as work product under *Hickman v. Taylor*. A lawyer
510 who wants to retain a highly qualified expert who has never appeared as an expert witness, for
511 example, may now be deterred by the prospect that efforts to train the expert in the ways of
512 witnessing will be discoverable.

513 The differences between experts and other witnesses were then approached from a new
514 angle. There are two kinds of experts. In some circumstances, the expert witness is an advocate,
515 and everyone knows it. The jury figures it out. Then there are others who appear as witnesses
516 seldom, and then only to testify for a party they think is right on the issues addressed by the expert
517 testimony. The jury figures out this picture as well. “The rule will not sacrifice much.” But it will
518 save great expense, “and that is an important benefit for the party that ought to win.”

519 Attempts to summarize this discussion led first to the response that no Committee member
520 wants open discovery of communications. Nor did anyone want to limit protection narrowly to an
521 attorney’s mental impressions. But doubts remained whether discovery protection will extend to
522 protection at trial, underlined by grave doubts whether a discovery protection is worthwhile if the
523 matters ruled out of discovery can be explored at trial. It will be important to attempt, by further
524 research, to develop as good an idea as possible about the prospect that discovery limits will be
525 honored at trial.

526 **Expert Work Papers**

527 The Subcommittee devoted several hours to discussing the possible values and difficulties
528 of a rule protecting an expert witness’s “work papers” against discovery. The question is difficult.
529 Both sides of the argument were presented first.

530 The “whole loaf” protection argument builds on the practice, indulged by litigants who can
531 afford it, of retaining two sets of experts. The experts who will be trial witnesses are carefully
532 excluded from development of the case. The experts who are retained only as “consultants” are
533 shielded from discovery by the “exceptional circumstances” test in Rule 26(b)(4)(B). They can
534 participate openly in shaping strategy, in sorting unsuccessful approaches out from more favorable
535 approaches, in helping to evaluate the case, in reviewing reports by the other side’s experts, in
536 preparing cross-examination of the other party’s experts, and so on. Smaller firms find this
537 burdensome, and many clients cannot afford it. The “collaborative process” that engages an expert
538 witness in counsel’s work and work product should be protected by extending the Rule 26(b)(4)(B)
539 test to work that does not involve facts or data considered in forming the trial testimony. So, for

540 example, the expert may consider 3, or 4, or 5 different tests. Counsel picks the one that is most
541 favorable. If a consulting expert does all that, followed by a trial expert's consideration only of the
542 most favorable test, the consultant's work is not discoverable. A trial expert should be allowed to
543 perform this consulting work, and to be protected in the same way.

544 Similarly, suppose an expert jots notes in the margins of a draft report: is that part of the draft
545 report, and not discoverable? Will efforts to draw a line between protected draft reports and
546 unprotected "working papers" lead to gaming behavior similar to the behavior now prevalent? Or
547 suppose counsel and expert discuss alternative approaches — is the discussion not a draft report, so
548 in discovery a line must be drawn between the mental processes of counsel that are protected as
549 work product and the mental processes of the expert that are not protected?

550 And if an expert's working papers or notes are discoverable, will that open the door to
551 discovery of attorney-expert communications?

552 The less protective "half-loaf" approach would be to accord different treatment to work
553 papers than to draft reports or attorney-expert communications. Facts and data considered by the
554 expert would remain discoverable, no matter whether counsel was the source. But it is very hard
555 to separate work papers from facts and data. Drafting a clear definition of the things protected as
556 work papers will be difficult.

557 A "whole-loaf" approach, further, would be polarizing. If an expert explores 5 tests that
558 produce the "right" result by different methods, and chooses to rely on 2 or 3 of them, the others
559 should be discoverable.

560 Discussion began with the observation that if work papers are discoverable, the incentive to
561 retain two sets of experts will remain. And there will be gamesmanship to defeat discovery,
562 instructing the expert to label everything as a "draft report." But the decision to allow discovery of
563 facts and data considered by the expert seems to require discovery of work papers.

564 An observer suggested that the rule must protect the opportunity to ask the expert to review
565 an adversary's expert report, and to participate in planning cross-examination. A lawyer should not
566 have to retain a separate consulting expert to be protected against discovery of such collaboration.
567 So protection should extend to such discussions as evaluating settlement options, perhaps by
568 estimating the damage awards that would result from adopting the approaches suggested by one
569 expert or the other, or from amalgamating them. Such matters are not discoverable from a trial
570 witness in New Jersey.

571 It was suggested that the problem of work papers emerged at an advanced stage of
572 Subcommittee deliberations. The New Jersey rule does not address work papers. Neither do the
573 ABA recommendations. Some part of an expert's mental processes must be open to discovery —
574 the only way to test an opinion is to explore the ways in which it was developed.

575 The observer responded that under New Jersey practice discovery extends to the calculations
576 supporting an opinion. Papers on the discount rate assumed, market analysis, and such are
577 discoverable. That does not directly address the problem of the expert who repeats a test 37 times,
578 rejecting 36 unfavorable results and adopting the 1 favorable result. Are the 36 unfavorable tests
579 facts or data considered in forming the opinion? Perhaps it is enough to address such questions by
580 examples in the Committee Note. Discovery clearly extends to "work papers" supporting the report.
581 Perhaps it should extend to other "reports" considered.

582 The problem of two sets of experts returned with the observation that if you do not know
583 what the results of a test will be, you hire an expert who will remain a consulting expert if the results
584 prove to be unfavorable. But perhaps that is not a general problem. In any event, anyone who may
585 become a testifying expert will be instructed to create no notes, or notes in a form that you want to
586 have produced. Experienced expert witnesses will not produce papers inconsistent with what they
587 are testifying to.

588 It was protested that protecting work papers will not protect the interests of justice. We want
589 to know whether the expert was told not to inquire into one subject or another.

590 The “facts or data” line was brought back for discussion. All drafts seek to allow discovery
591 of facts or data considered by the expert. But how does that address the examples of expert advice
592 offered to counsel? We want discovery of all matters that went into shaping the expert’s opinion,
593 but expert advice to counsel should not be discoverable.

594 The difficulty of distinguishing advice offered by the expert to counsel from development
595 of the expert’s opinion was tested by asking whether an expert’s opinion may be shaped by
596 reviewing for counsel the report of the adversary’s expert? Suppose the adversary’s expert engaged
597 in sophisticated “numbers crunching” — may not the expert’s trial testimony be shaped, in part to
598 respond and perhaps in part to back off from initial opinions that now appear unsustainable? But
599 if you can discover that, why not also permit questions about the ways in which conversations with
600 counsel may have shaped the opinions?

601 Returning to the earlier decision to protect attorney-expert communications and draft reports,
602 it was noted that these protections should extend to discussions of strategy and the related examples
603 of evaluating adversary expert reports, preparing to cross-examine adversary experts, and the like.
604 At the same time, the expert witness can be asked: “Did you ever consider X”?

605 The next step was taken by asking whether the trial expert could be asked whether she had
606 evaluated the adversary expert’s report? If she did, can the next question be: “What did you think
607 of it”? The person who thought the communications protected responded that these questions
608 remain proper. But, it was protested, that response means that you do after all have to hire
609 consulting experts to protect against discovery of trial experts.

610 A similar dilemma was expressed by suggesting that if we protect something framed as a
611 communication to counsel, discovery is blocked by framing everything as a communication to
612 counsel. Well, not everything would be protected — facts and data considered would remain
613 discoverable. Opinions to be expressed at trial are discoverable. But what about opinions that will
614 not be expressed at trial? The view was expressed that these are not facts or data, and should not
615 be discoverable. Nor should assistance in preparing cross-examination be discoverable; the expert
616 can deflect discovery by saying that the cross-examination communications were not considered in
617 framing the expert’s own opinions. One way to bolster this position is to ask the expert to evaluate
618 the adversary expert’s report, and to help to prepare cross-examination, only after your expert has
619 prepared her own report.

620 The same problems were examined again by confessing that it is difficult to draw the proper
621 lines. Facts or data bear on the opinions expressed on the stand. It may be hard to draw that line.
622 “Did you consider X” is proper. “What of our expert’s report” is proper. If considering the
623 adversary expert’s report changed the opinion of another party’s expert, that should be discoverable
624 — perhaps it amounts to facts or data considered? Would it be possible to say that if the effect
625 flowed only as a matter of high theory, divorced from specific facts, it is not discoverable or subject
626 to examination at trial? It is difficult to ignore the problem of work papers, but the best line may

627 be that adopted in the drafts for attorney-expert communications and draft reports: “facts and data
628 considered” are to be disclosed and are subject to discovery, while other matters are protected by
629 the work-product tests.

630 It was suggested that if there is no separate protection for work papers, it will be important
631 to provide examples of protected attorney-expert communications in the Committee Note. And also
632 some testing illustrations of what are “facts or data.” This suggestion was seconded. At times it is
633 impossible to frame clear rule text that answers all of the prominent problems. Examples in the
634 Committee Note may help to clarify the rule text without creating unforeseen traps.

635 An observer noted that the ABA report implicitly deals with these problems. Analysis for
636 settlement, critique of an opposing expert, and exploration with the expert of competing
637 methodologies should be protected. But the “36 tests that disappear” may not be addressed by the
638 ABA resolution. And if “work papers” do not include “notes in the margin,” discovery of work
639 papers may be appropriate — the expert’s methodology is important.

640 But a challenge was put: “Do we agree that we should bar discovery of an expert’s critique
641 of an opposing expert”? Suppose the critique is factually based? Doesn’t the adversary need to
642 discover that? All the calculations the expert did that support or undermine the adversary expert’s
643 opinion should be fair game for discovery.

644 It was responded that if, after an expert’s disclosure report is filed, the retaining party asks
645 him to analyze the other party’s expert report, that analysis is not something that informed the
646 expert’s opinion. Production should not be required.

647 The need for protection was underscored by observing that one of the participants in the
648 January miniconference was an attorney who often takes “small-injury cases.” He cannot afford to
649 hire two experts. And he needs to be able to ask his expert for an opinion on what the case is worth
650 — but he cannot do that if the opinion will be subject to discovery.

651 A broader perspective was suggested by noting that what we are trying to avoid is the use
652 of an expert “witness” as an attorney’s mouthpiece to present the case. We protect the expert
653 consultant because that expert is not a mouthpiece. The expert witness should be subject to
654 discovery that uncovers the mouthpiece role.

655 This view was met by the suggestion that in reality, cross-examination will reveal the witness
656 who testifies as mouthpiece, not as expert.

657 A different but also broad perspective was taken in noting that as our system has evolved
658 trials have become more and more infrequent. Expert witnesses are used more on summary
659 judgment, certification of class actions, electronic discovery, and other events. Examination of an
660 expert is different in these contexts. The “documents” are critical in determining what other parties
661 can use in framing their examinations.

662 The difficulty of the “work papers” question was underscored by a suggestion that perhaps
663 it would be useful to publish a proposal for comment, indicating at the same time that the fall-back
664 position might be to rely only on protection for attorney-expert communications and draft reports.
665 Tentative publication for the purpose of eliciting comment to inform decision on controversial
666 proposals is at times appropriate. But the first task should be to reach the best judgment the
667 Committee can. If it seems unwise to attempt protection of work papers, it may suffice to note that
668 decision in the communication transmitting for publication the proposals on attorney-expert
669 communications and on draft reports. The important thing is to find a mode of publication that

670 elicits comments that may enable a decision to go forward without repeating the publication-and-
671 comment process.

672 The question whether to continue to allow discovery of facts or data “considered” returned
673 with the suggestion that the focus on facts or data “considered” in forming an opinion comes close
674 to facts relied upon, and that the problems posed by discovery of work papers might be solved by
675 limiting disclosure and discovery to facts “relied upon.” This suggestion was not pursued further.

676 An effort to focus the discussion on reaching decisions began by asking whether a rule
677 should be proposed to bar discovery of all work papers. No one supported this approach. Four votes
678 were offered for an attempt to draw a line that would allow discovery of work papers that “go to the
679 heart of the opinion, but not otherwise.”

680 Then it was recognized that sufficient protection might be found in limiting discovery of
681 communications with an attorney. The protection might be fleshed out by examples in the
682 Committee Note. And so it was concluded that the most promising approach is to carry forward
683 with the provisions that apply work-product standards to discovery of attorney-expert
684 communications and draft reports, while allowing discovery of facts and data considered by the trial-
685 witness expert in forming the opinions to be expressed.

686 **Duration of Protection**

687 A final question addressed a problem not framed by any draft rule text. How long should
688 the protection against discovery of expert trial witnesses extend? If protection is provided in the first
689 case, what about a second case with the same attorney, the same expert, and the same or closely
690 related subject matter? If we allow discovery in the second case of all communications and draft
691 reports in the first case, have we lost all of the benefits of the protections in any situation that
692 includes the possibility of related actions?

693 This question is nearly the same as the question of extending work-product protection from
694 one action to another.

695 The Subcommittee is investigating these questions. A recent decision has been found in
696 which an expert was involved in a first case. The same expert then became involved in a second
697 case involving similar subject matter, but different parties and a different lawyer. There were added
698 complexities. The court allowed discovery of the expert’s work in the first case. Is that proper?
699 The question is in some ways similar to the question raised by the “retaining counsel” question.
700 Suppose one defendant confronts 100 actions by 100 different plaintiffs with 100 different lawyers,
701 all of whom retain the same expert? The question is complicated. The Supreme Court has
702 approached it only in a Freedom of Information Act case, *FTC v. Grolier*. The Subcommittee has
703 begun to explore these problems only recently. There may be a real need to provide some form of
704 protection for the lawyer who often hires the same expert for similar actions, or closely related
705 actions.

706 These questions may only be aggravated in mass torts. Imagine, for example, the expert
707 retained for the bellwether trial in the first of 14,000 similar product-liability cases.

708 A further question may be posed by the “turncoat” expert who consults for one party and
709 then changes sides to work for an opposing party.

710 It was noted that agreements with expert witnesses commonly contain confidentiality
711 provisions, but that courts do not seem to feel bound to enforce them.

712 Discussion of expert-witness discovery problems concluded with the Subcommittee's
713 undertaking to prepare for the spring meeting a proposal that may be suitable for a recommendation
714 to publish.

715 *Rule 56*

716 Judge Baylson introduced the Rule 56 Subcommittee discussion by noting that the
717 miniconference held on November 7 was structured in the same way as the New York conference
718 in January. It was perhaps a bit larger — counting Subcommittee members there were perhaps 30
719 people gathered around the table. The discussion proceeded on a very high level throughout and
720 produced many excellent suggestions. The Subcommittee met for two hours after the conference
721 to consider which points were the most valuable. The next step will be a revised draft, framed in
722 reliance on the Committee's discussion today. The plan is to have a draft that can be presented for
723 initial discussion in the Standing Committee next January, with the hope to have a recommendation
724 for publication by next spring. The work has been strongly supported by Joe Cecil's research at the
725 Federal Judicial Center.

726 **Rule 56(a)**

727 The time-for-motion provisions in draft Rule 56(a) are in essence the same as the proposals
728 published last August as part of the Time-Computation Project.

729 The provision that allows the Rule 56(a) time periods to be changed by local rule has drawn
730 the questions that invariably arise when local rules are recognized. But allowing local rules will
731 recognize local docket circumstances and motion-practice traditions. This provision seems secure.

732 The provision allowing the court to order different time periods will be revised by adding
733 words to require that the order be made "in a case." These words are intended to discourage
734 "standing orders."

735 Subdivision (a)(1) describes a motion for summary judgment "on an issue." This phrase will
736 be changed to "part or all of a claim or defense." Inviting motions on "an issue" may lead to
737 requests for summary judgment on evidentiary issues. But it remains important to recognize well-
738 established partial summary judgment practices. One illustration used during miniconference
739 discussions was defining the relevant market in an antitrust case.

740 There has been little discussion of the decision last spring to set the motion deadline at 30
741 days after the close of all discovery. Elimination of the alternative that would have set the deadline
742 at 60 days before trial has been accepted.

743 Some miniconference participants thought that 21 days is not sufficient time to respond,
744 suggesting that 30 days would be better. It was argued that "parity" requires the same time as set
745 for the motion. But setting the motion deadline at 30 days after the close of discovery is not a simple
746 parallel — for one thing, deposition transcripts may not be immediately available upon the close of
747 all discovery.

748 No questions have been raised as to the 14-day period set for replying to a response.

749 **Rule 56(b)**

750 The Subcommittee wants to restore references to declarations in the places where the rule
751 refers to affidavits. Many younger lawyers are accustomed to declarations and may be puzzled by
752 the reference to affidavits. Some older lawyers may be accustomed to affidavits and will benefit
753 from a direct reminder that declarations can be used. The Style Subcommittee prefers to avoid

754 references to declarations in Rule 56 in order to avoid inconsistency with other rules that refer only
755 to affidavits. There may be some risk of ambiguous implications from the inconsistency.
756 Nonetheless the question will be raised once again.

757 There has been some question whether the Rule need direct that the affidavit or declaration
758 “show” that the affiant or declarant is competent. Most witnesses are competent. Perhaps a
759 statement should suffice. Present Rule 56(e)(1) directs that the affidavit “show affirmatively” that
760 the affiant is competent. Style Rule 56(e)(1) reduces this to “show.” There no indication that this
761 requirement has caused any real difficulty in practice. “Show” will remain in the next draft.

762 Later discussion agreed that it remains important to authorize support and opposition to
763 summary judgment by affidavits or declarations. Ordinarily these materials are not admissible in
764 evidence. But the provision will be relocated to become part of the procedure directions in
765 subdivision (c).

766 **Rule 56(c)**

767 The overall structure of the Rule 56 draft has been discussed, reflecting concern that it may
768 be too dense to be “user friendly.” Restructuring will be considered. Subdivision (c) could be
769 restructured by rearranging and consolidating the paragraphs. Paragraph (1) will remain as (1),
770 identifying the “default” quality of the detailed procedures by stating at the outset that the court can
771 order different procedures in a case. Paragraph (2) will begin with the provisions defining the
772 motion, response, and reply. Then it will continue with the common provisions for citing support
773 for fact positions; the description of affidavits or declarations; the direction to file cited materials;
774 and the provision for briefs. The hope is that this will be a clearer package. Clarity is important
775 because the draft departs from the structures of both present and Style Rule 56.

776 Committee members supported the rearrangement.

777 Discussion moved to a question that has been explored several times. Should the statement
778 of facts be a part of the motion, or should it be a separate document? Early drafts adopted a 3-
779 document approach that provided for a (brief) motion, a separate statement of facts, and a brief.
780 Later drafts reflected a decision to telescope the motion and statement of facts into one paper.

781 It was noted that practice in the District of Arizona follows the 3-document approach. The
782 motion is part law — the requested relief. It is brief. The statement of facts is separate. Other
783 judges reported 3-document practices in their districts, and expressed support for this approach. Still
784 another judge urged that there can be confusion as to what is the “motion”; the statement of facts
785 is a separate thing.

786 Another judge, however, suggested that it is better to include the statement of facts in the
787 motion. Although subdivision (c) is calculated to discourage overly long statements of fact, the
788 tendency to undue length may be restrained if the statement is part of the motion. This suggestion
789 prompted the concession that it is difficult to predict which format might provoke longer statements.

790 An observer suggested that from a practitioner’s viewpoint there is less risk of confusion if
791 the statement of facts is separated from the motion. A separate fact document will make it easier
792 to identify failures to comply with the rule’s other requirements and to give notice.

793 Yet another judge noted that in the Northern District of Illinois the statement of facts is
794 separate. Separation may help people remember they are supposed to do it — some lawyers who
795 appear in federal court are not regular federal practitioners, and even with the separate statement
796 requirement may forget to do it.

797 The separate fact statement was reflected in asking whether the response should similarly
798 be divided between a brief “response” and a separate paper addressing each fact in the statement
799 accompanying the motion. It would be possible to divide still further by requiring a third paper to
800 state additional facts that preclude summary judgment. But it also is possible to simplify the
801 response by providing that a single paper responds to the movant’s statement of facts and also states
802 the additional facts. It may not be as important to have a separate statement replying to a separate
803 motion. The nonmovant can be expected to dispute the summary-judgment relief sought in the
804 motion. Still, separation into a brief “response” and a separate responding statement of facts might
805 have advantages. The nonmovant may be willing to concede part of the relief sought, perhaps
806 premitting the occasion for responding at all to some of the facts stated by the movant.

807 Without taking a vote, six Committee members expressed a preference for the 3-document
808 approach to the motion, while 3 preferred the 2-document approach.

809 Later discussion asked whether it would be better to identify the elements without mandating
810 a 1, 2, or 3-paper process. If, for example, the rule directs 3 papers, some people still will include
811 everything in a single document. The response may be a protest that the motion is improper in form.
812 Why proliferate the opportunities for minor noncompliance, the number of hoop-jumping exercises
813 without reason?

814 Various wording issues were addressed. It was noted that if a 3-document approach is
815 adopted for the motion the provision for citing support should refer to a statement of fact “in a
816 movant’s statement,” or something like that, not “in a motion.” It might help to caption the response
817 provision as “Response to Statement of Facts” as a better reminder that a nonmovant is supposed
818 to respond. The provision for the movant’s statement of facts can be improved by “state concisely
819 in separately numbered paragraphs,” and “entitle the movant to summary judgment as a matter of
820 law.” Deletion of the reference to judgment as a matter of law will be supported if the basic
821 standard is articulated in the first subdivision by rearranging the present subdivisions.

822 Attention also was directed to the provision that a response may “qualify” a fact. Fear was
823 expressed that an open-ended “qualify” “invites a novel.” This word has been discussed extensively.
824 It is apparent that many readers attribute an expanded meaning, including arguments that supporting
825 evidence is not admissible or does not support, or that the asserted fact is not material. No
826 immediate disposition was expressed to change the word. The issue was discussed further, however,
827 in considering the provision for supporting positions on the facts.

828 Many participants in the November 7 miniconference asked whether the rule text could
829 clearly identify the place for arguing that the evidence identified to support an asserted fact is not
830 admissible. There was no particular concern as to what the place might be, whether in a response,
831 reply, or brief. Clear guidance could be provided by adding a provision to the rule on responses.
832 That would address replies as well since the procedure for a reply is the same as for a response. The
833 next draft will illustrate this approach.

834 Later discussion of the provision for supporting fact positions asked whether it is better to
835 provide for disputing an asserted fact rather than denying it. This change was accepted. The quest
836 is to identify genuinely disputed facts. It may be a more comfortable position for a lawyer who
837 believes that an asserted fact may be true but that the party asserting the fact cannot prove it.

838 The draft includes a separate subparagraph recognizing that a response “may state that those
839 facts do not support judgment as a matter of law.” This statement is the equivalent of a demurrer
840 to a complaint. It can be as general as a statement that summary judgment is not warranted even if
841 all the asserted facts are established beyond dispute. It is essentially argument, not a response in

842 factual terms. It was included as a “marker,” with the thought that it may help the court to know
843 when perusing the fact dimensions of the response that the nonmovant also is asserting that any
844 dispute as to this fact makes no difference. This discussion led to a consensus that this provision
845 addresses matters of argument better relegated to the brief. It will be deleted from the next draft.

846 The brief provision for a reply elicited little comment. It was noted that the rule text might
847 be revised to reflect the statement in the Committee Note that the reply may be addressed “only to
848 any additional fact stated in the response.” That is the intent — the reply is not to become a vehicle
849 for challenging the response’s positions on the facts in the movant’s statement or for adding new
850 citations to bolster the movant’s initial statements.

851 The provision for citing support has been economically drafted to include the motion,
852 response, and reply. That means that it includes terms that do not apply to all three of those papers.
853 A motion, for example, will not be supported by a showing that materials cited to support a fact do
854 not establish the fact. Care must be taken to avoid potential confusion.

855 One part of the provision on citing support recognizes a showing that materials cited to
856 support a fact do not establish the absence of a genuine dispute. This provision is incomplete; it
857 might well be expanded to refer to materials cited to support or dispute a fact, and say “do not
858 establish a genuine dispute or the absence of one.” Whether or not expanded, it is important to avoid
859 any invitation to add elements of argument that would better be included in a brief. But the rule is
860 both incomplete and misleading if it seems to say that there must be citations to specific materials.
861 A response, for example, need not cite anything to support the argument that the materials cited by
862 the movant do not establish the absence of a genuine dispute. The additional provision suggested
863 for a response challenging the admissibility of the supporting materials also does not require citation
864 of counter-materials.

865 This discussion led to more elaborate exploration of the way to provide for admissibility
866 arguments. It was urged that the response should be the place to say “because it is not admissible.”
867 Agreement was expressed by observing that it is important to provide an immediate indication that
868 a stated fact is disputed because the supporting materials are not admissible — “red flags go up if
869 there is no citation to support the response.” We should not rely on permission to “qualify” a fact
870 in a response; a qualification is a response that the fact is partly true. The purpose is to tell the judge
871 which facts are in dispute.

872 A related question arises from the provision for “showing that * * * no material can be cited
873 to support the fact.” This provision addresses a motion made by a party who does not have the trial
874 burden of production and who asserts that the nonmovant will not be able to carry its trial burden
875 of production. Finding a clear expression may be a challenge. But the issue clearly goes to one
876 proper form of motion; it is not something that can be relegated to the brief. The difficulty actually
877 begins with the description of the motion in draft (c)(2)(B). The motion is to state “facts that the
878 movant asserts are not genuinely in dispute.” But the “no-evidence” motion seems to be stating a
879 non-fact: “I was not driving the car.” More accurately, the motion states “you do not have evidence
880 to show that I was driving the car.” Is that a statement of a fact not genuinely in dispute? Yes. A
881 fuller statement would be that there is no genuine dispute as to the fact because the nonmovant, who
882 has the trial burden, cannot carry the trial burden. Alternative drafting would be awkward; the
883 language chosen should not misdirect a lawyer intent on making a “no evidence” motion by
884 “showing” an adversary has no evidence. The reference to “showing * * * no material can be cited,”
885 moreover, is a deliberate choice to avoid resolving what appears to be continuing uncertainty about
886 a notorious ambiguity in the Celotex opinion. Some observers still argue that a movant who does
887 not have the trial burden of production can “show” the nonmovant lacks evidence sufficient to carry

888 the burden by simply asserting that proposition without doing anything more to illuminate the lack
889 of evidence. Many others believe that the movant must do something more, such as ask by
890 interrogatory what evidence the nonmovant has to prove an issue and then address in the motion the
891 insufficiency or inadmissibility of any evidence the nonmovant identifies in its answer.

892 Discussion became more specific. Suppose discovery has closed: Can a defendant say there
893 is no evidence of scienter in a securities fraud case, or no evidence of agreement to conspire in an
894 antitrust case, without doing anything more? One response was that such motions are not made.
895 Movants do point to specific parts of the discovery materials and perhaps other supports such as
896 declarations.

897 The Subcommittee will consider possible drafting changes, but it was agreed that some
898 version of showing that nothing can be cited to support a fact should remain in the draft submitted
899 for Standing Committee consideration.

900 Draft (c)(6) will be changed to read “A party must attach to file with a motion * * *.” The
901 final words will be deleted: “~~or at a time the court orders.~~” The court’s authority to alter by order
902 any procedure specified in subdivision (c) is ensured by (c)(1).

903 The provision for filing only materials that have not already been filed presents a more
904 important issue. Some courts have local rules directing that all materials referred to in a Rule 56
905 motion be gathered in an appendix whether or not they are already on file. The draft Committee
906 Note approves this practice. This may be a case in which the rule text should expressly support the
907 Note. In addition, at the November 7 miniconference Judge Swain suggested that some bankruptcy
908 files are so mammoth — she described one with 1,000 pages of docket entries — that the judge may
909 face serious problems in attempting to retrieve a paper that is somewhere in the file. Consideration
910 should be given to revising the rule text to recognize appendix practice and to allow a court order
911 to refile information already on file.

912 Finally, an old question was reopened by asking whether the argument paper should be
913 referred to as a “memorandum” rather than a “brief.” The choice to substitute “brief” for
914 memorandum, made last spring, was reconfirmed.

915 It also was agreed that the provision authorizing use of affidavits or declarations should be
916 moved into subdivision (c) as one aspect of the procedure.

917 **Rule 56(d)**

918 Draft Rule 56(d) addresses the consequences of a failure to respond or a response that does
919 not comply with the procedural requirements of Rule 56(c). One question is whether it also should
920 address a motion that does not comply with Rule 56(c), the failure to reply (does that admit new
921 facts stated in the response?), and a failure to reply in proper form. Arguments have been made that
922 it is unfair to address only one form of impropriety. The imbalance leaves nonmovants uncertain
923 about the proper procedure, and may seem to imply favoritism for movants. One approach, for
924 example, would be to provide a motion to strike a motion in improper form. But providing the
925 motion might invite make-work challenges to trivial defects in the motion. Worse, it might invite
926 arguments that more serious defects — such as failure to cite any supporting material, or failure to
927 challenge the admissibility of cited material — are waived by failure to move to strike. Courts have
928 extensive experience in dealing with defective motions; there is no need to add a provision for
929 defective motions here. But consideration should be given to the failure to reply: the first question
930 will be whether permission to reply should entail an obligation to reply on pain of accepting any new
931 facts in the response not addressed by a reply.

932 The draft includes “any other appropriate order” in the list of responses to a failure to
933 respond or to respond properly. The Subcommittee discussed the “deemed admitted” practice at
934 length and initially decided to recognize this practice in the Committee Note, and in a subordinate
935 position. Rather than take the failure as a deemed admission of a fact not properly responded to, the
936 Note suggested that the court enter an order that the fact would be deemed admitted unless a proper
937 response is filed. On further consideration, it may be better to write deemed admission into rule text
938 as a direct consequence of the failure to respond properly. The text could, for example, include an
939 order that “a fact not properly responded to is not controverted for purposes of the motion.” This
940 would both enhance the duty to respond and give clear notice in rule text of the consequences of
941 failing to respond.

942 It was asked why not say “deemed admitted” in the rule? It was answered that some circuits
943 seem hostile to this practice, preferring that even if there is no response the district court must
944 examine the motion and supporting materials to determine whether there is a genuine dispute.

945 The relationship to partial summary judgment was noted. If a fact is considered not
946 controverted (or “deemed admitted”), the result may be summary judgment on the whole action,
947 summary judgment as to some part of the action, or denial of any summary judgment because the
948 fact is not material or other facts establish a genuine dispute.

949 The limitation of the considered acceptance of a fact to the purposes of the Rule 56 motion
950 was thought important. The result should be the same as for a response that explicitly accepts a fact
951 only for purposes of the motion. If summary judgment is not granted on the fact, it remains open
952 to dispute at trial. Of course careful pretrial practices are likely to flag this fact as one of the topics
953 for discussion in defining the issues for trial.

954 Hesitation was expressed. Appellate courts are wary of granting summary judgment without
955 examining the materials offered to show that there is no room for genuine dispute. This concern
956 rises higher in cases involving pro se or prisoner litigants. By whatever name, “deemed admitted”
957 will be controversial. One protection will be a direction that a pro se litigant must be given notice
958 of the need to respond, and perhaps a second notice after there is no response or an inadequate
959 response.

960 The discussion concluded by a straw poll that showed 7 members in favor of adding to the
961 rule a provision for an order that a fact is “deemed accepted” for want of a proper response, with 4
962 against.

963 **Rule 56(e)**

964 Draft Rule 56(e) began as a provision recognizing common practices not directly addressed
965 in the present rule. Courts may grant summary judgment without any motion; may grant a motion
966 for reasons not stated in the motion; and may grant summary judgment for the nonmovant.
967 Incorporation in the rule provides notice to the parties of the general practice. The rule also
968 recognizes the established requirement that the court should give notice and a reasonable time to
969 respond before doing any of these things. Including these provisions seems desirable.

970 Last spring it was decided that this subdivision seemed incomplete because it did not include
971 an admittedly redundant reminder that the court can also grant or deny the motion. That reminder
972 was included in the present draft. But it is redundant with other provisions, and may cause
973 confusion precisely because it is redundant.

974 This discussion led to a suggestion that had been made earlier. It may be better to rearrange
975 the subdivisions so that the first subdivision, (a) does the work done by subdivision (c) in present
976 and Style Rules 56. The rule can begin with a statement of the power to grant summary judgment,
977 just as Rules 50 and 59 begin with a statement of the powers to grant judgment as a matter of law
978 or a new trial, followed by the procedural details of time to move and the like. Rule 60(b) is similar
979 — the power to vacate a judgment is stated before the time limits. This arrangement will reduce the
980 redundant provisions in the present draft that anticipate the summary-judgment power that is not
981 announced directly until subdivision (g). It was agreed that a rearranged draft will be prepared for
982 consideration.

983 **Rule 56(f)**

984 Draft Rule 56(f) carries forward Style Rule 56(f) with little change. It adds a new
985 recognition that when the court orders time for further discovery it can deny a motion rather than
986 defer a ruling.

987 Some effort has been made to retain this provision as subdivision (f) because that has been
988 its familiar designation. But as the subdivisions come to be rearranged, logical sequencing may
989 require that it be relocated.

990 **Rule 56(g)**

991 Draft subdivision (g) states the basic power to grant summary judgment. Its language carries
992 forward the traditional core of the summary-judgment standard, substituting “dispute” for “issue”
993 but otherwise leaving the standard unchanged. Summary judgment is proper if there is no genuine
994 dispute as to any material fact and a party is entitled to judgment as a matter of law.

995 Some issues remain. Style Rule renders as “should” the direction in present Rule 56(c) that
996 the court “shall” grant summary judgment. The Committee Note for the Style Rule explains that it
997 has become well established that there is a one-way discretion on summary judgment. The court has
998 no discretion about granting summary judgment — a grant is proper only if the summary-judgment
999 record would require judgment as a matter of law at trial, a question reviewed de novo without any
1000 deference to the trial court. But there is discretion to deny summary judgment even though the same
1001 evidence at trial would not allow judgment on a contrary jury verdict. The Style Rule Note also
1002 indicates that the discretion to deny summary judgment should be used sparingly: “‘Should’ in
1003 amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary
1004 judgment when there is no genuine issue as to any material fact.”

1005 It was noted that the Style Project was forced by style conventions to find some substitute
1006 for “shall” in the present rule. Given the established discretion to deny summary judgment, “should”
1007 was the proper approach for the Style Project. But the present project supports substantive
1008 amendment. Substituting “must” for “should” would not violate the decision to leave the summary-
1009 judgment standard unchanged. The standard remains the same. If in the continuing language of the
1010 rule a party is “entitled to judgment as a matter of law” under the unchanged standard, there should
1011 be no discretion to deny.

1012 A counter-example was offered. Gender- and national-origin discrimination claims may be
1013 joined in a single action. The facts bearing on each claim may be almost entirely the same. Even
1014 though the evidence on one theory may seem very thin — for example the national-origin theory —
1015 it may be better to try all theories together to avoid the risk that a partial summary judgment
1016 rejecting the national-origin claim might be reversed and require a new trial.

1017 A more general question asked whether judges often exercise discretion to deny a summary
1018 judgment that is warranted under the summary-judgment standard? One response was that this is
1019 not a real problem in practice. "If a judge wants it to go away the judge will sit on the motion and
1020 the parties may settle." But it also was observed that some lawyers find it frustrating that a court
1021 may refuse to whittle a case down by partial summary judgment. A further frustration occurs when
1022 a summary-judgment motion is decided on the brink of trial. Recognizing these frustrations does
1023 not mean that it is possible to provide an effective response through Rule 56.

1024 Further discussion resolved the issue with 8 straw votes in favor of "should" and 2 for
1025 "must."

1026 A second set of questions arises from the direction that "[a]n order or memorandum granting
1027 summary judgment should state the reasons." Would it be better to say that the court "must" state
1028 reasons for a grant? Should the rule address an order denying summary judgment, either stating that
1029 the order "should" or "must" state the reasons?

1030 The strongest argument for saying that an order granting summary judgment must state the
1031 reasons arises when the judgment disposes of the entire action. There is likely to be an appeal.
1032 Although the court of appeals is obliged to provide de novo review, it is essential to understand the
1033 reasoning of the district judge who first undertook a comprehensive analysis of the record. The rule
1034 could distinguish grants from denials, either omitting denials or saying only that an order denying
1035 summary judgment should state the reasons.

1036 Reasons were offered for not saying that the court must give reasons for a denial. One
1037 example is a determination that the case is close, that sustained work will be required to determine
1038 whether summary judgment is indeed appropriate, and there is a real risk that any summary
1039 judgment will be reversed. Denial in deference to a trial that will produce a definitive answer may
1040 be wise. But little is gained by stating such reasons. This question relates to the question whether
1041 the court should identify specific issues that are genuinely disputed. Identifying disputed issues can
1042 help focus the parties' trial-preparation work, but also may be an investment of the court's time that
1043 pays few dividends. It also was suggested that given de novo review, the prospect that very few
1044 denials will come up on appeal outside official-immunity and similar collateral-order appeals, and
1045 general present practice, nothing more need be said on a denial than that there is a material disputed
1046 issue.

1047 It also was suggested that an obligation or strong encouragement to state reasons becomes
1048 more complicated when the court grants summary judgment as to only part of a case, or grants in
1049 part and denies in part.

1050 Straw voting at the end of this discussion produced some double votes. Three members
1051 favored a rule that the court must state reasons both in granting and in denying summary judgment.
1052 Five favored must for a grant and should for a denial. Five also favored should for both grant and
1053 denial.

1054 The question whether the basic statement of summary-judgment authority should be
1055 relocated to become subdivision (a) came back for further consideration. It was suggested that if
1056 it comes at the beginning, this provision is the proper place to refer to "evidence that would be
1057 admissible at trial." But the provision addressing the need to state reasons might better be relocated.
1058 Further support for relocation was offered: it is better to begin with the fundamental proposition in
1059 the model of several other rules, and then flesh out the surrounding procedures and incidents. This
1060 should not be buried in the last quarter of the rule. A rearranged draft will be prepared for
1061 consideration by the Subcommittee.

1062

Rule 56(h)

1063 Draft Rule 56(h) recognizes the long-established practice and terminology of “partial
1064 summary judgment.” The draft remains open to further wordsmithing here as everywhere else.

1065 Discussion focused on the provision in subdivision (h)(2) for an order stating that a material
1066 fact is not in dispute “and treating the fact as established in the action.” Should “established” be
1067 replaced by “accepted”? The response was that “accepted” is not appropriate for a court
1068 determination. “Accepted” is appropriate when addressing the “deemed admitted” consequence of
1069 a failure to respond properly because then there is no actual court determination that the record
1070 shows there is no genuine dispute. (h)(2), in contrast, requires a court determination on the
1071 summary-judgment record. Its language is close to present Rule 56(d) — “the facts so specified
1072 shall be deemed established” — and is drawn directly from Style Rule 56(d)(2) — “must be treated
1073 as established in the action.”

1074

Rule 56(i)

1075 Style Rule 56(g) provides that the court “must” order payment of the reasonable expenses,
1076 including attorney fees, caused by submitting a Rule 56 affidavit in bad faith or solely for delay.
1077 The court also may hold the offending party in contempt. Draft Rule 56(i) carries these provisions
1078 forward, but reduces the command to permission — the court “may” order these sanctions. The FJC
1079 responded to a request to study the use of Rule 56(g), finding that there are very few motions and
1080 almost no grants. The Subcommittee has thought about simply abolishing this provision as
1081 moribund. Civil Rule 11 and 28 U.S.C. § 1927 may be sufficient deterrents.

1082 Some participants in the November 7 miniconference thought Rule 56(i) should be expanded
1083 beyond bad-faith affidavits. They fear that summary-judgment motions are often made for strategic
1084 purposes of delay or to impose crippling costs on an adversary with few resources for the litigation.
1085 They recognize also that a hopeless response may be filed. The recommended solution is to create
1086 a cost-shifting sanction similar to the sanctions Rule 37 provides for unsuccessfully making or
1087 resisting a discovery motion.

1088 An observer expanded this proposal by suggesting that it is not properly characterized as
1089 cost-bearing or as cost-shifting. It is an attempt to discipline the parties to follow the structure of
1090 the new rule. A motion, response, or reply submitted without reasonable justification would be
1091 subject to a discretionary sanction to compensate the adversary. It would apply to all parties. It
1092 would not be a “lose and pay” rule.

1093 The underlying concerns reflect not only the strategic motion but also the “400-page
1094 statement of uncontested facts.”

1095 Competing observations suggested that the proposal goes well beyond the “bad faith”
1096 exception to the “American Rule” that the loser is not responsible for an adversary’s attorney fees.
1097 It also goes far beyond Civil Rule 11. It could easily be challenged as at least testing Enabling Act
1098 limits. Rule 37 discovery sanctions rest on failure to comply with the procedural obligations
1099 imposed by other discovery rules. The obligation not to make a strategic Rule 56 motion may not
1100 be as purely procedural. Rule 56 does state a summary-judgment standard, and it does address
1101 premature motions through the provision for further discovery. But translating these provisions into
1102 a procedural obligation that is a suitable foundation for a procedural sanction is not easy. Tort
1103 remedies for abusive litigation are deliberately narrow. Expanding “procedural” remedies may
1104 approach substantive law too closely for comfort.

1105 A more direct response was “thanks, but no thanks.” Any such sanction “will never be
1106 applied.” Rule 37 was amended in 1970 in an attempt to foster free use of discovery cost-shifting
1107 sanctions, but courts have been reluctant to follow the lead. And after a decade of experience, Rule
1108 11 was modified to reduce the volumes of collateral litigation spawned by the 1983 amendments.

1109 It was determined that draft Rule 56(i) should be retained in the draft form, with the addition
1110 of an explicit direction to give notice and a reasonable time to respond before a sanction order is
1111 entered.

1112 **FJC Study**

1113 Judge Baylson introduced presentation of the most recent phase of the FJC summary-
1114 judgment project by noting that it had been presented at the November 7 miniconference. At the
1115 end of the conference, Professors Burbank and Schneider both focused attention on Table 5. Table
1116 5 suggests that the median time to dispose of summary-judgment motions is significantly longer in
1117 courts with local rules that require, more or less as draft Rule 56(c) would require, counterpoint
1118 statements of fact and supporting citations in motion and response.

1119 Joe Cecil presented the study results. The study looked for possible effects of different local-
1120 rule patterns. Taking the count supplied by the Administrative Office, they categorized 20 districts
1121 as having statement and counterpoint reply rules similar to proposed Rule 56(c). They then
1122 compared those districts to those that require only a formal statement of uncontested facts by the
1123 movant, with supporting citations, and districts that do not require either a formal statement by the
1124 movant or a counterpoint response.

1125 Most of the tables show that there are no meaningful or even suggestive differences in the
1126 rates of filing or granting summary judgment, nor even in terminations of whole cases.

1127 Table 5 shows median time to disposition of 23 weeks in districts that require both statement
1128 and response, 17 weeks in districts that require the statement but not a response, and 14 weeks in
1129 districts that do not require either statement or response. This pattern holds when broken down for
1130 various types of cases. But the pattern does not of itself establish a causal relationship, much less
1131 an explanation for any causal relationship. The districts with a longer time to disposition also have
1132 longer times to disposition across the board; differences in summary-judgment times may or may
1133 not be reflected in the overall disposition times. It may be that the statement-counterpoint-response
1134 districts allow more time for briefing, or take more time for deliberation. Case loads and weighted
1135 case loads also must be taken into account.

1136 It was noted that at least some courts have standing orders that adopt the statement-
1137 counterpoint requirement established by local rule in other districts. The study took account of this
1138 phenomenon by removing from the analysis cases before any judge for whom such a standing order
1139 was identified.

1140 It was asked whether there really is a difference between practice in courts that formally
1141 require a counterpoint response and practice in courts that formally require only a statement of
1142 undisputed facts? Do responses in fact follow the seemingly natural path of counterpoint? The
1143 study may be able to explore actual motions to provide some insight on this question.

1144 Table 12 shows no differences among the three groups in terminations of whole cases by
1145 summary judgments. But there may be a higher rate in employment cases in districts with
1146 statement-counterpoint rules.

1147 The data are not ideal. Several districts, including large districts, have been excluded
1148 because the docket information cannot be unraveled. Further efforts may make it possible to include
1149 some of these districts. But there is no reason to anticipate that inclusion of these districts will
1150 change the pattern.

1151 And a further caution. There is no “scientific” basis for determining what is a significant
1152 difference in a study of this kind. Determination of significance must be a policy judgment.

1153 One observation was that “employment cases” that come to court tend to be weak. There
1154 are strong claims, but those tend to be resolved by administrative processes.

1155 Dr. Cecil agreed that the employment cases “are starting to look different from other cases.”
1156 There are many summary-judgment motions. Some of the motions are designed to get some of the
1157 parties out of the case.

1158 A final question asked whether it will be possible to study appellate review differences. The
1159 FJC studied appellate outcomes in some districts 12 years ago. It found reversal rates in summary-
1160 judgment cases that were similar to the rates in other cases. So, it was observed, the decisions
1161 granting summary judgment may be right, as measured by de novo appellate review, as often as
1162 other types of dispositions.

1163 *Class Action Fairness Act Report*

1164 Emery Lee presented the fourth interim report on the Federal Judicial Center study of the
1165 Class Action Fairness Act’s impact on federal courts.

1166 The first phase of the study involves collecting data on filings and removals of class actions
1167 from July 1, 2001 through June 30, 2007. The data reveal an increase in both filings and removals
1168 after enactment through June 30, 2006, especially in diversity class actions. The data for July 1,
1169 2006 through June 30, 2007 are being collected to determine whether these trends continue.

1170 Phase 2 will examine what happens in a class action case, and will ask particularly whether
1171 the amount of work has increased. The first part will begin by examining 300 pre-CAFA cases for
1172 all aspects of the work done through appeal; this part cannot yet be completed because some of the
1173 cases remain pending. A sample of post-CAFA cases will be examined for comparison. That step
1174 also cannot be taken yet. The second part of this phase will look at federal-question cases before
1175 and after CAFA, to address the question whether CAFA has created incentives to assert federal
1176 claims. One aspect of the question is whether plaintiffs who earlier would have pleaded only state-
1177 law claims so as to lock the case into state court are now adding federal claims because the case can
1178 be removed under CAFA. A related aspect is to see whether the number of state claims added to
1179 federal-question cases has changed.

1180 Of course the impact of CAFA also involves what is happening in state courts. A big
1181 increase in federal filings and even removals would not seem as significant if there is a parallel
1182 increase in state-court class actions. These data will be very difficult to get — few states collect
1183 them. California data may be available. Figure 1 on p. 5 of the FJC report shows a drop in
1184 California state-court filings in 2004-2005, accompanied by an increase in federal-court filings. The
1185 federal share of all class actions in California increased. This phenomenon may have been caused
1186 by CAFA. There has been a slight diminution in total civil-case filings in California, but there is
1187 nothing yet to indicate that the decrease in class actions is driven by the decrease in overall filings.
1188 The FJC will continue to work closely with California officials. The National Center for State

1189 Courts is interested in these questions; at one point they had funding for a study, but the funding was
1190 withdrawn.

1191 It was noted that California is studying actual court files; “that’s a whole lot of effort.”
1192 Students from the Hastings College of the Law are participating in the work.

1193 Federal-court studies can begin with CM/ECF, a real help. Previous reports identified a few
1194 particular categories of cases and included others as “other statutory actions.” This residual category
1195 is not satisfying. It is possible to recode many of these actions. Many of them are Title 15
1196 consumer-protection actions, such as the Truth in Lending Act. Figure 2 in the report shows the
1197 trend line. The biggest increase was in 2005 — the year CAFA took effect in mid-February.

1198 Remand rates for diversity actions have not shown a big change, from 32.5% pre-CAFA to
1199 27.5% post-CAFA. Even this difference may narrow — some more of the post-CAFA cases may
1200 yet be remanded.

1201 It was noted that many of the early post-CAFA remands involved sorting out actions that
1202 were not removable because they had been commenced in state court before CAFA’s effective date.
1203 Data for later periods will help to balance that effect.

1204 In response to an observer’s question, it was noted that the FJC study is not seeking to
1205 determine whether plaintiffs are seeking to avoid CAFA removals. But in diversity cases the study
1206 is looking to see where plaintiff class members are from.

1207 *Notice Pleading: Bell Atlantic v. Twombly*

1208 The last half year has generated great excitement about federal pleading standards. The topic
1209 was introduced by a brief recapitulation of recent events.

1210 Notice pleading has held a continuing place on the Committee agenda since the Leatherman
1211 decision in 1993. Throughout this period the Supreme Court has alternated between rulings that
1212 “heightened pleading” can be required only when authorized by statute or court rule and other
1213 rulings that seemed, without using the “heightened pleading” phrase, to exact greater pleading detail
1214 than required to identify the events in suit and a sustainable legal theory. Lower-court decisions
1215 generally came to repeat the “no heightened pleading” formula, but at the same time often seemed
1216 to require greater pleading detail in some kinds of actions than in others. If it is possible to measure
1217 degrees of pleading specificity, the thermometer seemed to register differently.

1218 Last May 21 the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955.
1219 The opinion is rich in phrases describing the demands of a notice pleading sufficient to state a claim
1220 and show that the pleader is entitled to relief. Many of the phrases focus on some level of fact
1221 specificity. Many of them look for sufficient fact context to make the claim “plausible.” The Court
1222 explicitly retracted the statement in *Conley v. Gibson*, 1957, 355 U.S. 41, that a complaint should
1223 not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can
1224 prove no set of facts in support of his claim which would entitle him to relief.” Beyond the phrases
1225 of the opinion, the result suggests that at least reasonably detailed fact pleading was contemplated.
1226 The Court, reversing the court of appeals, ruled that the complaint was properly dismissed for failure
1227 to state a claim. There was, however, no doubt that the complaint gave clear notice of the claims.
1228 Neither was there any doubt that the complaint relied on a sustainable legal theory — the Sherman
1229 Act is violated by an “agreement” among four incumbent local exchange carriers to refrain from
1230 entering into competition with each other, and to engage in similar acts to discourage competitive
1231 local exchange carriers from entering. The demand for sufficient facts to first cross the line between

1232 the conclusory and the factual, and to then cross the line “between the factually neutral and the
1233 factually suggestive,” seems — despite the Court’s disavowal — to exact heightened fact pleading.

1234 The general reach of the Twombly opinion has created uncertainty from the outset. The
1235 Court spent some time decrying the enormous burdens that could be imposed by discovery, and in
1236 doubting the possibility that effective management of staged and focused discovery can be used to
1237 enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information
1238 exclusively available to the defendants can be used to supply a better preliminary fact showing that
1239 will justify full-scale discovery and litigation. The Court also relied heavily on its own sense of
1240 economically rational behavior in highly concentrated markets. One speculation has been that the
1241 opinion is no broader than antitrust pleading, and may be narrowed specifically to pleading § 1
1242 conspiracy claims.

1243 The narrow interpretation of the Twombly opinion gained some support from the decision
1244 on the certiorari papers in *Erickson v. Pardus*, 2007, 127 S.Ct. 2197. Reversing dismissal of a
1245 prisoner’s complaint claiming injury caused by removal from a Hepatitis C treatment program, the
1246 Court quoted Twombly quoting *Conley v. Gibson*: “Specific facts are not necessary; the statement
1247 need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it
1248 rests.””

1249 A third decision soon after the Twombly and *Erickson* decisions added an intriguing side
1250 light. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 2007, 127 S.Ct. 2499, the Court ruled that
1251 heightened pleading requirements do not violate the Seventh Amendment.

1252 Faced with the multifarious and often exacting phrases of the Twombly opinion, lower courts
1253 have struggled to determine whether pleading standards have in fact changed. The sense of struggle
1254 does not imply that changes are unwelcome. There is strong support for the proposition that lower
1255 courts have long applied standards close to the “contextual plausibility” test that can be teased out
1256 of the Twombly opinion. Greater pleading detail is required in cases that threaten to impose massive
1257 pretrial and trial burdens. Greater detail also may be required in facing substantive claims that
1258 courts sense are often misused. Greater detail may be required when appropriate to protect
1259 particular interests that limit the underlying claim — the detailed pleading of defamation claims
1260 required by some courts may be an example. License to do more openly what courts have been
1261 doing all along may prove welcome, once the decisions work the way through to finding clear
1262 license.

1263 A small sampling of the literally thousands of citations to the Twombly decision can begin
1264 with *Iqbal v. Hasty*, 2d Cir.2007, 490 F.3d 143. The opinion examines the “conflicting signals” of
1265 the Twombly opinion and concludes:

1266 [T]he Court is not requiring a universal standard of heightened fact pleading, but is
1267 instead requiring a flexible “plausibility” standard, which obliges a pleader to
1268 amplify a claim with some allegations in those contexts where such amplification is
1269 needed to render the claim plausible.

1270 Other appellate decisions provide interesting insights. The importance of context is
1271 suggested by two examples. One is a decision dealing with a claim of retaliation for complaining
1272 about employment discrimination. The court ruled that although a complaint for discrimination need
1273 only plead the basis of the discrimination — for example, race, age, or gender — a complaint for
1274 retaliation must plead the nature of the plaintiff’s protest about discrimination. The plaintiff should
1275 know the nature of the plaintiff’s own conduct and should be required to plead it to enable a
1276 determination whether the protest involved matters within the reach of discrimination law. A second

1277 is a decision dealing with a claim that the defendants violated the plaintiff's First Amendment Free
1278 Exercise rights by terminating him from a fieldwork practicum for an advanced social work degree.
1279 Ruling that the plaintiff must plead a sincerely held religious belief, the court also ruled that it
1280 suffices to state that the plaintiff "sincerely" holds a "religious" belief. There is no need to plead
1281 additional facts to support sincerity or to support the religious character of the belief. How else, the
1282 court asked, can a plaintiff assert these matters?

1283 With this introduction, it was suggested that it may be premature to embark on a major
1284 pleading project. The Standing Committee will have a program on pleading in January. They may
1285 provide some sense whether there is anything useful to be done now while the courts are working
1286 toward a new understanding of Rule 8. For that matter, the Supreme Court may render more
1287 opinions.

1288 One judge suggested that although there is no statistical basis for it, there is an impression
1289 that the number of motions to dismiss has increased. Many of the motions seem to request
1290 application of a fact-pleading requirement. And it seems clear that some members of the bar want
1291 more pointed pleading. But there are different views at the bar.

1292 Other judges were not sure whether there has been an increase in motions to dismiss. Of
1293 course Twombly is cited repeatedly in all motions. "Before Twombly courts could rely on context
1294 and plausibility." The Dura Pharmaceuticals decision requiring clear pleading of loss causation is
1295 an illustration. There is a long line of Second Circuit decisions holding antitrust complaints
1296 insufficient, influenced by fear that discovery and other burdens are so great as to coerce settlement.
1297 It remains to be seen whether Twombly will apply only in complex cases that involve expensive
1298 discovery.

1299 A similar view was expressed by another judge. Conley v. Gibson has been the mandatory
1300 citation on motions to dismiss. Now it will be Twombly. It will be fascinating to see, five or ten
1301 years from now, whether the result has been anything more than a change in the boilerplate citation.

1302 It was agreed that renewed interest in pleading is clearly linked to discovery. The greater
1303 the continuing uneasiness about the burdens of discovery in some cases, and the greater the doubts
1304 about the success of continuing discovery rule amendments, the greater the interest in raising
1305 pleading requirements as a preliminary shield.

1306 The very notion of contextual plausibility, moreover, brings back the question of
1307 transsubstantive procedure. The question of substance-specific pleading rules has often been raised
1308 by asking whether the particularized pleading categories in Rule 9 should be increased. Even those
1309 suggestions have encountered doubts about the potential effects on substantive rights. More open-
1310 ended and potentially less disciplined invocation of particularized pleading requirements according
1311 to an individual judge's sense of substantive values seems more troubling still. Come to think of
1312 it, it may be asked whether we have any sense whether Rule 9(b) works well? The Private Securities
1313 Litigation Reform Act raised pleading standards above the general Rule 9(b) fraud-pleading
1314 standards for securities actions; does Rule 9(b) work better in other settings? Why was it limited
1315 to mistake and fraud?

1316 It was noted that Twombly emphasizes both notice and entitlement to relief. Courts develop
1317 their own special tests. The Second Circuit, for example, requires pleading the precise defamatory
1318 statement complained of.

1319 The suggestion that Twombly may be nothing more than an antitrust pleading decision was
1320 renewed. The Court relied on the parallel summary-judgment approach to antitrust cases in the

1321 Matsushita case. The Court relies on its own concepts of economic rationality to measure the
1322 plausibility of claimed conduct.

1323 This suggestion elicited a partly sympathetic response that there is much for the “antitrust
1324 only” view, but that explicitly withdrawing the much-used “no set of facts” test clearly applies to
1325 all cases. A “plausibility” test clearly does not require a determination whether the plaintiff will,
1326 or even can, win. But the pleading standard must be reconsidered across the board.

1327 A specific example was offered. In a big MDL antitrust litigation, the Department of Justice
1328 is willing to share documents with the plaintiffs. But the defendants argue that the plaintiffs must
1329 first draft their pleadings without access to the documents. The linkage of pleading and discovery
1330 in the Twombly opinion will cause trouble even in a case such as this where the discovery will cost
1331 the defendants nothing — they are not the ones that have to produce the documents. Experience
1332 with litigating many 12(b)(6) motions, including through appeals, has shown problems enough under
1333 pre-Twombly pleading standards. It could take 4 or 5 years to reach the point of establishing that
1334 the complaint states a claim. What will lawyers and judges talk about under a “plausibility” test?
1335 The test seems completely subjective, judge-by-judge. It will be as so many Rorschach blots, with
1336 self-same complaints interpreted differently by each viewer. Even now, motions to dismiss
1337 commonly assert that the complaint “does not sufficiently allege * * *.” This has almost become
1338 a legal standard. To say that pleading requirements are “contextual” does not much advance the
1339 inquiry or practice.

1340 This example was paralleled by asking whether, under a “contextual plausibility test” — if
1341 that is what emerges from Twombly — it matters who possesses the information needed to plead
1342 with adequate fact specificity?

1343 One example of institutionalized pleading requirements has been “case statements” in actions
1344 under the Racketeer Influenced and Corrupt Organizations Act. Some courts have had local rules
1345 or standing orders requiring these statements. But some of these courts have abandoned them for
1346 fear they violate notice pleading rules. Perhaps the Twombly case offers renewed authority for this
1347 practice.

1348 Employment cases are another category that may provide interesting applications of the
1349 Twombly tests. The courts of appeals have not addressed pleading in these cases in a substantive
1350 way. They arise in infinite variety.

1351 Product-liability cases were offered as another example. Simplified notice pleading seems
1352 to work well for them.

1353 It also was noted that good lawyers have been filing pretty detailed complaints for many
1354 years. They want to tell the story and to frame the issues. It seems likely that the Twombly decision
1355 will have little or no impact in most cases brought by careful lawyers.

1356 This example was used as a basis for asking whether, under a “contextual plausibility test”
1357 — if that is what emerges from Twombly — it matters who possesses the information needed to
1358 plead with adequate fact specificity? The plaintiff, for example, knows her race and gender, and that
1359 she was fired. She may know about a few questionable remarks. But much important information
1360 is in the employer’s hands. So can pleading standards be adjusted to require statement of what the
1361 plaintiff can fairly be expected to know, and no more? This question was echoed in the suggestion
1362 that perhaps Twombly will help “sort out who is the lower-cost information provider.”

1363 It was observed that if more fact-specific pleading is required, plaintiffs will be required to
1364 front-load the case, as has happened in securities actions after the PSLRA. But once the plaintiff
1365 survives a motion to dismiss, the lawyers presume there is merit to the claim. The result is earlier
1366 and higher settlements. But the value of front-loading the pleadings as an offset to the difficulty of
1367 controlling discovery does not come without cost. The cost is not only on the parties; motions will
1368 put the cost on courts as well. In situations that involve a contest among counsel to become the first
1369 to file and thus to gain advantage in becoming lead counsel, moreover, the ability to front-load
1370 preparation may be undercut by the need to respond promptly with a parallel filing after the most
1371 eager lawyer has filed without much loading at all.

1372 The past was recalled by noting that the Supreme Court seems to march up and down the
1373 specific pleading hill. The FJC did a study of motions to dismiss almost 20 years ago, responding
1374 to this Committee's study of a proposal to abolish the Rule 12(b)(6) motion. The tie to discovery
1375 practice in the Twombly opinion raises a similar empirical question: have judges been more or less
1376 engaged in managing discovery, particularly in targeting initial discovery, in ways that might reduce
1377 the concerns about launching discovery with no more than a complaint identifying the events that
1378 will become the focus of discovery?

1379 The possibility of empirical inquiry was pursued. The FJC might be able to design a study
1380 that will show whether fact pleading has increased. There is a foundation in earlier studies in the
1381 frequency and outcomes of motions in 1975, 1986, 1990, and 2000. That work, at least, can be
1382 updated. The Committee agreed that such work will be enormously helpful if the time comes to
1383 consider amending the rules.

1384 It was suggested that it may be desirable to resurrect the Rule 12(e) proposals that were put
1385 on hold a year ago. Case-specific pleading requirements directed by the judge with an eye to the
1386 needs of effective management of the particular case may be a good substitute for more open-ended
1387 requirements imposed at the initial pleading stage. The concern about inviting boilerplate motions
1388 may be offset by concern that at least for a while the Twombly opinion may encourage reflexive
1389 motions to dismiss. Although the potential uses of present Rule 12(e) have been reduced, revision
1390 may prove worthwhile.

1391 This discussion was extended by noting that there was a time when lawyers were too quick
1392 to file Rule 12(e) motions. Courts in effect told them not to bother — this is a notice-pleading
1393 system. Lawyers took the message to heart. Another lawyer agreed that “Rule 12(e) is no use.”
1394 There seemed to be a similar lesson on Rule 12(b)(6) — be really careful; a losing motion is a bad
1395 way to start a case. The Twombly opinion is seen by practitioners as an invitation. CLE seminars
1396 are springing up. Practitioners will reinvigorate motions practice. And we have yet to see what
1397 courts will do.

1398 Discussion of the vistas opened by the Twombly opinion concluded with general agreement
1399 that the Committee should not immediately move into more aggressive action on its pleading
1400 projects.

1401 *James Duff Report*

1402 James Duff, Director of the Administrative Office of the United States Courts, met with the
1403 Committee to discuss its ongoing work and pending legislation. Judges Kravitz and Rosenthal
1404 expressed appreciation for the support the Administrative Office has provided for the work of the
1405 rules committees. Special appreciation was expressed for the outstanding work of the Rules
1406 Committee Support Office, and particularly the work and support provided by Peter McCabe, John
1407 Rabiej, James Ishida, and Jeffrey Barr.

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Rule 68

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The Committee was reminded that proposals to “put teeth” into the Rule 68 offer-of-judgment provisions continue to arrive “in the mail box” at rather regular intervals. Rule 68 was studied, and revisions were published for comment, in the 1980s. These proposals may have been the origin of the warnings that one proposal or another will generate a firestorm of protest. They did. Rule 68 was studied again in the 1990s in response to an elegant “capped benefit-of-the-judgment” proposal advanced by Judge Schwarzer. The FJC undertook a study of Rule 68 practice to support the work. That undertaking led to an increasingly complicated draft and eventually to abandonment of the project without publishing any proposal. Last year the Second Circuit published an opinion explicitly inviting revision of Rule 68 to address the problems presented by cases that involve specific relief. Recent empirical work investigating the use of Rule 68 offers in fee-shifting cases involving employment discrimination and civil rights has been undertaken by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Specific proposals will emerge from their work.

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It was noted that Pennsylvania state courts use added interest awards as an incentive to accept an offer of judgment. It may be possible to rely on enhanced costs or interest awards to make Rule 68 more effective without intruding on the traditional attorney-fee rules that apply outside the realm of statutory fee shifting.

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It was agreed that Rule 68 can remain on the agenda for possible future consideration.

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Other Topics

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The major topics on the current agenda are those discussed at this meeting — expert-witness discovery and summary judgment. They are well advanced in the Committee’s initial process. There soon will be room in the agenda for active consideration of new topics. That does not mean that something must be found to occupy all available energies. Recent years have been the occasion for many important projects, and it is useful to give the bar a rest. Concern with the wave of changes led to an explicit decision to not publish any proposals in August 2006; barring some emergency, no new amendments are in the pipeline to take effect on December 1, 2008, apart from a minor technical revision of Supplemental Rule C(6). It is not essential to have something to take effect on December 1, 2011. But most projects require at least three years from start to effective date, and many require more. It is not too early to be asking about possible new topics.

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One possibility might be to revisit the simplified procedure project that was opened and then put aside a few years ago. The proposal was not shaped as a distinctive practice for pro se cases. Although the procedure would be simplified for cases brought within the rules, understanding would not be easier — the simplified procedures could be understood only as simplification of the general procedures. Various concerns led to the decision to defer further work. One was reports of experience in courts that have established multiple “tracks” by local rules. Few if any lawyers seem willing to believe that their “federal cases” really are simple cases calling for simplified procedures. And some observers were worried that judges might somehow direct attention away from more complex cases in order to tend to the simplified cases.

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An observer reported that the ABA has a task force examining the great variations in pretrial order forms used across the country. Some forms exact such great detail as to amount almost to a first trial on paper, a true ordeal. Great expense may be entailed. At the same time, settlement may be promoted because the preparation requires the lawyers to take a close look at the cases.

1450 It was reported that the new privacy rules are about to take effect, spurring a review of
1451 Administrative Office forms for consistency. Some forms call for filing information that is
1452 inconsistent with the privacy rules — requirements for social security numbers are the most common
problems. Various privacy issues may come back to the rules committees.

Respectfully submitted,

Edward H. Cooper
Reporter