ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
May 1-2, 2003
Volume II

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
MAY 1-2, 2003

1. Report on Judicial Conference action on class actions minimal-diversity jurisdiction legislation

   - Report on local rules project, reviewed by Professors Cooper and Capra

2. **ACTION** — Approving minutes of October 3-4, 2002, committee meeting

3. Legislative Report

4. **ACTION** — Approving for publication proposed restyled Rules 1-15

5. Report of Forfeiture and Sealing Documents Subcommittee

   A. Draft language prescribing new Admiralty Rule G
   B. Federal Judicial Center study of sealed-settlement agreements and review of local sealing-order rules

6. Report of Discovery Subcommittee on electronic discovery issues

7. **ACTION** — Approving for publication proposed amendments to Rule 45(a) requiring notice to a deponent of the means of recording the deposition

8. **ACTION** — Approving for publication proposed new Rule 5.1 to provide notice to attorney general of constitutional challenge to state statute

9. **ACTION** — Approving for publication proposed amendments to Rule 6(e) clarifying time-counting provision

10. **ACTION** — Approving for publication proposed technical amendments to Rule 27 to address outdated cross-references

11. Report of Class Action Subcommittee

    - Federal Judicial Center survey of attorneys' reasons for filing class actions in federal or state court

12. Consideration of proposed new Rule 62.1 authorizing indicative court rulings

13. Consideration of proposed amendments to Rule 50(b) modifying procedures governing consideration of post-trial motions

14. Consideration of Rule 12(f) procedures governing material struck as scandalous, redundant, or impertinent in an electronic world

15. Consideration of proposed amendments to Rule 15

16. Bankruptcy Rules Committee's proposed amendments to Rule 7004 authorizing issuance of summons by electronic means

17. Next Meeting

Stefan Cassella
<Stefan.Cassella@usdoj.gov>

11/26/2002 11:48 AM

To: John_Rabiej@ao.uscourts.gov (Receipt Notification Requested)
cc: Alice.Dery@usdoj.gov (Receipt Notification Requested), John.Roth@usdoj.gov (Receipt Notification Requested), coopere@umich.edu (Receipt Notification Requested), James.Ingram@usdoj.gov (Receipt Notification Requested), James.Swain@usdoj.gov (Receipt Notification Requested), Leslie.Westphal@usdoj.gov (Receipt Notification Requested), Mary.Lundberg@usdoj.gov (Receipt Notification Requested), Richard.E.Cohen@usdoj.gov (Receipt Notification Requested), Richard.Hoffman2@usdoj.gov (Receipt Notification Requested)
Subject: Re: Forfeiture rules

Date: 11/26/2002 11:53 am -0500 (Tuesday)
From: Stefan Cassella
To: "John_Rabiej@ao.uscourts.gov@inetgw".WTGATE2.CRMGW; Ed Cooper
CC: adery; john; Rule G
Subject: Re: Forfeiture rules

To: John Rabiej
Ed Cooper

John/Ed,

Attached is a revised version of Rule G and the Justice Department's response to the comments of the NACDL. Because there will be some people who are new to the issues involving Rule G, we have provided the response to NACDL in the form of additions to the original Explanation of the Rule. Thus, someone coming to the issue for the first time can read the entire Explanation, along with the responses to NACDL, at one time, without having to move back and forth between two documents.

At the same time, for the convenience of those who have been involved in the process from the beginning, the new material in the Explanation responding to NACDL is in boldface.

In most instances, we found the criticisms of NACDL not well taken, but nevertheless have provided a detailed response, complete with citations to relevant authority. In other instances, where we agreed with the comment, we made revisions to the proposed Rule.

The attached document reflects the contributions of a working group of Assistant U.S. Attorneys, all of whom have many years of experience as the dedicated asset forfeiture experts in their respective offices. The contributors included: Richard Hoffman (D. Mass.), Mary Lundberg (S.D. Cal.), Richard Cohen (W.D.Wash.), James Swain (S.D. Fla.), Bill Beckerleg (S.D. Fla.), James Ingram (N.D. Ala.) and Leslie Westphal (D. Oregon).

I look forward to attending the next meeting of the forfeiture subcommittee and wish you and yours a Happy Thanksgiving.

Stef

Supplemental Rule G

Revised November 26, 2002

Rule G. Forfeiture Actions In Rem: Special Provisions

(1) **Application.** This Rule G applies to a forfeiture action *in rem* for violation of a federal statute. Rules A through F also apply unless inconsistent with Rule G.

(2) **Complaint.**

(a) The complaint must be verified and must describe with reasonable particularity the property that is the subject of the action.

(b) The complaint must state —

(i) the location of the property;

(ii) the basis for the court's exercise of subject matter jurisdiction over the action or *in rem* jurisdiction over the property;

(iii) the basis for venue;

(iv) the statute under which the action is brought, and the nature of the relationship between the property and the underlying criminal offense that gives rise to forfeiture under the statute; and

(v) the circumstances from which the action arises with such particularity that a claimant will be able to commence an investigation of the facts and to frame a responsive pleading.

(c) Interrogatories may be served with the complaint without leave of court.

(3) **Judicial Authorization and Process.**

(a) Arrest Warrant or Restraining Order.

(i) The clerk must promptly issue a warrant to arrest property other than real property described in a forfeiture complaint.

(ii) If a court has jurisdiction over property under an order that restrains the property, issuance of an arrest warrant under Rule G(3)(a)(i) is unnecessary unless, on motion of the United States, the court finds that execution of a warrant is necessary to preserve the court's jurisdiction in the event the restraining order expires or

is dissolved.

(iii) If the property is real property, the United States must proceed under 18 U.S.C. § 985.

(iv) If the property to be arrested is neither already in the possession of the Government nor subject to a judicial order that restrains the property, the warrant may be ~~issued only after a~~ judge neutral and detached magistrate has determined that there is probable cause for the arrest.

(b) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States;(C) someone specially appointed by the court for that purpose; (D) any officer or employee of the United States; or (E) in the case of property located in a foreign country, a person authorized to serve process in such country.

(ii) A person authorized under Rule G(3)(b)(i) must execute the warrant or supplemental process as soon as practicable, unless the court directs a different time when

(A) the complaint is under seal,

(B) the property is located abroad, or

(C) the action is stayed prior to execution of the warrant.

(iii) Process in rem may be executed within the district or outside the district when authorized by statute.

(4) **Notice.**

(a) Publication.

(i) Following execution of an arrest warrant under Rule G(3)(b) or, in the case of real property, following compliance with 18 U.S.C. § 985(c), the Attorney General must publish notice of the forfeiture action. Unless the court orders otherwise, the notice must

(A) specify the times under Rule G(5) to file a claim to the property and to answer the complaint,

(B) name the attorney for the United States to be served with a claim and answer, and

(C) appear once a week for three successive weeks in a newspaper of general circulation in a district where (1) the action is filed, (2) the property was seized, or (3) the property is located.

(ii) The Rule G(4)(a)(i)(C) notice need be published only once if, before the action was filed, notice of non-judicial forfeiture of the same property was published in a newspaper of general circulation for three successive weeks in a district where publication is authorized under Rule G(4)(a)(i)(C).

(iii) No publication is required under Rule G(4)(a)(i) if the value of the property is less than $1000 and direct notice of the forfeiture action is sent under Rule G(4)(b).

(iv) If the property subject to forfeiture is located in a foreign country, or a person on whom notice must be served under Rule G(4)(b) is believed to be located in a foreign country, publication may be made in any of the following:

(A) a newspaper of general circulation in the district where the action is filed;

(B) a newspaper published outside the foreign country where the property is located but generally circulated in that foreign country; or

(C) a newspaper, legal gazette, or listing of legal notices published and generally circulated in the foreign country where the property is located.

(v) In lieu of publication in a newspaper, notice that satisfies Rule G(4)(a)(i)(A) and (B) may, in the Attorney General's discretion, be posted on the Internet for a period of not less than 30 days in a manner reasonably calculated to provide notice to persons who may have an ownership interest in the property.

(b) Direct Notice.

(i) In addition to the requirements of Rule G(4)(a), the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, on any person who, appearing to have an interest

in the property, is a potential claimant.

(ii) The notice required under Rule G(4)(b)(i) may be served on the potential claimant or the potential claimant's counsel representing the potential claimant with respect to the seizure of the subject property, or representing the potential claimant in a related investigation, administrative forfeiture proceeding, or criminal case, in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail. Notice pursuant to this Rule G(4)(b) is served on the date when the notice is sent.

(iii) Notice to a potential claimant who is incarcerated must be sent to the facility where the potential claimant is incarcerated.

(iv) Notice to a potential claimant who was arrested in connection with the offense giving rise to the forfeiture but who is not incarcerated may be sent to the address given by the potential claimant at the time of his arrest or release from custody, unless the potential claimant has provided a different address to the agency to which he provided the address at the time of his arrest or release from custody.

(v) The notice must state the date on which the notice is sent, and must either (A) state that a claim must be filed not more than 30 days after such date, or (B) set forth a specific date not less than 30 days after the date on which the notice is sent by which a claim must be filed.

(vi) The notice must also name the attorney for the United States to be served with a claim and answer and must state that an answer to the complaint must be filed under Rule G(5)(b) not later than 20 days after filing the claim.

(vii) In cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)), the time periods set forth in the notice pursuant to Rule G(4)(b)(v) and (vi) must correspond to the time periods in the applicable statute.

(5) **Responsive Pleading; Interrogatories.**

(a) Claim.

(i) A person who asserts an ownership interest in the property that

is the subject of the action may contest the action by filing a claim in the court where the action is pending. The claim must —

(A) identify the specific property being claimed;

(B) state the claimant's ownership interest in such property, in terms of 18 U.S.C. § 983(d)(6);

(C) be signed by the person making the claim under penalty of perjury; and

(D) be served on the attorney for the government who is designated under Rule G(4)(a)(i)(B) or (b)(vi).

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

(A) by the time stated in a direct notice sent under Rule G(4)(b), or

(B) if direct notice was not sent under Rule G(4)(b) to the person filing the claim,

(1) no later than 30 days after the date of final publication of notice under Rule G(4)(a), or

(2) no later than 60 days after the complaint was filed, if notice was not published under Rule G(4)(a)(iii).

(iii) A claim filed by a corporation must be verified by an officer of the corporation who is duly authorized to file a claim on behalf of the corporation.

(iv) In cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)), the time for filing a claim under Rule G(5)(a)(ii)(B) must correspond to the time periods in the applicable statute.

(b) Answer.

A person filing a claim must serve and file an answer to the complaint within 20 days after filing the claim. Any objections to the court's exercise of *in rem* jurisdiction over the property, or to the venue for forfeiture action, must be stated in the answer or will be waived.

(c) Interrogatories.

Answers to interrogatories served under Rule G(2)(c) must be served with the answer to the complaint.

(6) **Preservation and Disposition of Property; Sales.**

(a) Preservation of Property. When the owner or another person remains in possession of property that has been named as the defendant *in rem* in a civil forfeiture action, or has been attached or arrested under the provisions of this Rule or any statute that permits execution of process without taking actual possession, the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance.

(b) Interlocutory Sales; Delivery.

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

(A) the property is perishable, or liable to deterioration, decay, diminution in value, or injury by being detained in custody pending the action;

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

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

(D) other good cause is found by the court.

(ii) In the circumstances described in Rule G(6)(b)(i), the court, on motion by a person filing a claim, may order that the property, rather than being sold, be delivered to the movant pending the conclusion of the proceeding upon giving security under these rules.

(c) Sales; Proceeds.

(i) All sales of property under Rule G(6)(b) must be made by the agency of the United States having custody of the property or that agency's contractor, or by any other person assigned by the court.

(ii) The court must designate the proceeds of a sale under Rule G(6)(b) as a substitute *res* subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account pending the outcome of the forfeiture action.

(iii) The sale of property under Rule G(6)(b) shall be governed by Chapter 127 of title 28, United States Code (28 U.S.C. §§ 2001 *et seq.*), except where the interlocutory sale or aspects of such sale of the property are agreed upon by all parties and approved by the court.

(d) Entry of Order of Forfeiture. Upon completion of the forfeiture proceeding by entry of an order of forfeiture, the property or proceeds of the sale of the property under this Rule must be disposed of as provided by law.

(7) Motions.

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

(b) Motion to Strike Claim. The United States may move at any time before trial to strike a claim and answer for failure to comply with the filing requirements, or for failure to establish an ownership interest in the property subject to forfeiture.

(c) Motion for Release of Property. If the property is in the possession of the United States (including a contractor of an agency of the United States), a party with standing to seek the release of the property under 18 U.S.C. § 983(f) may move for release of the property by the court. A motion for the release of property pursuant to Section 983(f) is the exclusive means for seeking the return of the property to the custody of the claimant pending trial. Rule 41(e) of the Federal Rules of Criminal Procedure does not apply to civil forfeiture actions once a verified complaint has been filed.

(d) Dismissal. (i) A party with an ownership interest in the property may, at any time after filing a claim and answer, move to dismiss the complaint under Rule 12(b).

(ii) A complaint may not be dismissed on the ground that the United States did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(e) Excessive Fines. A claimant may seek mitigation of a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment under Rule 56, or by motion made after entry of a judgment of forfeiture, if

(i) the claimant has pleaded the Excessive Fines defense under Rule 8; and

(ii) the parties have had the opportunity to conduct civil discovery on the factors relevant to the Eighth Amendment issue.

(f) Rules G(7) (c) and (d) do not apply to cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)).

(8) Trial.

The trial is to the court, unless any party requests a trial by jury under Rule 38.

Explanation of Rule G, Supplemental Rules

Introduction

Civil forfeiture cases typically begin with the seizure of property by a State or Federal law enforcement officer.[1] Except in cases involving real property,[2] and non-cash property having a value of more than $500,000,[3] the Government has the option of forfeiting the property administratively pursuant to the Customs laws.[4] If the Government commences an administrative forfeiture proceeding,[5] and no one contests the administrative forfeiture by filing a timely claim,[6] the property is forfeited to the Government upon the entry of a declaration of forfeiture by the seizing agency,[7] and without any action having to be taken by any court.[8]

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[1] *See* 18 U.S.C. § 981(b) (authorizing seizure for forfeiture for most federal crimes); 21 U.S.C. § 881(b) (same for drug cases). Except in extraordinary circumstances, the Government does not seize real property prior to commencing a judicial forfeiture action. *See* 18 U.S.C. § 985.

[2] *See* 18 U.S.C. § 985.

[3] *See* 19 U.S.C. § 1607.

[4] *See* 19 U.S.C. § 1602 *et seq.* as incorporated for most non-drug civil forfeiture cases by 18 U.S.C. § 981(d), and for drug forfeiture cases by 21 U.S.C. § 881(d).

[5] Administrative forfeiture proceedings are governed by 18 U.S.C. § 983(a)(1), enacted by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), and by 19 U.S.C. § 1602 *et seq.* To the extent that these two provisions conflict, the title18 procedures control. For a discussion of the application of CAFRA to administrative forfeitures, *see* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 Journal of Legislation 97, Notre Dame Law School (2001).

[6] The procedure for filing a claim is set forth in 18 U.S.C. § 983(a)(2).

[7] *See* 19 U.S.C. § 1609.

[8] For a summary of administrative forfeiture procedure, *see United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001); *United States v. McDaniel*, 97 F. Supp.2d 679 (D.S.C. 2000); *United States v. $57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996); *United States v. $50,200 In U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999).

On the other hand, if someone does contest the administrative forfeiture, or if the Government is required by statute to proceed directly to court to forfeit the property judicially, or if the Government simply elects to bypass the administrative forfeiture procedure, the Government must commence a civil forfeiture action by filing a complaint in a Federal district court.[9]

The filing of a civil forfeiture complaint, and the subsequent litigation of the merits of the action, are governed by a combination of statutory requirements and the provisions of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"). In particular, 28 U.S.C. § 2461(b) provides that in cases where the forfeiture of property is prescribed as a penalty for a violation of Federal law, and the seizure of the property takes place on land, "the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty." Moreover, 18 U.S.C. § 981(b)(2)(A) provides that property may be seized for the purposes of civil judicial forfeiture pursuant to an arrest warrant *in rem* issued in accordance with the Supplemental Rules, and 18 U.S.C. § 983(a)(3) provides that when a claim is filed contesting an administrative forfeiture proceeding, the Government "shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules . . .."

Finally, Section 983(a)(4) provides that a person claiming an interest in the property named in the complaint must file a claim and answer in the manner set forth in the Supplemental Rules, except to the extent that the Supplemental Rules conflict with the time limits described in the statute. Other provisions of Section 983 govern various aspects of pre-trial, trial, and post-trial procedure in civil forfeiture cases, including the pre-trial release of the property,[10] the issuance of pre-trial restraining orders,[11] burden of proof at trial,[12] and the adjudication of post-trial petitions to reduce the amount of forfeiture to avoid a violation of the Excessive Fines Clause of the Eighth Amendment.[13] 18 U.S.C. § 985 contains additional procedures governing civil judicial forfeitures of real property.

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[9] The procedure for filing a complaint in response to the filing of a claim in an administrative forfeiture proceeding is set forth in 18 U.S.C. § 983(a)(3).

[10] *See* 18 U.S.C. § 983(f).

[11] *See* 18 U.S.C. § 983(j).

[12] *See* 18 U.S.C. § 983(c).

[13] *See* 18 U.S.C. § 983(g).

In addition to the Supplemental Rules and the statutory provisions governing civil forfeiture cases, there is a well-developed body of case law filling in the gaps in forfeiture procedure, and applying additional requirements articulated by the Supreme Court regarding the application of the warrant requirement of the Fourth Amendment, the Due Process Clause of the Fifth Amendment, the right to a trial by jury guaranteed by the Seventh Amendment, the Excessive Fines Clause of the Eighth Amendment, and other constitutional matters.

Purpose of Rule G

The purposes of Rule G are several. First, the consolidation of all procedural rules governing civil forfeiture practice in one place recognizes that civil forfeiture practice is now a routine part of federal law enforcement litigation, involving thousands of filings every year. Just as the Federal Rules of *Criminal* Procedure pertaining to asset forfeiture have been consolidated into a single rule,[14] so should the procedures pertaining to civil forfeiture be consolidated. The current situation, in which the rules applicable to civil forfeitures are interspersed with rules applicable only in traditional admiralty cases, and are spread over all of the Supplemental Rules, is confusing to courts and practitioners alike, and impedes the administration of justice.

Second, the current rules fail to address situations that arise out of the application of the forfeiture laws to situations not contemplated by traditional admiralty procedures, such as forfeiture actions directed against assets located in foreign countries, or the forfeiture of real property. The current rules also do not address the constitutional requirements that the courts have applied to civil forfeiture procedure, such as the requirement that direct notice of the forfeiture action be sent to each person appearing to have an interest in the property subject to forfeiture,[15] and they do not provide any guidance regarding motions practice – a gap that has been filled in different ways in different courts.

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[14] *See* Rule 32.2, Federal Rules of Criminal Procedure, effective December 1, 2000.

[15] *See Dusenbery v. United States,* 534 U.S. 161 (2002) (mailing notice to the prison where claimant was incarcerated, and where there were procedures in place for delivering mail to prisoners during "mail call," satisfied due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); more rigorous procedures such as having prisoner sign a logbook, which would guarantee proof of actual receipt of notice, are not required).

The current rules also should be updated to take advantage of advances in technology, such as the possibility of providing notice of a forfeiture action via the Internet instead of relying on traditional newspaper publication.

Finally, separating the rules governing civil forfeitures from those governing traditional admiralty cases will avoid the confusion, inefficiency, and unintended consequences that flow when language intended to be applied in one type of case is applied in the other type of case. In particular, such separation will avoid the disruption in traditional admiralty procedure that results when a long-established procedure or well-defined term is modified by a court applying that procedure or term in a non-admiralty context.

The provisions of Rule G are intended to be consistent with, and complementary to, the statutory procedures enacted by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The following is a section-by-section analysis of the provisions of Rule G.

Section (1). Application

The intent of the amendment to the Supplemental Rules is to place all of the procedures that are unique to civil judicial forfeiture proceedings in one place: *i.e.,* in Rule G. Thus, in addition to setting forth civil forfeiture procedures in Rule G itself, the amendments include a set of conforming amendments that strike the provisions that were designed to apply only to civil forfeiture cases from Rules A through F. However, to avoid unnecessary redundancy, provisions that apply equally to traditional admiralty cases and to civil forfeiture cases have not been replicated in Rule G. To the contrary, if a matter is not addressed by Rule G, it is intended that a provision addressing that matter that is found in Rules A through F shall apply. Rule G(1) expresses this principle of application.

Moreover, Rule A provides that the general Rules of Civil Procedure apply to cases governed by the Supplemental Rules "except to the extent that they are inconsistent" with those rules. In accordance with Rule G(1), that provision will apply equally in civil forfeiture cases governed by Rule G. Thus, just as is the case under the current structure, matters not addressed either by Rule G or by any other provision of the Supplemental Rules will be governed by the general Rules of Civil Procedure.

It should be clear, however, that Rule G applies exclusively to forfeiture cases, and that the use of terms such as "claim" and "claimant" in Rule G relates to the specialized meaning given those terms in the applicable forfeiture

statutes, such as 18 U.S.C. § 983, and does not have any impact on the very different meaning assigned those terms in traditional admiralty cases governed by Rules A through F.

In their comments regarding an earlier draft of Rule G, the National Association of Criminal Defense Lawyers (NACDL) pointed out that while Rule G was designed to conform with the statutory procedures enacted by the CAFRA, codified at 18 U.S.C. § 983, not all civil judicial forfeiture proceedings are governed by CAFRA. In particular, traditional customs cases, tax cases and forfeitures involving the Trading With the Enemy Act and the International Emergency Economic Powers Act are exempted from CAFRA by 18 U.S.C. § 983(i).

Judicial forfeiture cases involving the exempted statutes are relatively rare, comprising only a small fraction of all civil forfeiture filings in a given year. Nevertheless, throughout Rule G, clauses have been inserted making clear when a given provision only applies to cases governed by CAFRA. For example, Rule G(7)(d) provides a procedural counterpart to 18 U.S.C. § 983(a)(3)(D), which deals with motions to dismiss a civil forfeiture complaint. But because Section 983(a)(3)(D) does not apply to cases exempted from CAFRA by Section 983(i), Rule G(7)(d) would not apply to such cases either. This is made clear by Rule G(7)(f).

Section (2). Complaint

Rule G(2) is derived for the most part from current Rule C(2), which requires that a complaint be verified, describe the property with "reasonable particularity," and state the place where the seizure took place, the basis for the court's exercise of jurisdiction, and "all allegations required by the statute under which the action is brought."

All of the requirements of Rule C(2) are retained, with certain clarifying language changes. For example, subsection (b) makes clear that the complaint must state both the basis for court's exercise of *in rem* jurisdiction over the property and the basis for venue.[16] In addition, the requirement that the

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[16] *See* Rule G(2)(b)(ii) and (iii). Generally, the same facts will support both the exercise of *in rem* jurisdiction over the property and venue for the filing of the forfeiture action. *See* 28 U.S.C. § 1355(b) and (d), providing that the court in the district where

complaint set forth "all allegations required by the statute under which the action is brought" is clarified to require that the complaint 1) identify the statute under which the action is brought, and 2) describe the nature of the relationship between the property and the underlying criminal offense that gives rise to the forfeiture of property under that statute. Both requirements would be satisfied by citing a particular forfeiture statute and tracking the language describing the property subject to forfeiture.

For example, in a drug case, the complaint might state that the forfeiture action was filed pursuant to 21 U.S.C. § 881(a)(4), and that, in the terms of that statute, the property was subject to forfeiture because it was a conveyance that was used or intended to be used to transport or to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance.

The last provision in Rule G(2), subsection (b)(v), is derived from current Rule E(2)(a), which requires that the complaint state the facts and circumstances of the case with particularity. No substantive change to the particularity requirement is intended. To the contrary, the intent is solely to place the current particularity requirement in the same section of the Rule where the other pleading requirements pertaining to the complaint appear. Thus, the case law interpreting current Rule E(2)(a) would apply to Rule G(2)(b)(v).[17]

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the offense giving rise to the forfeiture took place is the proper venue for the forfeiture action and may issue process to obtain jurisdiction over the property. *See also United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (§ 1355(b) is not merely a venue statute; it gives the court *in rem* jurisdiction over property located in another district; "it would make little sense for Congress to provide venue in a district court if there were no means for that court to exercise jurisdiction"); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (section 1355(b) is both a venue statute and an *in rem* jurisdictional statute; district has both jurisdiction and venue over property seized in other districts if some of the offenses giving rise to forfeiture occurred in district); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (same).

[17] Rule E(2) requires more specificity than simple notice pleading, and is meant to ensure that claimant is apprized of the circumstances that support a forfeiture. *United States v. Funds in Amount of $122,500*, 2000 WL 984411 (N.D. Ill. 2000). But the complaint need not plead all of the facts sufficient to meet the Government's burden of proof at trial. *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) (complaint need not satisfy burden of proof pre-trial); *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (same); *United States v. $94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. 1998) (particularity requirement ensures that the

NACDL objects that the Government is actually seeking a substantive change in what the "particularly requirement" requires. But that is not the case. In fact, the Government originally proposed that the language in Rule E(2) be transferred to Rule G(2)(b) verbatim. The omission of the phrase "without moving for a more definite statement" from Rule E – the alteration in language that NACDL cites as evidence of a substantive change (Troberman Letter at 4) – was the suggestion of the Advisory Committee's Reporter, who thought the phrase was unnecessary.

Government does not "seize and hold," for a substantial period, property to which it has no legitimate claim; but particularity requirement does not require demonstration that Government can meet its burden of proof pretrial); *United States v. One Parcel ... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (same); *United States v. $57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same), quoting *Pole No. 3172*, 852 F.2d 636, 628 (1st Cir. 1988); *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (the heightened pleading requirements in Rule E(2)(a) are intended "to avoid the due process problems associated with the [G]overnment holding property to which it has no legitimate claim"; complaint alleging that funds were intended to finance Middle East terrorism was sufficiently particular). *See also* 18 U.S.C. § 983(a)(3)(D) ("No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.").

Thus, a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular. *See United States v. Daccarett, supra* (complaint described property with reasonable particularity where it named intermediate bank through which wire transfer occurred and the intended beneficiary); *United States v. $15,270,885.69 Formerly on Deposit in Account No. 8900261137,* 2000 WL 1234593 (S.D.N.Y. 2000) (money laundering complaint was sufficiently particular because it apprized the claimant of the means by which the money laundering scheme was carried out, the accounts involved, some of the bank officials who furthered the scheme, and the dates, places and amounts of a number of the transactions); *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. Ill. 1999) (complaint that provided date and location of seizure, identity of vehicle, and its relationship to alleged offenses was sufficiently particular); *United States v. Funds in Amount of $122,500, supra* (complaint that contains specific information about the date and location of the seizure, the amount of money seized, and claimant's actions on date of seizure, is sufficiently particular); *United States v. Funds in the Amount of $29,266*, 96 F. Supp.2d 806, 809 (N.D. Ill. 2000) (same).

NACDL also contends that the cases cited in the margin do not accurately recite the case law interpreting the particularity requirement under current law. Troberman Letter at 3-4. The Government contends, to the contrary, that it has accurately represented the case law. While courts have indeed used a variety of ways of describing the contours of the particularity requirement, the cases most certainly do not say, as NACDL represents, that a forfeiture complaint may not be filed "unless it is supported by substantial evidence."
But this is beside the point. Whatever the cases say, nothing in Rule G changes or is intended to change in any substantive way what the Government is required to do to comply with the particularity requirement.

Rule G(2)(c) also preserves the existing provision in Rule C(6), authorizing the Government to serve interrogatories along with the complaint without leave of the court. The service of interrogatories along with the complaint in forfeiture cases has been part of civil forfeiture practice since its inception, **yet NACDL suggests that this practice should be abandoned.**

The service of interrogatories along with the complaint serves an important purpose. Because forfeiture proceedings are filed *in rem,* "there is a substantial danger of false claims in forfeiture proceedings."[18] Unlike a plaintiff in a normal civil lawsuit, who chooses the defendant against whom he will litigate, the Government has no control over who will file a challenge to a civil forfeiture complaint. For all the Government knows, the claimant may have no standing to contest the forfeiture, or no legal interest in the defendant property. In fact, in some cases, such as cases where the claim is filed by a foreign corporation, the Government does not even know if the claimant is a legal entity, or if it is controlled by the person whose criminal acts gave rise to the forfeiture.[19]

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[18] *United States v. $557,933.89, More or Less, in United States Funds*, 1998 WL 817651 (E.D.N.Y. 1998) (citing the need to guard against false claims as one of the reasons why claimant had to specify his interest in the defendant property under Rule C(6)).

[19] This is an important point in applying the "fugitive disentitlement doctrine," 28 U.S.C. 2466 (neither any person who is a fugitive in a related criminal case, nor any corporation he controls, may file a claim contesting the civil forfeiture of property).

The interrogatories thus serve the essential purpose of providing the Government with a means of determining, at an early stage in the proceedings, who the claimant is, what interest he has in the property, and whether his claim is frivolous – purposes which the courts have recognized as a proper basis for strictly applying the pleading requirements in present Rule C(6).[20] Indeed, these are the same reasons cited *infra* in support of requiring the claimant to file his Answer, and to answer the interrogatories, before he can move to dismiss the complaint – i.e., the Government should not have to litigate an *in rem* case with a person who has no interest in the property or no legal basis for contesting the forfeiture.

In CAFRA, Congress recognized that the filing of frivolous claims in forfeiture cases was a serious problem and a legitimate concern for the Government. Thus, language discouraging the filing of such claims was made an important part of the reforms enacted in 2000. *See* 18 U.S.C. § 983(h). Retaining the interrogatory provision in the Rules is necessary for the same reasons.

Section (3). Judicial Authorization and Process

Rule G(3)(a) governs the issuance of an arrest warrant *in rem* by the Clerk of the Court upon the filing of a civil forfeiture complaint. The language is derived from current Rule C(3)(a) which requires the issuance of an arrest warrant and summons by the Clerk in all civil forfeiture cases. The new provision incorporates the following changes to the existing procedures.

First, under the new Rule the Clerk would issue only the warrant itself and would not be required to issue a "summons" as well. As the notice requirements set forth in Rule G(4) require service of the complaint on any potential claimant to the property, no purpose is served by having the Clerk issue a "summons" along with the arrest warrant *in rem.*

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[20] *See United States v. $230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (the time limits and other pleading requirements in Rule C(6) exist to force claimants in civil forfeiture cases to come forward as soon as possible after forfeiture proceedings have begun, and to prevent them from filing false claims), quoting *United States v. One Urban Lot*, 885 F.2d 994, 1001 (1st Cir.1989).

Second, the new Rule exempts cases involving real property from its provisions. This brings the Supplemental Rules into accord with 18 U.S.C. § 985 which prescribes the procedures for commencing a forfeiture action against real property, and specifically dispenses with the requirement of an arrest warrant *in rem* in such cases.[21]

Third, Rule G(3)(a) dispenses with the arrest warrant as an unnecessary duplication and waste of judicial resources in cases where the property is subject to a pre-trial restraining order that has already been, or will be, served on the property.[22] However, Rule G(3)(a)(ii) provides that the court may issue an arrest warrant, on motion of the Government, if it becomes necessary for the court to do so to retain jurisdiction in the event the restraining order expires or is dissolved.

NACDL objects to the issuance of an arrest warrant *in rem* by the Clerk of the Court when it forms the basis for the actual seizure of property. In the vast majority of civil forfeiture cases, of course, personal property subject to forfeiture is already in the Government's possession by the time a complaint is filed and an arrest warrant *in rem* is issued. That is because most civil actions against personal property begin as administrative forfeitures in which the property was either seized as evidence, or was seized pursuant to arrest or pursuant to a warrant issued under 18 U.S.C. § 981(b).[23] In those cases, as NACDL seems to acknowledge, there is no problem in having the arrest warrant *in rem*

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[21] *See* 18 U.S.C. § 985(c)(3); *United States v. 630 Ardmore Drive*,178 F. Supp.2d 572 (M.D.N.C. 2001) (CAFRA overrules arrest warrant and summons requirement in real property cases).

[22] The old Rule did not address this issue because the authority to issue a pre-trial restraining order in a civil forfeiture case was not codified until 18 U.S.C. § 983(j) was enacted by CAFRA.

[23] 18 U.S.C. § 981(b)(2) provides for seizures pursuant to a seizure warrant, but authorizes seizures without a warrant in a number of circumstances in which there is probable cause to believe the property is subject to forfeiture, including seizure made pursuant to a lawful arrest or search, or where another exception to the Fourth Amendment warrant requirement would apply, such as where exigent circumstances exist. 18 U.S.C. § 981(b)(2)(A) also expressly provides for seizure without a warrant if a complaint for forfeiture has been filed in district court and the court has issued a warrant of arrest pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims.

issued as a ministerial act by the Clerk of the Court, as it does not result in the actual seizure of any property. Under these circumstances the warrant of arrest serves simply to bring the *res* within the jurisdiction of the court.[24]

In the rare case in which the arrest warrant actually results in the seizure of property, it is the practice of most U.S. Attorneys offices to have the arrest warrant issued by a district judge or a magistrate judge, based upon a finding of probable cause, as if it were a seizure warrant issued under the Fourth Amendment. The current draft of Rule G(3) codifies this practice, so that the Government will be required to apply to the court for an arrest warrant in rem when the property is not already in the Government's custody[25].

Subsection (b)(i) deals with the execution of the arrest warrant *in rem*, and is derived from current Rules C(3)(b) and E(4). Like Rule C(3)(b)(ii), the new Rule provides for execution of the warrant by a United States Marshal or one of three other categories of persons authorized to service process in forfeiture

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[24]"To acquire *in rem* jurisdiction, courts require actual or constructive control of the property." *United States v. All Right, Title and Interest in Five Parcels of Real Property and Appurtances Thereto Known as 64 Lovers Lane*, 830 F.Supp. 750, 755 (S.D.N.Y. 1993); *See also, United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, 941 F.2d 1428, 1435 (11th Cir. 1991) ("In rem jurisdiction derives entirely from the court's control over the defendant res.")

[25] NACDL misstates the underlying circumstances it says that "a warrant of arrest in rem issued pursuant to this provision by a clerk of the court without a prior determination of probable cause by a neutral and detached judicial officer may serve only to notify the defendant in rem of the filing of a civil complaint for forfeiture, in much the same way as an in personam defendant is served with a summons." Troberman Letter at 7 (emphasis added). This statement ignores the fact that under the forfeiture statutes, 18 U.S.C. § 981(b), and under the Fourth Amendment, there are constitutionally permissible exceptions to the warrant requirement when the government seizes property for forfeiture. Thus property already may be lawfully in the possession of the Government even in the absence of a prior determination of probable cause by a judicial officer. That is the basis for the court's holding in *United States. v. Turner*, 933 F.2d 240 (4th Cir. 1991), a case cited by counsel, in which the issuance of a warrant of arrest *in rem* by the Clerk was upheld as constitutional even though no finding of probable cause had been made by a judicial officer prior to the seizure. The seizure was upheld in the face of a 4th Amendment constitutional challenge, because it involved an automobile, and because the police officer who had previously seized the property had probable cause to believe the defendant Corvette contained contraband.

cases. In addition, the new Rule provides that in the case of property located abroad, the warrant may be executed by a person authorized to serve process in that country.

Subsection (b)(ii) requires that the warrant be executed "as soon as practicable," but creates three exceptions to that requirement. In cases where the complaint is filed under seal, the property is located abroad, or the case is stayed prior to the execution of the warrant, the court may direct that the service of the warrant be delayed for an appropriate period of time. Among other things, this provision recognizes that the "forthwith" service requirement of the existing provision in Rule E(4)(a) is inconsistent with the notion that a complaint may be filed under seal,[26] and may be inapplicable when the Government must rely on the cooperation of a foreign Government in serving the arrest warrant on property located abroad.

NACDL disputes the need for this provision, suggesting that there is no basis for filing a civil forfeiture complaint under seal. But filing a complaint under seal is accepted practice. It is rarely employed, but it is necessary in cases in which the government is required to comply with a time limit of some sort, but the case is part of an on-going undercover operation, grand jury investigation, or court-authorized electronic surveillance that would be jeopardized if the civil forfeiture complaint were publicly filed[27].

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[26] *See United States v. Funds Representing Proceeds of Drug Trafficking ($75,868.62)*, 52 F. Supp.2d 1160 (C.D. Cal. 1999) (Rule E(4)(a) requires arrest of the property "forthwith"once the complaint is filed; 94-day delay while complaint remained under seal failed to comply with this requirement).

[27] In a number of cases, courts have authorized the filing of civil forfeiture complaints under seal, to prevent disclosures prior to the seizure of property, so as to insure the availability of the property, or to avoid jeopardizing an ongoing criminal investigation. Cases filed under seal to avoid concealment of assets prior to seizure include *United States v. Leasehold Interest in Property Known as 900 East 40th Street, Apartment 102, Chicago, Illinois*, 740 F. Supp. 540, (N.D. Ill. 1990); *United States v. Michelle's Lounge*, 1992 WL 194652 (N.D. Ill. Aug. 6, 1992); *United States v. Real Property Commonly Known as 16899 S.W. Greenbrier, Lake Oswego, Clakamas County, Oregon*, 774 F.Supp. 1267 (D.Or. 1991): *United States v. One Parcel of Land ... Commonly Known as 4204 Cedarwood Matteson, Il*, 671 F. Supp. 544 (N.D. Ill. 1987).

While there is generally a presumption favoring access to judicial records, it is

For example, if the Government determines that funds in a certain bank account are traceable to a terrorism offense, it must file a civil forfeiture action against those funds within one year of the offense in order to take advantage of the "fungible property" provision in 18 U.S.C. § 984. (Electronic funds are considered fungible for only one year. After that time has passed, the Government is required to trace the funds in a bank account directly to the act giving rise to the forfeiture, something that is difficult to do in cases involving international terrorist financing and other matters.) But in that case, it may be inappropriate to file the civil complaint publicly because of the danger of jeopardizing the on-going terrorism investigation. It has been necessary to take this step several times since September 11, 2001.

Nothing in Rule G authorizes or expands in any way the Government's authority to request that a complaint be filed under seal. Again, although infrequently used, that authority already exists.[28] Rather, Rule G is drafted to address an inconsistency between the forthwith requirement in the current rules and the necessity of filing a complaint under seal that has been exploited in some cases by the defense. For example, in *United States v. Funds Representing Proceeds of Drug Trafficking ($75,868.62)*, 52 F.Supp.2d 1160 (C.D. Cal. 1999), a major drug trafficking case, it was necessary for the Government to file its complaint under seal in order to toll the one-year fungible property limitation in 18 U.S.C. § 984 while the lives of undercover agents, informants and witnesses were at risk in a still secret investigation. The court granted the Government's motion to seal the complaint, and the Government naturally did not serve the arrest warrant *in rem* while the complaint remained sealed. However, when arrests were made and the complaint was unsealed, the court ruled that the Government had failed to comply with the "forthwith" requirement in Rule E(4)(a), because a total of 94 days had elapsed between the filing of the complaint and the service of the warrant.

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left to the sound discretion of the district court to weigh the interests advanced by the parties and the public interest. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995). The U.S. Court of Appeals for the Second Circuit in *Amodeo*, "recognized the law enforcement privilege as an interest worthy of protection." *Id.* at 147.

[28]The Government's form motion and order for placing a civil forfeiture complaint under seal is attached as Exhibit A.

Such a delay, the court said, indicated that the Government had not complied with the requirement to serve the warrant "forthwith."

In proposing Rule G(3)(b)(ii), the Government seeks only to codify a reasonable exception to the forthwith requirement to apply to cases where a court has granted the Government's request to file a complaint under seal. If a judge is persuaded that there are good reasons to file a case under seal, those reasons should not be frustrated by the operation of an inflexible administrative rule regarding the service of the warrant.

Subsection (b)(iii) is derived from current Rule E(3)(b) which permits service of process within the district where the action is filed, or outside the district when authorized by statute.[29]

Section (4). Notice.

(a) Publication.

Subsection (4)(a) sets forth the requirement that notice of the forfeiture action be given by publication following execution of the arrest warrant *in rem*, or in the case of real property, following the service of notice on the property owner pursuant to 18 U.S.C. § 985. It is derived from existing Rule C(4) with a number of significant changes.

First, unlike the existing rule which is unclear as to the number of times the notice must be published, subsection (a)(i) provides that the notice must be published once a week for three successive weeks. This conforms with the statutory requirement in administrative forfeiture cases,[30] and the customary practice of the Department of Justice in civil judicial cases. But subsection (a)(i) also provides that the court may prescribe a different publication schedule if it deems it appropriate to do so.

Subsection (a)(i) also clarifies that the publication may take place in any district where the action is filed or where the property was seized or is located. In addition, as is currently the case under Rule C(4), subsection (a)(i) requires

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[29] *See* 28 U.S.C. § 1355(d) (authorizing nationwide service of process in civil forfeiture cases).

[30] *See* 19 U.S.C. § 1607(a).

that the notice specify the time limits governing the filing of a claim to the property and an answer to the complaint.

Second, subsection (a)(ii) is a new provision allowing the Government to publish the notice only once in a civil judicial forfeiture case if the forfeiture action began as an administrative forfeiture and notice of the administrative forfeiture was published for three successive weeks. In short, if the Government has already published notice three times, has filed a civil judicial complaint, and is required to serve personal notice of that complaint on anyone who appears to have a legal interest in the property (see subsection (b), *infra*), there is little purpose in requiring the Government to bear the expense of publishing the same notice three more times for the benefit of persons unknown to the Government who did not choose to file a claim in the first instance.

Similarly, subsection (a)(iii) dispenses with the publication requirement to save judicial resources in cases where the property subject to forfeiture has a value of less than $1,000 and the Government has provided direct notice of the forfeiture to any person with a potential interest in the property. For example, if the Government seizes a gun from a criminal defendant, and commences a civil judicial forfeiture of the firearm under 18 U.S.C. § 924(d), the cost of publication of notice of the forfeiture action may greatly exceed the value of the weapon. Yet there is little purpose in such publication if the Government provides direct notice of the forfeiture to the person from whom the gun was seized.

Third, subsection (a)(iv) deals for the first time with the publication of notice in cases where the property or a person entitled to notice is located in a foreign country. It provides that the publication requirement may be satisfied in any of three ways: A) by publication in a newspaper in the district where the complaint is filed; B) by publication in a newspaper that circulates in the foreign country where the property is located (*e.g.*. in the *International Herald Tribune* or the international editions of a U.S. newspaper such as *USA Today*); or C) in a legal publication published and circulated in the foreign country.

Finally, recognizing the reality of 21st Century technology, subsection (a)(v) permits the Attorney General to satisfy the publication requirement by posting notice of the forfeiture action on the Internet for a period of not less than 30 days. Such posting would actually, in many instances, be more likely to provide notice to interested parties that would traditional newspaper publication.[31]

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[31] According to Nielsen/Netratings, by January 2001, 58 percent of U.S. households had Internet access. *Plunkett's E-Commerce and Internet Business Almanac* (2002),

NACDL opposes many of the provisions of the publication requirement for a variety of reasons. Troberman Letter at 7-9. At bottom, however, NACDL's difficulty derives from a failure to distinguish between two quite different concepts: (a) "service of process" in an *in rem* civil forfeiture case, which, as in traditional admiralty cases, means service upon the *res* for purposes of obtaining *in rem* jurisdiction; and (b) provision of notice to potential claimants. Rule G(4) is not, as NACDL suggests, a "drastic revision" of current Rule (C)(3)(b), which covers service of process upon the *res*. It is rather a reasonable revision, amplification, and clarification of the notice and response provisions that appear in current Rule C(4), and in the amended version of Rule C(6)(a)(i) that took effect on December 1, 2002.

In ordinary civil cases, the plaintiff knows its defendants in advance. At the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the *res*. The plaintiff in an ordinary civil case names its defendants in the complaint, serves the complaint only upon those named defendants, litigates only with them, and obtains a judgment binding only as to them. By contrast, the United States, as plaintiff in an *in rem* civil forfeiture case, names only the *in rem* defendant in the complaint, serves process only upon that defendant, and ultimately obtains a judgment concerning the *in rem* defendant that is valid against all the world. To obtain such an *in rem* judgment, the Government publishes general notice of the forfeiture and also sends notice directly to those whom the Government has reason to believe will assert an interest in the *res*.

Service of the complaint in a civil forfeiture case is simply one of the ways of giving notice to potential claimants of the forfeiture proceeding. Thus the applicable statutes and the applicable section of Rule C provide that the time by which potential claimants must file claims is equally triggered either by service of the complaint or by the date of final publication of notice. 18 U.S.C. § 983(a)(4)(A); Rule C(6)(a)(i)(A) (2000); Rule C(6)(a)(i)(A) (2002).

The general publication of notice of civil forfeiture proceedings is done in addition to the sending of direct notice to known interested persons. As a practical matter, such general publication, particularly in its

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available at http://www.plunkettresearch.com/technology/ecommerce_almanac.htm.

traditional forms -- fine print legal notices and classified advertisements in the back sections of legal journals and newspapers -- is not highly likely to reach a general audience. Publication, particularly in these traditional forms, is only "constructive" notice, a legal fiction for the most part, done as a formality because the case law has viewed it over the years as somewhat better than nothing as a way of achieving notice to unknown persons, but not <u>much</u> better. The provisions contained in Rule G(4)(a) are designed to increase the likelihood that potential claimants will actually receive notice by publication, while seeking to minimize the expenditure of limited resources on publication that has no substantial chance of reaching that target audience.

With this background, we turn to each of NACDL's objections to the publication provisions in Rule G(4)(a).

Rule G(4)(a)(1)(C)

Current Rule C(4), as NACDL indicates, requires publication in, and only in, the district where the forfeiture case is filed. However, Rule C(4) was drafted and promulgated before Congress expanded venue for civil forfeiture cases to include not only the district in which the property is located, but also the district where the crime giving rise to the forfeiture took place. See 28 U.S.C. 1355(b) (enacted in 1992). Thus, under current law, if a crime occurs in Boston, the Government may file a forfeiture action against the proceeds of that crime in the District of Massachusetts, even though those proceeds have been invested in a real estate development in Miami.[32]

In such cases, under current Rule C(4), the Government must publish notice in the district where the case was filed, even if the property – and hence the persons most likely to be interested in contesting the forfeiture of the property – are all located in another district. In the above example, lienholders who have an interest in the real estate development

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[32] *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (under section 1355(b) district court has both jurisdiction and venue over property seized in other districts if some of the offenses giving rise to forfeiture occurred in district); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (same); *United States v. Contents of Account Number 2033301*, 831 F. Supp. 337 (S.D.N.Y. 1993) (district court in New York has venue and *in rem* jurisdiction over action against structured funds found in Florida where structuring offense occurred in New York).

in Miami are unlikely to see a notice published in a Boston newspaper, but would be much more likely to see the notice if it were published in a Florida newspaper.

The proposed rule gives additional flexibility as to the place of publication in order to increase the likelihood that interested persons unknown to the Government will actually see the notices. In deciding which of the proposed options to use, prosecutors will take into account the case law requiring that notice be given in a manner reasonably likely to achieve results.[33] NACDL's suggestion that the Government might choose to publish in the location of a remote storage facility to which an asset might have been taken, rather than publishing in a district where claimants are more likely to reside, fails to acknowledge the Government's strong interest in protecting forfeiture judgments from post-judgment attack. That interest is best served by publishing notice in the place most likely to reach potential claimants.[34] The proposed change simply gives the Government the option to do that in cases where the district of filing is not such a likely location.

NACDL's suggestions that the Government be required to publish in *both* districts, or that the Government be required to publish notice only in large, nationally circulated newspapers, are impractical and unjustified. Despite its relative inefficiency as a means of reaching unknown potential claimants, publication is extremely costly. In Boston, for example, current publication costs in local newspapers are running from about $1,000 to $2,000 per case. Nationally, the Treasury Office of Asset Forfeiture, which oversees forfeitures by the Customs Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Secret Service spent approximately $1.65 million to publish forfeiture notices in Fiscal 2002. The U.S. Marshals Service, which oversees the publication of forfeiture notices for itself, the Drug Enforcement Administration, and the

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[33] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) ("the touchstone is reasonableness: the Government must afford notice sensibly calculated to inform the interested party of the contemplated forfeiture and to offer him a fair chance to present his claim of entitlement").

[34] Post-judgment attacks on civil forfeiture judgments, based on alleged due process violations concerning lack of notice, are among the most popular ways of challenging civil forfeiture actions. Hundreds of such actions are filed every year, and defending against them is an enormous drain on governmental and judicial resources.

Federal Bureau of Investigation, spent an average of more than $3.9 million per year on such notices during Fiscal 2000-2002.

Requiring the Government to publish notice in multiple districts, or to publish only in national newspapers, would drive these costs even higher, with little or no practical benefit. Where all of the persons likely to claim are in the district where the property was seized, for example, publishing both there and in the remote district where the action is pending would be a needless waste of money. Similarly, the added expense of publishing in *USA Today*, the *New York Times*, or some other nationally distributed newspaper could not be justified in a routine, locally based, civil forfeiture action, particularly when the Government is also required to send direct notice to potential claimants of whom the Government is aware.[35]

As the Supreme Court recognized in *Mullane*, organizations required to give notice may use means that are both "efficient and inexpensive." 339 U.S. at 319; *see Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-90 (notice "need not be inefficient or burdensome"). We should be looking for cost-effective ways of maximizing the number of people reached through publication, not burdening the Government with new costs for no good reason.

Property located abroad / Rule G(4)(a)(iv)(A)

Current Rule C(4)'s requirement of publication in the district where the complaint is filed, regardless where the property is located, is not consistent with the notion of providing efficient and fair notice in cases where the property, and the potential claimants, are located abroad.[36] Some change, therefore, must be made to the rule to allow the Government to publish notice in the foreign country itself if that is the best

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[35] *United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (publication in *USA Today* satisfied publication requirement, but the Government also had an independent duty to provide direct notice).

[36] Section 1355(b)(2) allows complaints to be filed in the United States if that is where the crime occurred. In such cases, the Government has a choice of venue between the District of Columbia and the district where the crime occurred. See *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (Section 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad).

way of reaching the potential claimants. In selecting among the proposed options in Rule G(4)(a)(iv)(A), the Government would be guided by the requirement that its selection be reasonably calculated to achieve notice under the applicable circumstances.

A blanket rule that notice *always* be published in the country where the property is located, however, is not reasonable. In some cases, notwithstanding the location of the property abroad, all of the interested parties are in the United States. For example, a New York drug dealer may hide all of his drug proceeds in a Caribbean bank account at a "brass plate" bank that has no physical presence in any Caribbean country. In such a case, publishing notice in an island newspaper would be a meaningless exercise. By the same token, a requirement that the Government always publish both in the U.S. and abroad would be needlessly, and unreasonably, expensive.

Moreover, some countries do not permit the United States to publish notice of forfeiture actions in their newspapers. Indeed, in some countries, any attempt at such publication would be considered a criminal offense.

Accordingly, the rule must have some flexibility so that prosecutors, mindful of the strictures of foreign law as well as the requirements of constitutional due process, can publish the notice in the manner most likely to reach the potential claimants.

Internet publication / Rule G(4)(a)(v)

Electronic filing has been authorized by Rule 5(e) of the Federal Rules of Civil Procedure since 1996 for districts where local rules permit such filing. The Bankruptcy Court, in the Eastern District of Virginia and elsewhere, is using electronic filing now, and federal district courts plan to begin using it soon for civil matters and, in selected experimental districts such as the District of Massachusetts, for both civil and criminal filings.

The 58 percent figure previously cited for Internet availability only covers its estimated availability in households. The figure does not include the free access to the Internet now available in many public libraries, and in most businesses and schools.

While access to the Internet is not yet universal, it cannot be contested at this point that Internet access is increasing and that it is already significantly greater than access to any particular newspaper, particularly when viewed nationally or internationally. Searching for a particular item on the Internet is already simpler than obtaining, and then manually searching through, all available newspapers to find a particular fine print legal notice.

If the use of the Internet for publication of forfeiture notices is authorized, the Government will be able to establish, and publicize to all those interested in forfeiture matters, a central forfeiture notice government website. That site would become the modern equivalent of the central forfeiture notice register publication that was under serious consideration by the Administrative Conference of the United States as long ago as 1994. The website would be much more easily locatable, searchable, and accessible to practitioners and the general public, than the bulky paper publication then contemplated. At best, the paper register would have been distributed to law libraries. The website will be conveniently and simultaneously available to everyone who has access to the Internet.

That some portions of the population presently lack access to the Internet is regrettable, but not dispositive of this issue. It may well be that those same portions of the population do not ordinarily buy the *New York Times* or *USA Today* on a daily basis. It is virtually certain that they do not regularly purchase *The National Lawyer's Weekly* or other such legal publications. Even those who do sometimes buy general interest or legal newspapers probably do not read carefully through all of the fine print legal notices appearing in them.

Authorizing forfeiture notice via the Internet would be a positive step, designed to make a real, practical, improvement in the publication of forfeiture proceedings to practitioners and the general public. Such notice, like traditional newspaper publication, would, of course, be <u>in addition to</u> direct notice to known interested persons. Like traditional newspaper publication, it would ultimately be measured by the courts against the same reasonable and practical due process standards that have been applied to other means of general "constructive" notice in the past.

(b) Direct Notice.

Other than the requirement regarding service of the arrest warrant *in rem*, the current rules pertaining to civil judicial forfeiture contain no requirement regarding the service of direct written notice of the forfeiture action on any interested party. In many cases, however, sending such direct notice may be essential to the guarantee of due process.[37]

Subsection (b)(i) requires that in addition to providing notice by publication, the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, on any person who "appears to have an interest" in the property.[38] That would include, at a minimum, a person who filed a claim contesting the forfeiture in any administrative forfeiture proceeding that may have preceded the commencement of the judicial forfeiture action, and any other person who the Government has reason to believe has a legal interest in the property.[39] For convenience, a person appearing to have an interest in the

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[37] Most of the case law involves the parallel due process requirement in administrative forfeiture proceedings. *See, e.g., United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (publication in *USA Today* satisfies publication requirement, but the Government has independent duty to provide direct notice); *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) ("the touchstone is reasonableness: the Government must afford notice sensibly calculated to inform the interested party of the contemplated forfeiture and to offer him a fair chance to present his claim of entitlement;" if Government knows whereabouts of fugitive it must send him notice, and may not rely on notice sent to "straw" owners, or notice published in newspaper); *United States v. Minor, 228* F.3d 352 (4th Cir. 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture"); *United States v. Marolf*, 973 F. Supp.1139 (C.D. Cal. 1997) (failure to send notice to person appearing to have an interest in the property violates due process under the Supreme Court's decision in *Mullane v. Central Hanover Trust*).

[38] The requirement is identical to the one that applies to administrative forfeiture proceedings under 19 U.S.C. § 1607(a). That statute requires that notice be sent to "each party who appears to have an interest in the seized article."

[39] *See United States v. Colon*, 993 F. Supp. 42 (D.P.R. 1998) (sending notice to defendant alone was inadequate where the Government was on notice that another party's name appeared as the owner of record of the seized bank account); *but see Kadonsky v. United States*, 216 F.3d 499, 503 n.2 (5th Cir. 2000) ("mere possession of an article in and of itself is insufficient to render an individual one 'who appears to have an interest in the seized article' for purposes of § 1607(a)"); *Arango v. United States*, 1998 WL 417601 (N.D. Ill. 1998) (person who denies ownership of seized currency at the time it is seized cannot seek judicial review of administrative forfeiture on ground that he did not receive personal notice); *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (in criminal forfeiture cases, Government does not have to send notice to persons who lack standing to contest the forfeiture); *see also United*

property is referred to throughout the remainder of the Rule as a "potential claimant."

Subsection (b)(ii) addresses the manner in which direct notice may be served. The notice may be served on either the potential claimant or his counsel[40] in any manner "reasonably calculated to ensure that such notice is received," including first class mail, private carrier or electronic mail.

NACDL objects that this rule "would so radically change current civil procedure that it would make it almost unrecognizable." Troberman Letter at 9. But again, the issue here is notice, not "service of process."

NACDL is correct that the direct notice provisions in Rule G(4)(b) would be a change from current regulation, but not for the reasons that NACDL suggests. The primary change would be the codification of direct notice *at all*. While case law has required that direct notice be sent to known interested persons at least since *Mullane*, and while the Government, accordingly, has been sending direct notice to such persons for years, there is no provision in either the applicable statutes or the Supplemental Rules that requires *any* direct notice of a civil judicial forfeiture action other than the service of process upon the *res* itself. The Government can presently comply with all statutory requirements regarding third-party interests simply by publishing notice in a newspaper.

For the most part, Rule G(4)(b) is designed to codify and standardize practices already in use to varying degrees, with sometimes conflicting local variations, around the country. The primary reason for doing so is to provide a degree of uniformity, so that prosecutors and practitioners will know what to expect, and so that means of providing notice used in one district will not run afoul of a local requirement in some other district where persons receiving notice might reside.

States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999) (the Government should be encouraged to send notice as widely as possible; sending notice therefore does not estop the Government from moving to dismiss claim for lack of standing or for lack of subject matter jurisdiction).

[40] *See Bye v. United States*, 105 F.3d 856 (2d Cir. 1997) (notice to attorney representing defendant in the criminal case constitutes sufficient notice of administrative forfeiture); *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. 1996) (service on defense counsel during discovery in criminal case was sufficient notice).

Rule G(4)(b) is intended to address this problem for the first time. It sets forth procedures designed to provide proper notice of civil forfeiture actions to interested parties by means reasonably calculated to achieve that goal efficiently, without unnecessary expenditure of Government resources. Moreover, the proposed rule relies upon means approved in the comparable context of notice of administrative forfeiture proceedings, *see* 18 U.S.C. § 983(a)(2)(B) (notice of administrative forfeiture may be in the form of a letter notifying the claimant that claims must be filed within 35 days from the date of the letter), and upon case law establishing the types of notice that are acceptable.[41]

The use of e-mail / Rule G(4)(b)(ii)

One of NACDL's objections is to the use of electronic mail to achieve direct notice. Troberman Letter at 10. Rule G(4)(b)(ii) permits notice to be sent by e-mail in circumstances where such notice is reasonable. To be sure, electronic mail has not yet replaced physical mail in business correspondence, but it certainly has made substantial inroads upon written correspondence both in business and in personal life. It has also been increasingly treated by private individuals, the business community, and government officials and attorneys as a generally reliable means of routine communication.

As one example, electronic mail is now the almost exclusive means of confirming wire transfers of billions of dollars every day between financial institutions all over the world. If e-mail can be relied upon for such a purpose, surely it should be possible, in at least some instances, to rely upon electronic mail to provide notice of a forfeiture action. Any rule written in the first decade of the twenty-first century that did not take into

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[41] *Brown v. United States,* 2002 WL 1339102 (S.D.N.Y. 2002) (notice mailed to residence where claimant's wife and children lived was adequate); *Crespo-Caraballo v. United States*, 200 F. Supp.2d 73 (D.P.R. 2002) (notice published in San Juan newspaper and mailed to claimant in English was valid even though claimant only spoke Spanish, zip code was incorrect on mailed notice, and dollar amount was slightly different from actual amount seized); *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. 1997) (notice sent to defendant's address by certified mail is sufficient); *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (mailing certified notice to correct address is sufficient, even if claimant did not receive it); *Wilhite v. United States*, 2001 WL 124937 (N.D. Tex. 2001) (notice mailed to plaintiff at the address he provided for notice was adequate).

account this technological development would be blind to the realities of modern communications.

NACDL argues that no other rule or statute authorizes the use of electronic mail for the provision of notice. In fact, the electronic filing systems being used in bankruptcy courts, and prepared for use in federal district courts, permit parties to notify and serve other parties with pleadings by electronic mail, which may be generated at the time when the pleadings are filed, also electronically. In addition, Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure specifically permits the service of papers other than the complaint in ordinary civil proceedings to be done by electronic means where the person served has consented in writing to such service. Rule 5(b)(3) provides, as an additional safeguard, that service by electronic means is not effective if the person making service learns that the attempted service did not reach the person to be served.

To be sure, electronic mail is not suitable for giving notice to all persons, including those without computers or without current e-mail addresses. If the Government chooses to rely upon e-mail notice as to certain persons in a particular case, it will do so subject to the requirement that notice be reasonably calculated to achieve actual notice to the intended recipient. In a situation suggested by NACDL, where the Government knows that it has seized the intended recipient's only computer, the use of e-mail would not be reasonable, and the Government would fall back on more traditional methods such as first class mail or Federal Express.

However, the fact that electronic mail is not suitable in some cases is no reason to bar its use in *all* cases. Where Government counsel knows that defense counsel, to whom notice is to be sent, regularly uses electronic mail, it would be reasonable for the Supplemental Rules to permit the Government to use that means of notifying counsel of a pending forfeiture.

NACDL makes the reasonable point that recipients are wary about e-mail attachments coming from strangers. Government attorneys relying upon e-mail notice would reasonably take such concerns into account, knowing that the efficacy of their notices could eventually be dispositive of their cases. If Government counsel were sending notice to a well-known colleague who was used to receiving attachments, counsel could send an

attached notice. If the notice was going to a stranger (although, of course, it would have to be a person for whom a reasonably reliable e-mail address was available to the government attorney in the first place), the notice could be placed in the body of the e-mail message instead.

However, such fine detail is not the proper concern of generally applicable rules. As always, details determining what passes due process muster, and what does not, will be developed on a case by case basis, over time. For now, it is sufficient that electronic mail is an available, much used, generally reliable means of communication. It is reasonable to permit the use of this means to give notice in appropriate cases.

Notice to potential claimant's counsel / Rule G(4)(b)(ii)

NACDL also objects to the provision authorizing notice to the potential claimant's counsel. Troberman Letter at 10. The Government has no objection to clarifying that this provision in Rule G(4)(b)(ii) is intended to authorize the sending of notice to counsel "representing the potential claimant with respect to the seizure of the subject property, or representing the potential claimant in a related investigation, administrative forfeiture proceeding, or criminal case." That change has been made to the Rule.

Recalling, once again, that the "the touchstone is reasonableness," notice to an attorney representing a potential claimant in any of these contexts is reasonably calculated to alert the claimant to the pendency of the forfeiture proceeding. A trained attorney, even one unfamiliar with forfeiture law, is generally more likely than the average person to recognize that a legal notice requires some type of responsive action. Attorneys are also likely to recognize that they would be placing themselves and their clients at risk if they received such a notice directed to one of their clients and failed, at a minimum, to tell the client about it. Courts have often recognized the efficacy of notice to criminal defense counsel, either by holding that such notice was sufficient in a given case, or by pointing out that if such notice had been given, that would have cured a notice deficiency.[42] The provision here is merely designed to

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[42] *See Bye v. United States*, 105 F.3d 856 (2d Cir. 1997) (notice to attorney representing defendant in the criminal case constitutes sufficient notice of administrative forfeiture); *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. 1996) (service

codify what these courts have already made clear.

Notice deemed served on the date it is sent / Rule G(4)(b)(ii)

NACDL also objects to the provision in Rule G(4)(b)(ii) stating that "For purposes of this Rule G(4)(b), notice is served on the date that the notice is sent." Troberman Letter at 10-11. The date of service of notice is important because it, along with the date of final publication, triggers other requirements, such as the date by which the claimant must file a claim and answer, and the date on which a court may enter a default judgment for failure to do so.

The proposed provision that notice be deemed served on the date when it is sent is not a "radical departure." It is consistent with Rule 5(b)(2)(B) and (D) of the Federal Rules of Civil Procedure, which provides, respectively, that service by mail is complete on mailing, and that service by electronic means is complete upon transmission. It is also consistent with the model that Congress adopted in CAFRA for sending notice of administrative forfeiture. Section 983(a)(2)(B) provides that the Government can establish the date by which a claim contesting the forfeiture must be filed by including a deadline in the notice letter that is not less than 35 days from the date when the Government sent the notice. Clearly, this provision uses the date when the notice is *sent* as the triggering date, not the date when the notice is received.

Once it is understood that the purpose in both contexts is identical -- to give notice of forfeiture to a potential claimant -- there is no reason why using the date when notice is sent is adequate in administrative forfeiture proceedings, but not in judicial forfeiture proceedings, either of which can

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on defense counsel during discovery in criminal case was sufficient notice); *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (where there is a parallel administrative forfeiture and criminal prosecution, the Government must serve notice of the forfeiture on the defense attorney in the criminal case); *United States v. Cruz*, 1998 WL 326732 (S.D.N.Y. 1998) (notice sent to attorney in then-pending criminal case is adequate); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Ore. 1995) (attempts to send notice to defendant's home, attorney, and place of confinement were sufficient; failure to receive notice was not the Government's fault); *Allen v. United States*, 38 F. Supp. 2d 436 (D. Md. 1999) (same) (service on attorney sufficient, even though notice sent to defendant was sent to wrong jail); *United States v. Watts*, 1999 WL 493786 (E.D. Pa. July 13, 1999) (service on attorney was sufficient).

lead to a valid final forfeiture of the asset in question.

Subsection (b)(iii) provides that in the case of a potential claimant who is incarcerated, notice must be sent to the facility where the person is being held. The intent is for the rule to require the same level of notice as that approved by the Supreme Court in *Dusenbery v. United States.*[43] **NACDL'S objection to this is that, basically, they do not agree with the *Dusenbery* decision and would prefer that it were legislatively overruled.**

Rule G(4)(b)(iii), on the other hand, simply codifies the requirement of cases before and since *Dusenbery* holding that when the Government knows that a potential forfeiture claimant is incarcerated, it must send notice to the potential claimant at the current place of incarceration, and not only at a former home address.[44] These decisions place the burden on the Government to keep track of the prisoner's location. Notice sent to a prison where the prisoner was previously held, but not where he is being held at the time the notice is sent, is also inadequate.[45]

NACDL proposes that Rule G(4)(B)(iii) be amended to require proof that the notice sent to an incarcerated potential claimant was actually

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[43] 534 U.S. 161(2002), *supra* note 15.

[44] *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture"); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (seizing agencies must take steps to locate the prisoner and send him notice in jail); *United States v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (it violates due process for DEA to send notice to USMS, asking USMS to forward to prisoner; DEA must at least send notice to prison where defendant is confined); *but see Harris v. DEA*, 2001 WL 310974 (D. Md. 2001) (DEA not expected to know defendant is in state custody on unrelated state charge; therefore notice sent to home address was adequate even though defendant was incarcerated); *United States v. Donovan*, 2002 WL 730906 (7th Cir. April 18, 2002) (Table) (in light of DEA agent's statement to defendant that his property had been seized, and that he needed to take steps to recover it, failure to send notice to jail where defendant was held did not violate due process under *Dusenbery*).

[45] *Alli-Balogun v. United States,* 281 F.3d 362 (2nd Cir. 2002) (sending notice to prison two weeks after claimant was transferred to another prison violated claimant's due process rights under *Dusenbery*); *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998) (notice sent to prisoner's place of incarceration is not adequate if notice is returned undelivered to seizing agency before administrative forfeiture is complete and agency could have taken steps to locate prisoner); *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 2000) (same as *Small*; also, parallel notice to prisoner's wife that *her* interest may be forfeited does not cure defective notice).

received. But that is exactly the requirement that the Supreme Court rejected in *Dusenbery*. The Court noted

> [N]one of our cases cited by either party has required actual notice in proceedings such as this. Instead, we have allowed the Government to defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315 ....

Dusenbery, 122 S. Ct. at 701. After reviewing the reasonable procedures for delivery of mail that were in place at the penitentiary where Dusenbery was housed at the time of notice, the Court held:

> Here, the use of the mail addressed to petitioner at the penitentiary was clearly acceptable for much the same reason we have approved mailed notice in the past. .... We think the FBI's use of the system described in detail above was "reasonably calculated, under all the circumstances, to apprize [petitioner] of the pendency of the action." *Mullane*, 339 U.S. at 314 .... Due process requires no more.

Dusenbery, 122 S. Ct. at 702.

The purpose underlying Rule G(4)(B)(iii) is to *codify Dusenbery* and related case law so that the rule adopted by the Supreme Court is accessible to practitioners. Rule G(4)(b) should not overturn the rule adopted by the Supreme Court in favor of the position that the NACDL advanced in the Court and lost. To be consistent with *Dusenbery*, Rule G(4)(b) should require the Government to send the notice addressed to the prisoner at the prison where the prisoner is presently incarcerated, but it should not require proof of actual receipt of the notice.

Of course, at trial, if the adequacy of the notice is contested, the Government will have to show not only that it complied with the Rule, but also that the prison had reasonable procedures in place to ensure proper delivery of the mail. It is not necessary or appropriate for the text of the Rule itself to attempt to spell out such procedures. At the due process hearing, the evidence will show that the prison either did or did not have the requisite procedures for mail delivery in place. The burden is on the Government to give, and ultimately to show that it gave, proper notice. Accordingly, there is no need for the Rule to impose additional burdens

beyond those already imposed by the requirements of due process.

Subsection (b)(iv) provides that, in most cases, if the person to be served with notice was arrested in connection with the offense giving arise to the forfeiture, but that person is no longer incarcerated, it will be sufficient for the Government to send direct notice of the forfeiture to the address that the potential claimant gave to the Government at the time of his arrest or release. This is consistent with the rule some courts have adopted,[46] and is intended to make clear that the Government is not required to check all available sources for alternative addresses for the potential claimant if that person gave the Government an apparently valid address when he was arrested or released.

This provision simply recognizes that it is generally reasonable for the Government to send a forfeiture notice to a non-incarcerated potential claimant at the address that the potential claimant provided to the Government at the time of arrest. Not coincidentally, the time of the potential claimant's arrest is, in many instances, identical, or very close, to the time when the subject assets are seized. The provision would not permit reliance upon the address given at time of arrest where the potential claimant has since provided the arresting agency with a different address.

NACDL objects to this provision (Troberman Letter at 12), but has provided no authority for its contrary argument that in comparable circumstances, a civil litigant would not generally be permitted to rely upon the address provided to the litigant by an opposing party.

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[46] *See, e.g. Wilhite v. United States*, 2001 WL 124937 (N.D. Tex. 2001) (notice mailed to plaintiff at the address he provided for notice was adequate; due process did not require the Government to track plaintiff down when plaintiff was not imprisoned and provided no forwarding address, nor is Government required to wait until plaintiff returns home from his travels before sending the notice); *Brown v. United States,* 2002 WL 1339102 (S.D.N.Y. 2002) (notice mailed to residence where claimant's wife and children lived was adequate under *Dusenbery,* even though claimant himself had been deported to Jamaica); *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications and mailed after claimant was released from jail is sufficient to satisfy due process, even if claimant never received notice); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not the Government's fault that notice was not effective).

Like the other provisions of Rule G(4), this provision would be construed under the reasonableness standards set by *Mullane* and upheld in *Dusenbery*. It would neither increase nor decrease the amount of diligence required of the Government by the courts. It would not protect the forfeiture from due process attack in any case where special circumstances make it unreasonable for the Government to continue to rely upon the address provided by the potential claimant at the time of arrest. However, this provision would have the significant benefit of encouraging potential claimants -- who, in such circumstances are generally well aware that their property has been seized and may be forfeited -- to protect their interests to the extent of furnishing a corrected address to the agency that seized the property. As courts have repeatedly held in the cases cited in the margin, it is generally not the Government's fault when notice duly sent to the very address provided by a property owner fails to reach the intended recipient because that recipient has moved, or has gone into hiding.

Civil forfeiture procedure should not be a game of "gotcha," in which potential claimants seek the return of their property on the ground that there was one more thing the Government might have done to find an alternative address to which to send notice. The test set forth by the Supreme Court in *Mullane* and reaffirmed in *Dusenbery* is whether the notice was reasonably calculated to apprize interested parties of the pendency of the action. Sending notice to the address that a person has personally given to law enforcement as the location where he can be reached surely satisfies that standard.

Finally, subsections (b)(v) and (vi) address the content of the notice and the timing of the filing of a claim and answer. Subsection (b)(v) provides that the notice must set forth the date on which the notice is sent, and must inform the recipient that he or she has 30 days from such date to file a claim in the judicial forfeiture proceeding. As provided in subsection (b)(ii), notice is deemed to be "served" on the date on which the notice sent. Thus, subsection (b)(v) conforms with the statutory requirement in 18 U.S.C. § 983(a)(4), which provides that a person contesting the judicial forfeiture action must file a claim pursuant to the Supplemental Rules "not later than 30 days after the date of service of the Government's complaint." Any other rule, such as one that counted the 30-day period from the date when the notice was received by the addressee, would be unworkable. In many cases, the Government and the court have no way of knowing when the notice is received, and thus have no way of knowing when a

default judgment may be entered against a party who has failed to file a claim.[47] Moreover, a rule counting the date for filing a claim from the date the notice is received would not take into account the fact that sending notice satisfies, in most cases, the requirements of due process even if the notice is not actually received.[48]

Subsection (b)(v) also gives the Government the option of setting forth a specific deadline for filing a claim that gives the potential claimant more time than the 30 days prescribed by statute. By availing itself of this option, the Government may extend a claimant the courtesy of having additional time to file a claim as the circumstances may warrant while at the same time making sure that the deadline for filing the claim is clearly set forth on the record.

NACDL objects to this Rule on the ground that the date of service should not be the date when notice is sent, but rather it should be the date when it is received. Troberman Letter at 13. The response to that

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[47] *See United States v. Commodity Account at Saul Stone & Co.*, 1999 WL 91910 (N.D. Ill. 1999) (once notice has been published and time for filing claims has expired, court may enter default judgment against all potential claimants who did not file claims), aff'd 219 F.3d 595 (7th Cir. 2000); *United States v. Real Property ... Lido Motel*, 135 F.3d 1312 (9th Cir. 1998) (claimant who received proper notice but failed to file claim in accordance with Rule C, lacked standing to challenge magistrate's authority to enter default judgment); *United States v. $230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (when party fails to respond to the complaint within the time specified by Rule C(6), the Government may move for default pursuant to Rule 55(a), F.R.Civ.P.; entry of default is prerequisite to a default judgment).

[48] *See Dusenbery, supra* note 15; *Krecioch v. United States*, 221 F.3d 976 (7TH Cir. 2000)(notice sent to defendant's current home address is adequate where DEA had no way of knowing when it sent the notice that defendant would turn himself in and be incarcerated before the notice arrived); *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not the Government's fault that notice was not effective); *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. 1997) (notice sent to defendant's address by certified mail is reasonable if the Government has no reason to believe it failed to reach defendant; the Government not responsible if someone forged defendant's name on return receipt card); *Gonzalez v. United States*, 1997 WL 278123 (S.D.N.Y. 1997) ("the [G]overnment is not required to ensure actual receipt of notice that is properly mailed").

objection appears *supra* with respect to Rule G(4)(b)(ii) and is not repeated here.

Rule G(4)(b)(v) would require that the notice set forth the date when the notice is sent, and either inform the recipient that claims must be filed within 30 days from that date, or set a deadline that is at least 30 days from the date when the notice was sent. Providing such a date in the notice itself is simply intended to benefit the potential claimant by clarifying a filing deadline that might otherwise be uncertain.

Again, this provision is consistent with the statutory provision adopted by Congress in CAFRA for the sending of notice of administrative forfeiture proceedings. *See* § 983(a)(2)(B). In such cases, the Government routinely sends the potential claimant a letter stating the date when the notice is being sent, and setting a deadline for filing a claim, which deadline is at least 35 days after the date of the notice. This bright line establishing when a claim must be filed greatly enhances the administration of justice, removes the uncertainty that would prevail if the court had to determine when, if ever, the potential claimant had received notice, and does not infringe in any meaningful way upon the claimant's opportunity to file a timely claim, or to challenge forfeitures that fail to conform to the requirements of due process.

Subsection (b)(vi) conforms with the statutory requirement in Section 983(a)(4)(B) giving the claimant 20 days after the filing of a claim to file an answer to the Government's complaint. **NACDL's objection (Troberman Letter at 14) is addressed *infra* with respect to Rule G(5).**

Section (5). Responsive Pleading; Interrogatories

Section (5) deals with the content and timing of a claim contesting a judicial forfeiture action. It is derived, for the most part, from current Rule C(6).

The first part of Section (5), however, which deals with the content of the claim, has no counterpart in the present Rule. In fact, both current Rule C(6) and the statute governing the filing of a claim in a judicial forfeiture case, 18 U.S.C. § 983(a)(4), are silent as to the information that the claim must contain. To fill this gap, subsection (5)(a)(i) sets forth requirements regarding the content of the claim that are derived from the statutory requirements for filing a claim in

an administrative forfeiture proceeding pursuant to 18 U.S.C. § 983(a)(2)(C),[49] and for filing a third party claim contesting a criminal forfeiture action pursuant to 21 U.S.C. § 853(n)(3).[50] Under subsection (a)(i), the claimant must identify the specific property being claimed, state the claimant's interest in the property, file the claim under oath, and serve a copy of the claim on the attorney for the Government.

Subsection (5)(a)(i) also makes clear that only a person who asserts an ownership interest in the property may file a claim. The definition of owner is tied to the statutory definition in 18 U.S.C. § 983(d)(6) which was enacted by CAFRA as part of the uniform innocent owner defense. The requirement makes clear that the Government does not have to litigate the forfeitability of the property with a person who does not have an ownership interest in it, even though he may have been in possession of the property when it was seized.

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[49] Section 983(a)(2)(C) provides that a claim contesting an administrative forfeiture proceeding must identify the specific property being claimed, state the claimant's interest in such property, and be made under oath and subject to penalty of perjury.

[50] Section 853(n)(3) requires that a third party contesting a criminal forfeiture order must file a petition under oath and must "set forth the nature and extent of the petitioner's right, title or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought." *See United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which claimant is asserting an interest and nature of that interest does not comply with section 1963(l)(3) (identical provision to section 853(n)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline)*, 916 F. Supp. 1286 (D.D.C. 1996) (claim that simply listed random legal phrases dismissed for failure to set forth nature and extent of legal interest in the forfeited property as required by section 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) (petition stating only that "the property belongs to me" was insufficient); *Pegg v. United States*, No. 98-9617 (11th Cir. April 10, 2000) (unpub.) (Section 853(n) requires a third party to state the third party's interest in the property with particularity; a petition that merely tracks the language of section 853(n)(6) and does not provide the details section 853(n)(3) requires is insufficient and subject to dismissal on motion of the government); *United States v. Lindow*, 98-CR-244 (N.D.N.Y. Sept. 21, 2001) (bare assertion of legal title not sufficient for claim under § 853(n)(3); where claimant's husband stated during guilty plea that property belonged to him, claimant must explain basis for asserting an ownership interest).

This situation arises most frequently in cases involving the seizure of currency from a drug courier who has no ownership interest in the property yet files a claim contesting its forfeiture.

NACDL objects that the language in Rule G(5)(a)(i), limiting standing to file a claim to persons with an ownership interest in the property, is a departure from current case law. In this they are partially correct; in the absence of any statutory guidance, many courts do grant standing to claimants with no ownership interest in the defendant property. This is simply a situation where the rule needs to be changed.

Not long ago – indeed at the time CAFRA was being considered by Congress – courts in civil forfeiture cases used the terms "ownership" and "standing" almost interchangeably. This led to a great deal of confusion: a court would rule, as a threshold matter, that a claimant had "standing" to file a claim, but then, at the conclusion of the evidence regarding the claimant's ownership interest, would reverse itself and deny the claim for "lack of standing."

For example, in *United States v. $9,041,598.68 in U.S. Currency,*[51] the district court found, at the outset of the case, that a claimant who controlled a family bank account had standing to contest the forfeiture of the defendant funds. After a trial on the merits, however, the court reversed itself, finding that the claimant had not established the requisite ownership interest in the property and therefore did not have standing.[52] On appeal, the Fifth Circuit affirmed the district court, but noted that the court's initial determination of standing was correct, and should not have been reconsidered in light of what took place at trial. The district court's later determination that the claimant had no ownership interest in the defendant property, the panel said, went to the merits of the affirmative defense, not to the claimant's standing to litigate his claim.[53]

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[51] 976 F. Supp. 640, 648 (S.D. Tex. 1997).

[52] *Id.* (control over a "family" bank account may be sufficient to satisfy threshold standing requirements at the onset of trial, but the claimant still must prove his ownership interest by a preponderance of the evidence).

[53] 163 F.3d at 245 ("we consider Judge Atlas' post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court's earlier determinations that Massieu had standing to

Similarly, in *United States v. Hooper,*[54] the district court in a criminal forfeiture case held that the defendants' wives lacked standing to contest the forfeiture of certain property that they alleged to be part of their respective marital estates. On appeal, however, the Ninth Circuit held that there was "no dispute that Claimants had Article III standing to file their petitions and challenge the forfeitures on the asserted grounds." What the district court meant in concluding that the claimants lacked "standing," the panel said, was "simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief."[55] *See* Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," 89 *Kentucky Law Journal* 653, 672-77 (2001) (discussing the confusion between "standing" and "ownership" in recent case law).

Recognizing this confusion, courts have struggled to adopt a rule that distinguishes standing and ownership. The rule that has emerged in the past two or three years is this: standing and ownership are different concepts – one determines whether the claimant gets in the courthouse door; the other is an element of the affirmative innocent owner defense. Thus, it is now the law that a person with a merely "colorable interest" in the property has a sufficient interest to satisfy the Article III case-or-controversy requirement to litigate a civil forfeiture claim, but that same person may fail to establish his affirmative defense if he does not qualify as an "owner" of the property. *Id.*[56]

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be dispositive of that issue").

[54] 229 F.3d 818 (9th Cir. 2000).

[55] 229 F.3d at ___ n.4, citing *$9,041,598.68, supra. See also United States v. 5 S.351 Tuthill Road*, 2000 WL 1779182 (7th Cir. Dec. 5, 2000) (conflating standing with ownership, court holds that beneficiary of a land trust who would be injured if the property were forfeited, had standing, even though he failed to exercise dominion or control, and that therefore the only remaining issue was claimant's innocence), amended March 5, 2001, 233 F.3d 1017 (7th Cir. 2000).

[56] *See United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000), *as amended Mar. 21, 2001* (fact that beneficiary of a land trust, who would be injured if the property were forfeited, has standing even though he failed to exercise dominion or control does not resolve the issue of innocent ownership); *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (lienholder has standing even if he acquired his lien after the property became subject to forfeiture, and he may not be able to prevail on the merits); *United States v. $100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (even though the person from whom currency is seized has standing to contest its forfeiture, if he is not the

The *de facto* adoption of this dichotomous approach has produced both good and bad results. On the one hand, courts recognize that Congress, in enacting CAFRA, has provided a statutory definition of "ownership" and made it clear that ownership is an element of the "innocent owner defense" codified at 18 U.S.C. § 983(d). Thus, persons who cannot establish the elements of ownership will not be able to establish an innocent owner defense even if they are found to have Article III standing.[57] Note: "ownership" as defined in Section 983(d)(6) is broadly defined to include lienholders, mortgagees, assignees, bailees (as long as they identify the bailor and have a "colorable legitimate interest" in the property) and persons with a secured interest.

On the other hand, courts have been inclined to interpret the case-or-controversy requirement freely, extending standing to persons with the most tenuous connection to the defendant property, believing that, in the end, if the claimant is not an "owner," his challenge to the forfeiture action will fail. For example, courts have extended standing to persons who actually *denied ownership* at the time the property was seized,[58] to one whose only possessory interest in a vehicle was that the keys momentarily passed through his hands,[59] to a non-owner resident who claimed that the

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owner of the property, his innocent owner defense must fail); *In re Seizure of $82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient for standing, but must prove ownership as part of innocent owner defense on the merits); *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (Table) (for standing, claimant need not prove merits of underlying claim; allegation of ownership and some supporting evidence, such as possession, is sufficient; but claimant may yet fail to establish ownership on the merits); *United States v. $347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (standing is a threshold issue; claimant still must establish ownership on the merits; Government's motion to dismiss denied where claimant has standing and his claim of ownership cannot be negated on the pleadings).

[57] See previous footnote.

[58] *United States v. $39,400 in U.S. Currency*, No. 01cv16255-IEG(LSP) (S.D. Cal. Aug. 12, 2002) (claimant who denied ownership at time currency was seized, but who later filed claim asserting ownership, has standing).

[59] *Mantilla v. United States,* 302 F.3d 182 (3rd Cir.2002) (claimant's temporary possession of the seized currency, however fleeting – he held the keys to the vehicle for a moment before passing them on – sufficient for court to "assume" claimant had a possessory interest).

forfeiture of the defendant real property would leave him homeless,[60] and to a person who claimed to have found the forfeitable currency blowing along the road.[61]

This latter trend, coupled with another change in civil forfeiture procedure under CAFRA, has produced unforeseen and deleterious consequences for the administration of justice. For it is not true, as some had surmised, that extending standing freely to all comers is a harmless gesture, certain to be cabined within the boundaries of the innocent owner defense. To the contrary, because under CAFRA the Government now has to establish the forfeitability of the defendant property by a preponderance of the admissible evidence *before* the claimant is required to put on his affirmative defense, there are a multitude of cases where the court never reaches the ownership issue at all.

This was not a problem as recently as three years ago when the Government could require the claimant to establish his ownership interest in the property simply by establishing probable cause to believe that the defendant property was subject to forfeiture.[62] But now the Government must establish the forfeitability of the property by a preponderance of the evidence before the issue of ownership is even joined. This means that the Government must litigate the merits of the case with anyone who has standing, and a claimant who has standing may prevail in the forfeiture action and recover the property if the Government fails to establish forfeitability, *even if the claimant is not the owner. United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2nd Cir. 2002) (ownership only comes into play if the Government establishes forfeitability and the court reaches the innocent owner defense).

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[60] *United States v. 8402 W. 132nd Street*, 2000 WL 294094 (N.D. Ill. 2000) (non-owner resident who would be left homeless if property is forfeited has standing to contest forfeiture of father's real property).

[61] *United States v. $347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (finder of lost currency has "facially colorable interest" sufficient for Article III standing).

[62] Before August 23, 2000, civil forfeiture proceedings were governed by 19 U.S.C. § 1615, under which the Government was required only to establish probable cause to believe that the defendant property was subject to forfeiture. Moreover, hearsay was admissible to establish probable cause. This was changed by CAFRA. *See* 18 U.S.C. § 983(c).

This cannot be right. It means, for example, that a person who finds money blowing along the road, or a drug courier carrying cash for a third party, can force the Government to establish the forfeitability of seized currency simply by asserting "I am the owner" in his claim, even though he has no interest in the money beyond simple possession.[63] The same would be true for a nominee whose only connection to the vehicle, boat or parcel of land subject to forfeiture is that someone put his name on the title.[64] It is understandable that owners involved in illegal activity would like this rule: it gives them an opportunity to contest forfeiture actions through couriers and straw men without ever having to identify themselves as the real parties in interest. But this is not good public policy.

The Government simply should not have to litigate the forfeitability of money with persons who deny ownership when it is seized or simply find it blowing down the road. In *United States v. $347,543.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001), an automobile driven by one Diuela Chavannes was headed west on a local road, when the car hit a bump causing the rear-hatch door to fly open and a box of Tide detergent to fall on the road. Giving new meaning to the term money laundering, the box spilled a quantity of soap powder as well as approximately $50,000 in cash on the pavement. An alert citizen, Robert Chandler, the driver in the vehicle behind Ms. Chavannes, jumped out of his car and started picking up currency, whereupon Ms. Chavannes alighted from her car and began striking Chandler and demanding the money back. Chandler called the police who arrived promptly and found another 8 boxes of Tide in Chavannes' car. Inside each box were bundles of currency, wrapped in fabric softener sheets (to avoid detection by a drug dog), and fastened together with rubber bands. All together, more than $347,000 in suspected drug proceeds were recovered.

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[63] *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 71 n.1 (2nd Cir. 2002) (reaffirming that naked possession alone is insufficient for standing, but if courier files a verified claim asserting ownership, he has standing and can recover the property without having to establish his ownership interest if the Government cannot establish forfeitability by a preponderance of the evidence).

[64] *See United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (third-party challenge to criminal forfeiture: titled owner of real property had standing, but he was a mere straw and therefore could not prevail on the merits).

The Government filed a civil forfeiture complaint against the currency and quickly settled a claim filed by Chavannes' boyfriend, who claimed that some of the money came from a legitimate source. However, Chandler, the man who began picking up the money from the road, also filed a claim asserting that the money belonged to him. Following a hearing, the district court ruled that Chandler had standing to contest the forfeiture as a finder-in-possession, and referred the matter to a Magistrate Judge for an evidentiary hearing. At that hearing, the Government – now litigating only with Chandler – was required to establish by a preponderance of the admissible evidence that the money constituted drug proceeds before the court would reach the issue whether Chandler was an "owner" of the property under State law. Ultimately, the Government avoided the hearing by giving Chandler $10,000 to drop his claim.

To avoid such travesties, the rules regarding standing should be made coextensive with the broad definition of ownership that Congress enacted as part of CAFRA. If that were done, only a person who has a legitimate interest in the property – i.e., a person who at least could satisfy the ownership element of the innocent owner defense – could force the Government to go through the steps necessary to link the defendant property to the underlying offense. NACDL's position, that standing should be coextensive with the minimal requirements of Article III, has no constitutional basis and nothing to recommend it as a matter of good public policy.

Subsection (5)(a)(ii) is derived from current Rule C(6)(a), which sets forth the deadlines for filing a claim and answer in a civil judicial forfeiture proceeding. The new Rule, however, makes a number of substantive changes that are necessary to conform with the statutory requirements regarding the filing of the claim and answer that were enacted in 2000 as part of CAFRA.

In particular, before it was amended effective December 1, 2002, Rule C(6)(a) provided that a "statement of interest or right" must be filed "within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice," but Section 983(a)(3), as noted previously, provides that a "claim" must be filed "not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." To eliminate these conflicts, Rule G(5)(a)(ii) uses the statutory term "claim" instead

of "statement of interest or right," and provides that the claim must be filed not later than the deadline set forth in the direct notice sent to the claimant pursuant to Rule G(4)(b), *supra*, or 30 days after the final publication of notice, whichever is earlier. As mentioned earlier, these deadlines do not apply to cases to which the deadlines in Section 983(a) do not apply.

Subsection (a)(iii) addresses claims that are filed by corporations. It provides that such claims must be "verified by an officer of the corporation who is duly authorized to file a claim on behalf of the corporation." This is a necessary requirement in light of the provision in subsection (a)(i)(C) that the claim be filed under oath, subject to penalty of perjury. A claim filed by an attorney with no personal knowledge of the facts supporting the claim cannot comply with this requirement. Thus, the claim must be verified by an officer of the corporation.

Subsection (b) preserves the current rule and statutory requirement that an answer to the complaint be filed within 20 days after the filing of the claim. The new Rule conforms with the statutes enacted by CAFRA by using the statutory term "claim" in lieu of "statement of interest or right."

Subsection (b) also makes clear that the claimant must state any objections to the court's exercise of *in rem* jurisdiction over the property, or to the venue for the forfeiture action, in the answer. The concepts of *in rem* jurisdiction and venue have been merged by 28 U.S.C. § 1355(b),[65] at least with respect to property located in the United States.[66]

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[65] *See* note 16, *supra.*

[66] With respect to property located abroad, the courts sometimes require a showing that the district court has "constructive control" over the property by virtue of the cooperation of a foreign court or Government, and sometimes do not. *See United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (Section 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad; the foreign's country's compliance and cooperation "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders"); *United States v. Contents of Account #03001288 (Tasneem Jalal)*, 167 F. Supp. 2d 707 (D.N.J. 2001) (court has subject matter jurisdiction and venue for forfeiture of property abroad pursuant to 28 U.S.C. § 1355(a) and (b), and it obtained *in rem* jurisdiction over the property when UAE officials informed the United States that they had restrained the funds at their request, and that a United States forfeiture order would be enforced); *United States v. All Funds on Deposit*, 856 F. Supp. 759 (E.D.N.Y. 1994) (section 1355(b)(2) gives district court in

Finally, Subsection (c) preserves the provision in current Rule C(6)(c) that answers to interrogatories must be served along with the answer to the complaint. Subsection (c) is identical in all respects to the current Rule, and the case law regarding that Rule will therefore apply.[67]

In their comments on this provision, NACDL takes exception to the Government's characterization of the current law, and to the provision in Rule G(7)(d) requiring the claimant to file the answer before filing any dispositive motion. The difference of opinion between the Government and the NACDL on this issue is clearly stated. Defense lawyers want to be able to move to dismiss a forfeiture complaint pursuant to Rule 12(b) on technical grounds – such as the expiration of the statute of limitations – before having to establish that the claimant has a bona fide interest in the property. The Government – focusing on the fact that civil forfeitures are *in rem* actions in which the plaintiff has no control over who the claimant may be – believes that it should not have to litigate challenges to the complaint until it knows who the claimant is and that he has a right to challenge the forfeiture at all. Thus the defense lawyers take the view that Rule 12(a)(4) – permitting the filing of an answer to be deferred until after the court rules on dispositive motions – trumps current Rule C(6) and should trump Rule G(5)(b), while the Government believes that current law, and the better view, is that the answer must be filed before the court considers any dispositive motions.

There are many good and sound reasons that the provision in Rule 12(a)(4) deferring the filing of an answer until after the court rules on a dispositive motion, should not apply to in rem forfeiture cases, and the two

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New York venue and subject matter jurisdiction over property in United Kingdom; court also has *in rem* jurisdiction because seizure by U.K. authorities at request of U.S. gives court constructive possession or control); *aff'd, United States v. All Funds in Any Accounts Maintained in the Names of Meza*, 63 F.3d 148 (2d Cir. 1995).

[67] *See United States v. $8,221,877.16 in U.S. Currency*, 148 F. Supp.2d 427 (D. N.J. 2001) (filing of a motion to dismiss the forfeiture complaint does not toll the period for filing an answer under the Rule C(6); claimant must file answer and respond to interrogatories before filing motion to dismiss); *United States v. $38,870.00 in U.S. Currency,* No. 7:99-CV-47-(HL) (M.D. Ga. Sept. 24, 1999) (same; failure to file answer results in entry of default judgment).

courts that have addressed this issue have agreed with the Government.[68] In short, both courts agreed that Supplemental Rule C(6), which requires that the claimant answer the complaint and any interrogatories that were served with it within 20 days, overrides the provision in Rule 12(a)(4) that permits the defendant in an ordinary civil proceeding to file a dispositive motion in lieu of an answer.

To put it bluntly, current Rule C(6) is designed to "smoke out" claimants who have no real interest in the defendant *in rem* before the court invests judicial resources in litigating the claim. If there were no mechanism for testing the bona fides of a claimant in an *in rem* proceeding, the Government could be forced to litigate its case in the guise of defending a motion to dismiss the complaint against a claimant who declines to reveal his interest in the defendant property. For example, in *United States v. $8,221,877.16 in U.S. Currency*, 148 F. Supp. 2d 427 (D.N.J. 2001), the Government – believing that the money in question represented laundered drug proceeds -- seized the contents of several bank accounts in the United States that were held in the names of several foreign corporations. A money exchanger based in Brazil filed a claim, but instead of filing an answer or responding to interrogatories, attempted to attack the complaint on a variety of grounds under Rule 12. For example, he argued that some of the seized funds were not covered by the seizure warrant, that the Government could not rely on the fungible property provision in 18 U.S.C. § 984 because it commenced its forfeiture action more than one year after the alleged criminal offenses, and that the Government could not establish probable cause to believe that the seized funds were traceable to any drug trafficking activity. But the Government responded that the court should not permit a claimant to raise such issues until the claimant, through his answers to the complaint and the interrogatories, provided sufficient reason to believe that he had an interest in the defendant funds.

The district court agreed with the Government and ordered the claimant to file an answer and respond to the Government's discovery requests. When he refused to do so, the court struck his claim and entered a default judgment for the Government. This case is now on

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[68] *See* note 67, *supra.*

appeal to the Third Circuit.[69]

It is entirely understandable that a claimant would like to have a complaint dismissed on technical grounds before having to identify himself and his connection to the defendant property – particularly, as was the case in *$8,221,877.16,* if the claimant is concerned that connecting himself to the property will make him the focus of a criminal investigation. But the Government has an overriding interest in knowing who it is that is challenging the forfeiture, and whether that person has a true interest in the property. In short, courts should not be entertaining challenges to forfeiture actions filed by anonymous South American money managers unwilling to tell the court who they are.

Moreover, if a non-owner claimant who has articulated no defense to the forfeiture were to prevail on technical grounds in a pre-trial motion to dismiss, there would be a distinct possibility that the property would be returned to a person who had no legal interest in the property – resulting in the unjust enrichment of a person who happened to have the foresight to file a claim and move to dismiss a forfeiture action on grounds cognizable under Rule 12(b). The rules of civil procedure should not countenance such a result.

Accordingly, the case law under which Supplemental Rule C(6), per Rule A, overrides Rule 12(a)(4), is sound legally and as a matter of public policy and its effectiveness should be preserved in Rule G.

Section (6). Preservation and Disposition of Property; Sales.

Subsection (6)(a) is derived from current Rule E(10) and permits the court to "enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance." Such an order would include a pre-trial restraining order under 18 U.S.C. § 983(j), or the interlocutory sale of the property under Rule G(6)(b). **In light of NACDL's objections to Rule G(6), it may be useful to review the existing rules and statutes governing interlocutory sales.**

The majority of interlocutory sales in civil forfeiture cases are ones in

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[69] No. 02-1264 (3rd Cir. 2002).

which the parties stipulate to the sale. In the minority of cases, a party, either the government, the claimant, or another holder of an interest in the property, will object to a proposed interlocutory sale. When the parties do not agree to the sale of the property or to the sale terms, a court order authorizing the interlocutory must be obtained by motion served on all interested parties.[70] The court may order that such a sale take place over a party's objection,[71] but in that case, the court must articulate the reasons justifying the sale.[72]

Rule G(6) does not break any new ground. In addition to Rule E(9)(b), statutory authority for interlocutory sales is already found in the Customs statute, 19 U.S.C. § 1612(a),[73] which is similar to the current Rule E(9)(b), and also authorizes interlocutory sales when property becomes subject to diminution in value. The statute provides as follows:

> Whenever it appears to the Customs Service that any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws is liable to perish or to waste *or to be greatly reduced in value* by keeping, or that the expense of keeping the same is disproportionate to the value thereof, and such [property] . . . has not been delivered under bond . . . [and is not subject to administrative forfeiture], . . . the Customs Service shall forthwith transmit its report of the seizure to the United States Attorney who shall petition the court to order an immediate sale of such vessel, vehicle, aircraft, merchandise, or baggage and if the ends of justice

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[70] See *United States v. Steel Tank Barge H 1651*, 272 F.Supp 658, 662-63 (E.D.La. 1976) (vacating Interlocutory Sale Order because barge's owner had not received actual notice of the proposed sale).

[71] *See United States v. Pelullo*, 178 F.3d 196, 198-99 (3rd Cir. 1999) (interlocutory sale approved over criminal defendant's objections where equity was being depleted by accruing taxes and interest on mortgagee's foreclosure judgment);

[72] *See United States v. 8 Princess Court*, 970 F.2d 1156, 1160 (2nd Cir. 1992) (noting absence of findings by district court to justify sale and remanding case for further proceedings).

[73] Section 1612(a) is incorporated with other pertinent customs statutes by 21 U.S.C. § 881(d), 18 U.S.C. §981(d), and 18 U.S.C. § 2254(d) to the extent that it is "applicable and not inconsistent" with those civil forfeiture provisions. *See United States v. One Parcel of Property Located at 414 Kings Highway*, 128 F.3d 125 (2nd Cir. 1997) (19 U.S.C. § 1612 applies to forfeitures under 21 U.S.C. § 881).

> require it the court shall order such immediate sale, the proceeds thereof to be deposited with the court to await the final determination of the condemnation proceedings. Whether such sale be made by the Customs Service or by order of the court, the proceeds thereof shall be held subject to claims of parties in interest to the same extent as the vessel, vehicle, aircraft, merchandise, or baggage so sold would have been subject to such claim.

19 U.S.C. § 1612(a). (Emphasis added.)

Moreover, when the court orders an interlocutory sale over the objections of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002, and/or 2004. These statutes provide procedural safeguards to ensure that court ordered sales are made on terms that best preserve the parties' interests, and apply to civil as well as criminal forfeitures.[74] Court-ordered interlocutory sales of personal property must proceed in the same manner as sales of real property, "unless the court orders otherwise." 28 U.S.C. § 2004. In all contested cases the Court is free to fashion an order to accommodate the interests of the government and the claimant, such as a release of the asset to the claimant on sufficient bond.[75]

The case law does not explicitly address whether a court is bound by 28 U.S.C. §§ 2001, 2002, 2004 when all interested parties agree to an interlocutory sale and to the terms of the sale. Section 2004 does expressly allow courts to alter the procedure for sales of personal property, but sections 2001 and 2002 do not contain such language. However, these provisions were aimed at protecting the rights of parties in situations where the court orders an interlocutory sale over a party's objection. The government believes that all interested parties may stipulate to the form of an interlocutory sale and have that sale approved by the court. Once proper notice of the intended interlocutory

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[74] *See United States v. Macia*, 1257 F. Supp.2d 1369, 1371 (S.D. Fla. 2001) (applying section 2001 to interlocutory sale in criminal forfeiture); *1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. 697, 701 (W.D. Tex. 1992) (noting that property subject to 21 U.S.C. § 881 forfeiture may be sold pursuant 28 U.S.C. §§ 2001-2004 ("to the extent . . . not inconsistent with the relevant portions of the Drug Control Act").

[75] The Internal Revenue Code at 26 U.S.C. § 7324, provides for a return to owner under bond any property seized by the Internal Revenue Service that is "liable to perish or become greatly reduced in price or value by keeping, or when it cannot be kept without great expense - . . . ."

sale has been given to all interested parties and all interested parties agree on the terms of the sale, the considerations that might justify costly protective measures such obtaining three appraisals prior to a private sale pursuant to 28 U.S.C. § 2001(b) are no longer at issue because the parties have consented to the sale in terms acceptable to them. Accordingly, courts routinely approve stipulated interlocutory sales without reference to 28 U.S.C. §§ 2001 et seq.[76]

Rules G(6)(b) through (d) are derived from current Rule E(9) dealing with the interlocutory sale and ultimate disposition of the property subject to forfeiture. Subsection (b) sets forth the circumstances in which the court may order the interlocutory sale notwithstanding the objections of a party. In addition to those set forth in current Rule E(9), these circumstances include situations in which there is a diminution in value of the property, the authority for which is found in 19 U.S.C. § 1612(a), and where the owner of property subject to forfeiture has defaulted on mortgage or tax obligations.

Contrary to NACDL's contention, Rule G(6) does not create "broad new authority for the government to force" interlocutory sales in civil forfeiture cases. Courts have approved interlocutory sales in all of the circumstances described in proposed Rules G(6) (b) through (d).[77]

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[76] *See United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001); *United States v. BCCI Holdings (Luxembourg)*, S.A., 69 F. Supp.2d 36, 44-45 (D.D.C. 1999); *United States v. 4118 West 178th Street*, 1995 WL 758436 (N.D. Ill. Dec. 21, 1995).

[77] *See e.g. United States v. Real Property Located 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001) (stipulated sale paid off mortgage); *United States v. Pelullo*, 178 F.3d 196, 198-99 (3rd Cir. 1999) (interlocutory sale approved over criminal defendants' objections where equity was being depleted accruing taxes and interest on mortgagee's foreclosure judgment); *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1389-90 (10th Cir. 1997)(district court granted government's unopposed motion for interlocutory sale and confirmed sale despite claimant's subsequent motion to block it because property was subject to deterioration and decay); *United States v. $82,585.53, More or Less in Proceeds from the Interlocutory Sale of 218 Cattle*, 2000 WL 828080 (S.D. Ala. May 31, 2000) (livestock sold); *Aguilar v. United States*, 1999 WL 1067841 *5 (D. Conn. Nov. 8, 1999) (explaining that interlocutory sale opposed by claimant was warranted because properties were abandoned and subject to "vandalism, deterioration and depreciation" and mortgage payments were several months in arrears); *United States v. One 1979 Peterbilt*, 1994 WL 99540 *2 (E.D. La. Mar. 18, 1994) (granting unopposed motion for interlocutory sale because of depreciating value of vehicle); *cf. United States v. Real*

Moreover, the interlocutory sale of the property may protect the interests of the mortgagee or taxing authority which otherwise is unable to foreclose on the property pending the outcome of the forfeiture action.[78]

Whereas NACDL characterizes the interlocutory sale of property when mortgages or taxes are in default as a "substantial broadening of the government's power to force interlocutory sales," in fact it is the court and not the government that decides whether any particular contested interlocutory sale is appropriate, and then only after a noticed motion where the claimant and any other secured and interested parties have the opportunity to be heard. And, as noted earlier, courts have routinely approved interlocutory sales of real property when the claimant defaults on the mortgage. The fact that the property is subject to forfeiture is not an excuse for failing to keep the mortgage current. Any time a claimant falls behind on mortgage payments, a secured lender can, using appropriate state law procedures, foreclose on the property. Such private foreclosures, however, are disfavored because the lender generally sells the property for the amount of the lien, leaving nothing for the government or the victims.[79] Because of this, the government can generally enjoin private foreclosures, or remove the foreclosures from state to federal

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Property Known As 2916 Forest Glen Court, 162 F. Supp.2d 909, 917 (S.D. Ohio 2001) (court denied claimant's motion for interlocutory sale of seized, and nearly expired, pharmaceuticals because, *inter alia*, claimant failed to show likelihood of success on the merits and it was not in public interest to require the government to incur significant expense for tests to determine whether expiration date could be extended).

[78] *See United States v. One Parcel ... Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (interlocutory sale of residence, while civil case was stayed pending criminal trial, avoided waste and expense and allowed the Government to satisfy mortgage that defendant had stopped paying); *In re Newport Savings and Loan Association,* 928 F.2d 472, 479-80 (1st Cir. 1991) (foreclosure restrained where mortgagee bank had failed to file claim in civil forfeiture case, and had failed to protect government's forfeitable equity interest in the property by posting bond equal to difference between property's fair market value and amount of bank's mortgage interest).

[79] 18 U.S.C. § 981(e)(6) provides for the restoration of forfeited property to victims of the offenses giving rise to the forfeiture.

courts.[80] Given that the failure to pay a mortgage subjects the claimant to foreclosure anyway, what Rule G(6) does is to establish an orderly procedure to protect the interest of the lienholder, the government, and the victims, while preserving the claimant's right to contest the forfeiture of an amount equal to the value of his equity in the property.

Finally, Rule G(6)(c) makes clear that the proceeds of the sale must be designated as a substitute *res* to be forfeited to the United States in place of the property that has been sold, if the Government prevails in the forfeiture action. The proceeds must be held in an interest-bearing account until that time. All defenses that would otherwise apply to the forfeiture of the property that has been sold will apply to the forfeiture of the substitute *res*.

Subsection (c) also makes clear that the sale must be conducted by the marshal or other government agency or person appointed by the court pursuant to the procedures set forth in 28 U.S.C. § 2001 *et seq*. However, if the sale or aspects of the sale that would otherwise be determined according to the statute – such as the number of appraisals required or the location of the sale – are agreed to by all parties, it is not necessary for the sale to be conducted in accordance with all of the statutory requirements. This is intended to eliminate the unnecessary expense that would otherwise be incurred, for example, in connection with obtaining appraisals and publishing notice of the sale.

Section (7). Pre-trial Motions.

Subsection (7) addresses a number of issues that are not covered explicitly by the existing Supplemental Rules, but which arise repeatedly in civil judicial forfeiture cases. These include the application of the exclusionary rule to *in rem* forfeiture proceedings; the procedure for releasing seized property in "hardship" cases under 18 U.S.C. § 983(f); the applicability of Rule 41(e) of the Federal Rules of Criminal Procedure; and the procedures governing the application of the Excessive Fines Clause of the Eighth Amendment.

These issues are unique to forfeiture cases, but in the absence of any guidance provided by the Supplemental Rules, courts have been forced to fill in the gaps in the current procedures by borrowing concepts from both the civil and

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[80] *See Bank One, N.A. v. Everly*, 2002 WL 31056716 (N.D. Ill. 2002) (in this criminal case, instead of enjoining a state mortgage foreclosure action, the government removed the state action to federal court and moved to dismiss it as barred by 21 U.S.C. § 853(k)).

criminal rules of procedure, even though the situations in which those Rules apply are not analogous to the civil forfeiture context. The purpose of subsection (7) is to create a body of procedural rules that apply to the unique circumstances of civil forfeiture, and to consolidate in one place the rules regarding the most common pre-trial motions that have emerged thus far from the case law.

Subsection (a) adopts the case law holding that the Fourth Amendment exclusionary rule applies to civil forfeiture cases. Thus, if property is illegally seized, the court may order the suppression of that property and its fruits as evidence in the forfeiture case.[81] Subsection (a) also makes clear, however, as virtually all courts that have addressed the issue have held, that whatever evidentiary consequences the suppression of the seized property may have, such suppression does not bar the Government from proceeding with the forfeiture action based on other evidence.[82] Adoption of this Rule will eliminate a great deal of confusion among practitioners concerning this issue.

NACDL states that they are unaware of any "confusion among

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[81] *See United States v. Premises and Real Property ... 500 Delaware Street*, 113 F.3d 310 (2d Cir. 1997) (exclusionary rule applies to civil forfeiture cases) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)); *United States v. $57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same); *United States v. One 1993 Ford Pickup*, 148 F. Supp.2d 1258, 1258 n.1 (M.D. Ala. 2001) (same); *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (all evidence, including officer's testimony, derived from illegal search of house suppressed; suppressed evidence cannot be used to establish basis for forfeiture).

[82] *See United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999) (exclusionary rule applies to "quasi-criminal" civil forfeiture cases; but even if the seizure is unlawful, the Government may prove its forfeiture case with other, untainted evidence); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (district court erred in dismissing forfeiture complaint; illegal seizure of property might result in return of property pending trial or in suppression of evidence, but lack of probable cause at the time of seizure has no bearing on the right of the Government to establish forfeitability of the property at trial); *United States v. $9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (lack of probable cause for seizure may result in suppression of seized property as evidence but has no other consequence); *United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993) ("even when the initial seizure is found to be illegal, the seized property may still be forfeited," although evidence may be suppressed); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (seizure without probable cause has "evidentiary consequences" but does not bar forfeiture of the property).

practitioners" regarding the application of the exclusionary rule, but that confusion is evidenced by the number of cases in which claimants continue to move to dismiss civil forfeiture complaints on the ground that the property was illegally seized. If such motions weren't being made, there wouldn't be so many reported cases rejecting them.[83] As those cases uniformly hold, illegal seizure may be the basis for suppression of evidence, but nothing more. Making this clear in the rule will avoid needless litigation.

NACDL also says that the exclusionary rule should apply in instances other than at trial. Troberman Letter at 23. They do not say, however, when, other than "at trial," illegally seized evidence might be suppressed. The Government is not aware of what the other "purposes" of the exclusionary rule might be in the forfeiture context.

In any case, the application of the exclusionary rule in the civil forfeiture context works the same as it does in the criminal contest. Only a person with an expectation of privacy has standing to move to suppress the evidence. *Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978). Just as in a criminal case, where the defendant has no standing to object to the allegedly illegal search of his girlfriend's purse, *Rawlings v. Kentucky,* 448 U.S. 98, 104-06 (1980), so in a civil forfeiture case, the claimant may not have standing to object to the admission of evidence illegally seized from a non-claimant third party. Thus, for example, a lienholder challenging the civil forfeiture of a vehicle would not have standing to object to the search or seizure of that vehicle without a warrant.

Subsection (b) provides a mechanism for the Government to move to strike the claim and answer for various reasons including failure to satisfy the filing requirements, and failure to establish the ownership interest necessary to establish standing under Rule G(5)(a). **In response to NACDL's concern that the phrase "at any time" was too broad, the current version makes clear that the Government may file such a motion to strike "at any time before trial."**

The explanation of Rule G(5), *supra*, addresses NACDL's opposition to raising the standard for standing to challenge a civil forfeiture action above the minimum required by the case-or-controversy clause of the

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[83] *See* note 82, *supra.*

Constitution. That explanation is not repeated here. In short, raising the standard to comport with the statutory definition of ownership in 18 U.S.C. § 983(d)(6) ensures that the Government does not have to litigate the forfeitability of the property with a person who has no ownership interest in it.

Subsection (c) provides a procedural counterpart to 18 U.S.C. § 983(f) which was enacted by CAFRA to provide a mechanism for the release of seized property pending trial to avoid a hardship. **In response to NACDL's valid concern that the proposed Rule was more limited than Section 983(f) in terms of both the time for making the motion and the identity of the person entitled to make it, those provisions have been dropped from the Rule.**

NACDL also pointed out that the Rule, as previously drafted, did make it explicit that a motion for the release of property to avoid a hardship is the exclusive ground for seeking the pre-trial return of the property to the claimant's custody, or that Rule 41(e) of the Criminal Rules does not apply to civil forfeiture matters once a verified complaint is filed. That omission has been rectified.

The latter provision of Subsection (c) is necessary to address confusion caused by the pre-CAFRA case law. Before Section 983(f) was enacted in 2000, some courts treated motions for the pre-trial release of property in civil forfeiture cases as motions filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. In doing so, the courts evidently thought it necessary to exercise "anomalous jurisdiction" in order to avoid the hardship caused by the Government's delay in instituting formal forfeiture proceedings.[84] But in adopting

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[84] *See In the Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business, and delay in instituting civil forfeiture action leaves claimant no remedy at law; but court holds that four-month delay since time of seizure does not violate due process, given the Government's need to avoid jeopardizing ongoing criminal investigation); *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the Government seized property without probable cause; motion denied upon finding that probable cause was established); *In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards*, 970 F. Supp. 557 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture complaint, the motion will be stayed for 60 days to give the Government an opportunity

the standards set forth in Rule 41(e), the courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property.

The legality of the seizure is the proper subject of a motion to suppress filed pursuant to subsection (a), but it has no bearing on the claimant's hardship motion under subsection (b). Property may be released to the claimant pending trial if the requirements of Section 983(f) are met whether or not the seizure was illegal; conversely, the illegality of a seizure is not a ground for the release of the property under Section 983(f). Nor may a claimant use Rule 41(e) to gain the release of his property in a civil forfeiture case: that equitable remedy is not available when the claimant has an adequate remedy at law, namely contesting the forfeiture action at trial.[85]

NACDL evidently disagrees with this long-standing rule. "Contrary to the view of many courts," they say, Rule 41(e) motions should be permitted even though formal forfeiture proceedings have been commenced. Troberman Letter at 24. But the "many courts" — indeed the vastly overwhelming majority of courts — that decline to exercise jurisdiction over Rule 41(e) motions in this context are correct. Once

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to file); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government generally not required to establish probable cause pre-trial, but where there is undue delay in filing the complaint, a finding of lack of probable cause may result in return of the property to the claimant pending trial).

[85] *See Rodriguez v. United States Department of Justice*, 2001 WL 180127 (2nd Cir. 2001) (Table) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property (other than by filing a motion to suppress evidence); claimant's remedy is to contest the forfeiture action itself on the merits); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law; *i.e.*, contesting the forfeiture in the civil forfeiture case); *In Re Motion for Return of $61,412.00 in U.S. Currency*, No. 00-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpub.) (once Government files civil forfeiture complaint, court lacks jurisdiction to consider Rule 41(e) motion based on Fourth Amendment violation, unless Claimant would suffer irreparable harm and lacks an adequate remedy at law).

forfeiture proceedings are commenced, the claimant has an adequate remedy at law and hence cannot seek equitable relief under Criminal Rule 41(e) or by asking the court to assert "anomalous jurisdiction." Now that there is a formal procedure for dealing with the hardship cases, as well as a set of strict deadlines for commencing forfeiture actions once property has been seized,[86] there is no reason for a court to exercise "anomalous jurisdiction" to grant equitable relief when forfeiture litigation in a federal court has already commenced.

Given the overwhelming case law stating that challenges to the forfeitability of the property cannot be raised pre-trial, it might seem to be unnecessary to codify that law in Rule G. But NACDL's comments make it abundantly clear that some claimants will continue to seek opportunities to challenge the rule no matter how many courts adopt it until the Rules of Procedure close the door on such endeavors.

Subsection (d) deals with motions to dismiss the complaint. The Rule simply makes clear that such motions are filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and is not intended to modify any of the well-established case law applying the traditional grounds for relief under Rule 12(b) to civil forfeiture cases.[87] The new Rule is needed, however, to provide a procedural counterpart to a new statute, 18 U.S.C. § 983(a)(3)(D), which was enacted by CAFRA to overturn legislatively a number of cases permitting a civil

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[86] *See In Re Motion for Return of $61,412.00 in U.S. Currency*, No. 00-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpublished) (any due process concern that might result from forcing claimant to litigate her Fourth Amendment claim in the forfeiture proceeding, instead of pursuant to a Rule 41(e) motion, is mitigated by the Government's prompt filing of its complaint).

[87] *See, e.g., United States v. Funds in Amount of $122,500*, 2000 WL 984411 (N.D. Ill. 2000) (complaint should not be dismissed unless it appears plaintiff cannot prove any facts in support of his claim that would entitle him to relief; to withstand a motion to dismiss, complaint need only allege facts sufficient to set forth the essential elements of the cause of action); *United States v. One Parcel ... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (when motion to dismiss is filed, court presumes all facts alleged to be true, and will deny motion unless it appears beyond doubt that the Government can prove no set of facts in support of its claim that would entitle it to relief); *United States v. Approximately $25,829,681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (same); *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. Ill. 1999) (motion to dismiss is intended to test sufficiency of complaint, not its merits; complaint need only set out essential elements of the cause of action).

forfeiture complaint to be dismissed pre-trial based on lack of evidence.[88]

Lack of evidence, of course, is not a basis for a motion to dismiss under Rule 12.[89] Section 983(a)(3)(D) affirms this rule by providing explicitly that "No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." Subsection (d) incorporates this statute into the rule governing motions to dismiss.

NACDL's first objection is that it should not be necessary for the claimant to wait to file a dispositive motion until he has filed both a claim and an answer. The explanation of why a motion to dismiss may not be filed until the claimant has filed both a claim *and answer* appears in response to NACDL's criticism of Rule G(5) and is not repeated here. In short, contrary to NACDL's assertion, civil in rem forfeiture cases *are* different from ordinary civil litigation, which is why a different rule must apply.

Next, NACDL opposes Rule G(7)(d)(ii) on the ground that 18 U.S.C. § 983(a)(3)(D) is self-enforcing – thus making the rule unnecessary. But NACDL's statement makes it obvious just how necessary the rule is.

Section 983(a)(3)(D) was part of a carefully crafted congressional compromise whereby the Government accepted the enactment of a series of strict deadlines for filing civil forfeiture actions – *see* §§ 983(a)(1) & (3) –

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[88] *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (construing 19 U.S.C. § 1615 to require that the Government have probable cause at the time it files its complaint or suffer dismissal); *United States v. $405,089.23 in U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997) (the Government could not rely on drug dealer's conviction or evidence adduced at criminal trial to establish probable cause where forfeiture complaint was filed at the time of indictment); *United States v. Real Property Located at 22 Santa Barbara Drive*, 121 F.3d 719, 1997 WL 420580 (9th Cir. July 16, 1997) (unpublished) (Table) (same); *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (applying *$405,089.23*; because evidence in the Government's possession at the time the complaint was filed was suppressed, and because evidence acquired independently after the complaint was filed was inadmissible to show probable cause; the Government was unable to forfeit residence drug dealer purchased with drug proceeds); *United States v. 255 Broadway, Hanover,* 9 F.3d 1000, 1003-06 (1st Cir. 1993) (probable cause determination in the First Circuit is made as of the time of the filing of the complaint); *see also United States v. One Lot of U.S. Currency ($36,634)*, 103 F.3d 1048, 1053-54 (1st Cir. 1997).

[89] *See* note 87, *supra.*

but in return obtained a clear statement that a civil forfeiture complaint could not be dismissed for lack of evidence. This was necessary because a minority of courts – principally the Ninth Circuit – had interpreted 19 U.S.C. § 1615 (the statute that governed civil forfeiture procedure before CAFRA) to mean that the Government had to have probable cause *at the time it filed its complaint.*[90] In contrast, the majority of courts had followed the usual rule that a complaint may not be dismissed unless the plaintiff could prove no set of facts that would entitled it to relief. *See* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 J. Legis. 97, 148-49 (2001) (discussing the legislative history).

In the Government's view, if the Government was going to be required to do more than simply meet the particularity requirement in Rule E(2) – that is, if it was going to be required to establish that it had a given quantum of evidence in hand at the time it filed its complaint – then it needed ample time to conduct its investigation before the complaint was filed. On the other hand, if the complaint had to be filed in just 90 days, then it should be clear that the complaint need only satisfy the particularity requirement, and that Government could continue to gather evidence after the complaint was filed. Congress agreed and included Section 983(a)(3)(D) in CAFRA. *Id.* at 149 & n.264.

Note: this has nothing to do with the standard for *seizing property* or for granting a motion to suppress evidence if the property is unlawfully seized. The issue here concerns only the standard for filing a complaint, which in itself does not affect the seizure of any property. *Id.* Indeed, complaints against real property are routinely filed without any prior or concurrent seizure; and complaints are often filed against personal property that has not been seized if the property is abroad, or if there is an ongoing investigation that requires that the complaint be filed under seal.

Despite the clear language in Section 983(a)(3)(D), some defense lawyers have continued to argue – in post-CAFRA cases – that the statute does not mean what it plainly says, and that the pre-CAFRA probable cause requirement still applies in the Ninth Circuit and elsewhere. Courts have uniformly rejected this argument, but NACDL persists in taking the unreconstructed view. Indeed, NACDL asserts that "many cases, both before *and after* CAFRA, hold that the Government must have probable

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[90] *See* note 88, *supra.*

cause at the time it files its complaint." Troberman Letter at 25. In support of that assertion, however, NACDL cites only one post-CAFRA case – a case that was decided in 2002 but involved *pre-CAFRA* facts and hence applied *pre-CAFRA* law.[91]

In an ideal world, the plain language of Section 983(a)(3)(D) would make it unnecessary to include a procedural counterpart in Rule G(7)(d). But as long as there is a dispute over the plain language that Congress has enacted, there will be a need to make the rules of procedure crystal clear.[92]

Finally, NACDL proposes that Rule G(7) be amended to include a new provision authorizing the filing of a motion for summary judgment after the filing of a complaint. Troberman Letter at 27. There does not appear to be any merit in this proposal. As Rule 56 itself provides, a motion for summary judgment should not be considered until the evidence is gathered and discovery is complete. *See* Rule 56(d). Moreover, the NACDL proposal is inconsistent with another provision of CAFRA – 18 U.S.C. § 983(c)(2), which provides as follows: "the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture."[93]

Subsection (e) fills in the gaps in the statute setting forth the procedure for resolving a motion to mitigate a civil forfeiture judgment to avoid a violation of the Excessive Fines Clause of the Eighth Amendment. The statute, 18 U.S.C. § 983(g), incorporates the constitutional standard of excessiveness articulated by the Supreme Court in *United States v. Bajakajian,* 524 U.S. 321 (1998): *i.e.,* a

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[91] *United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 655 (3rd Cir. 2002) (applying § 1615 and other aspects of pre-CAFRA law to civil forfeiture complaint filed in January, 1999).

[92] At page 26 of the Troberman Letter, NACDL cites a statement from the legislative history in support of its contention that the probable cause standard survives the enactment of CAFRA. That statement, which was inserted into the Congressional Record at NACDL's request after the CAFRA compromise had been agreed to, and after the bill had passed the Senate, cannot contradict the plain language of the statute itself.

[93] NACDL also argues that Rule G(7)(d)(ii) should not apply to post-CAFRA cases to which CAFRA does not apply on account of the "carve-out" provision in 18 U.S.C. § 983(i). We address this in our response to NACDL's criticism of Rule G(1).

forfeiture is excessive if it is grossly disproportional to the gravity of the offense giving rise to the forfeiture. Moreover, the statute provides that the claimant has the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury. But the statute is silent as to the point in a civil forfeiture proceeding when the Eighth Amendment challenge may be made.

Consistent with the case law on this issue, subsection (e) provides that a motion to mitigate a forfeiture to avoid an Eighth Amendment violation may be made "after the entry of a judgment of forfeiture, or as part of a motion for summary judgment in accordance with Rule 56," if the parties have had the opportunity to conduct civil discovery on the Eighth Amendment issue.[94] Moreover, the Rule provides that an Eighth Amendment objection is waived if not set forth as an affirmative defense in the answer pursuant to Rule 8.

NACDL contends that Congress expressly rejected the Government's proposal to include language similar to Rule G(7)(e) in CAFRA, and that adoption of Rule G(7)(e) would therefore undo a deliberate congressional choice. Troberman Letter at 27. That is not so.

During the CAFRA negotiations, the Government did ask for a clear rule stating that arguments relating to the proportionality of a civil forfeiture judgment could only be raised once discovery was complete and the forfeitability of the property was determined. NACDL argued for the opposite: a rule permitting Eighth Amendment arguments to be raised pre-trial. Congress, as it is sometimes inclined to do when contentious issues

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[94] *See United States v. Funds in the Amount of $170,926.00*, 985 F. Supp. 810 (N.D. Ill. 1997) (motion to dismiss civil complaint on Eighth Amendment grounds denied; court should not address excessive fines challenge until the Government has established forfeitability at trial); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (pretrial determination of excessiveness of yet-to-occur forfeiture would be premature); *United States v. One Parcel of Real Estate Located at 13143 S.W. 15th Lane)*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issues is not ripe for review until after judgment of forfeiture has been entered); *United States v. Contents of Account 4000393242*, No. C-1-01-729 (S.D. Ohio March 13, 2002) (§ 983(g)(1) says court must conduct 8th Amendment review to determine if forfeiture "was" excessive; use of past tense means that determination is made only after there has been a finding of forfeiture; court cannot make disproportionality determination based only on a seizure and before any forfeiture occurs); *United States v. 2304 E. Highland Drive, Tucson, Arizona*, No. 98-CV-444-TUC-ACM (D. Ariz. Nov. 16, 2000) (court defers excessive fines issue until after it enters summary judgment for the Government on the merits, and then directs parties to submit briefing).

are involved, punted – leaving the issue totally unresolved so that the warring parties could fight over the issue in the courts. *See* 18 U.S.C. § 983(g) (providing that the gross disproportionality of the forfeiture may be raised in civil forfeiture cases, but remaining silent as to when such issues could be raised). Thus, the only deliberate congressional choice was the decision to leave the issue for another day.

That day has arrived. In a series of cases listed in the margin, courts have agreed with the Government that it makes no sense to ask the court to consider whether a forfeiture judgment would be disproportional to the gravity of the offense until all of the facts regarding the offense have been established. An Eighth Amendment argument raised before the court determines if the property is subject to forfeiture – i.e., before the court determines the nature, duration and seriousness of the offense, and any other factors that might go into the disproportionality equation – would be clearly premature. Indeed, in response to such a motion, the court would rightfully ask "disproportional to what?" A steady stream of cases, including those decided since Rule G(8) was first submitted to the Advisory Committee, say just that.[95]

Given that more than 2 years have passed since CAFRA was enacted, during which time the issue left open by Congress in Section 983(g) has been litigated numerous times, the time has come to end the uncertainty and debate and codify the rule embodied in Rule G(7)(e).

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[95] *See United States v. Six Negotiable Checks*, 207 F. Supp. 2d 677 (E.D. Mich. 2002) (claimant's motion for summary judgment on 8th Amendment issue denied; it is premature to resolve 8th Amendment issues when factors bearing on the gravity of the offense will be illuminated at trial); *United States v. Contents of Account 4000393242*, No. C-1-01-729 (S.D. Ohio March 13, 2002) (§ 983(g)(1) says court must conduct 8th Amendment review to determine if forfeiture "was" excessive; use of past tense means that determination is made only after there has been a finding of forfeiture; court can't make disproportionality determination based only on a seizure and before any forfeiture occurs); *United States v. One 1997 Ford Expedition*, 135 F. Supp 2d 1142 (D.N.M. 2001) (Government's motion for summary judgment on Eighth Amendment issue premature; requires factual inquiry); *United States v. $100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (if claimant raises Eighth Amendment claim in a motion for summary judgment, the court may re-open discovery to allow the Government to collect additional evidence relating to the connection between the property and other criminal acts, and the harm caused by the offense).

Finally, Subsection (f) provides that Rules G(7)(c) and (d) do not apply to cases exempted from 18 U.S.C. § 983 by Section 983(i).

Section (8)

The right to trial by jury in a civil forfeiture case is guaranteed by the Seventh Amendment. Rule G(8) codifies this principle while making it clear that the right to a jury is waived unless specifically requested under Rule 38. *See United States v. U.S. Currency in the Amount of $97,253.00*, 1999 WL 84122 (E.D.N.Y. Feb. 11, 1999).

NACDL questions the need for this provision. Troberman Letter at 28. It is true that Rule 38 applies to civil forfeiture cases, and that the right to a jury trial is waived if a request is not timely made pursuant to Rule 38(b). *See United States v. U.S. Currency in the Sum of $97,253*, 1999 WL 84122 (E.D.N.Y. 1999). However, for whatever reasons, practitioners continue to be confused regarding the manner in which the right to a jury trial may be exercised in an *in rem* proceeding. Thus, it seems helpful, and certainly harmless, to include an explicit reference to the applicable procedure in the rules dealing directly with civil forfeiture proceedings.

Accordingly, this section is proposed to clarify the need for any party in a civil forfeiture action to request a jury trial in a timely manner, and is consistent with Fed. R. Crim. P. 32.2, the new rule governing criminal forfeiture procedure. Rule 32.2(b)(4) codifies each party's right to a jury determination on the issue of forfeiture where a jury has returned a verdict of guilty, but requires a party to make a timely request "that the jury be retained to hear additional evidence regarding the forfeitability of the property." *See United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001).

Form No.:CIV2005
Document: Motion and Order to Seal Complaint
Comments: This form may be used to ask the district court to allow the Government to file its civil forfeiture complaint under seal. This may be necessary to toll an applicable statute of limitations while a case remains under active covert criminal investigation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	UNDER SEAL
CONTENTS OF BANK ACCOUNT	)	
	)	
Defendant.	)	
	)	

EX PARTE APPLICATION TO FILE COMPLAINT FOR FORFEITURE IN REM
UNDER SEAL UNTIL FURTHER ORDER OF COURT

The United States of America hereby applies to this Court for an Order permitting the filing of the Complaint For Forfeiture In Rem in this case, and the declarations and exhibits attached thereto (hereinafter collectively referred to as the "Complaint for Forfeiture"), in camera under seal until further Order of Court. In addition, the government asks that this application likewise be filed under seal.

INTRODUCTION

EXHIBIT A

The Complaint for Forfeiture will be filed in a civil forfeiture action that arises out of an ongoing criminal investigation entitled Operation X. Operation X is an undercover operation. Premature exposure of the details of the investigation, as set forth in the Complaint for Forfeiture, could jeopardize the success of the operation and expose undercover agents and others to considerable risk to their personal safety. The government is filing the present Complaint for Forfeiture to preserve a statute of limitations and to expedite the seizure of the defendant funds once the ongoing undercover investigation is terminated and the individual subjects are arrested. However, it is of great importance that the Complaint for Forfeiture remain under seal until that time.

LEGAL AUTHORITY

Federal Courts are empowered to seal documents in appropriate circumstances. Cf. Fed. R. of Crim. P. 6(e)(4) (sealing of indictments). The Supreme Court has noted that "[e]very Court has supervisory power over its own records and files, and access has been denied where Court files might have become a vehicle for improper purposes." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). Moreover, federal district Courts have the inherent power to seal affidavits filed with search warrants in appropriate circumstances. Washington Post v. Robinson, 935 F.2d 282, 289 n. 10 (D.C. Cir. 1991); Offices of Lakeside Non-Ferrous Metals, Inc. v. United States, 679 F.2d 778 (9th Cir. 1982); United States v. Agosto, 600 F.2d 1256 (9th Cir.

1979). This inherent power may appropriately be exercised when disclosure of the affidavit would disclose facts which would interfere with an ongoing criminal investigation. Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1979). Rule 5 of the Federal Rules of Civil Procedure grants federal Courts supervisory power over the filing of pleadings.

DISCUSSION

As mentioned above, the premature disclosure of the Complaint for Forfeiture in this case would directly harm the government's ongoing investigation and expose undercover agents to considerable risk to their personal safety. This case involves [*e.g.* the laundering of narcotics proceeds through bank accounts in the United States and abroad, in violation of 18 U.S.C. Sections 1956 and 1957]. The declarations in support of the forfeiture complaint in this case describe the ongoing investigation, which involves a confidential informant and undercover government agents [doing interesting things in a covert manner]. The government intends to conclude the investigation and arrest the targets within approximately _____ days. Disclosure of the existence of this continuing investigation and the declaration in support of the civil forfeiture complaint before the investigation is concluded will alert the subjects of the investigation to the extent and direction of the investigation and will prevent law enforcement agents from arresting the targets, most of whom are not currently in the United States.

EXHIBIT A

In addition, the disclosure of the existence of this ongoing investigation may cause the subjects of the investigation to threaten or kill law enforcement agents and witnesses who would provide testimony and evidence against them. Finally, premature disclosure of the contents of the Complaint would give the holders of the bank accounts subject to forfeiture an opportunity to remove the subject funds before the United States has an opportunity to request the assistance of the foreign governments where the accounts are located in seizing or restraining the subject funds.

CONCLUSION

For all of these reasons, the government respectfully requests that the Complaint for Forfeiture, and this Application, be filed under seal and held by the Court *in camera*, pending further Order of this Court.

Respectfully submitted,

Attorneys for Plaintiff
UNITED STATES OF AMERICA

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONTENTS OF BANK ACCOUNT	)	
	)	UNDER SEAL
	)	
Defendant.	)	
	)	

ORDER SEALING

The United States of America has applied to this Court for an Order permitting it to file the Complaint for Forfeiture and the underlying declarations and exhibits in the above-captioned case, together with this its Ex Parte Application, in camera under seal. Upon consideration of the application and the entire record herein,

IT IS HEREBY ORDERED that the Complaint For Forfeiture and underlying declarations and exhibits in the above-entitled proceedings, together with the application of the United States, shall be filed with this Court in camera under seal and shall not be disclosed to any person unless otherwise Ordered by this Court.

DATED:

_____
UNITED STATES DISTRICT JUDGE

EXHIBIT A

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 2, 2002

MEMORANDUM TO FORFEITURE SUBCOMMITTEE

SUBJECT: *NACDL's Comments on Proposed Rule G*

For your information, I am attaching a copy of NACDL's comments on the proposed forfeiture Rule G. A copy of the Department of Justice's reply was sent electronically earlier to you.

John K. Rabiej

Attachment

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August 26, 2002

Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed New Admiralty Rule G.

Dear Professor Cooper:

On behalf of the over 10,000 members of our association (and the approximately 28,000 affiliate members from all fifty states), the National Association of Criminal Defense Lawyers ("NACDL" herein) is pleased to submit the following comments with respect to the proposed amendment to the Supplemental Rules for Certain Admiralty and Maritime Claims. We want to thank the Committee for giving us this opportunity to comment on the Supplemental Rule G draft at this early stage of the process. We also hope to continue participating in the Committee's future deliberations concerning this important proposed amendment.

We believe that our considerable familiarity with the drafting process of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA" herein) will shed important light on the validity of some of the proposals under discussion. (Because there were no committee reports on the final version of the bill, the legislative history of CAFRA is rather opaque.) NACDL member David B. Smith, in his capacity as a frequently cited expert on forfeiture law, played a critical role in drafting the legislation that became CAFRA.[1]

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[1] Mr. Smith is the author of the leading forfeiture treatise, PROSECUTION AND DEFENSE OF FORFEITURE CASES. Recognizing Mr. Smith's contributions to CAFRA, House Judiciary Chair Henry Hyde (R-IL) observed in his remarks to Congress following passage of the bill:

> "And I must thank David Smith, who has been there since the beginning. David helped me draft my first forfeiture reform bill, the Civil Asset Forfeiture Reform Act of 1993, and helped draft Senators LEAHY'S and HATCH'S reform bill and helped draft the Senate-passed bill we are considering today. This bill is truly his accomplishment."

146 CONG. REC. H2047 (daily ed. April 11, 2000).

Richard J. Troberman and E. E. Edwards III, as co-chairs of the National Association of Criminal Defense Lawyers Forfeiture Abuse Task Force, also worked directly with Chairman Hyde's staff and Senator's Leahy's staff in the drafting process, and testified before Congress.[2]

Proposed Rule G appears to be the latest round in a decade long struggle between the proponents and opponents of civil forfeiture reform--a struggle that we had hoped was ended by the enactment of CAFRA. While some parts of the proposed Rule G are useful and unobjectionable, the same cannot be said about many of the more significant provisions which are inconsistent with the language, the spirit, and the legislative intent of CAFRA, and represent substantive as well as procedural changes.

One of the main goals of CAFRA was to create a level playing field in civil forfeiture cases. Proposed Rule G, however, represents an attempt, outside of the legislative process, to amend the Supplemental Rules and CAFRA, and to overrule clear and well established case law, in ways that would stint many of CAFRA's due process protections and again tilt the playing field in favor of the government. Nowhere is this more obvious, or more egregious, than in the proposed Sections 4 and 5 of Rule G, which attempt to vastly expand the methods of service of process (Section 4) while at the same time severely limit who may contest a forfeiture (Section 5). See discussion, *infra*. Accordingly, we view the government's efforts here with deep suspicion and apprehension, as well as a misuse of the Rules Enabling Act process.

We believe that the Committee should question why the DOJ has submitted many of these proposals to the Committee instead of to Congress. Clearly, it would make more sense to include many of these provisions in 18 U.S.C. § 983, rather than in a new Supplemental Rule. We believe the answer is obvious: many of these proposals were previously rejected by Congress during the CAFRA debate, and many of the others would not be given serious consideration by the House or Senate Judiciary Committees.

Nevertheless, DOJ apparently now believes that it can persuade this Committee to do what Congress would not. But they can only accomplish that goal by distorting the meaning and intent of the relevant CAFRA provisions and existing caselaw. They are attempting to do precisely that, as we show below. We now turn to the specific

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[2] For their work on asset forfeiture reform and CAFRA, Mr. Troberman and Mr. Edwards were awarded NACDL's Marshall Stern Award for Legislative Achievement for 2000 and 1998, respectively.

provisions, which we address in the same order they appear in the draft. (Some of the provisions that are the most disturbing appear toward the end of the draft.)

Section (1). Application. Proposed Rule G(1) states that "This Rule G applies to a forfeiture action *in rem* for violation of a federal statute." The expressed intent of the proposed rule is "to place all of the procedures that are unique to civil judicial forfeiture proceedings in one place, *i.e.,* in Rule G." Explanation of Rule G ("Explanation") at 4. The problem with this approach is that the rules for civil forfeiture proceedings are not all the same. See, *e.g.,* 18 U.S.C. §983(i)(2), which excludes certain forfeiture proceedings from the definition of "civil forfeiture statute" in 18 U.S.C. §983, thus exempting them from the CAFRA reforms.[3]

Thus, while some of the provisions proposed in Rule G are intended to apply to *all* civil forfeiture actions, many others are not. Accordingly, we believe that this provision must identify with greater specificity those statutes to which Rule G will apply. Moreover, in light of 28 U.S.C. §2072(b), the amended Rule as written (being ostensibly procedural in nature) would apparently supplant, not supplement, much of the carefully crafted and recently enacted work of Congress in this area.

Section (2). Complaint.

Rule G(2)(b)(v). The Explanation states (p.5) that Rule G(2)(b)(v) is not intended to make a substantive change to the particularity requirement in current Rule E(2)(a). "Thus, the case law interpreting current Rule E(2)(a) would apply to Rule G(2)(b)(v)." Despite that assurance, we are concerned about the highly inaccurate presentation of the case law interpreting Rule E(2)(a) in footnote 18 of the Explanation. In particular, the statement that "a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular" is simply wrong. There is no support for that minimalist view of Rule E(2)(a) in the reported case law. The insertion of such misleading statements in the Committee's authoritative note is likely to be used by the government to persuade courts that the law is what the Committee's note says it is, not what the cases actually say. Thus, if case law is to be cited in the note, it is important to present that case law objectively.

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[3] The United States Customs Service, for example, has recently taken the novel position that forfeiture proceedings for violations of Title 21 United States Code, which would be subject to CAFRA if initiated pursuant to 21 U.S.C. §881, are exempt from CAFRA if Customs chooses to proceed instead under the Tariff Act of 1930, 19 U.S.C. §1595a. This attempted end-run around CAFRA demonstrates the difficulties inherent in trying to establish one set of rules for all judicial forfeiture proceedings.

Although the cases use various verbal formulations, the courts agree that the complaint must *at least* allege sufficient facts to support a reasonable belief that the government will be able to prove the property is subject to forfeiture. This is a fairly demanding requirement, as the cases show. *E.g., U.S. v. One Parcel of Real Property Known As 6 Patricia* Dr., 921 F.2d 370, 76 (1st Cir. 1990); *U.S. v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993); *U.S. v. One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999); *U.S. v. $38,000.00 In U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987); *U.S. v. 59,974.00 In U.S. Currency*, 959 F. Supp. 243, 248 (D.N.J. 1997). Thus, the particularity requirement provides an important protection for claimants by insuring that a forfeiture complaint will not be filed unless it is supported by substantial evidence.

We also note that although the Explanation states (p. 5) that "the intent is solely to place the current particularity requirement in the same section of the Rule where other pleading requirements pertaining to the complaint appear," proposed Rule G(2)(b)(v) has inexplicably deleted the language "without moving for a more definite statement" which currently appears in Rule E(2)(a). If the language of Rule G(2)(b)(v) differs from the language of Rule E(2)(a), it will inevitably invite the argument that a different meaning was intended. Accordingly, we see no basis for the removal of this clause, and request that it be reinserted into the proposed new provision.

Rule G(2)(c). Rule G(2)(c) allows interrogatories to be served with the complaint without leave of court. Although that language carries forward the provision currently found in Rule C(6)(c), it is an anomaly that can no longer be justified in a rule that is intended to "place all of the procedures that are *unique to civil judicial forfeitures* in one place."

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) acknowledges that the procedure for serving interrogatories with the complaint departs from the general provisions of Fed.R.Civ.P. 26(d), but states that "the special needs of expedition that often arise *in admiralty* justify continuing the practice." However, in the same Note, the Committee rightly says that "[a]dmiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings." Although the Committee established different procedures for forfeiture and admiralty proceedings where appropriate, it inexplicably failed to do so in this instance. This would be an appropriate opportunity to eliminate this oversight.

Allowing the government to serve a first set of interrogatories with the complaint also encourages abuse. Many prosecutors serve lengthy, intrusive and burdensome interrogatories with the complaint in the hope of discouraging the claimant from contesting the forfeiture. These interrogatories frequently ask the claimant to detail her

entire financial history. The Committee should be aware that a high percentage of claimants are either unrepresented by counsel or ineffectively represented. They do not understand that they have a right to object to interrogatories that are overly burdensome or seek irrelevant information. Faced with the prospect of having to quickly answerer a battery of intrusive, burdensome interrogatories, many claimants will decide that they do not have the time or the intestinal fortitude to fight the government.

Accordingly, we submit that proposed Rule G(2)(c), instead of authorizing the service of interrogatories with the complaint, should clearly provide that Rule C(6)(c) does *not* apply to forfeiture actions *in rem* for violation of a federal statute.

Section (3). Judicial Authorization and Process.

Rule G(3)(a). This proposed rule, which is derived from current Rule C(3)(a)(i), authorizes the clerk of the court, upon the filing of a complaint for forfeiture, to issue--without prior judicial approval--a warrant of arrest for the property that is subject to forfeiture. There is a serious question as to whether this provision passes constitutional scrutiny when it forms the basis for the *actual seizure* of the property. A clerk's ministerial action in issuing a warrant for the arrest of property cannot make lawful a seizure that is not based upon probable cause.

Addressing the issue of "whether a valid warrant of arrest may issue without a prior determination of probable cause by a neutral and detached magistrate," the Fourth Circuit has concluded

> We hold that *if the seizure of the property is otherwise proper under the fourth amendment*, no violation of the fourth amendment occurs when the district court clerk issues a warrant of arrest in rem pursuant to subsection 881(b).

United States v. Turner, (One 1963 Corvette), 933 F.2d 240, 245 (4th Cir. 1991) (emphasis supplied). In reaching this conclusion, the Court further observed:

> Other courts considering the constitutionality under the fourth amendment of the warrant procedure established by subsection 881(b) and Rule C(3) have found it unconstitutional. *United States v. Real Property Located at 25231 Mammoth Circle, El Toro, Cal.,* 659 F.Supp. 925 (C.D. Cal. 1987); *United States v. Life Ins. Co. of Va., Single*

> *Premium Whole Life Policy, Policy No. 002138373,* 647 F.Supp. 732, 742 (W.D.N.C. 1986); *rev'd on other grounds sub nom. United States v. B & M Used Cars,* 860 F.2d 121 (4th Cir. 1988); *United States v. One Hundred Twenty-Eight Thousand Thirty-Five ($128,035.00) in U.S. Currency,* 628 F.Supp. 668 (S.D. Ohio), *appeal dismissed,* 806 F.2d 262 (6th Cir. 1986); *In re Kingsley,* 614 F.Supp. 219 (D.Mass. 1985), *appeal dismissed,* 802 F.2d 571 (1st Cir. 1986).

Id., 933 F.2d at 245.

Thus, courts have upheld this procedure only when no actual seizure of the property has occurred based upon a warrant of arrest issued by a court clerk.

> In the present case, the Government did not "seize" the real property. Instead, the Marshal's posting of the arrest warrant served only as notice to the in rem defendants of the civil complaint filed against them. Appellant Cunan has not shown that he was denied access to the property in question, which would indicate an actual seizure of the property by the government. A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. We find no such "meaningful interference" here for the warrant executed in this case only gave notice to the defendant in rem--it did not effect a seizure. Posting an in rem defendant is an appropriate method of notifying such a defendant of the action against it in much the same way as an in personam defendant is served with a copy of a complaint. It is a fictional way of acquiring jurisdiction over the res in an in rem action.

United States v. TWP 17 R 4, Certain Real Property in Maine, 970 F.2d 984 (1st Cir. 1992) (citations omitted) (containing a discussion of the Commentary to the 1985 Amendment to Rule C(3)). See also, *United States v. Pappas,* 613 F.2d 324, 329-330 (1st Cir. 1980) (en banc); *Schrob v. Catterson,* 948 F.2d 1402, 1415 (3rd Cir. 1991).

Accordingly, we believe that it is appropriate to include language in this provision, or in the Advisory Committee's Notes, to make clear that a warrant of arrest in rem issued by a clerk of the court under this section does not authorize the *actual seizure* of property, and thus is not a substitute for a proper seizure under the fourth

amendment. Stated another way, a warrant of arrest in rem issued pursuant to this provision by a clerk of the court without a prior determination of probable cause by a neutral and detached judicial officer may serve only to notify the defendant in rem of the filing of a civil complaint for forfeiture, in much the same way as an in personam defendant is served with a summons.

Rule G(3)(b)(ii). The other problem we have with proposed Rule G(3) is the provision in Rule G(3)(b)(ii) that allows the government to delay execution of the warrant when the complaint is filed under seal or when the action is stayed prior to execution of the warrant. We are unaware of any authority that permits the government to file a civil forfeiture complaint under seal. Indeed, the Explanation acknowledges (p. 7) that the "forthwith" service requirement of Rule E(4)(a) "is inconsistent with the notion that a complaint may be filed under seal." Filing a complaint under seal and delaying execution of process, which provides notice to the owner, can easily be abused. It allows the government to meet statute of limitations requirements and the ninety day deadline for filing a complaint pursuant to 18 U.S.C. § 983(a)(3)(A) without notifying the owner or giving her an opportunity to contest the forfeiture. Thus, the purpose of the ninety day deadline and the statute of limitations is thwarted. Under the proposed rule, execution of process may be delayed indefinitely.

Permitting execution of the warrant to be delayed if the action is stayed prior to execution of the warrant raises the same concerns. The government would make an *ex parte* application for a stay when it filed the complaint. The owner would not know of the complaint or the stay order until the court saw fit to lift the stay. But the government could file a lis pendens notice, effectively freezing real property, or direct a bank or brokerage firm to freeze the owner's accounts based on the secret complaint.

The government should be required to explain to the Committee why it is necessary to have resort to such drastic measures. And if these measures are to be made available, there must be a showing by the government that the circumstances of the particular case justify them. The draft does not require the government to make any showing before sealing a complaint or when seeking a stay of the action. It would encourage prosecutors to routinely resort to these extraordinary procedures.

Section (4). Notice.

Although we have many objections to proposed Rule G(4), we are especially troubled by the "Direct Notice" provisions in Section G(4)(b). Proposed Rule G(4)(b) constitutes a drastic revision of current Rule C(3)(b), and improperly conflates the administrative notice requirements of 18 U.S.C. §983(a)(1)(A)(i) and 19 U.S.C.

§1607(a) with the current service of process requirements of Rule C(3)(b) and Fed.R.Civ.P. 4 and 4.1. As explained below, this Rule, if adopted, would provide expansive new methods for service of process which would be unique to civil forfeiture actions. There is no justification for such an expansive and unique set of rules.

Rule G(4)(a)(i)(C). This provision permits publication of notice in the district "where (1) the action is filed, (2) the property was seized, or (3) the property is located." Current Rule C(4) requires publication in the district where the action is filed. No explanation is given for this proposed change. The current requirement should not be altered to give the government a choice of where to publish notice.

The district where the action is filed is usually the district where publication is likely to be most effective in providing notice to interested persons. In the case of personal property, the district where the property is "located" may often be different than either the district of seizure or the district where the action is filed because the Customs Service and the Marshals Service have widely scattered facilities for storing airplanes, boats and vehicles, and persons with an interest in the property often do not know where the property has been taken. Thus, publication solely in the district to which the property has been moved *by the seizing agency* is not likely to reach persons with an interest in the property.

For these reasons, we suggest that in those cases where the property is seized (or in the case of real property, is located) in a district other than the district in which the action is filed, the government should be required to publish notice in *both* districts.

We also believe that it is desirable that publication be made in a newspaper of national circulation such as *USA Today*. Such a practice would be much more likely to reach all interested persons than publication in some obscure local newspaper or business journal. Some law enforcement agencies already follow this practice in administrative forfeiture cases. We would propose this as an alternative method of publication.

Rule G(4)(a)(iv)(A). This provision provides that if the property is located in a foreign country, or the person on whom notice must be served is believed to be located in a foreign country, publication may be made (1) in a newspaper in the district in the United States where the action is filed; (2) in a newspaper published outside the foreign country where the property is located but generally circulated in the foreign country; or (3) in a newspaper, legal gazette, or listing of legal notices published and circulated in the foreign country where the property is located. We believe that when the property is located in a foreign country, or the person to whom notice must be

served is believed to be located in a foreign country, notice published solely in the district in the United States where the action is filed is clearly insufficient both in practical and in constitutional terms. Thus, in those situations, the government should be required to also publish notice in a newspaper or legal gazette generally circulated in the foreign country where the person or property is located. Anyone truly desiring to provide notice to interested persons would certainly do so.

Rule G(4)(a)(v). This provision would permit publication of the Notice required by Rule G(4)(a)(i) to be made solely on the Internet. The government cites statistics purporting to show that 58% of U.S. households have access to the Internet. Even if true, that still leaves almost half the population without Internet access. Moreover, experience teaches that those are the households that are more likely to have their property seized. Even if one has Internet access, how would one know that the government posts forfeiture notices on a particular web site? More importantly, what if the property seized is the claimant's computer (a not at all uncommon occurrence)? While we agree that in keeping up with technological advances it would be a good idea for the government to post notice on the Internet, we believe that at least for the foreseeable future this posting should be *in addition* to publishing notice in a newspaper, not *in lieu* thereof, since it would cost the government virtually nothing to post a notice on the Internet. Indeed, it is much too soon to mandate the use of the Internet in this way, as the Judicial Conference has repeatedly determined in other contexts in recent years, such as in discussing electronic filing and service by e-mail.

(B) Direct Notice.

Rule G(4)(b)(ii). This proposed rule would so radically change current civil procedure that it would make it almost unrecognizable in the context of civil judicial forfeiture proceedings. The proposed rule would permit *service of process* in civil judicial forfeiture cases "in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail." The government provides no justification, or even explanation, for such a radical change.[4]

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[4] The government's entire "explanation" for this radical and unprecedented change in existing law is as follows:

> Subsection (b)(ii) addresses the manner in which direct notice may be served. The notice may be served on either the potential claimant or his counsel in any manner "reasonably calculated to ensure that such notice is received," including first class mail, private carrier or electronic mail. (p. 10)

We know of no other civil proceeding in which such expansive methods of service of process are authorized as a matter of right. Nor do we see any need for such expansive methods in the context of civil forfeiture proceedings.

There are several disturbing departures from the current rules of civil procedure buried within this provision. For example, we are unaware of any rule in any other context that would allow service of process to be made by electronic mail. If this method is not deemed sufficiently reliable in any other case, why should it be deemed an appropriate method of service in a civil forfeiture proceeding in which the government is seeking to permanently deprive the claimant of his or her property? It is common knowledge that e-mail can be accidentally or intentionally deleted by anyone with access to the same e-mail address, for example the claimant's child. E-mail can be also be sent to the wrong person, and e-mail addresses often change based on who the claimant's internet service provider is at any given time. Moreover, not everyone with e-mail can download an attached document, and in this era of internet viruses many people who are computer savvy simply refuse to do so. In sum, adoption of this provision would turn the spirit of CAFRA--which was to make forfeiture proceedings more fair--on its head.

Proposed Rule G(4)(b)(ii) would also allow service of process to be made on "the potential claimant's counsel." We are unaware of any provision authorizing service of original process on a person's counsel as a matter of right in any other context. *Bye v. United States,* 105 F.3d 856 (2nd Cir. 1997), the case cited in footnote 28 at page 10 of the Explanation, is clearly inapposite. That case dealt with an administrative notice of forfeiture, not service of process after a civil forfeiture complaint was filed.

Moreover, the proposed rule does not specify upon which of the "potential claimant's" counsel process may be served. Would this apply to a potential claimant's divorce counsel, or any other counsel representing the potential claimant in a non-related matter? Even if the provision was more narrowly drafted to limit it to counsel representing the potential claimant in a related criminal matter, it would continue to pose practical problems. This is so because a significant majority of criminal defense lawyers, especially public defenders, are not experienced in civil forfeiture law, and rarely handle these proceedings. Thus, it is not unheard of for such counsel to simply place the notice in the client's file and either take no further action at all, or not take *timely* action.

Rule G(4)(b)(ii) includes another radical departure from current procedure by providing that "notice is served on the date that the notice is sent." In other words, Rule G(4)(b)(ii) provides that *service of process* is deemed complete on the date service of process is sent. Given the number of methods of service set forth in the

proposed rule, we have no idea what this means. Service has always been deemed complete on the date when it actually occurred. Thus, a return of service is filed with the court indicating when the person was served, not when the process server received the papers with instructions to serve them. Even in those rare instances when service is accomplished by some means other than personal service by agreement of the parties, the date of service is generally deemed to be when the notice is actually received. For example, where first class mail is used, certified mail with a return receipt typically indicates when the notice was actually received. We see no compelling need or justification for such a radical change in procedure.

Rule G(4)(b)(iii). This provision would require that "notice" (*i.e.,* service of process) to a potential claimant who is incarcerated be sent to the facility where the potential claimant is incarcerated. The purported rationale for this rule is the Supreme Court's decision this term in *Dusenbery v. United States,* 534 U.S. 161, 151 L.Ed.2d 597, 122 S.Ct. 694 (2002). But that is not what *Dusenbery* holds. *Dusenbery* involved an administrative notice of forfeiture, not service of process. Moreover, the FBI in that case also sent notices to the address of the residence where Dusenbery was arrested as well as to his mother's residence address.

The Supreme Court, in a 5-4 decision, held that the government had satisfied the *minimal* due process requirements of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed.2d 865, 70 S.Ct. 652 (1950), because the notice was "reasonably calculated under all of the circumstances" to apprise Dusenbery of the pendency of the forfeiture. The Court observed as follows:

> The government here carried its burden of showing the following procedures had been used to give notice. The FBI sent certified mail addressed to petitioner at the correctional facility where he was incarcerated. At that facility, prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail. App. 36. The staff signed for all certified mail before leaving the post office. Once the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom. Id. at 37. A member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing it from the mailroom, and either a Unite Team member or another staff member distributed the mail to the inmate during the institution's "mail call." Id. at 37, 51.

Id., 534 U.S. at 700. The government was only able to meet the minimal due process requirement by demonstrating the above facts. Nevertheless, four members of the Court found that the government's notice efforts in that case were insufficient.

Proposed Rule G(4)(b)(iii) does little to ensure that an inmate will actually receive process, because it only requires that notice be "sent" to the institution. Unlike the Court in *Dusenbery*, it says nothing about what steps the institution must take to deliver the notice to the inmate. While there may be established procedures for delivering mail to inmates in federal facilities, there is no guarantee that such procedures exist in state, county, or municipal facilities.[5]

Accordingly, while we agree that notice must be sent to the facility where a potential claimant is incarcerated, we believe that the rule should also provide that notice is deemed complete in such circumstances only when there is evidence that the potential claimant actually received the notice, *e.g.,* a signed receipt.

Rule G(4)(b)(iv). This provision deals with service of process on persons who were arrested in connection with the offense giving rise to the forfeiture, but who are not currently incarcerated. The rule provides that in such situations the "notice... may be sent to the address given by the potential claimant at the time of his arrest or release from custody, unless the potential claimant has provided a different address to the agency to which he provided the address at the time of his arrest or release from custody." The Explanation (p. 11) states that this procedure "is consistent with the rule some courts have adopted." Id. However, the government's sole support for this assertion is an unpublished order from a district court which upheld that procedure for an administrative notice, not for service of process, under the specific facts of that case.

We do not believe that the government should be relieved of making *reasonable* efforts to provide actual notice of forfeiture proceedings to potential claimants. That is what the caselaw requires. See, *Mullane, supra,* 339 U.S. 306. Reasonableness must be decided based upon the facts of each case. The proposed rule does not meet this test. For example, if the potential claimant is the subject of some pending criminal

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[5] As the government informed the Supreme Court on brief in *Dusenbery,* Bureau of Prison employees currently "must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery. BOP Program Statement 5800.10.409, 5800.10.409A (Nov. 3, 1995). If a prisoner refuses to sign, a prison officer must document that refusal. BOP Operations Memorandum 035-99 (5800), July 9, 1999. 534 U.S. at 706 (GINSBURG, J., dissenting).

proceeding, or is currently on probation in another matter of which the government is aware, it is not unreasonable to require the government to check with the clerk of the court, the probation department, or the prosecutor or defense counsel, in an effort to determine a valid address for the potential claimant. Similarly, it is not unreasonable to require the government to check with the state Department of Licensing for the potential claimant's most current driver's license address. Any other plaintiff in a civil action is required to take such measures. Why should the government, with its superior resources, be relieved of such an obligation?

Rule G(4)(b)(v). This provision requires that the notice served with the Complaint must state that a claim must be filed no later than 30 days after the date of the notice. For the reasons stated in our objections to Rule G(4)(b)(ii), we find this provision unacceptable as a clear misstatement of well established law, and nothing in CAFRA was intended to change the current law in this regard. Contrary to the Explanation at page 11, this provision does not conform the rule with the statutory requirement in 18 U.S.C. §983(a)(4)(A). Section §983(a)(4)(A) provides that a claim must be filed "not later than 30 days after the date of service of the Government's complaint . . . " As stated above, service of a complaint has traditionally been on the date on which it was received, not the date on which it was sent.

The Explanation (p. 11) further complains that any other rule would be "unworkable" because the government would have no way of knowing when the notice is received. We suggest that this is more a problem created by the government's hoped-for expanded methods of service (*e.g.,* service by first class mail or by e-mail), for it has never been a problem with the traditional means of service currently in use. Indeed, even in those cases where service is accomplished by agreement of the parties utilizing first class mail, there is no difficulty in pinpointing the date when notice is received because the government sends a certified letter, return receipt requested.[6]

Even if there is doubt in some cases as to the precise date when the notice is received, this is not a practical problem. The government typically does not move for a default the day after the period for filing a claim expires, because Rule C(6) gives the court discretion to excuse the late filing of a claim. That discretion has been liberally exercised in the interest of deciding cases on their merits. Since the government normally waits at least a couple of weeks before moving for a default, determining the precise date when notice was received is generally not necessary.

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[6] See, *e.g.,* Fed.R.Civ.P. 4(d). Notably, the Civil Rules refer to this procedure as "waiver" of service, not "acceptance" of service.

The rule proposed by the DOJ, *if* service of process by mail is adopted by the Committee, would also unfairly penalize potential claimants who, through no fault of their own, receive notice after a long delay of the mail. Moreover, despite the fact that a notice might be dated on a certain date, there is no guarantee that it was actually mailed to the potential claimant on that date. Even when mail is timely delivered, the proposed rule would shave several days off the thirty day period for filing a claim under 18 U.S.C. §983(a)(4)(A). Treating the receipt of notice as the date service is hardly an "unworkable" rule, contrary to the protests of DOJ.

Rule G(4)(b)(vi). This rule would, *inter alia*, require that the notice served with the Complaint include a statement that "an answer to the complaint must be filed under Rule G(5)(b) not later than 20 days after filing the claim. We recognize that this conforms with the statutory requirement of 18 U.S.C. §983(a)(4)(B) and current Rule C(6)(a)(iii). However, we believe it important to clarify that a claimant in a judicial civil forfeiture proceeding may file a responsive pleading pursuant to Fed.R.Civ.P. 12(b) within 20 days, rather than an answer. We explain our concerns in more detail in our response to proposed Rule G(5)(b), *infra*.

Section (5). Responsive Pleadings; Interrogatories.

This section is the single most objectionable provision of proposed Rule G. It would, without any legislative deliberation, severely restrict the class of persons who could file a claim to contest a forfeiture, and clearly conflicts with well established caselaw and the letter, spirit, and intent of CAFRA. Frankly, we are shocked by the content of this provision, and by the Explanation which accompanies it at page 13. As demonstrated below, the DOJ knows full well that CAFRA does not in any way, shape, or form limit the right to file a claim to persons asserting an ownership interest.

Rule G(5)(a)(i) and (a)(v)(i)(B). Proposed Rule G(5)(a)(i) states that "[A] person who asserts an *ownership* interest in the property that is the subject of the action may contest the action by filing a claim in the court where the action is pending." This is directly contrary to well established caselaw and current Rule C(6)(a). Rule C(6)(a)(i) provides that "[I]n an in rem forfeiture action for violation of a federal statute:

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

* * *

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

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) includes the following statement:

> In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or right against the property involved. *This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession.* In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings. (emphasis supplied).

Well established caselaw holds that in order to establish Article III standing, "a claimant must have a colorable *ownership, possessory or security interest* in at least a portion of the defendant property." *United States v. $515,060.42 in United States Currency,* 152 F.3d 491, 497 (6th Cir. 1998) (emphasis supplied).

The Second Circuit states the rule as follows:

> To demonstrate standing under Article III, therefore, a litigant must allege a "distinct and palpable injury to himself that is a direct result of the "putatively illegal conduct of the [adverse party]," and "likely to be redressed by the requested relief." (citations omitted)

United States v. Cambio Exacto, 166 F.3d 522, 527 (2nd Cir. 1999) (money exchange businesses had standing to contest a forfeiture of funds seized from their bank accounts because they had a financial stake in the funds--they had a liability to their customers in an amount equal to the forfeited funds).

See also, *United States v. Contents of Accounts Nos. 303450504 and 144-07143,* 971 F.2d 974, 985 (3rd Cir. 1992) (any colorable ownership or possessory interest sufficient); *United States v. 5 S 351 Tuthill Road,* 233 F.3d 1017, 1021-1026 (7th Cir. 2001) (conferring standing on the beneficiary of a land trust); *United States v.*

$191,910.00 in U.S. Currency, 16 F.3d 1051, 1057 (9th Cir. 1994) (claimant need only have some type of property interest in the forfeited items); *United States v. $260,242.00 in United States Currency,* 919 F.2d 686, 687 (11th Cir. 1990) (constructive possession of money in trunk of car is constitutionally sufficient for standing in forfeiture actions); 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04, 9-69 through 9-70.6(1) (June 2002 ed).

During the CAFRA drafting process, the location and meaning of the term "owner" in the innocent owner provision [18 U.S.C. §983(d)(6)] was the subject of considerable debate, despite the fact that *all* parties, including the DOJ, understood that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property.

As part of the CAFRA drafting process, House and Senate staffers working on the bill sought input from a number of sources, including both DOJ and NACDL. Memoranda were circulated requesting comments on specific provisions that were undergoing revision, including the innocent owner provision. In particular, Senator Leahy's staff invited comments from the DOJ regarding the following proposal:

> **Page 22, lines 16-17.** Strike "an ownership interest" and insert "an ownership or possessory interest."
>
> It is well established that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property. This is the formulation used in the Sessions/Schumer bill, both in the provision on notice ("Upon commencing administrative forfeiture proceedings, the seizing agency shall send notice of the proceedings . . . to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest in the seized property.") and in Section 3 (motion to set aside a declaration of forfeiture shall be granted if the moving party "had an ownership or possessory interest in the forfeited property"...) S.1931 as currently drafted is particularly confusing, because it refers to "possessory interest" in one context (on page 16, re hardship release of property), and "ownership interest" in another (on page 22, re definition of "owner"). (emphasis in original)

On March 16, 2000, the DOJ responded to this proposal as follows:

[This] proposal would strike "an ownership interest" and insert "an ownership or possessory interest" on page 22, lines 16-17. This proposal involves the definition of the word "owner" in proposed new section 983. A global search of this provision reveals that the terms "owner" or "ownership" appear only in the provision governing the "innocent owner" defense to civil forfeiture. (Page 10, line 25, through page 14, line 21). (The terms also appear in proposed new Section 985 (page 13, line 10, through page 36, line 16), although we see no indication that the definition of the term "owner" on pages 22-23 is intended to apply to this section.

We believe that what is needed in addition to the provision defining "owner" on pages 22-23 is a provision stating that a claimant shall be deemed to have standing to contest a civil forfeiture if he/she (1) establishes a possessory or ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest, (2) but not if the claimant is:

> (i) a person with only a general unsecured interest in, or claim against, the property or estate of another;
>
> (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
>
> (iii) a nominee who exercises no dominion or control over the property.

Such a provision would codify established law that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property and it would also codify the exceptions to the standing requirement under current law. This appears to be what the definition of "owner" on pages 22-23 was intended to do, but it makes no sense to attempt to accomplish this purpose by defining a term that appears only in connection with the innocent owner defense.

We submit that the most logical place to put such a provision would be at page 10 of the March 9 draft just before current subsection (c) dealing with the burden of proof. . .

> We believe that the definition of "owner" on page 18 should remain intact. As noted, this definition applies to the "innocent owner" defense. Some provision is needed that makes clear that no relief will be granted where a person with a superior interest in the property subject to forfeiture fails to satisfy the "innocent owner" defense with respect to the property, while a person holding only a mere possessory interest is able to satisfy the defense. (emphasis in original).

DOJ's "March 16 Response to 'Comments on the March 9th Bill'" at 6-7.

Given that DOJ acknowledged to the drafters of CAFRA that clearly established law provides that persons with an ownership *or* possessory interest have standing to contest a forfeiture, and that DOJ even urged the inclusion of a separate provision that would make that point even more clear, it is incomprehensible to us that DOJ would now urge this Committee to adopt a rule that provides that only a person with an ownership interest has standing to contest a forfeiture.

Rule G(5)(a)(ii)(A). We object to this provision based upon our objection to the notice provision in Rule G(4)(b)(ii) ("notice is served on the date notice is sent.").

Rule G(5)(b). We agree that current Rule C(6)(a)(iii) and 18 U.S.C. §983(a)(4)(B) provide for the filing of an "answer" to the complaint within 20 days after the date of the filing of the claim. However, we are troubled by DOJ's interpretation of this rule as set forth in the Explanation, at 15, fn. 36. Relying on a single published decision of a district court judge in New Jersey--a decision which is currently under appeal to the Third Circuit--and one unpublished district court decision, the Explanation implies that, pursuant to Rule C(6)(a)(iii), a claimant may not file a motion to dismiss pursuant to Fed.R.Civ.P. 12(b), *or any other motion,* before filing an answer (as well as answers to interrogatories if served with the complaint). (See proposed Rule G(7)(d)(i)). We strongly disagree. In effect, DOJ's interpretation of Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b) would not merely supplement Rule 12 of the Federal Rules of Civil Procedure, but would entirely supersede it.

The purpose of Rule C(6) and proposed Rule G(5) is clear: in situations in which the government brings an *in rem* proceeding against potentially forfeitable property, some mechanism is necessary in order to determine who has standing to enter the controversy. Obviously, the property, which is the actual defendant in the action, cannot itself contest the action. Rule C(6)(a) and proposed Rule G(5)(a) establish a procedure for entering the controversy, *i.e.,* by filing a claim. Admittedly, this procedure differs from Fed.R.Civ.P. 12, because in the ordinary civil case, there is no

need to file a claim. The Rules, however, also provide the time limit within which an answer must be filed *after* the filing of a claim. See Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b). Thus, while Rule C(6) and proposed Rule G(5) interpose what is clearly a *supplemental* requirement--the filing of a verified claim--the remainder of the rule merely clarifies the requirement that an answer to the verified complaint must be served and filed following the filing of the claim, and the deadline for doing so.

Rule A provides, in relevant part, that "the general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules." We do not believe that current Rule C(6)(a)(iii) or proposed Rule G(5)(b) is inconsistent with Fed.R.Civ.P.12. Instead, Rule C(6) and proposed Rule G(5) merely *supplement* Rule 12's explicit language that "the service of a motion permitted under this rule alters these periods of time [to answer] as follows: if the court denies the motion . . . the responsive pleading shall be served within 10 days after notice of the court's action." Fed.R.Civ.P. 12(a)(4)(A). The purpose of this rule is obvious: a defendant in a civil action should not bear the burden of responding to the allegations of a complaint that is so deficient that further proceedings will be unnecessary.

Indeed, Supplemental Rule E(2) requires that the government's complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts." See Objections to proposed Section G(2)(b)(v), above. The requirements of Supplemental Rule E(2) and proposed Rule G(2)(b)(v) would be meaningless, and their purpose frustrated entirely, if a claimant were required to answer insufficiently pled allegations *before* moving for relief. See also, David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04[4] (June, 2001) ("[c]laimant will be excused from filing an answer on the merits pending disposition of defenses made by motion under Fed.R.Civ.P. 12.").

Thus, we submit that Rule C(6)(a) and proposed Rule G(5)(b) are not inconsistent with Fed.R.Civ.P. 12. We further submit that there is no justification for prohibiting the filing of a motion to dismiss prior to the filing of an answer pursuant to Rule 12(b) in judicial civil forfeiture proceedings. Indeed, the government has yet to explain why a different rule should apply to civil forfeiture proceedings. We submit that, in order to clarify once and for all that Fed.R.Civ.P. 12 applies in forfeiture proceedings, the first sentence of proposed Rule G(5)(b) should be redrafted as follows:

> (b) Answer. A person filing a claim must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed.R.Civ.P. 12, within 20 days after filing the claim.

For the same reasons, we object to the proposed new requirement that objections to the exercise of the Court's *in rem* jurisdiction over the property, or to venue, must be raised in the answer or will be deemed waived. The basis for objections to jurisdiction or venue may not become apparent until discovery has commenced. Fed.R.Civ.P 12(b) expressly provides that these matters may be raised by motion. The Explanation offers no justification for requiring that these matters be raised in the answer or are deemed waived.

Rule G(5)(c). We object to this provision based upon our objections to Rule G(2)(c), above.

Section (6). Preservation and Disposition of Property; Sales.

As discussed in detail below, proposed Section (6) creates broad new authority for the government to force the interlocutory sale of property named as a defendant in an *in rem* civil forfeiture proceeding. While at first glance this section appears benign and seemingly reasonable, the authority it grants--specifically the authority in subsections (6)(b) and (6)(c)--leaves substantial room for abuse by the government. Unfortunately, history strongly suggests that abuses will occur under these provisions. *See, e.g., United States v. Michelle's Lounge,* 39 F.3d 684, 699 (7th Cir. 1994)(using civil forfeiture laws to seize all of a person's substantial assets and hold such assets over two years without adversary hearing before indictment reflects a statutory scheme which "does present a great opportunity for abuse by the prosecutorial of the government"); *United States v. Farmer,* 274 F.3d 800 (4th Cir. 2001)(same; almost two years between seizure of all of defendant's assets and his indictment).

Rule G(6)(a). Preservation of Property. This subsection deals with property which is a defendant *in rem* in a forfeiture case and the owner or another person remains in possession of the property. In such cases the court may "enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance." While we have no objection to courts having this power, we are concerned with the expansive interpretation DOJ has placed on this power. As the government notes, the authority for proposed Rule G(6)(a) is derived from current Rule E(10). However, there is no provision in Rule E(10) that would allow for a *sale* of property under proposed Rule G(6)(a). Indeed, a sale of the defendant property would be inconsistent with the title and purpose of the proposed subsection, *i.e., the preservation* of the property.

Rule G(6)(b). Interlocutory Sales; Delivery. This subsection authorizes the sale of any defendant item of property, at any time after a forfeiture complaint is filed, on motion of any party, including the government or even the marshal, if any of four circumstances are shown:

(A) the property is perishable, or liable to deterioration, decay, diminution in value, or injury by being detained in custody pending the action;

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

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

(D) other good cause is found by the court.

Although this provision is apparently derived from current Rule E(9), it is an enormous expansion of the circumstances where the government can obtain a forced interlocutory sale. The phrase "diminution in value" does not appear in Rule E(9). Any car, truck, boat, or plane which is priced in the marketplace by the model year of the property (and thus depreciates with time) would fall within the scope of this provision. Forfeiture actions very often involve property of this type. This provision would substantially and unfairly increase the government's power to coerce settlements where the owner seeks the return of the actual seized property.

The provision in proposed Rule G(6)(b)(C) relating to property subject to a mortgage or taxes in default is also not found in Rule E(9). This too is a substantial broadening of the government's power to force interlocutory sales. We oppose this expansion of the government's power because it is all too easily subject to abuse, and because of its potential to exacerbate erroneous deprivations. For example, where the government has seized all of a person's assets, or frozen the person's bank accounts, it is unlikely that the person will be able to keep mortgage or tax payments current. If the seizure or freeze order was in error, the error will be compounded by a sale of the property. *See Michelle's Lounge, supra,* at 698-700, citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 528 (1976).

Consider also, *e.g.,* a forfeiture action against a family residence where the husband and wife owners are claimants. Since *United States. v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the government has been required to use a non-possessory method such as filing a *lis pendens* when

commencing a forfeiture action against real property. In order to take actual possession, prior notice and an adversary hearing is required. Significantly, the family that resides in the home is permitted to remain in possession while the case is pending. Under proposed (6)(b), if the family got behind on mortgage payments, the government could force an interlocutory sale, and the claimants would be helpless to stop it. Even if the owners ultimately prevailed after several years of litigation, they would still have lost their home. Moreover, the cost of buying comparable housing years later would almost certainly exceed the cash realized by the forced sale. In such cases, simply the *threat* by the government to force a sale could be used to coerce the claimants into accepting a settlement on the government's terms without any opportunity to have their claims adjudicated.

Similarly with motor vehicles, boats, and planes, the owner may have an interest in recovering the specific property that was seized. For example, the owner may know that the property functions well and has been well maintained. Its value to the owner may exceed what it would bring in the marketplace, and the owner may believe that it will be realistically impossible to buy an item of comparable quality on the open market. Such an owner would be highly susceptible to coercion to accept the government's settlement offer where the government is threatening to force a sale of the property.

In some cases the owner may agree to liquidate a defendant property. Obviously, in such instances no coercion would be involved, and a sale by agreement could proceed. However, in order to avoid the risk of erroneous deprivation, the authority to prevent a forced sale should remain with the owner.

In sum, we believe that the phrase "diminution in value" should be deleted from (6)(b)(i)(A) and that (6)(b)(i)(C) should be deleted altogether. The provision in (6)(b)(ii) allowing an alternative to a forced sale, *i.e.,* delivering the defendant property to a party while the case is pending upon the party's giving security, should be kept in the rule.

Rule G(6)(c). Sales; Proceeds. If the changes proposed in (6)(b) above, are made, we would have no opposition to this subsection.

Rule G(6)(d). Entry of Order of Forfeiture. This subsection provides that, upon the entry of an order of forfeiture, the property "must be disposed of as provided by law." No mention is made of a stay pending appeal. In order to avoid confusion, language should be added qualifying the mandatory disposal by the phrase "unless a stay is granted."

Section (7). Pre-trial Motions.

Section (7) addresses a number of issues that are not covered by the existing rules. We see no need to address any of these issues in Rule G. However, if the Committee is inclined to adopt any of these proposals, we want to be sure that the rule makes clear that the motions described in this section are not intended to be all-inclusive. We also have specific objections to the treatment of these issues.

Rule G(7)(a). Subsection (a) is a misguided attempt to codify existing case law holding that the Fourth Amendment exclusionary applies to civil forfeiture cases. As drafted, this proposal improperly narrows the holding of the caselaw because it limits suppression to use of the property as evidence "at the forfeiture trial." The caselaw provides for suppression of the use of the property for *all purposes.* Moreover, we are not aware of any "confusion among practitioners" concerning the application of the exclusionary rule. Explanation at 17.

Rule G(7)(b). Subsection (b) provides that the government may "move at any time to strike a claim and answer for failure to comply with the filing requirements, or for failure to establish an ownership interest in the property subject to forfeiture." We have already explained in response to proposed Section 5 why it is not necessary to establish an ownership interest in the property in order to have standing. This subsection would allow the government to move at any time to disqualify a claimant for failure to comply with the technical filing requirements governing claims and answers. We see no reason to permit the government to argue at trial, or even after trial on the merits, that a claim was filed late. Just as a claimant may waive certain issues by not raising them at the appropriate time, so can the government.

Rule G(7)(c). Subsection (c) provides that a claimant "with an ownership interest in the property" may move "at any time after filing a claim and answer, for release of the property under 18 U.S.C. 983(f)." DOJ claims that this subsection is needed to provide "a procedural counterpart to 18 U.S.C. § 983(f)." Explanation at 17. In fact, 18 U.S.C. §983(f) provides its own procedural rules, and they are incompatible with DOJ's proposal.

First, §983(f)(1)(A) merely requires the claimant to have "a possessory interest in the property," not an ownership interest. Second, whereas subsection (c) only permits the filing of a motion for release of property after a claim and answer have been filed, §983(f)(3)(A) permits a "claimant" to file a petition for release of the property on hardship grounds even "if no complaint has been filed." CAFRA's hardship release provision was thus intended to be available immediately following the seizure of the

property. A claimant is not required to wait many months until the government files a complaint, nor is there any requirement that the claimant first file a claim and an answer.

The Explanation states that subsection (c) is "necessary to address confusion caused by the pre-CAFRA case law" governing motions under Rule 41(e) of the Federal Rules of Criminal Procedure.[7] Explanation at 17. However, we do not see any language in subsection (c) that addresses this alleged "confusion."

The Explanation at 19 further states that subsection (b) provides that the criteria set forth in Section 983(f) are the only grounds for the pre-trial release of the property, but there is no such language in the draft of Rule G(7)(b) that was provided to us. If the reference was intended to be to subsection (c), we object to that characterization because this subsection is at odds with the language of 18 U.S.C. §983(f), which does not preclude other motions for release of seized property based on the illegality of the seizure. DOJ sought to insert language in section 983(f) making it the exclusive means of obtaining release of property prior to trial. Congress rejected that effort to abolish Rule 41(e) motions. Moreover, we do not agree with the government's view of Rule 41(e). It still has an important role to play after the enactment of Section 983(f). Indeed, the government appears to concede that a Rule 41(e) motion will lie before an administrative forfeiture proceeding is commenced.

But even after a notice of seizure is sent to the owner, there are situations where the claimant cannot wait an additional ninety days or more (the time for filing a complaint may be extended for good cause) for a remedy, and thus the forfeiture suit itself does not provide an adequate remedy at law. A company's property may have been seized illegally and the property may severely diminish in value over time, *e.g.*, perishable goods. Contrary to the view expressed by many courts, there should be no hard and fast rule that a motion under Rule 41(e) will not lie once a notice of seizure

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[7] The Explanation (p. 18) erroneously complains that "in adopting the standards set forth in Rule 41(e), courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property." In fact, Fed.R.Crim.P. 41(e) provides, in relevant part, that "A person aggrieved by an unlawful search and seizure *or by the deprivation of property*" may move the district court for return of the property. (emphasis supplied). The Advisory Committee's Note to the 1989 amendments to Rule 41(e) explains that "[a]s amended, Rule 41(e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it."

is served. *See* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶10.05A, 10-93 (June 2002 ed.)("The court should carefully weigh the competing interests of the claimant and the government in determining whether to rule on a motion for return of seized property. The equities may vary enormously depending on the circumstances and courts should be flexible."); *Muhammed v. DEA*, 92 F.3d 648, 652 (8th Cir. 1996)(Rule 41(e) motion may still lie after initiation of administrative forfeiture proceedings, depending on the equities of the situation).

Rule G(7)(d)(i). Subsection (d)(i) provides that a claimant (again misdefined as a party "with an ownership interest in the property") "may, at any time after filing a claim *and answer*, move to dismiss the complaint under Rule 12(b)." We see the necessity for first filing a claim but not for first filing an answer. Fed.R.Civ.P. 12(b) gives the pleader the option to make seven specified defenses by motion before answering the complaint. Surely DOJ does not believe that a different rule should apply in civil forfeiture cases. If they do, they have provided no rational justification to support such a rule.

Rule G(7)(d)(ii). Subsection (d)(ii) provides that a complaint may not be dismissed on the ground that the United States did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." DOJ states that this provision is necessary to provide a procedural counterpart to a new statute, 18 U.S.C. § 983(a)(3)(D), which it claims was enacted "to overturn legislatively a number of cases permitting a civil forfeiture complaint to be dismissed pre-trial based on lack of evidence." Explanation at 20. DOJ states that lack of evidence is not a basis for a motion to dismiss under Rule 12.

Subsection (d)(ii) is not necessary to implement 18 U.S.C. §983(a)(3)(D), which is self-enforcing. DOJ wants to insert this provision, with a completely misleading explanation of section 983(a)(3)(D), in order to give section 983(a)(3)(D) a meaning it clearly does not have, and which Congress specifically sought to avoid.

Many cases, both before and after the enactment of the CAFRA, hold that the government must have probable cause at the time it files the complaint.[8] Indeed, the

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[8] In addition to the cases cited in the Explanation at 20 n.43, see *U.S. v. $734,578.82 In U.S. Currency*, 286 F.3d 641, 655 (3d Cir. 2002). As the Third Circuit observed, this rule "avoids the obvious questions of fundamental fairness that would arise from the government attempting to have a court order forfeiture without first having an adequate factual basis to support the request."

legislative history of CAFRA expressly states the requirement:

> And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

146 CONG. REC. H2050 (daily ed. April 11, 2000).

The government may not acquire its probable cause later, by conducting civil discovery. This probable cause requirement follows naturally from the fact that the Fourth Amendment prevents the government from seizing property without probable cause. It is also embodied in a statute, 19 U.S. C. § 1615, that was originally enacted in 1790, to govern the burden of proof in customs forfeiture cases.

DOJ asked Congress to abolish this requirement when it enacted CAFRA, but Congress refused to do so. However, Congress did agree that because CAFRA raised the government's burden of proof from probable cause to preponderance of the evidence, the government should not be required to prove its case by a preponderance of the evidence at the time it files the complaint. That is the rule found in section 983(a)(3)(D). The same rule is found twice in CAFRA. The other place is section 983(c), which provides that the "government may use evidence gathered after the filing of a complaint for forfeiture to establish, *by a preponderance of the evidence*, that property is subject to forfeiture." Congress thought it was enough that the government have probable cause at the time it commenced the forfeiture action. Had Congress wished to enact the DOJ's proposal, it would have substituted the words "probable cause" for "adequate evidence. . . to establish the forfeitability of the property" in section 983(a)(3)(D).[9]

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[9] H.R. 1965, a pro-government version of the "Hyde bill" introduced in 1997, would have relieved the government of the need to demonstrate that it had probable cause at the time it filed its complaint. That was one of the more objectionable features of the bill that ultimately resulted in its failure to pass. See H. Rep. No. 105-358, 105th Cong., 1st Sess. 47, 89 (1997).

There is a further problem with the government's proposal. CAFRA exempts certain statutes, mainly the Customs forfeiture laws under Title 19, from its main provisions. Those "carve-out" statutes remain unreformed. 18 U.S.C. §983(i). The government's burden of proof in those proceedings remains probable cause, as provided in 19 U.S.C. §1615. For those statutes, the government must have adequate evidence at the time it files the complaint to establish the forfeitability of the property.

Accordingly, the fact that a Rule 12 motion to dismiss will not normally lie for lack of evidence does not matter. In the unique context of civil forfeiture law, most courts agree that the government must have probable cause at the time it files the complaint. If it does not, then it may suffer dismissal or summary judgment or judgment after a trial.

If the Committee is inclined to adopt proposed Rule G(7)(d)(i) and/or (ii), we urge the Committee to add a new subsection (e) as follows:

> (e) Summary Judgment. Any party may bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

This proposed new subsection (e) is consistent with existing caselaw, and the intent of CAFRA, as set forth in the legislative history quoted above. If the Rule addresses motions to dismiss pursuant to Fed.R.Civ.P. 12(b), we think it also appropriate, in order to avoid confusion, to address motions for summary judgment in the same rule.

Rule G(7)(e). Subsection (e) supposedly "fills in the gaps" in 18 U.S.C. §983(g), the proportionality provision of the CAFRA. DOJ notes that section 983(g) is silent as to the point in a civil forfeiture proceeding when an Eighth Amendment challenge may be made. The reason section 983(g) is silent on that point is easily explained. The DOJ asked Congress to include a provision exactly like subsection (e) but Congress rejected it. Congress saw no reason to force claimants to wait until the government had conducted discovery on the issue. It decided to leave that to the discretion of the court. There will be some cases where the forfeiture sought is so clearly excessive that civil discovery is not necessary to resolve the issue.

We also see no reason for a hard and fast rule that an excessiveness issue may not be raised unless the claimant has pleaded it as a defense under Rule 8. Case law under Fed.R.Civ.P. 8 should govern this "waiver" issue. There is no need for a special rule pertaining to this one defense. This is a transparent attempt to create another trap for the unwary--something CAFRA specifically sought to avoid.

Section (8). Trial.

There is no need to provide that trial is to the court unless a party requests a trial by jury under Rule 38. Rule 38 already covers this subject. Rule 38(d) provides that the failure of a party to serve and file a demand as required by Rule 38(b) constitutes a waiver by the party of trial by jury.

This concludes our comments to proposed Rule G. As always, NACDL appreciates the opportunity to offer the Advisory Committee our comments on proposed rule changes that may affect the interests of our clients. We thank you again for the opportunity, and look forward to our continued participation in the rule-making process.

Very truly yours,

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PROFESSOR COOPER'S JANUARY 9 EMAIL COMMENTING ON NOVEMBER 26 RULE "G" DRAFT

The attached comments were sent by Professor Cooper in a January 9, 2003, email to Judge McKnight. Professor Cooper explains that:

> The attachment is a set of notes on the November 26 Rule G draft. It is not particularly scientific – I simply read through the draft, comparing it to the April 11 draft, and identified the questions that came to mind. The "explanation" has expanded greatly with the responses to the NACDL comments. Many of my reactions to the explanations are incorporated with the notes on the rule, but a few are set out separately at the end.

Admiralty Rule G: November 26, 2002 Draft Comments

(2)(b)(ii): This is puzzling. It seems to say that the complaint need not state the basis for subject-matter jurisdiction if it states the basis for in rem jurisdiction over the property. Why the addition of "or in rem jurisdiction over the property"? The Explanation discussion, pp. 5-6, focuses on the relationship between in rem jurisdiction and venue. Perhaps we should combine (ii) and (iii) differently:

(b) The complaint must state: * * *

(ii) the basis for subject-matter jurisdiction;

(iii) the basis for in rem jurisdiction and venue; * * *

(3)(a)(iv): this is new. See explanation, pp. 10-11. It is a reassuring window to the general land-based view of "no restraint without judicial approval." But two questions: (1) Should there a provision for exigent circumstances? (Or is that provided somewhere else that I do not now recall?) (2) "neutral and detached magistrate" presents two questions — "neutral and detached" seems unnecessary, and almost insulting (a judicial officer who should not act will not act); and why not simply "judge"? We could say United States District Judge or Magistrate Judge, I suppose. Do we mean also to authorize state judicial officers? (The G(3)(b)(iii) reference to execution within or without the district seems to imply action by a federal judicial officer.)

4(a)(i)(C): The explanation, 16-18, seems persuasive as to publication in the place where the property was seized, and also in rejecting publication in national-circulation media. But we need something more as to publication in the place where the property is located: Can property be "seized" at a place different than the place where it is "located"? If not — if seizure always occurs where the property is located — the alternative of publication where the property is located has meaning only if the property is moved after seizure. Relying on the government's interest in constitutionally sufficient publication is no great comfort unless there is a good explanation of the reason to publish where the property is located when it was seized somewhere else and the forfeiture action is pending somewhere else.

(4)(a)(v): (1) The explanation, p. 20, says something so important that we may want to put it in the rule: the idea is that there will be a single central forfeiture web site. If properly constructed, it could indeed be useful — it would have to go beyond identifying the res as "$547,328.27, more or less, United States Coin and Currency." (2) The change to "reasonably calculated to provide notice" is an improvement. The change from "to persons who may have an interest in the property" to persons who may have an ownership interest is puzzling, but ties to something I have forgot about (5): Present C(6)(a) provides for a statement of interest and claim by a person "who asserts an interest in or right against the property." New G(5) is "ownership" interest. What of lien claimants — including innocent lenders? See (5) below. So (4)(b)(i) calls for notice to "any person who, appearing to have an interest in the property, is a potential claimant."

(4)(b)(ii): It would help to rearrange to accommodate the long list of relationships that make counsel an eligible target for notice. It also may help to separate the manner and date of service from the persons to be served:

(ii) Notice may be served in any manner reasonably calculated to ensure that it is received, including first class mail, private carrier, or electronic mail. Service is made on the day the notice is sent.

(iii) Notice may be served on:

(A) the potential claimant, or

(B) counsel representing the potential claimant with respect to the property seizure, or representing the claimant in a related investigation, criminal forfeiture proceeding, or criminal case.

(4)(b)(vii): This is new. See p. 5 of the Explanation. The thought can be expressed more directly. Is the same thought conveyed in these words:

(vii) In a proceeding that 18 U.S.C. § 983(i) exempts from the Civil Asset Forfeiture Reform Act of 2000, the time periods stated in notices under Rule G(4)(b)(v) and (vi) must ~~correspond to~~ be those set by the applicable statute.

Whatever the words, they work only if "the applicable statute" actually sets time periods. So of the later provisions that recognize the § 983(i) exemption.

(5)(a)(i): Do we need an express requirement that the claim identify the person making the claim? Cf. pp. 40-41 in the Explanation, where the discussion of requiring that an answer be filed before a motion to dismiss is made states that the government needs to know who the claimant is.

(5)(a)(i)(B): At last the explanation, top p 36, reveals that "ownership" is used in a sense derived from § 983(d)(6): it includes lienholders, mortgagees, assignees, bailees (if they identify the bailor, etc.), and holders of secured interests. Here and elsewhere, is "ownership" good enough for Rule G? Or should there be something to flag the meaning? (And see the note for (7)(d) below — we should think about possession interests.)

5(a)(ii)(B)(2): in its present form this could easily be misread. It looks graceless, but this should be "if under Rule G(4)(a)(iii) notice was not published." Or, since (B)(1) refers to G(4), perhaps we can simply say "if notice was not published."

(5)(a)(iv): Again, this is new. Again, can it be stated in parallel with (4)(b)(vii):

(iv) In a proceeding that 18 U.S.C. § 983(i) exempts from the Civil Asset Forfeiture Reform Act of 2000, the time for filing a claim under Rule G(5)(a)(ii)(B) is the time set by the applicable statute.

(6)(a): "that has been named as the defendant in rem in a civil forfeiture action" is new. It adds this meaning: the court may — on motion or on its own (without notice?) enter an order to preserve the property before the property has been attached or arrested and before process has been executed without taking actual possession. The order could be served with the attachment, etc. Is this actually

done now?

(6)(b)(i): the provision for paying the proceeds into court is moved to (c)(ii). This seems an improvement.

(6)(b)(i)(B): "to its fair market value" is new. This is something of a circumscription — it closes off arguments that nonmarket values justify the expense of keeping the property. (And a style note: the Explanation uses "disproportional." At first blush, it seems better than "disproportionate." Can we use it in the rule?)

(6)(b)(i)(C): This is new. Should it be qualified — sale should be ordered only if needed to protect the mortgagee or tax creditor?

(6)(c)(ii): the first sentence is new. It seems a good idea. The second sentence is transposed from former 6(b)(i). It also is changed: the former provision directed the sales proceeds be held "to await further orders of the court." The new provision directs the proceeds be held "pending the outcome of the forfeiture action." This seems to circumscribe the court's discretion. It may be sensible; indeed, it seems to fit better with (6)(d), which directs disposition of the sale proceeds upon completion of the forfeiture proceeding.

(6)(c)(iii): This too is new. The repetitive chore of integration with 6(b) suggests that perhaps (b) and (c) could be folded together:

> **(b)** ***Interlocutory Sales; Delivery.*** The following rules apply to an interlocutory sale or delivery of the property: * * *
>
> > **(iii)** The sale must be made by the agency of the United States that has custody of the property, by the agency's contractor, or by a person designated by the court.
> >
> > **(iv)** The sale proceeds become a substitute res subject to forfeiture [in place of the sold property], and must be held in an interest-bearing account pending [final judgment][the outcome of the forfeiture action].
> >
> > **(v)** Chapter 127, 28 U.S.C. (§§ 2001 - 2007) governs the sale unless the court approves an agreement by all parties to use different procedures.

(7)(a): (1) Do we lose anything if, in response to NACDL, explanation p. 49, we strike "at the forfeiture trial"? The argument inevitably will be made on summary judgment anyway. (2) This provision ties to (7)(c). The explanation, pp. 50-52, seems by implication to leave a gap for Criminal Rule 41(e): before a civil forfeiture complaint is filed, a Rule 41(e) motion for return may be made on the ground that the seizure was unlawful. But after the complaint is filed, the illegality of the seizure is not a basis for return — § 983(f) implicitly (?not explicitly?) forecloses return before trial on that ground, leaving open the way for suppression as evidence.

(7)(b): The "ownership" issue here is almost the same as in (5) and (7)(d) — see (7)(d). But there may be added difficulty in allowing a motion to strike a claim that forces the claimant to "establish"

an ownership interest before the government has proved forfeitability. Here too the draft seems calculated to reduce the force of the statute requiring the government to prove forfeitability.

7(c): (1) The first sentence is changed: it was "a party with an ownership interest" may move for release. Now it is a party with standing to seek release under § 983(f): is this narrower or broader? Note that 7(d) continues to allow a party with an ownership interest to move for dismissal. (2) Is there any risk of confusion in referring to property in the possession of the United States or its contractor — isn't property in the "possession" of the court after the forfeiture complaint is filed — or at least the court's "custody"? cf. Explanation p. 10, n. 24. (3) Does § 983(f) purport to be the exclusive means for seeking return pending trial? (4) The last two sentences are new. (5) We will need to consult the Criminal Procedure crowd before ousting Criminal Rule 41(e); cf. (7)(a) above.

(7)(d): The defense in explanation pp. 40-43 is not fully convincing. Along with the "ownership" issues, it seems more and more to be an attempt to get around the requirement that the government prove forfeitability. If the government has not been able to initiate the forfeiture proceeding correctly — it does not help to refer to its failings as mere technicalities — why not let the challenge be made at the beginning? This seems akin to a challenge to personal jurisdiction: the government has not done what is required to establish in rem jurisdiction. The concern that the property will be returned to a non-owner at least needs more explanation: why not return it whence it was seized? The bank accounts of the example simply are unfrozen. There also is an air of inquisition in referring to claimants who understandably do not want to identify their relationship to criminal activity. We might have a better chance arguing that a claim must be made before a motion to dismiss can be made, but why also the answer? The claim could be defended as the efficient way to establish "standing," including a sufficient statement of a protectable interest.

7(f): This is new. It might better be integrated, despite the repetition, in 7(c) and 7(d), or transposed to become 7(e):

> **(e)** Rules G(7)(c) and (d) do not apply to a case exempted by 18 U.S.C. § 983(i) from the Civil Asset Reform Act of 2000.

But: what does apply to those cases? No one can move to release the property or to dismiss? See 4(b)(vii) and 5(b)(iv).

Sealing Order Form

Is it intended that the sealing order application be adopted as an official form?

Notes on Explanation

p. 5: How far do these various statutes supply procedures that make up for the exclusion from Rule G?

p. 7: We could reinstate "without moving for a more definite statement" in (b)(2)(v), but it really is surplusage. Perhaps a mention in the Committee Note will suffice.

pp. 8-9: It would help to have some sense of the cases in which interrogatories are served with the complaint. To whom are they directed? What do they ask? Are they useful because there are many seizures in which the government knows at least the person who had possession or title at the time of seizure? Cf. pp. 15-16 on often not knowing who will claim an interest.

p. 20: Is there some special meaning here? Several districts permit electronic filing of civil actions.

p. 23: The top of the page suggests that a means of notice authorized by local rule in the district where a forfeiture action is pending might be defeated if the notice is delivered in a different district that has an inconsistent local rule. That is so difficult to believe that perhaps this suggestion should be deleted.

p. 28: If the prison fails to deliver the notice to the prisoner, how does it happen that the adequacy of notice is contested "at trial"? Would this be better as "if the adequacy of the notice is contested"?

pp. 36-38: Some of the examples are troubling. Why should an owner be estopped from filing a claim because the owner denied ownership at the time the property was seized? There may be reasons for denying ownership other than lack of ownership. And there may be a possessory interest of sorts in a person who is permissibly occupying a dwelling — a "resident" as described. If the resident can show that the property in fact is not forfeitable, is that so bad? Some of the later arguments are even more troubling. If the government cannot prove that the property is forfeitable, why let the government keep it? A person in possession at the time of seizure has a better claim than the government. Chandler's claim to possession is disputable because the immediate possessor — Chavannes — was disputing his claim, and had not intended to part with physical custody of the soap box. If the property is not forfeitable, it might well go to Chavannes, but why the government? If there is a persuasive case, it must be expressed differently. Perhaps more to the point, the question seems to tie to § 983(d)(6), which (top p 36) may not include possessory interests in "ownership." If it does not, we might choose to rely on the statute, but still need a more persuasive reason why "standing" should not flow from a possessory interest.

pp. 54-55: Rule 56 allows a motion for summary judgment to be filed even before an answer. See Rule 56(a) and (b). Filing and "consideration" are different things. This explanation should be expanded.

Responses to Ed Cooper's January 9, 2003 Notes on Rule G

G(2)(b)(ii)

The recombination of the requirements in (ii) and (iii) regarding subject matter jurisdiction, in rem jurisdiction and venue is a good idea. It was never the intent to make subject matter jurisdiction and in rem jurisdiction alternative requirements.

G(3)(a)(iv)

1) There is no need for an exigent circumstances exception to the requirement that an arrest warrant in rem be approved by a judicial officer. If there are exigent circumstances, the Government will simply seize the property pursuant to 18 U.S.C. 981(b) before reaching the point where it files the complaint and requests issuance of the arrest warrant.

2) The phrase "district judge or magistrate judge" would be fine. We suggested "neutral and detached magistrate" only to echo the language from the Supreme Court's Fourth Amendment jurisprudence.

G(4)(a)(i)(C)

The reason for separating "where the property was seized" and "where the property is located" into alternative places where publication could take place was only to address situations where property in *not* seized – *e.g.*, real property or property that is arrested pursuant to G(3)(a)(iv). It was not intended to allow the Government to seize property in one place, remove it to a storage location in another place, and publish only in the latter place. The confusion could be eliminated by inserting in (C)(3) the phrase, "if the property is not seized, the place where the property is located".

G(4)(a)(v)

1) We have no objection to requiring that internet publication be on a "central forfeiture website."

2) As noted later in Ed's notes, lienholders do fall within the statutory definition of "owner" in Section 983(d)(6).

3) To be consistent, we probably should amend (4)(b)(i) to read "ownership interest."

G(4)(b)(ii)

The suggested restructuring is a good idea.

G(4)(b)(vii)

Ed is correct in pointing out that the attempt to exempt CAFRA-exempted forfeitures from the filing requirements in Rule G is problematic. We were attempting to respond to NACDL's point that not all forfeitures are covered by CAFRA, and hence not all forfeitures are subject to the requirements for filing claims in Section 983(a)(3) that are mirrored in Rule G. However, the CAFRA-exempted statutes do not have statutory provisions of their own regarding the filing requirements. Rather, Rule C(6) continues to apply to those cases. It would be much simpler if Rule G could make the requirements in Rule G apply to CAFRA and non-CAFRA cases alike, as we originally proposed, rather than have to preserve Rule C(6) for the non-CAFRA cases.

G(5)(a)(i)

It would be a good idea to add a requirement that the claim identify the person making the claim.

G(5)(a)(i)(B)

We could include a specific cross-reference to the definition of "owner" in Section 983(d)(6), but point out that (5)(a)(i)(B) already does this.

G(5)(a)(ii)(B)(2)

There is no objection to either alternative drafts, "graceless" or otherwise.

G(6)(a)

The notion was to make the court's authority to enter an order preserving the property under Rule G(6)(a) consistent with its authority under Section 983(j). That statute permits the issuance of both pre- and post-complaint restraining orders. In the latter case, the order is typically issued ex parte based on the inclusion of the property in the complaint. There is no case law on Section 983(j) (because it was only enacted in 2000), but the identical language in 21 U.S.C. 853(e) (pertaining to post-indictment restraining orders in criminal cases) has been universally interpreted to permit ex parte restraining orders in that situation. *See United States v. Acord*, 47 F. Supp. 2d 1339 (M.D. Ala. 1999) (post-indictment restraining order may be issued *ex parte* to preserve the Government's interest in movable property, such as an automobile).

G(6)(b)(i)(B)

"Disproportional" instead of "disproportionate" is fine.

G(6)(b)(i)(C)

The interlocutory sale of property on which the owner has stopped making mortgage or tax payments is not only for the benefit of the lienholder or tax creditor. It is also to protect the Government from becoming liable for mortgage or tax penalties accrued by the delinquent property owner before the forfeiture is final.

Combining (6)(b) and (c) seems like a good idea.

G(7)(a)

The reason for limiting the suppression of illegally seized evidence to its use "at the forfeiture trial" was never to allow such evidence to be used in responding to a motion for summary judgment. Property that may not be used at trial equally may not be relied upon in the context of a motion for summary judgment. Rather, the point was that the suppression should only apply to the merits of the forfeiture case, and should not apply in other related contexts, such as the defense of a Section 1983 civil rights action based on the seizure of the property; a perjury prosecution; a request for sanctions under Rule 11; an enforcement action under Section 983(h) for filing a frivolous claim; or the opposition to a request for attorneys fees under the Equal Access to Justice Act or 28 U.S.C. 2465(b) stemming from the forfeiture action in which the property owner prevails.

G(7)(b)

Forcing the claimant to establish that he or she has a bona fide ownership interest in the property before engaging in the litigation of the merits of the case is a major objective of the proposed Rule. As stated in the Explanation, the goal is not to avoid having to establish the forfeitability of the property once a proper party has asserted a claim; rather, it is to avoid affording wrongdoers the opportunity to recover property through strawmen and nominees.

Many times, forfeitable property is simply found in a Fed Ex package, seized from a courier who denies knowledge of it, or discovered in a concealed compartment or abandoned stash house. The *owner* of such property has the right to put the Government to its proof; but a mere nominee or straw – behind whom the true owner is hiding – does not.

Consider a case in which a police officer, acting on a tip that a drug deal is in the works, approaches four men in a parked car in a dark parking lot. As the officer approaches, all four suspects flee, leaving behind $100,000 in cash concealed in the tire well of the car. Proof that the property is subject to forfeiture (as property intended to be used in a drug deal) is circumstantial and less than compelling. Nevertheless, the Government should not have to return the property unless the owner files a claim. Suppose the Government files a forfeiture action against the cash, and the only person who files a claim is an elderly lady from Tennessee (the grandmother of one of the four suspects who fled the police), whose name happens to be on the title to the vehicle where the cash was found. Under current law, the grandmother has standing to contest the forfeiture, but she is unlikely to be able to establish ownership. *See In re Seizure of $82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient to contest forfeiture of cash found in vehicle's gas tank). There is no reason the Government should have to establish forfeitability of the property in litigation with the grandmother if she has no ownership interest in the money, but is only acting as a shield and straw for the anonymous drug suspects.

G(7)(c)

1) The term "person with standing to seek release under Section 983(f)" is broader than "a party with an ownership interest." The change was intended to respond to NACDL's correct observation that standing to file a 983(f) hardship petition is not limited to property owners.

2) We don't believe there is any confusion between the concepts of property in the possession of the
United States (or its contractor) and property in the possession of the court. The property must be physically in the possession of the seizing agency or its contractor before the agency can grant the relief that 983(f) contemplates (the statute provides that the hardship petition is filed, in the first instance, with the seizing agency, and with the court only if the seizing agency does not grant the petition).

3) Section 983(f) is silent with respect to whether it is the exclusive means of seeking pre-trial release of seized property. However, it is the only provision setting forth a procedure for releasing pre-trial, or creating a right to seek such release. Thus, it appears to be the exclusive remedy. The case law holding that the court has no jurisdiction to grant a Rule 41(e) (now Rule 41(g)) motion once forfeiture proceedings have been commenced reinforces this view. The last two sentences of Rule G(7)(c) make this clear.

G(7)(d)

For the reasons discussed above regarding straw claimants and nominees, we think that the claimant should be required to answer the complaint and the interrogatories before challenging the complaint on legal or factual grounds that only a party with a bona fide interest in the property should be permitted to raise.

G(7)(f)

The proposed redraft is fine. As to what does apply to CAFRA-exempted cases, the answer, unfortunately, is "the old law." There was no hardship provision applicable to pre-CAFRA cases, and Section 983(f) clearly does not apply to CAFRA-exempted cases. Obviously, that fact is not helpful to property owners, but it reflects the intent of Congress. Conversely, the "Ninth Circuit Rule" allowing the claimant to challenge a complaint for failure to establish the existence of probable cause at the time the complaint was filed, was overruled by Section 983(c)(2) and (a)(3)(D), but those statutes do not apply to CAFRA-exempted cases. Obviously, that is not helpful to the Government in such cases, and is the reason NACDL raised the point about the non-applicability of parts of Rule G to CAFRA-exempted cases, but it reflects the intent of Congress.

Notes: Rule G Conference Calls

25 March 2003

Participants in the 25 March conference call included Cassella, Cooper, Heim, Jeffries, Kyle, Levi, Marcus, McCabe, McKnight, and Rabiej.

Setting the Scene

The first questions addressed were the reasons for adopting a Rule G, and for doing it now.

Background. Cassella noted that civil forfeiture statutes have been adopted over a period of many years. The Civil Asset Forfeiture Reform Act of 2000 is only the most recent legislation. CAFRA overlays "some procedural uniformity" from the initial investigation to filing a civil proceeding. It also creates some new defenses.

Without a new Rule G, procedure will continue to be governed by the supplemental rules. The forfeiture statutes generally do not provide the details of procedure, but instead refer procedure to the supplemental rules.

The draft Rule G is intended to do several things. It picks up the specific forfeiture provisions in the supplemental rules, particularly Rules C and E. It addresses issues that never have been addressed in the supplemental rules. It is a parallel to the exercise that consolidated the procedures for criminal forfeiture in Criminal Rule 32.2.

Rule G is consistent with CAFRA both in letter and in spirit. CAFRA sets time limits for some procedures, but has few other specific procedure provisions. Some forfeitures, including traditional customs and tax forfeitures, are exempted from CAFRA. Although the current draft attempts to carve these CAFRA-exempt forfeitures out of Rule G, there a few instances where that cannot be done. G(7) covers those. But it may be better to bring all forfeitures back into Rule G, so as to have a uniform procedure that can be relied on. (Rule G(7)(c) has a hardship exception procedure for release of property, modeled on § 983(f); that would not apply in customs forfeitures. That does not, however, create any need to continue to apply Rules C or E to forfeiture proceedings. In the 9th Circuit, ~~Rule E(2)~~ the pre-CAFRA rule regarding a probable cause requirement for filing a forfeiture complaint applies only to non-CAFRA cases.)

If we delete the exceptions made in the current draft for forfeitures that are exempt from CAFRA, the result will be that, through G(1), Rule G applies to all civil forfeitures.

Rule G responds to difficulties in present practice. C and E have provisions designed for admiralty cases that at best apply awkwardly in forfeiture. The 2000 supplemental rules amendments were a bit of a band-aid, adopted because admiralty lawyers did not like to have forfeiture decisions that stretch the admiralty concepts to fit forfeiture needs, at the cost of distorting admiralty proceedings.

Beyond that, the supplemental rules do not address several topics that should be addressed by rule. Constitutional requirements have developed for notice, and for excessive fines. CAFRA dictates some changes. And it is desirable to modernize to provide for forfeiture of property in other countries; for other cases where the property is outside the district where the forfeiture is being conducted; and for publication on the internet.

Some parts of Rule G react to developing case law. Generally the draft provisions reflect the developing law. But G(5) seeks to depart from recent decisions that adopt an Article III minimum threshold for standing to file a claim. The area of greatest concern is the ability to file a claim through a strawman or nominee, enabling the wrongdoer to conceal his identity.

Fit With Supplemental Rules. The basic plan is to carve out from Rules A through F, most particularly C and E, all provisions that focus specifically on forfeiture. If we see something in A through F that is not in G, we should put it in G. If something is missed, G(1) allows incorporation of A through F to fill the gaps. This is a "belt and suspenders" approach. G remains located in the supplemental rules because many statutes over the years have adopted the admiralty rules to govern forfeiture proceedings.

It was observed that it would be helpful if G could be made entirely self-contained. A reader then would know that all procedure in forfeiture proceedings, to the extent governed by court rule, is to be found in Rule G and the Civil Rules. If there is any leakage, those involved in forfeiture proceedings will feel a need to become familiar with all of the Supplemental Rules. That task is not always easy.

As G stands now, it is not entirely self-contained. Draft G(6)(b)(ii), for example, calls for giving security "under these rules." This language draws from the parallel language in E(9)(b)(ii); general security provisions appear at least in E(5).

Incorporation of Rule A ensures the further incorporation of the Civil Rules. The supplemental rules, for example, say very little about discovery and nothing about discovery sanctions.

But there may be inconsistencies. What happens if Rule G says one thing, and somewhere in Rules A through F there is an inconsistent provision?

This discussion suggests that work remains to be done on the second sentence of G(1): "Rules A through F also apply unless inconsistent with Rule G." The admiralty bar is concerned that so long as any part of Rules A through F may apply in civil forfeiture proceedings, the meaning of those rules may be strained to fit the needs of forfeiture at the cost of distorting admiralty practice. And whatever happens, it will be important to be sure that the excisions from A through F are matched by careful reconstruction of the parts that remain. (An illustration is provided by the March 26 discussion of serving interrogatories with the complaint: if Rule G departs from Rule C, it must be made clear that Rule G governs forfeiture practice.)

Substantive Rights. There was brief discussion of the possibility that some G provision might transgress the Enabling Act by abridging, enlarging, or modifying a substantive right. It was agreed that this concern must be addressed on a case-by-case basis. Procedural changes often have a profound impact on the enforcement of substantive rights, but do not for that reason alone violate the Enabling Act. But there may be more directly substantive effects, including effects on constitutional rights.

Even apart from the Enabling Act, Rule G touches on often sensitive issues. We must be particularly careful. This is not the first setting in which it is not easy to choose between rulemaking and waiting for Congress to act. Some of the issues are controversial. Thoughtful disposition by

Congress might be the best approach. But deferring to Congress runs the risk that Congress may never become involved — there is a feeling that enacting CAFRA absorbed all the energy Congress has for this topic. And there is always a risk that a lack of time for serious work may lead to hasty legislation that produces ineffective rules.

Controversial issues must be identified for the Advisory Committee. That does not mean that they will not be taken on, but the decision whether to take them on should be informed by all sides of the controversy. Criminal Rule 32.2 took on controversial issues, and resolved them — one example is the question whether criminal forfeiture is a matter to be decided by the jury, or is a sentencing matter.

Statutory Incorporation. Draft Rule G frequently invokes CAFRA provisions by explicit statutory reference. There is always a risk that these references will be superseded, leaving the rule in a confusing relationship to new statutes until the amending process takes note and effects a change. But as a practical matter, it does not seem likely that the statute will be changed soon. Congress took seven years to adopt CAFRA, and was exhausted at the end. "No one wants to revisit it."

CAFRA was enacted without contemplating creation of a new Rule G. That idea arose later. Exhaustion had set in by the point of considering legislation on such procedural details as what a claim must say. They just referred to the supplemental rules and for the most part let it go at that. At a few points CAFRA does address the details of judicial forfeiture procedure; it may be that it went too far with some of these provisions.

What Rule G is intended to do is to fill in gaps, to create procedures addressing things that Congress clearly decided to put over. Nothing in the draft is inconsistent with the statute or with the deals made in Congress. Having a comprehensive Rule will help spot the possible inconsistencies.

G(5): Claim Standing

Dean Jeffries began the discussion by noting that on a first pass, there seem to be two prominent issues: Must an answer be filed before a claimant may make a motion to dismiss? And, as a matter of still greater difficulty, should standing to claim require a showing of ownership? Will a "possessory" interest do? Why should the United States be put to the burden of justifying forfeiture if the claimant is not entitled to the property?

Part of the difficulty arises from the proposition that the government does have the burden to prove forfeiture — it is not entitled to keep the property unless it proves forfeitability.

Approaching these questions by rule seems an aggressive use of the Enabling Act. If we are to take them on, we must become thoroughly familiar with what the cases have done and where they seem to be going.

It was pointed out that it seems too late to think that the courts are divided. In the last three years, they seem to have reached a consensus that any colorable interest supports standing: ownership is not required. So a person who finds money in the road; money found in a car titled in a drug owner's mother's name — she did not buy the car, never controlled it, but has title. "Ownership" itself is defined in CAFRA, § 983(d)(6), but in general terms that are given content by incorporating state law. CAFRA is incorporated in Rule G(5)(a)(i)(B).

And so Rule G(5) undertakes to elevate the standing threshold. G(5)(a)(i) requires an "ownership interest." Should we undertake this change in judicial doctrine? What are the policy grounds for disapproving what courts have done?

The course of forfeiture proceedings was described. A bundle of money is seized from a locker in a Port of New York Authority facility. Notice must be published, and sent at least to the person who rented the locker. A possessory interest suffices to file a claim. Once a claim is filed, the government has to establish forfeitability by a preponderance of the evidence. The cases say, in effect, "so what"? Once forfeitability is established, the claimant will win only by proving both ownership and innocence. But the government must establish forfeitability as soon as a claim is made by someone who asserts a bare possessory interest. And it may be very difficult to establish the forfeitability of the money. Proofs will involve testimony as to sniffs by drug dogs, analysis for drug residue in the locker, and so on. This is hard and at times chancy work. The government should not be put to this work on the basis of a flimsy possessory interest. One case, for example, recognized standing for a claimant whose only showing was that the keys to the seized automobile had once passed through his hands. Remember that if the government fails to establish forfeitability, the property goes to the claimant.

One part of the concern is that claims are often filed by straw men acting on behalf of the actual owners. If standing is limited, the result at times will be to force disclosure of the owner. The "real bad guy" commonly has notice, because the government knows of his interest, but fails to come forward. The problem occurs most frequently with respect to seizures of cash — money found in a vehicle, carried by a courier, and so on. At the same time, "it is rare for a claim to open an investigational lead."

A major concern is that proof of forfeitability often requires disclosure of an informant, wiretap evidence, or like sensitive information. The concomitant risks should not be incurred at the instance of a claimant who lacks an ownership interest.

In something like 85% of seizures, no one files an administrative claim and no judicial forfeiture proceeding is initiated. But in cases in which the crook does not make a claim, we are now seeing claims by "nominees."

These questions tie to draft G(7)(b), which allows the United States to move at any time before trial to strike a claim and answer for failure to establish an ownership interest in the property subject to forfeiture.

These questions were not identified as issues in dealing with Congress during the enactment of CAFRA. It was in the late 90s that courts started down the path of recognizing standing under liberal rules, saving the ownership inquiry until the government had established forfeitability.

Before CAFRA was enacted, the burden of proof was taken from the customs statutes. The government had to establish probable cause; then the claimant had to show nonforfeitability. In Congress, the Department of Justice agreed to the § 983(c) allocation of the burden to the government. That makes the standing question more important.

An analogy might be found in the old 4th and 5th amendment cases dealing with the problem that a criminal defendant might need to incriminate himself in order to establish standing to

challenge a search and seizure. These problems are controversial. There is a Supreme Court ruling that a showing made to establish standing cannot be used against a defendant during the case in chief. The Department of Justice would not object to including a feature like that in Rule G.

It was suggested that in many ways G(7)(b) is the key provision, since it allows the government to move to strike the claim for failure "to establish an ownership interest." The G(5)(a)(i)(B) incorporation of § 983(d)(6) ownership definitions simply puts the claimant on notice.

In considering whether to "choose sides," or instead leave these problems to Congress, it should be noted that the decisions do not address the practical problems encountered by the government when it is put to the burden of proving forfeitability. The cases are mainly pre-CAFRA cases, decided when the government had only the lower burden of showing probable cause. The Second Circuit has applied the relaxed standing rules in a CAFRA case ($557,000).

As an illustration, a person driving the car in which the money was found has standing to make a claim even though the car was registered to someone else. That puts the government to the burden of proving forfeitability.

The Enabling Act does authorize rules that overtake what courts have done. But a decision to do that requires a careful study of the question, and a deliberate choice by the full Advisory Committee.

It may be possible to find an intermediate solution that allows standing to claim on the basis of a "real" possessory interest. A right to possession at the time of the seizure might do it. One illustration is provided by the case in which a box of Tide detergent fell out of an automobile. The driver of the following car stopped, picked up the box, and then engaged in a fight for possession with the driver of the car the box fell from. The driver of the following car should not have standing; the brief physical possession, good against the rest of the world, was not good against the driver of the car the box fell from.

Rule G(5) also ties to G(7)(d), which requires that a claimant file an answer before being entitled to move to dismiss. The case law has not really focused on this issue. At times it has been assumed that there must be an answer, at other times this possible requirement has been overlooked. The question arises when the government wants the answer, and responses to interrogatories, before consideration of a motion to dismiss. A case illustrating the problems is now pending in the Third Circuit. $8,000,000 was seized from A's bank account. A was a convicted money launderer. The account was held in the name of one money exchange service. B, another money exchange service, filed claims asserting that A was its nominee, who would pay the money to B through "another Virgin Islands corporation," and filed a motion to dismiss. If the government has a right to dismiss the claim of a non-owner (G(7)(b)), then the information provided by an answer and by responses to interrogatories can be helpful. The government won in the district court with its argument that an answer must be filed to support a motion to dismiss. The case is on appeal; at oral argument, at least one judge expressed skepticism whether present Rule C(6) can trump Rule 12(a)(4), which permits a motion to dismiss before answering. But there are two district-court decisions in the government's favor.

There is no inevitable sequence to set for a government motion to dismiss a claim for lack of standing, a claimant's answer, and a claimant's motion to dismiss the complaint. A motion to

dismiss the complaint turns only on what is in the complaint, for example the particularity requirement. Some defense lawyers argue that probable cause must be established in the complaint: if they are right, the government would have a serious problem with revealing the sources of information. The government does not believe that it should be forced to defend the complaint against all 12(b)(6) grounds unless the claimant is a "real party in interest." One consequence of dismissing the complaint is that the arrest warrant is released and the property goes to the claimant, unless the government is able to start over. These questions are analogous to the standing question, but standing is more important. The arguments that support a pre-answer motion to dismiss in ordinary civil procedure do have some force in civil forfeiture proceedings.

G(5): Waiver of Objections

Discussion turned to the provision in G(5)(b) that objections to in rem jurisdiction or venue are waived if not stated in the answer. NACDL objects to this approach. But Rule 15 should be available to amend an answer that omits the objections. Waiver of similar objections is familiar from Rule 12(b)(1). There is a problem with objections made very late in the game. The purpose of G(5)(b) is to ensure that the 12(b)(1) principle applies to in rem jurisdiction. If there is doubt about the ability to retrieve a lost opportunity to answer, redrafting to invoke Rule 15 should not be a problem.

G(5): Exemption of CAFRA-Exempt Forfeitures

G(5)(a)(iv) exempts from the claim-filing times of (ii) any case exempted from CAFRA by § 983(i). But on second or third thought, it would be better to strike the exemption. A uniform filing time for all types of civil forfeiture proceedings is desirable. The statutes that govern proceedings exempted from CAFRA all refer to the supplemental rules for procedure. A check will be made to be sure that they do not have their own independent times for filing claims. If the statutes have separate times, it might prove confusing to exercise the supersession power — claimants who check the statute may be misled. If that problem does not arise, the (iv) exemption will be deleted.

G(5): Identify Claimant

It has been suggested that perhaps G(5)(a)(i) should include a requirement that the claim identify the claimant. This would be useful, but may be a matter of some delicacy. On the other hand, the caption of the claim might do that.

March 26, 2003

Participants in the March 26 conference included Cassella, Cooper, Heim, Levi, Kyle, McCabe, McKnight, Marcus, and Rabiej.

G(1)

The first question is whether it is useful to attempt to draw all of the civil forfeiture provisions out of the current supplemental rules, and to join them with additional new provisions in a new Rule G. That question has been discussed. Questions of implementation remain. The incorporation of Rules A through F to fill the gaps in G may need to be accomplished by subtler means. This sentence will be worked over.

A related question, touched on yesterday, is what approach should be taken to any inconsistencies that might appear between Rule G and the forfeiture proceedings that are exempted from CAFRA. Customs, tax, and some other proceedings are non-CAFRA proceedings. Rule G could be drafted to supersede inconsistent statutory provisions, or the inconsistent provisions could be expressly incorporated. If supersession is not the answer, express incorporation will help to avoid confusion — confusion both as to whether there is an intent to supersede and as to the need to consult the non-CAFRA statutes. Still a third approach is simply to carve the non-CAFRA statutes out of Rule G, leaving them to be governed by the other supplemental rules. That approach has a clear disadvantage — we could not strip the forfeiture provisions from the present rules, but would have to leave them in place to govern these other proceedings. (Or we could leave the non-CAFRA forfeiture proceedings to be governed by the real admiralty rules; unsatisfactory experience with that approach is what led to the 2000 amendments that added explicit forfeiture provisions to the supplemental rules.)

It was noted that if a decision is made to supersede a statutory provision, it might be desirable to consult Congress. Congress tends to be concerned only if a proposal is controversial, but some of these issues will be controversial with the bar.

G(2)(b)(v)

Draft G(2)(b)(v) requires that the complaint state the circumstances with such particularity that a claimant will be able to commence an investigation of the facts and to frame a responsive pleading. NACDL protests that this incorrectly represents how much evidence is required. The government says it is not changing how much particularity is required. NACDL wants details of facts sufficient to form a belief that the government will be able to prove forfeitability.

The intention was to reproduce, as nearly verbatim as possible, current Rule E(2)(a). The explanation cites the case law, noting that the cases are not consistent in the words they use. The difference with NACDL is their view that the present rule requires more than it does. The government is content to leave development of the particularity requirement to the case law so long as the rule says that it has always said. Pleading is deliberately set apart from other civil pleading. The complaint is followed by an arrest warrant; motions to recover property are held in abeyance. The defendant's avenue to relief is a motion to dismiss, claiming the government has not enough facts to go forward. There should be facts to show a reasonable basis to believe the government will be able to establish forfeitability at trial. Very few cases are dismissed for want of particularity. The

allegations of the complaint have nothing to do with ownership. The challenges to the complaint do not seek to identify the property. NACDL seeks a higher standard of pleading than the government thinks appropriate. This ties to G(7)(d)(ii), which in turn is based in § 983(a)(3)(D) — a complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish forfeitability.

It was suggested that Rule E(2)(a) includes the standard that the claimant be able to investigate and frame a responsive pleading "without moving for a more definite statement." Deletion of these words from G might easily be read to reduce the required level of particularity. The initial draft retained them, on the theory that deletion might invite controversy. No substantive change was intended. Perhaps the words should be restored, despite the argument that they are surplusage. (Without making it express, there seemed to be a consensus to restore "without moving for a more definite statement." The next draft will restore these words. There was also some discussion of diluting the particularity requirement by demanding only "reasonable" particularity, but this suggestion seemed to be rejected.)

G(2)(b)(ii)

It was noted that "or" in the draft should be changed to "and" — "subject-matter jurisdiction over the action ~~or~~ and in rem jurisdiction over the property."

G(2)(c): Interrogatories with Complaint

G(2)(c) carries forward C(6)(c) — interrogatories may be served with the complaint. (G(5)(c) requires that answers to the interrogatories be served with the answer to the complaint.) NACDL argues that the special needs that justify this practice in admiralty do not apply to civil forfeiture. They further urge that the practice encourages abuse — that the government demands much unnecessary information, going beyond what is needed to go forward with the proceeding. Unrepresented claimants may be overwhelmed. The government, on the other hand, says that this is standard practice, and that it needs to know at the beginning whether the claimant has standing to contest the forfeiture. It is important to know whether there is a proper party before motions are filed and discovery begins. The need to act quickly arises here as well as in admiralty, as when assets held by a foreign person are seized.

It was conceded that at times lengthy sets of interrogatories may be served with the complaint, going far beyond what the government needs to know at the outset. In some courts the government is discouraged from serving interrogatories with the complaint. The practice is routine in other courts, at least with respect to questions addressed to who the claimant is and what is the claimant's relationship to the property.

It would be possible to limit complaint interrogatories to questions addressed to the claimant's identity and interest in the property. For that matter, there is no particular need to serve even these interrogatories with the complaint, so long as they can be served and answered "before motions practice." This question ties to the G(7)(d) bar on moving to dismiss before filing an answer. A claim, for example, may state simply "I am the owner." We want to know what is the basis for that statement.

Remember that under G(4)(b) the government will serve the complaint on any person

appearing to have an interest in the property. It is administratively convenient to serve the interrogatories with the complaint. Generally the claimant has filed in the administrative forfeiture — that is the reason why a judicial proceeding has been initiated. There is no litigation in the administrative procedure: if a claim is filed, the government has to go to court to effect forfeiture. (The government is now pursuing the "interesting issue" whether it has to go to court in response to a claim that clearly is bogus.)

It was pointed out that serving interrogatories with the complaint may discourage claims, including legitimate claims. Of course the government does not see the claims that are not filed; what it sees are responses that file a claim and a motion attacking the interrogatories as burdensome.

In ordinary civil practice, Rule 26(d) bars interrogatories before the Rule 26(f) conference.

It was asked why the courts that frown on the complaint-interrogatory practice disapprove it. The response was that the government could wait until a claim is filed. Many people are served who do not file claims; in practice, interrogatories go only to the real party in interest.

G(7)(b): the interrogatory discussion moved into a discussion of Rule G(7)(b), which allows the government to move to strike a claim and answer for "failure to establish an ownership interest in the property." The government understands that this motion, as a motion to strike, goes to the sufficiency of the claim and answer pleading, not to actual proof. But it may also want the motion to address the sufficiency of the fact evidence, to go beyond the face of the pleading. It is much like a Rule 56 summary-judgment motion. Interrogatory answers could be used to support the motion. For example, a claimant may rely on the proposition that the owner of the property owes money to the claimant; that is not sufficient, because an unsecured creditor lacks standing to challenge a forfeiture. This question is separate from the question whether there must be an "ownership" interest, or whether some form of possessory interest may support a claim.

If there are cross-motions, one to dismiss the complaint and one to dismiss the claim and answer, there is no priority that requires decision of one before the other.

It was suggested that if dismissal of the complaint has priority, interrogatories should come later.

G(7)(d)(ii): Rule G(7)(d)(ii) addresses a motion based on lack of evidence needed to plead with particularity. It tracks CAFRA. The government still must plead with particularity the circumstances from which the action arises. The only basis to dismiss the complaint is failure to plead with particularity; § 983(a)(3)(D) overrules a 9th Circuit rule that the government must have facts sufficient to establish probable cause at the time it files the complaint.

Turning back to complaint interrogatories, it was said that the government could accept a rule that permits government interrogatories at any time after a claim is filed. But a rule still is needed to accomplish this, because the defense bar otherwise will continue to argue that under the Rule 26(d) moratorium there can be no discovery until after the Rule 26(f) conference.

It was asked whether this rule should be bilateral — should the claimant be able to address interrogatories to the government with the claim? The response was no. The ordinary discovery rules should apply, with the one exception to permit the government to serve interrogatories addressed to the ownership interest issues after a claim is filed.

It was noted that this sort of discovery is discouraged in other civil litigation. The first wave of form interrogatories often proves inadequate to the case as it develops. We are trying to cut back on the extent and burden of discovery. And it is difficult to draft a rule that confines post-claim interrogatories to ownership interest issues. We could rely on a rule that requires court permission — but that is what Rule 26(d) already does.

A draft will be prepared that limits G(5)(c) interrogatories to those addressing a claimant's ownership interest, and that permits them to be asked only after a claim is filed.

This drafting effort will raise anew the question of integrating Rule G with the other supplemental rules. C(6)(c) provides for interrogatories with the complaint. We will need to be careful to be sure that the admiralty practice does not supplement the forfeiture practice, both in restructuring C(6) to remove forfeiture proceedings and in crafting the G(1) provision that invokes Rules A through F to fill in gaps in the balance of Rule G. This task deserves further attention.

G(3)(a)

Rule G(3)(a)(i) directs the clerk to issue a warrant to arrest property described in a forfeiture complaint. NACDL argues that this provision violates due process. The government responds that generally the property is already in the government's possession. If the property is not already in the government's possession, and is not subject to a judicial restraining order, G(3)(a)(iv) requires that a judge determine that there is probable cause for the arrest.

It was pointed out that G(3)(a)(iv) goes beyond present Rule C(3)(a)(i) in requiring a probable-cause determination by a judge when the property is not already restrained or in government possession. CAFRA dispenses with a warrant as to real property, and also provides for restraint. Although § 985 does not require it, the government practice in real-property forfeitures is to record notice of the forfeiture proceedings.

As a matter of drafting, it may be useful to integrate the judge-determination provisions of (iv) with the clerk-issued warrant provisions of (i). That approach may defuse due process objections that arise from reading (i) without moving on to consider (iv).

It was asked whether the reference to "a neutral and detached magistrate" in (iv) reflects a need to rely on state judges to make probable-cause determinations. The government experience is that emergencies rarely arise, and that they can be resolved by getting a seizure warrant under Criminal Rule 41. The advantage of the G(3) arrest warrant is that it establishes in rem jurisdiction. (It was noted that a state judge can issue a seizure warrant, but not the arrest warrant that establishes federal court in rem jurisdiction.) The warrant is a formality in most cases — those in which the government already has possession of the property. The warrant also is useful to establish in rem jurisdiction when the property is seized by local officers and turned over to federal officials; this often happens.

The concern with a clerk-issued warrant is that it is a seizure without a determination of probable cause. Government attorneys now are advised to go to a judge in the circumstances covered by G(3)(a)(iv); the rule is designed to codify and reaffirm actual practice.

It was decided that the probable cause determination should be made only by a federal judge. As a matter of style, cutting across the Civil Rules, it must be decided whether it is better to say

"judge," "federal judge," "magistrate judge or district judge," or conceivably some other term. And it must be decided whether to establish a preference for going first to a magistrate judge: "only after a magistrate judge, or a district judge if a magistrate judge is not (reasonably) available, has determined that there is probable cause for the arrest."

G(3)(b)(ii)(A), (C)

Rule G(3)(b)(ii) requires that the warrant be executed as soon as practicable, unless the court directs a different time in any of three circumstances. The first circumstance, (A), is that the complaint is under seal. NACDL assails this provision on the ground that there is no authority to seal the complaint, and on the further ground that there is an abuse when the government seeks to file under seal as a strategy to satisfy limitations periods while delaying further proceedings indefinitely. The same protest is made as to the third circumstance, (C), that allows delay in executing the warrant if the action is stayed prior to execution. (§ 983(a)(3)(A), with several complications, requires that within 90 days after a claim is filed in an administrative forfeiture proceeding the government file a civil-forfeiture action, or return the property.)

It is not clear how often the government seeks to delay execution of the warrant. Present Rule E(4)(a) directs that the marshal "forthwith execute the process." NACDL likes this requirement. (But note that Rule E(3)(c) provides that issuance and delivery of process in rem shall be held in abeyance if the plaintiff so requests.) The "forthwith execute" provision has caused problems for the government. There are three cases in the Central District of California — two of them now on review in the Ninth Circuit — that dismiss the complaint as a sanction for failure to serve "forthwith." That approach is inconsistent with sealing to protect sources of information, and is inconsistent with a stay issued to protect sources of information. It also is inconsistent with the problems that arise when the property is located abroad, where the government must rely on foreign officials for execution.

NACDL's concerns seem to arise with respect to the CAFRA 90-day filing requirement and statutes of limitations. One "limitations" illustration arises from the statute providing that electronic funds are fungible for one year, but after that forfeiture of a present electronic fund is permitted only if it can be traced to the original forfeitable fund. It is important to file within that year. Another limitations problem arises in money-laundering; funds laundered long ago may be protected against forfeiture, even though involved in a continuing scheme.

Satisfying these requirements without letting the claimants know is a legitimate concern. But delay is authorized by Rule G only if the court is persuaded to seal the complaint or stay execution.

These provisions need to be contrasted with Civil Rule 4 provisions for serving the summons and complaint in an ordinary civil action. In a forfeiture proceeding, the arrest warrant is served only on the property, the "defendant" res. Statutory time limits are not geared to service of the arrest warrant. The complaint is served on identifiable potential claimants under G(4)(b), triggering the times to claim and to answer. G(4) does not set any time for serving the notice. It may be necessary to tend to the integration of G(4) with Civil Rule 4(m). Rule 4(m) addresses the time for serving summons and complaint on a defendant. On its face, it does not apply to the different system in forfeiture proceedings where the only defendant is the property, and notice (not summons) and complaint are served on "any person who, appearing to have an interest in the property, is a potential

claimant." But these distinctions may prove confusing. If nothing else, it might help to have a Committee Note stating that Rule 4(m) does not apply. But thought also should be given to the question whether to adapt something like Rule 4(m) to Rule G(4), perhaps as a parallel to G(3)(b)(ii) requiring notice "as soon as practicable," with exceptions for sealed complaints, property abroad, or stays.

5-B

Sealed Settlement Agreements in Federal District Court – May 2003 Progress Report

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The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to conduct research on sealed settlement agreements filed in federal district court. Although the practice of *confidential* settlement agreements may be common, the question is how often and under what circumstances are such agreements *filed* under seal?

Research Questions

We identified three general research questions for this project:

1. *What are local rules and practices concerning sealed settlement agreements?* There are very few local rules concerning sealed settlement agreements specifically, but many jurisdictions have rules concerning sealed court documents generally. We identified which federal district court local rules concern sealed court documents and compiled them in Appendix A. Because state practice often influences federal practice, we also identified state and local statutes and rules that concern sealed court documents in state trial courts, and compiled them also in Appendix A. This progress report includes a summary analysis of all federal and state rules on sealed documents filed in trial courts.

2. *How often are sealed settlement agreements filed in federal court?* We have begun to determine how often sealed settlement agreements are filed in each district. We do this by searching docket sheets for sealed documents and then reading docket sheets and filed (unsealed) documents to determine which sealed documents are sealed settlement agreements. At this early stage of the research it appears that sealed settlement agreements are filed in approximately one per 300 civil cases. This progress report includes frequency estimates for 11 districts.

[1] We are grateful for advice on the presentation of this report from Jim Eaglin, Geoff Erwin, Molly Treadway Johnson, David Marshall, Syl Sobel, Russell Wheeler, and Ken Withers.

3. *Why are sealed settlement agreements filed?* In cases with sealed settlement agreements the unsealed court records often give clues to the nature of the settlement agreement. Because settlement agreements often are confidential, the question usually is not why is the settlement agreement sealed, but why is it filed? From our analysis of court records we can determine what types of cases have sealed settlement agreements, and sometimes we can infer why the agreement was filed. At a later phase of this research we may want to consider other methods to learn more about the sealed documents, such as by contacting judges or attorneys involved in the cases. This progress report includes case descriptions of cases from 11 districts that appear to have settlement agreements filed under seal.

Local Rules on Sealed Documents

Case records generally are public records and all documents filed with the court are available to the public for inspection upon request unless a statute, rule, or order provides otherwise. Judges generally have the authority to shield all or portions of court records from the public in appropriate cases.

Here we summarize state and federal rules on sealed court records. The rules are compiled in Appendix A.

Federal Local Rules

Very few written rules concern sealed settlement agreements specifically. More common are rules on the sealing of documents generally.

Only one district court – the District of South Carolina – prohibits the filing of sealed settlement agreements, and this rule was adopted recently – November 1, 2002. Sealing rules more often address either findings that must be made for a document to be sealed or time limitations on sealed documents remaining in court files.

Forty-seven district courts (50%) have local rules concerning the sealing of court records in civil cases. For 15 districts (16%), their rules do not limit the sealing of documents, but instead cover such issues as administrative mechanics (e.g., how sealed documents are to be marked). Thirty-two districts (34%) have local rules governing either the grounds for sealing or the duration of sealing or both.

Eleven districts (12%) restrict the judge's authority to seal documents. Nine districts require that a judge find "good cause" before sealing.[2]

[2] These districts are California Northern, Illinois Northern, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, Oklahoma Northern, Tennessee Eastern, and Utah.

The Northern District of California's local rules include a "commentary" that elucidates good cause.

> As a public forum, the Court will only entertain requests to seal that establish good cause and are narrowly tailored to seal only the particular information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality. Documents may not be filed under seal pursuant to blanket protective orders covering multiple documents. Counsel should not attempt to seal entire pleadings or memoranda required to be filed pursuant to the Federal Rules of Civil Procedure or these Local Rules.[3]

Two districts have limitations stronger than good cause. The Western District of Washington requires the court to find that the "strong presumption of public access to the court's files and records" has been outweighed by the "interests of the public and the parties in protecting files, records, or documents from public review."[4] The District of Maryland requires the judge to consider the parties' motion to seal portions of the court record and any opposition, refrain from ruling on a motion for at least 14 days to permit interested parties to file objections, consider any objections, and find and hold that alternatives to sealing would not provide sufficient protection and that sealing of the specified portion of the record would be appropriate.[5]

Twenty-nine districts (31%) limit how long a document may remain sealed, absent an order to the contrary. Only the Eastern District of Michigan has a rule pertaining to sealed settlement agreements specifically. The rule specifies that sealed settlement agreements "will be unsealed and placed in the case file" "two years after the date of sealing," "[a]bsent an order to the contrary."[6] Conversations with court staff reveal that it is difficult to know to which cases this rule applies, because it is not court practice to identify sealed settlement agreements in the court record as anything other than sealed documents. For other sealed documents,

> Sixty days after the entry of a final judgment and an appellate mandate, if appealed, attorneys of record in a case must present to the court a proposed order specifying whether the material sealed with protective orders is (a) to be returned to the parties or (b) unsealed and placed in the case file. Failure to present the order will

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[3] N.D. Cal. Civ. L.R. 79–5(b) (commentary).

[4] Wash. L. Civ. R. 5(g)(1).

[5] Md. L.R. 105.11; District of Maryland Form Order Sealing Portions of the Court Record.

[6] E.D. Mich. L.R. 5.4.

result in the court ordering the clerk to unseal the materials and place them in the case file.[7]

Districts with durational rules on sealed documents vary on how much time may elapse between the end of the case and the removing or unsealing of documents (see Table 1). Two districts – Western District of Virginia and Southern District of Florida – measure sealing duration from the date of filing or sealing rather than the conclusion of the case.

Table 1. Sealing Durations According to Federal Local Rules.

Ordinary Sealing Expiration	Number of Districts	List of Districts
At end of case.	6	California Southern, Idaho, North Carolina Western, North Dakota, Utah, Washington Western
30 days after sealing.	1	Virginia Western
30 days after case is over.	11	Iowa Northern and Southern,[8] Maryland, Michigan Western, Mississippi Northern and Southern, Missouri Eastern, North Carolina Eastern, North Carolina Middle, Ohio Northern, Tennessee Eastern
60 days after case is over.	2	Michigan Eastern, Texas Northern
63 days after case is over.	1	Illinois Northern
90 days after case is over.	1	Connecticut
6 months after case is over.	1	Minnesota
2 years after case is over.	1	Pennsylvania Middle
5 years after filing.	1	Florida Southern
10 years. after case is over	1	Kansas

[7] *Id.* R. 5.3.

[8] Sixty days if the United States is a party.

The Northern District of California provides for unsealing 10 years from transmittal of the case file to the records center. The Eastern District of New York provides for transmittal of sealed documents to the records center five years after the case is over and the unsealing of documents 20 years thereafter.

State Statutes and Rules

Twenty-nine states (58%) have statutes or rules concerning the sealing of court records in civil cases. For seven states (14%), their rules do not limit the sealing of documents, but just cover such issues as administrative mechanics.

Eight states proscribe sealed or confidential settlement agreements with public parties (Arkansas, Colorado, Florida, Iowa, Nevada, North Carolina,[9] Rhode Island, Texas). Two states expressly permit such settlement agreements upon a proper showing – if "a right of individual privacy clearly exceeds the merits of public disclosure" in Montana[10] and "for good cause shown" in Oklahoma.[11]

Florida's "Sunshine in Litigation" law proscribes sealed or confidential settlement agreements with any party that conceal public hazards.[12]

Five states explicitly require good cause to seal a court document (Delaware, Michigan, New York, Tennessee, Vermont). Four states require a finding that privacy interests outweigh public interests (California, Idaho, Indiana, North Carolina); two states require privacy interests to *clearly* outweigh public interests (Georgia, Utah); and one state requires the privacy interest to be compelling (Utah).

Seven states permit sealing only if it is the least restrictive means available to serve the privacy interest (California, Florida, Idaho, Michigan, New Hampshire, North Carolina, Texas). California also requires that sealing be narrowly tailored to the privacy interest and that only necessary portions of documents be sealed, to the extent feasible.

Time limits are rarer in state statutes and rules than they are in federal rules. Indiana requires documents to be unsealed at the earliest possible time. Delaware specifies that sealed documents will be returned or unsealed 30 days after the end of the case. Two of New Mexico's 13 judicial

[9] North Carolina makes an exception for "an action for medical malpractice against a hospital facility." N.C. Gen. Stat. § 132–1.3(a).

[10] Mont. Code § 2–9–304(2).

[11] 51 Okla. Stat. § 158.

[12] Fla. Stat. § 69.081(3).

districts specify that absent good cause, sealed documents will be unsealed 180 days after sealing.

Michigan has an interesting requirement that sealing orders themselves not be sealed.

Sealed Settlement Agreements We Found

Many civil cases settle before trial and defendants commonly seek confidentiality agreements concerning the terms of settlement. Usually such agreements are not filed. A high proportion of civil cases settle,[13] but a sealed settlement agreement is filed in only one in approximately 300 civil cases.[14]

We examined 39,496 civil cases that were filed in one of 11 districts[15] and terminated either in 2001 or the first half of 2002.[16] We found 140 cases with sealed settlement agreements. Table 2 breaks these data down by district. Appendix B includes details about each of the 140 cases.

The most common reason for filing a settlement agreement appears to be to facilitate enforcement. It often will be administratively easier to enforce the agreement if it is breached while the court retains jurisdiction, and it is common for district courts to retain jurisdiction after termination – e.g., for 60 days – for the purpose of enforcing settlement agreements. Enforcement can be sought by motion rather than by filing a new contract action, the court will already be familiar with the case, and the agreement can be enforced with contempt sanctions.

Usually the settlement agreement is simply filed with the court under seal. Sometimes, however, what is under seal is the record of a settlement conference (we have found six such cases so far). Occasionally, the settlement agreement is not filed until one party believes it has been breached,

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[13] An analysis of disposition codes for civil terminations from 1997 through 2001 showed 22% were dismissed as settled and 2% were terminated on consent judgment. Another 10% were voluntarily dismissed, and some of these probably were settled. An additional 20% are coded as "dismissed: other."

[14] The rates for individual districts we have examined so far range from approximately one in 900 civil cases in South Carolina to approximately one in 130 civil cases in Virginia Western.

[15] We are examining districts in a modified random order of states (see Appendix B for a fuller description of the method). We have begun to examine cases in five additional districts (Florida Middle, Minnesota, Mississippi Northern, Virginia Eastern, Washington Western).

[16] Our intention is to examine cases terminated in 2001 and 2002, but data on terminations in the last half of 2002 only recently became available.

and then it is filed as a sealed exhibit attached to a motion to enforce the agreement (we have found 11 such cases so far).

Table 2. Frequency of Sealed Settlement Agreements Among Federal Civil Cases

District	Terminated Cases	Cases With Sealed Settlement Agreements	
Florida Northern	2,264	4	(0.18%)
Florida Southern	12,005	73	(0.61%)
Idaho	1,005	3	(0.30%)
Michigan Eastern	7,072	13	(0.18%)
Michigan Western	2,025	4	(0.20%)
North Carolina Eastern	2,143	3	(0.14%)
North Carolina Middle	1,724	4	(0.23%)
North Carolina Western	1,663	6	(0.36%)
South Carolina	6,031	7	(0.12%)
Virginia Western	2,602	20	(0.77%)
Washington Eastern	962	2	(0.21%)
Total	**39,496**	**140**	**(0.35%)**

Occasionally a sealed settlement agreement is filed because the court needs to approve the agreement and the parties want to keep it confidential. An example of this is a wrongful death action by a surviving minor.

Sealed settlement agreements appear in cases of many different types. Nature of suit frequencies are presented in Table 3, but these data should not be taken as representative of federal cases as a whole at this early stage of the research.[17]

In most cases that we examined, the complaint is not sealed, so although the terms of the settlement are sealed, the allegations are not. One exception is an employment action against the University of Michigan.[18] This case's entire case file is sealed, although the docket sheet is not. The

[17] For example, one district may be skewing the frequency of Fair Labor Standards Act cases among cases with sealed settlement agreements. The Southern District of Florida has a relatively high rate of sealed settlement agreements (0.61% compared with a study average of 0.35% so far), and 42% of the sealed settlement cases there are Fair Labor Standards Act cases, compared with 6% on average in the other ten districts.

[18] *E.g.*, Baker v. Bollinger (MI-E 4:00-cv-40239 filed 06/26/2000).

docket sheet indicates that the case file contains confidential health information.

Table 3. Types of Cases With Sealed Settlement Agreements

Nature of Suit	Cases	
Personal Injury	22	(16%)
Personal Property	5	(4%)
Fair Labor Standards Act	35	(25%)
Employment	21	(15%)
ERISA	2	(1%)
Housing/Accommodations	2	(1%)
Civil Rights	12	(9%)
Contract	17	(12%)
Intellectual Property	15	(11%)
RICO	1	(1%)
Securities	1	(1%)
Social Security	1	(1%)
Prisoner	1	(1%)
Forfeiture/Penalty	1	(1%)
Miscellaneous Statute	4	(3%)
Total	**140**	

Most cases with sealed settlement agreements that we have reviewed so far would not be of widespread public interest. A wrongful death action against a truck driver,[19] a sexual harassment action against a private employer,[20] or a patent infringement action concerning edible pet greeting cards[21] might be of interest to members of the public, but a sealed settlement agreement in cases such as these would be unlikely to cover up a public danger.

[19] *E.g.*, Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-23 filed 02/24/1999), *consolidated with* Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-24 filed 02/24/1999), Cardwell v. Louisiana-Pacific Corp. (NC-W 5:99-cv-25 filed 02/24/1999), Phillips v. Louisiana-Pacific Corp. (NC-W 5:99-cv-26 filed 02/24/1999), *and* Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-27 filed 02/24/1999).

[20] *E.g.*, Hale-DeLaGarza v. Spartan Travel Inc. (MI-W 1:01-cv-00557 filed 08/28/2001).

[21] *E.g.*, Hoy v. Pet Greetings (MI-E 2:00-cv-72308 filed 05/19/2000).

An action against a public officer,[22] or an action against the manufacturer of a vehicle[23] might be of greater public interest.[24] Cases likely to be of great public interest are uncommon among the cases we have reviewed so far.

[22] *E.g.*, Blankenship v. Gilchrist County (FL-N 1:01-cv-00052 filed 05/16/2001) (sexual harassment by deputy sheriffs against another officer); Smith v. City of Detroit (MI-E 4:00-cv-40273 filed 07/21/2000) (wrongful killing by police officer); Doe v. Florence School District (SC 4:99-cv-01007 filed 04/08/1999) (rape by school security guard) ; Thompson v. Town of Front Royal (VA-W 5:98-cv-00083 filed 11/04/1998) (outrageously racist behavior by director of public works); (Blackman v. Town of Front Royal (VA-W 5:99-cv-00017 filed 03/19/1999) (same); Rogers v. Pendleton (VA-W 7:99-cv-00164 filed 03/16/1999) (unjustified arrest and search).

[23] *E.g.*, Rzepka v. Daimler Chrysler (FL-N 5:00-cv-00023 filed 02/01/2000) (Dodge Caravan); Rando v. Slingsby Aviation (FL-S 1:98-cv-02224 filed 09/22/1998) (Firefly aircraft); Regalado v. Airmark Engines (FL-S 0:99-cv-07579 filed 11/29/1999) (faulty aircraft fuel pump system); Acevedo v. Airmark Engines (FL-S 0:99-cv-07590 filed 11/29/1999) (same); Shinski v. McDonnell-Douglas Corp. (ID 00-cv-00280 filed 05/23/2000) (helicopter); Williams v. Ford Motor Co. (SC 2:00-cv-03398 filed 10/26/2000) (Ford Aerostar); White v. Daimler Chrysler Corp. (SC 2:00-cv-03803 filed 12/05/2000) (Jeep Grand Cherokee); Green v. Ford Motor Co. (VA-W 3:00-cv-00049 filed 06/01/2000), consolidated with Carey v. Ford Motor Co. (VA-W 3:00-cv-00050 filed 06/01/2000) (U-Haul truck).

[24] Other cases of possibly great public interest include Sosa v. American Airlines (FL-S 1:97-cv-03863 filed 12/03/1997) (wrongful death against airline because of insufficient ground navigational aids in Colombia); Doe v. Metropolitan Health (FL-S 1:01-cv-00546 filed 02/12/2001) (policy of not disclosing AIDS diagnosis to minor); Parks v. Alteon Inc. (NC-M 1:00-cv-00657 filed 07/13/2000) (experimental diabetes drug).

Appendix A
State and Local Rules on Sealed Settlement Agreements in Particular and Sealed Documents Generally in Trial Courts

Compiled and analyzed by Marie Leary, Federal Judicial Center

This appendix contains the text of statutes and rules governing the sealing of documents – especially settlement agreements – in state and federal trial courts.

We examined each federal district court's local rules for provisions concerning sealed documents. We generally relied on districts' Web sites for rule text, but we also consulted West's published local rules. For state statutes and rules we searched Westlaw's statute, rules, and orders databases, using "seal," "settle," "public," "document," "court," and "record" as search terms. We adjusted the exact combination of search terms as appropriate for each state's statutory database.

ALABAMA

State of Alabama

No relevant statute or rule.

Middle District of Alabama

No relevant local rule.

Northern District of Alabama

No relevant local rule.

Southern District of Alabama

No relevant local rule.

ALASKA

State of Alaska

No relevant statute or rule.

District of Alaska

No relevant local rule.

ARIZONA

State of Arizona

Arizona Supreme Court Rule 123
Public Access to the Judicial Records of the State of Arizona

(d) *Access to Case Records.* All case records are open to the public except as may be closed by law, or as provided in this rule. Upon closing any record the court shall state the reason for the action, including a reference to any statute, case, rule or administrative order relied upon.

District of Arizona

No relevant local rule.

ARKANSAS

State of Arkansas

Arkansas Code, Title 25, Chapter 18, Subchapter 4, Section 401
State Government, Public Records, Settlement Agreements, Disclosure Required

No public official or employee acting in behalf of a governmental agency or another agency wholly or partially supported by or expending public funds shall:

(1) Agree or authorize another to agree that all or part of a litigation settlement agreement to which the agency is a party shall be kept secret, sealed, or otherwise withheld from public disclosure; or

(2) Seek a court order denying public access to any court record or other document containing the terms of a settlement agreement resolving a claim by or against the agency.

Eastern and Western Districts of Arkansas

No relevant local rule.

CALIFORNIA

State of California

California Rules of Court, Rule 243.1
Sealed Records

(a) *[Applicability]*

(1) Rules 243.1-243.4 apply to records sealed or proposed to be sealed by court order.

(2) These rules do not apply to records that are required to be kept confidential by law. These rules also do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. The rules do apply to discovery materials that are used at trial or submitted as

a basis for adjudication of matters other than discovery motions or proceedings. . . .

(c) *[Court records presumed to be open]* Unless confidentiality is required by law, court records are presumed to be open.

(d) *[Express findings required to seal records]* The court may order that a record be filed under seal only if it expressly finds that:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(e) *[Scope of the order]*

(1) An order sealing the record must (i) specifically set forth the factual findings that support the order, and (ii) direct the sealing of only those documents and pages – or, if reasonably practicable, portions of those documents and pages – that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

. . .

Advisory Committee Comment: This rule and rule 243.2 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999). These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. . . .

Rule 243.1(d)-(e) is derived from *NBC Subsidiary*. That decision contains the requirements that the court, before closing a hearing or sealing a transcript, must find an 'overriding interest' that supports the closure or sealing, and must make certain express findings. (*Id.* at 1217-1218.) The decision notes that the First Amendment right of access applies to records filed in both civil and criminal cases as a basis for adjudication. (*Id.* at 1208-09, fn. 25.) Thus, the *NBC Subsidiary* test applies to the sealing of records.

NBC Subsidiary provides examples of various interests that courts have acknowledged may constitute "overriding interests." (*See id.* at 1222, fn. 46.) Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute "overriding interests." The rules do not attempt to define what may constitute an "overriding interest," but leave this to case law.

California Rules of Court, Rule 243.2
Procedures for Filing Records Under Seal

(a) *[Court approval required]* A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely upon the agreement or stipulation of the parties.

(b) *[Motion to seal a record]* (1) A party requesting that a record be filed under seal must file a noticed motion for an order sealing the record. The motion must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing. (2) The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion is made, unless good cause exists for not lodging it. Pending the determination of the motion, the lodged record will be conditionally under seal. (3) If necessary to prevent disclosure, the motion, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal. (4) If the court denies the motion to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file.

(c) *[References to nonpublic material in public records]* A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal.

(d) *[Lodging of records that a party is requesting be placed under seal]* (1) The party requesting that a record be filed under seal must put it in a manila envelope or other appropriate container, seal the envelope or container, and lodge it with the court. (2) The envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL." (3) The party submitting the lodged record must affix to the envelope or container a cover sheet that: (i) Contains all the information required on a caption page under rule 201; and (ii) States that the enclosed record is subject to a motion to file the record under seal. (4) Upon receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed.

(e) *[Order]* (1) If the court grants an order sealing a record, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating, "SEALED BY ORDER OF THE COURT ON (DATE)," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court's order. (2) The order must state whether – in addition to records in the envelope or container – the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed. (3) The order must state whether any person other than the court is authorized to inspect the sealed record. (4) A sealed record must not be unsealed except upon order of the court.

(f) *[Custody of sealed records]* Sealed records must be securely filed and kept separately from the public file in the case. . . .

(h) *[Motion to unseal records]* A party or member of the public, or the court on its own motion, may move to unseal a record. Notice of the motion to unseal must be filed and served on the parties. The motion, opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with (c).

Calaveras County Superior Courts, Rule 1.11
Sealed/Confidential Records

Unless confidentiality is required by law, court records in both criminal and general civil cases are presumed to be open to the public for inspection. For all records filed where confidentiality is required by law, the document caption or title shall state "CONFIDENTIAL" with an accompanying citation to the applicable law requiring such confidentiality. For any other court record a party wishes to be sealed from public inspection, the party shall follow those procedures set out in California Rules of Court, rule 243.1 et. seq.

An agreement or stipulation between the parties for confidentiality or sealing of a document filed with the court is legally insufficient. The law requires court findings prior to sealing any records not deemed confidential by existing statute. The party filing a confidential or sealed report shall, at the time of filing the document, submit an 8½ by 11 inch envelope with the report title, case number and the word "confidential" printed prominently on the outside.

Imperial County Superior Court Rules, Rule 10.03
Confidentiality Agreements, Protective Orders, Sealed Documents

It is the policy of the Court that confidentiality agreements and protective orders are disfavored and should be recognized and approved by the Court only when there is a genuine trade secret or privilege to be protected. Such agreements will not be recognized or approved by the Court absent a particularized showing (document by document) that secrecy is in the public interest, the proponent has a cognizable interest in the material (e.g., the material contains trade secrets, privileged information, or is otherwise protected by law from disclosure), and that disclosure would cause serious harm. Sealed records may be viewed only by parties and their attorneys of record, unless the order sealing the records states otherwise. Sealed records may not be copied by persons authorized to view them, absent a court order to the contrary.

San Diego County Superior Court Rules, Rule 2.48
Confidentiality Agreements, Protective Orders, Sealed Documents

It is the policy of the court that confidentiality agreements and protective orders are disfavored and should be recognized and approved by the court only when there is a genuine trade secret or privilege to be protected.

Such agreements will not be recognized or approved by the court absent a particularized showing (document by document) that secrecy is in the public interest, the proponent has a cognizable interest in the material (e.g., the material contains trade secrets, privileged information, or is otherwise protected by law from disclosure), and that disclosure would cause serious harm.

Sealed records may be viewed only by parties and their attorneys of record, unless the order sealing the records states otherwise. Sealed records may not be copied by persons authorized to view them, absent a court order to the contrary.

San Francisco Superior Court, Rule 10.5
Confidentiality and Protective Orders

A. It is the policy of this Court that orders sealing any record (as defined in California Rule of Court 243.1(b)(1)) filed or lodged in a proceeding, and orders directing that parties or others comply with agreements to maintain the confidentiality of documents relating to a proceeding, are disfavored and should be entered only upon a showing that:

1. the subject matter of such record or document is privileged under a provision of the Evidence Code; or

2. disclosure would violate a personal, financial, or other interest protected by law, and that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information; and

3. if the record is to be sealed, the facts justify the findings specified in California Rule of Court 243.1(d).

B. Nothing herein must preclude the entry of a protective order designed to facilitate the expeditious production of documents during discovery, provided that the order permits counsel to designate as confidential under the terms of such order only those documents as to which counsel entertains a good faith belief that such document is entitled to confidentiality pursuant to section 10.5.A..1 or A.2.

C. An order sealing any record filed in a proceeding must direct the sealing of only those documents, pages, or, if reasonably practicable, those portions of documents or pages, which contain the information requiring confidentiality. All other portions of such document or page must be included in the public file. For each document or page, or portion thereof, filed under seal there must be included in the public file a document bearing a legend in substantially the following form: "By order dated _____, the complete (identify document), pages or portion thereof, has been filed under seal, and may not be examined without further order of the court."

D. Except as stated in paragraph H, a party requesting that a record be filed under seal must file a noticed motion for an order sealing such specific record(s) in compliance with California Rule of Court 243.2(b). Any provision in a protective order which authorizes the filing of records under seal without the necessity of obtaining an order pursuant to a motion filed in compliance with this rule and based upon the findings specified in California Rule of Court 243.1(d) must not be sufficient to authorize the filing of any record under seal except as permitted in paragraph H; provided, however, that any record which prior to July 1, 2001 was filed under seal must remain under seal unless an order specifically unsealing such record is entered.

E. If a pleading, a memorandum of points and authorities or an affidavit or declaration contains or discloses the content of records designated as confidential pursuant to a protective order, the filing party must concurrently file redacted copies, lodge unredacted originals as specified in California Rule of Court 243.2(d) and, if the record was designated confidential by another party, give written notice to the party that designated the records confidential that the records will be placed in the public file unless within 15 days of the notice such party files a motion for a sealing order in compliance with California Rule of Court 243.2(b) and this provision of the Local Rules. If the party that designated the records confidential fails to file such a motion within 15 days (unless extended by the court for good cause), that party must be deemed to have consented to the public filing of the record and the clerk must remove the originals from the envelope labeled "CONDITIONALLY UNDER SEAL" and file the complete pleading, memorandum of points and authorities, or affidavit or declaration in the public file. If the party that designated the records confidential does file such a motion within 15 days (or within any extension ordered by the court), the originals must remain conditionally under seal until the court rules on the motion, and thereafter must be filed in the manner directed by the court.

F. A motion for an order sealing a record must specify the grounds and provision of law authorizing confidentiality of each record sought to be placed under seal. An order sealing a record must comply with California Rules of Court 243.1(d) and (e) and 243.2(e).

G. A motion filed pursuant to paragraphs D and E must be noticed for hearing in the department in which the matter to which the records relate will be heard. If this department cannot be ascertained when the motion is filed, the motion must be noticed for hearing before the Presiding Judge or before any judge designated by the Presiding Judge to hear such motion.

H. Paragraphs D and E do not apply to records that are required to be kept confidential by law, nor to discovery motions and records filed or lodged in connection with discovery motions. A party seeking to file under seal records that are required to be kept confidential by law may do so only upon an order issued by the Presiding Judge or the designee of the Presiding Judge, or by the judge assigned to hear the matter to which the records relate. A party seeking to file under seal records in connection with a discovery motion may do so only

1. if the motion is to be heard in a Discovery Department and is identified as required by Rule 8.14(G) or

2. if the motion is to be heard in another department, upon an order issued by the Presiding Judge or the designee of the Presiding Judge, or by the judge assigned to hear the matter to which the records relate. An order authorizing the filing of records under seal pursuant to this paragraph may be requested by an ex parte application. A record filed under seal on the ground that it relates to a discovery motion, and without the court having made the findings specified in California Rule of Court 243.1(d), may not be considered for any

other purpose unless the record is unsealed or the court enters an order in conformity with California Rules of Court 243.1(d) and (e) and 243.2(e).

Central District of California

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule. Disclosure can only occur upon written order of the Court.

Central District of California Local Rule 79-5
Confidential Court Records,

79-5.1 Filing Under Seal–Procedures. No case or document shall be filed under seal without prior approval by the Court. If a filing under seal is requested, a written application and a proposed order shall be presented to the judge along with the document submitted for filing under seal. The original and judge's copy of the document shall be sealed in separate envelopes with a copy of the title page attached to the front of each envelope. Conformed copies need not be placed in sealed envelopes.

79-5.2 Confidential Court Records–Disclosure. No sealed or confidential record of the Court maintained by the Clerk shall be disclosed except upon written order of the Court.

79-5.3 Procedure for Disclosure of Confidential Court Records. An application for disclosure of sealed or confidential court records shall be made to the Court in writing and filed by the person seeking disclosure. The application shall set forth with particularity the need for specific information in such records. The procedures of L.R. 7-3 et seq. shall govern the hearing of any such application.

Eastern District of California

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule. Unsealing of a settlement agreement must be made by court order.

Eastern District of California General Local Rule 39-138(b)
Sealing of Documents

Except as otherwise provided by statute or rule, documents may be sealed only upon written order of a Judge or Magistrate Judge. Court orders sealing documents are filed and maintained in the public case file and should not reveal the sealed information. A duplicate order is attached to the envelope containing the sealed documents. The case file shall reflect the date a document is ordered unsealed and by whom, and, if a document is resealed, the date and by whom.

Northern District of California

Analysis: The court must find that good cause to seal has been established before ordering a settlement agreement or portions thereof to be placed under seal.

A sealed settlement agreement may not remain under seal indefinitely. Unless the court orders otherwise upon a showing of good cause at the conclusion of the case by a party that submitted the settlement agreement which the Court placed under seal, the settlement agreement will be automatically unsealed and open to public inspection 10 years from the date the case was transmitted to the National Archives and Records Administration or other Court-designated depository.

Northern District of California Civil Local Rule 79-5
Sealed or Confidential Documents

(a) *Applicability.* When a statute, a federal or local rule or a Court order permits documents or things to be filed under seal, i.e., not open to inspection by the public, the procedures set forth in this local rule apply.

(b) *Lodging Matter with Request to File Under Seal.* A party authorized by statute, rule or Court order to file a document under seal must lodge the document with the Clerk in accordance with this rule. The Clerk shall refer the matter to the assigned Judge pursuant to Civil L.R. 79-5(d). No document shall be filed under seal except pursuant to a Court order that authorizes the sealing of the particular document or portion thereof and is narrowly tailored to seal only that material for which good cause to seal has been established. Any order sealing any documents shall direct the sealing of only those documents, pages or, if practicable, those portions of documents or pages, which contain the information requiring confidentiality. All other portions of such documents shall be included in the public file.

Commentary: As a public forum, the Court will only entertain requests to seal that establish good cause and are narrowly tailored to seal only the particular information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality. Documents may not be filed under seal pursuant to blanket protective orders covering multiple documents. Counsel should not attempt to seal entire pleadings or memoranda required to be filed pursuant to the Federal Rules of Civil Procedure or these Local Rules.

(c) *Format.* The lodged document must be contained in an 8½ inch by 11 inch sealed envelope or other suitable container. The party must affix a cover sheet to the document and to its envelope or container, which must:

(1) Set out the information required by Civil L.R. 3-4(a) and (b);

(2) Set forth the name, address and telephone number of the submitting party;

(3) If filed pursuant to a previous Court order, state the date and name of the Judge ordering the matter filed under seal and attach a copy of the order; if filed pursuant to statute or rule, state the authorizing statue or rule and good cause for filing the submitted matter under seal;

(4) Prominently display the notation: "DOCUMENT FILED UNDER SEAL." When permitted by the Court order, the notation may also include: "NOT TO APPEAR ON THE PUBLIC DOCKET."

(d) *Motion to File Under Seal.* Counsel seeking to file a document or thing under seal, which is not authorized by statute or rule to be so filed, may file a motion under Civil L.R. 7-10 and lodge the document or thing with the Clerk in a manner which conforms with Civil L.R. 79-5(c). If pursuant to referral by the Clerk or motion of a party, the Court orders that a lodged document be filed under seal, the Clerk shall file the lodged document under seal. Otherwise, the lodged document shall be returned to the submitting party and the document shall not be placed in the file.

Commentary. Upon receipt of an order to file a lodged document under seal, the Clerk shall file-stamp the sealed envelope or container containing the document. Following receipt and away from public view, the clerk shall remove the item from the envelope, place a dated filed-stamp on the original document, enter it on the docket in a manner that ensures confidentiality consistent with this local rule, and place the document in a sealed folder which shall be maintained in a secure location at the courthouse of the assigned Judge or at the national Archives and Records Administration or other Court-designated depository.

(e) *Effect of Seal.* Unless otherwise ordered by the Court, any document, paper or thing filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action during the pendency of the case. Once a case is closed, any document, paper or thing filed under seal in a case shall be open to public inspection without further action by the Court 10 years from the date the case is transmitted to the National Archives and Records Administration or other Court-designated depository. However, a party that submitted documents, papers or other things which the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order which would continue the seal until a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts.

Southern District of California

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless otherwise ordered by the court, a sealed settlement agreement will be returned to the party that submitted it upon entry of the final judgment or termination of the appeal, if any.

Local Civil Rule 79.2
Books and Records of the Clerk

b. *Sealed Documents.* Documents filed under seal in civil actions will be returned to the party submitting them upon entry of the final judgment or termination of the appeal, if any, unless otherwise ordered by the court.

c. *Sealing Orders.* Documents that are to be filed under seal must be accompanied by an order sealing them. If the order is also to be filed under seal, it shall so state.

COLORADO

State of Colorado

Colorado Court Rules, Chapter 38
Public Access to Records and Information

The purpose of this rule is to provide the public with reasonable access to Judicial Branch documents and information while protecting the privacy interests of parties and persons. In addition, this rule is intended to provide direction to Judicial Branch personnel in responding to public records requests.

The Chief Justice is authorized to issue directives regarding access of the public to documents and materials made, received, or maintained by the courts. Such Directives of the Chief Justice are orders of the Supreme Court and shall govern release of records to the public. The Chief Justice on behalf of the Supreme Court is authorized, in the implementation of this rule, to appoint committees and assign custodians of records, and to designate the functions of such committees and custodians of records, as the Chief Justice may determine.

The Chief Justice has issued CJD 98-05, which is authorized pursuant to this rule without further action. Pursuant to CJD 98-05, the Chief Justice has appointed a Public Access Committee to adopt policy. The policy of that Committee is effective without further action. Because policy concerning public access to information is in development stages, as are components of the ICON system, the policy of any duly authorized committee appointed by the Chief Justice is effective when adopted. This rule is adopted by the Court on an interim basis, pending a final proposal by the Public Access Committee, public comment thereon, and further action by the court.

Custodians of records within the judicial branch are not authorized to release any records or material to the public inconsistent with this rule or the Chief Justice Directives. This rule is intended to be a rule of the Supreme Court within the meaning of the Colorado Public Records Act, including sections 24-72-204(1)(c) and 24-72-305(1)(b) (7 C.R.S.)

Colorado Statutes Section 24-19-105
Settlement Agreements – Public Inspection – Filing With the Department of Personnel

(1)(a) Notwithstanding any other law to the contrary, if any settlement agreement between a governmental unit or government-financed entity and a government-supported official or employee settles any employment dispute between such parties and involves the payment of any compensation to such official or employee after the term of employment of such official or employee in a particular employment position has ended, information regarding any amounts

paid or benefits provided under such settlement agreement shall be a matter of public record. Any governmental unit or government-financed entity that is a party to such a settlement agreement shall make such information available for public inspection and copying during regular business hours.

(b) If a state governmental unit enters into a settlement agreement to settle an employment dispute with a government-supported official or employee, the state governmental unit shall file a copy of the final settlement agreement with the department of personnel, which shall be a public record pursuant to the provisions of part 2 of article 72 of this title [procedures for inspection, copying, or photographing public records].

Colorado Statutes Section 24-19-107
Open Records

If a governmental unit is required under the provisions of this article to make any employment contracts or any information regarding amounts paid or benefits provided under any settlement agreements available to the public, such employment contracts or information shall be deemed to be public records, as such term is defined in section 24-72-202(6), and shall be subject to the provisions of part 2 of article 72 of this title [procedures for inspection, copying, or photographing public records].

District of Colorado

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

District of Colorado Local Civil Rule 7.2
Motions to Seal; Motions to Close Court Proceedings

A. *Scope.* Upon motion and a showing of compelling reasons, a judicial officer may order that:

1. All or a portion of papers and documents filed in a case shall be sealed; or

2. All or a portion of court proceedings shall be closed to the public.

B. *Motion Open to Public Inspection.* A motion to seal or close court proceedings will be placed in the case file and open to pubic inspection.

C. *Proposed Filing.* A proposed filing of papers or documents will be submitted under seal until the motion to seal is decided by a judicial officer.

D. *Public Notice; Objections.* On the business day after the filing of a motion to seal or motion to close court proceedings, a public notice will be posted in the clerk's office and on the court's web site. The public notice will advise of such motion and state that any person or entity may file objections to the motion on or before the date set forth in such public notice. The date will be not less than three business days after the public notice is posted.

E. *Order*. No order to seal or close court proceedings will be entered before the date set forth in the public notice for filing objections, except in emergency circumstances shown or referred to in the motion.

Local Civil Rule 7.3
Procedures for Filing Papers and Documents Under Seal

A. *Manner of Filing*. The following papers or documents must be placed unfolded in a sealed envelope with a copy of a cover page (see section B. of this rule) affixed to the outside of the envelope:

1. papers or documents ordered sealed by the court;

2. proposed filings of papers or documents submitted under seal with a motion requesting that the documents be sealed; and

3. documents required to be sealed by law.

B. *Cover Page*. The cover page affixed to the outside of the sealed envelope must include:

1. the case caption;

2. the title of the paper or document;

3. the name, address, and telephone number of the attorney or pro se party filing the paper or document;

4. a notation that the paper or document is filed under seal;

5. the title and date of the court order pursuant to which the paper or document is sealed, if applicable; or

6. the citation of the statute or other authority pursuant to which the paper or document is sealed, if applicable.

C. *Copies*. Copies of the papers or documents in sealed envelopes shall be filed in accordance with D.C. Colo. L. Civ. R. 10.1.L.

CONNECTICUT

State of Connecticut

Connecticut Rules of Court for the Superior Court, Civil Procedure Rule 11-20
Exclusion of the Public; Sealing Files Limiting Disclosure of Documents

(a) Except as provided in this section and except as otherwise provided by law, including Section 13-5, the judicial authority shall not order that the public, which may include the news media, be excluded from any portion of a proceeding and shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited.

(b) Upon motion of any party, or upon its own motion, the judicial authority may order that the public be excluded from any portion of a proceeding and may order that files, affidavits, documents or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in attending such pro-

ceeding or in viewing such materials. Any such order shall be no broader than necessary to protect such overriding interest.

(c) In connection with any order issued pursuant to subsection (b) of this section, the judicial authority shall, on the record in open court, articulate the overriding interest being protected and shall specify its findings underlying such order. The time and date of any such order shall be entered by the court clerk in the court file together with such order.

(d) With the exception of orders concerning any session of court conducted pursuant to General Statutes §§ 46b-11, 46b-49, 46b-122 or any other provision of the General Statutes under which the judicial authority is authorized to close proceedings, whether at a pretrial or trial stage, no order excluding the public from any portion of a proceeding shall be effective until seventy-two hours after it has been issued. Any person affected by such order shall have the right to the review of such order by the filing of a petition for review with the appellate court within seventy-two hours from the issuance of such order. The timely filing of any petition for review shall stay such order.

(e) With the exception of orders concerning the confidentiality of records and other papers, issued pursuant to General Statutes § 46b-11 or any other provision of the general statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents or other materials, whether at a pretrial or trial stage, any person affected by a court order that seals or limits the disclosure of any files, documents or other materials on file with the court or filed in connection with a court proceeding, shall have the right to the review of such order by the filing of a petition for review with the appellate court within seventy-two hours from the issuance of such order. Nothing under this subsection shall operate as a stay of such sealing order.

(f) The provisions of this section shall not apply to settlement agreements which have not been incorporated into a judgment of the court.

District of Connecticut

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. If counsel did not file a motion for return of the sealed settlement agreement, 90 days after final determination of the action the Clerk may destroy the sealed settlement agreement or send it with other parts of the file to the Federal Records Center, whereupon the settlement agreement will be automatically unsealed without notice to counsel.

District of Connecticut Local Rule 7(F)
Sealed Documents

1. Counsel seeking to file a document under seal, shall file a motion to seal and shall attach to the motion the document to be sealed. The document shall be submitted in an unsealed envelope, bearing the caption of the case, the case number, and the caption of the document to be sealed. The Clerk of the Court

shall file-stamp the motion to seal and the document to be sealed, shall docket the motion and document and shall forward the motion to seal and the document to be sealed to the Court for consideration. If ordered sealed by the Court, the Clerk shall seal the document in the envelope provided by counsel, shall note the date of the sealing order on the envelope and docket sheet. Until such document is ordered sealed, the document shall be treated as a public document subject to public inspection. In the alternative, counsel can seek advance permission of the Court to file a document under seal without submitting the document to be sealed.

2. Counsel filing documents which are, or may be claimed to be, subject to any protective or impounding order previously entered shall file with the documents, and serve on all parties, a notice that the documents are, or are claimed to be, subject to such order or orders, identifying the particular order or orders by date, and shall submit such documents to the Clerk under seal.

3. Any file or document ordered sealed by the Court upon motion of the parties, by stipulation or by the Court, sua sponte, shall remain sealed pending further order of this Court, or any Court sitting in review. Upon final determination of the action, as defined in Rule 14 of the Local Rules of Civil Procedure, counsel shall have ninety (90) days to file a motion pursuant to Rule 14 for the return of the sealed documents. Any sealed document thereafter remaining may be destroyed by the Clerk pursuant to Rule 14 or retired by the Clerk with other parts of the file to the Federal Records Center, whereupon they shall be automatically unsealed without notice to counsel.

DELAWARE

State of Delaware

Delaware State Superior Court Rule of Civil Procedure 5(g)
Service and Filing of Pleadings and Other Papers, Sealing of Court Records

(1) Except as otherwise provided by statute or rule, including this Rule 5(g) and Rule 26(c), all pleadings and other papers of any nature filed with the Prothonotary, including briefs, appendices, letters, deposition transcripts and exhibits, answers to interrogatories and requests for admissions, responses to requests for production or certificates and exhibits thereto ("Court Records"), shall become a part of the public record of the proceedings before this Court.

(2) Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of this Court specifying those Court Records, categories of Court Records, or portions thereof which shall be placed under seal; provided, however, the Court may, in its discretion, receive and review any document in camera without public disclosure thereof and, in connection with any such review, may determine whether good cause exists for the sealing of such documents; and provided further that, unless the Court or-

ders otherwise, the parties shall file within 30 days redacted public versions of any Court Record where only a portion thereof is to be placed under seal.

(3) The provisions of paragraph (2) of this Rule 5(g) notwithstanding, the Court may, in its discretion, by appropriate order, authorize any person to designate Court Records to be placed under seal pending a judicial determination of the specific Court Records, categories, or portions thereof to which such restriction on public access shall continue to apply.

(4) Any person who objects to the continued restriction on public access to any Court Record placed under seal pursuant to paragraphs (2) or (3) of this Rule 5(g) shall give written notice of his or her objection to the person who designated the Court Record for filing under seal and shall file such written notice with the Court. To the extent that any person seeks to continue the restriction on public access to such Court Record, he or she shall serve and file an application within 7 days after receipt of such written notice setting forth the grounds for such continued restriction and requesting a judicial determination whether good cause exists therefor. In such circumstances, the Court shall promptly make such a determination.

(5) The Prothonotary shall promptly unseal any Court Record in the absence of timely compliance with the provisions of this Rule 5(g), if applicable. In addition, 30 days after final judgment has been entered without any appeal having been taken therefrom, the Prothonotary shall send a notice, return receipt requested, to any person who designated a Court Record to be placed under seal that such Court Record shall be released from confidential treatment if required to be kept by the Prothonotary or, if not required to be kept, returned to the person at the person's expense or destroyed, as such person may elect, unless that person makes application to the Court within 30 days after notice from the Prothonotary for further confidential treatment for good cause shown.

[*Note:* Rule 5(g) of the Chancery Court Rules and Rule 5(g) of Common Pleas Court Civil Rules are similar.]

District of Delaware

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

District of Delaware Local Rule 5.3
Number of Copies

The original and one copy of pleadings, stipulations, motions, responses to motions, briefs, memoranda of points and authorities, appendices and any papers filed under seal shall be filed with the Clerk of Court. Any party filing papers under seal shall distinguish the original on the cover of the paper. The original of all other papers required to be filed shall be filed with the Clerk. Two copies of each paper filed with the Court shall be served on local counsel for each of the other parties. Whenever papers are captioned in more than one action, suf-

ficient copies shall be furnished to permit the Clerk to file one copy in each action.

DISTRICT OF COLUMBIA

District of Columbia Superior Court Rule Civil 5-III
Sealed or Confidential Documents

(a) Absent statutory authority, no case or document may be sealed without an order from the Court. Any document filed with the intention of being sealed shall be accompanied by a motion to seal or an existing order. The document will be treated as sealed, pending the ruling on the motion. Failure to file a motion to seal will result in the pleading being placed in the public record.

(b) Unless otherwise ordered or otherwise specifically provided in these Rules documents submitted for a confidential *in camera* inspection by the Court, which are the subject of a Protective Order, which are subject to an existing order that they be sealed, or which are the subject of a motion for such orders, shall be submitted to the Clerk securely sealed. The envelope/box containing such documents shall contain a conspicuous notation such as "DOCUMENT UNDER SEAL" or "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

(c) The face of the envelope/box shall also contain the case number, the title of the Court, a descriptive title of the document and the case caption unless such information is to be, or has been, included among the information ordered sealed. The face of the envelope/box shall also contain the date of any order or the reference to any statute permitting the item to be sealed.

(d) Filings of sealed materials shall be made only in the Clerk's Office during regular business hours. Such filings of sealed materials at the security desk are prohibited because the Security Officers are not authorized to accept this material.

District of the District of Columbia

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

District of Columbia Federal District Court Local Civil Rule 5.1(j)
Sealed or Confidential Documents

(1) Absent statutory authority, no cases or documents may be sealed without an order from the Court. Any pleading filed with the intention of being sealed shall be accompanied by a motion to seal. The document will be treated as sealed, pending the outcome of the ruling on the motion. Failure to file a motion to seal will result in the pleading being placed in the public record.

(2) Unless otherwise ordered or otherwise specifically provided in these Local Rules, all documents submitted for a confidential *in camera* inspection by the Court, which are the subject of a Protective Order, which are subject to an exist-

ing order that they be sealed, or which are the subject of a motion for such orders, shall be submitted to the Clerk securely sealed in an envelope/box needed to accommodate the documents. The envelope/box containing such documents shall contain a conspicuous notation that carries "DOCUMENT UNDER SEAL" or "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

(3) The face of the envelope/box shall also contain the case number, the title of the Court, a descriptive title of the document and the case caption unless such information is to be, or has been, included among the information ordered sealed. The face of the envelope/box shall also contain the date of any order, or the reference to any statute permitting the item sealed.

(4) Filings of sealed materials must be made in the Clerk's Office during the business hours of 9:00 a.m. and 4:00 p.m. daily except Saturdays, Sundays and legal holidays. Filings at the security desk are prohibited because the Security Officers are not authorized to accept this material.

FLORIDA

State of Florida

Florida Statutes Section 69.081
Sunshine in Litigation; Concealment of Public Hazards Prohibited

(2) As used in this section, "public hazard" means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced. . . .

(8)(a) Any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced. Any person has standing to contest an order, judgment, agreement, or contract that violates this section. . . .

Florida Rule of Judicial Administration 2.051
Public Access to Judicial Branch Records

(a) *Generally.* Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below. . . .

(c) *Exemptions.* The following records of the judicial branch shall be confidential: . . .

(9) Any court record determined to be confidential in case decision or court rule on the grounds that

(A) confidentiality is required to

(i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

(ii) protect trade secrets;

(iii) protect a compelling governmental interest;

(iv) obtain evidence to determine legal issues in a case;

(v) avoid substantial injury to innocent third parties;

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;

(B) the degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (A);

(C) no less restrictive measures are available to protect the interests set forth in subdivision (A); and

(D) except as provided by law or rule of court, reasonable notice shall be given to the public of any order closing any court record.

Florida Rule of Judicial Administration 2.075
Retention of Court Records

(k) *Sealed Records.* No record which has been sealed from public examination by order of court shall be destroyed without hearing after such notice as the court shall require.

Middle District of Florida

No relevant local rule.

Northern District of Florida

No relevant local rule.

Southern District of Florida

Analysis: No specific restriction on court's authority to seal a settlement agreement; party seeking to file matter under seal must set forth reasonable basis for departing from court's general policy of public filings. A sealed settlement agreement may not remain sealed indefinitely unless the court's sealing order specifically provides for permanent sealing of the matter. A sealed settlement agreement will be unsealed, destroyed, or returned to the filing party upon expiration of the time specified in the court's sealing order which may not exceed five years from the date of filing absent extraordinary circumstances.

Southern District of Florida General Local Rule 5.4
Filings Under Seal; Disposal of Sealed Materials

A. *General Policy.* Unless otherwise provided by law, Court rule or Court order, proceedings in the United States District Court are public and Court filings are matters of public record. Where not so provided, a party seeking to file matters under seal shall follow the procedures prescribed by this rule.

B. *Procedure for Filings Under Seal.* A party seeking to make a filing under seal shall:

1. Deliver to the Clerk's Office an original and one copy of the proposed filing, each contained in a separate plain envelope clearly marked as "sealed document" with the case number and style of the action noted on the outside. The Clerk's Office shall note on each envelope the date of filing and docket entry number.

2. File an original and a copy of the motion to seal with self-addressed postage-paid envelopes, setting forth a reasonable basis for departing from the general policy of a public filing, and generally describing the matter contained in the envelope. The motion shall specifically state the period of time that the party seeks to have the matter maintained under seal by the Clerk's Office. Unless permanent sealing is sought, the motion shall set forth how the matter is to be handled upon expiration of the time specified in the Court's sealing order. Absent extraordinary circumstances, no matter sealed pursuant to this rule may remain sealed for longer than five (5) years from the date of filing.

3. File an "ORDER RE: SEALED FILING" in the form set forth at the end of this rule. The form is available at the Clerk's Office. The bottom portion should be left blank for the Judge's ruling.

C. *Court Ruling.* If the Court grants the motion to seal, the Clerk's Office shall maintain the matter under seal as specified in the court order. If the Court denies the motion to seal, the original and copy of the proposed filing shall be returned to the party in its original envelope.

D. *Disposition of Sealed Matter.* Unless the Court's sealing order permits the matter to remain sealed permanently, the Clerk will dispose of the sealed matter

upon expiration of the time specified in the Court's sealing order by unsealing, destroying, or returning the matter to the filing party.

Comment on 2001 Amendment: The current amendments are intended to reflect more accurately existing procedures, and to assist the court in the maintenance and ultimate disposition of sealed records by creating a form order which specifies how long the matter is to be kept under seal and how it is to be disposed of after the expiration of that time. By its terms, this rule does not apply to materials covered by specific statutes, rules or court orders authorizing, prescribing or requiring secrecy. However, litigants are required to complete an "Order Re: Sealed Filing" in the form set forth at the end of this rule for materials being filed under seal after the entry of, and pursuant to, a protective order governing the use of and disclosure of confidential information.

GEORGIA

State of Georgia

Georgia State Uniform Rules for the Superior Courts

Rule 21. Limitation of Access to Court Files. All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below.

Rule 21.1. Motions and Orders. Upon motion by any party to any civil action, after hearing, the court may limit access to court files respecting that action. The order of limitation shall specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation.

Rule 21.2. Finding of Harm. An order limiting access shall not be granted except upon a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest.

Rule 21.3. Ex Parte Orders. Under compelling circumstances, a motion for temporary limitation of access, not to exceed 30 days, may be granted, ex parte, upon motion accompanied by supporting affidavit.

Rule 21.4. Review. An order limiting access may be reviewed by interlocutory application to the Supreme Court.

Rule 21.5. Amendments. Upon notice to all parties of record and after hearing, an order limiting access may be reviewed and amended by the court entering such order or by the Supreme Court at any time on its own motion or upon the motion of any person for good cause.

Middle District of Georgia

No relevant local rule.

Northern District of Georgia

No relevant local rule.

Southern District of Georgia

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

Southern District of Georgia Local Rule 79.7
Sealed Documents

(a) Papers submitted for filing with the Clerk may be placed under seal only where required by operation of law, these rules, or order of a judicial officer.

(b) Any person desiring to have any matter placed under seal shall present a motion stating grounds why a document filed with the Clerk should not be available for public inspection. The Clerk shall: (i) docket the motion as a Motion to Seal; (ii) refrain from labeling the filing as "sealed" or identifying the person seeking the sealing order unless the person consents; (iii) designate any accompanying papers as "sealed matter"; and (iv) maintain the motion and accompanying papers in a secure file pending a ruling on the Motion to Seal.

(c) If the Motion to Seal is denied, any papers which the person sought to have sealed, and which were submitted to the Clerk with the motion, shall be returned to the person, who shall then have the option of filing the papers in the normal course.

(d) Motions to Seal may extend to three layers of information:

(1) the name of the movant;

(2) the title of the filing sought to be sealed; and

(3) the contents of the filing itself. In most cases, only the contents of the filing itself (e.g., proprietary data embodied within an *in limine* motion) will warrant sealing, not the title of the filing (e.g., Motion in Limine) or the identity of the movant (e.g., XYZ Tire Company). Therefore, unless the Court specified otherwise, the Clerk shall construe all sealing orders to extend only to the contents of the underlying filing. The burden rests upon the moving party to justify all three sealing levels.

Southern District of Georgia Local Rule 83.28
Release of Information by Courthouse Personnel

All courthouse supporting personnel, including but not limited to the United States Marshal and his deputies, the Clerk and his deputies, the Probation Officer and probation clerks, bailiffs, court reporters, and any employees or subcontractors retained by the official court reporters, are prohibited from disclosing to any person, without authorization from the Court, any information relating to a pending grand jury proceeding, criminal case, or civil case that is not part of the public record of the Court. The public record of each case shall be those materials which are contained in the court's official file as maintained by the Clerk except such parts thereto as may be sealed, secret, impounded or specially set aside for in camera inspection. . . .

GUAM

Territory of Guam

No relevant statute or rule.

District of Guam

No relevant local rule.

HAWAII

State of Hawaii

No relevant statute or rule.

District of Hawaii

No relevant local rule.

IDAHO

State of Idaho

Idaho Court Administrative Rule 32
Records of the Judicial Department – Examination, Inspection and Copying – Exemption from and Limitations on Disclosure

(f) *Other Prohibitions or Limitations on Disclosure.* Records subject to inspection, examination and copying under paragraph (c) of this Rule and not exempt from disclosure by statute or paragraph (d) of this Rule, may be prohibited or limited from disclosure by order of the court on a case-by-case basis. In ruling on whether specific records should be disclosed or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest in privacy or public disclosure predominates. If the court prohibits or limits a disclosure to protect predominating privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests. Before a court may enter an order denying disclosure or sealing documents or materials from disclosure under paragraph (l), it must also make one or more of the following determinations in writing:

(1) That the documents or materials contain highly intimate or embarrassing facts or statements, the publication of which would be highly objectionable to a reasonable person, or

(2) That the documents or materials contain facts or statements that the court finds might be libelous, or

(3) That the documents or materials contain facts or statements, the dissemination or publication of which would reasonably result in economic or financial loss or harm to a person having an interest in the documents or materials, or compromise the security of personnel, records or public property of or used by the judicial department, or

(4) That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals. In applying these rules, the court is referred to the traditional legal concepts in the law of invasion of privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding intimate or embarrassing material about persons. . . .

(l) *Motion Regarding the Sealing of Records.* Any interested person or the court on its own motion may move to seal or unseal part or all of the records in any judicial proceeding. The custodian judge shall hold a hearing on the motion after the moving party gives notice of the hearing to all parties to the judicial proceeding and any other interested party designated by the custodian judge. The custodian judge shall issue a written decision on the motion to seal or unseal records which may be reconsidered, altered or amended by the court at any time.

District of Idaho

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise, after the case is closed and the appeal time has expired, or if appealed, after the conclusion of all appeals, the sealed settlement agreement will be returned to the submitting party.

District of Idaho Local Rule 5.3
Sealed Documents and Public Access

(a) *Motion to File Under Seal.* Counsel seeking to file a document under seal shall file an ex parte motion to seal, along with supporting memorandum and proposed order, and lodge the document with the Clerk of Court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading.

(b) *Motion to Seal Existing Documents.* Counsel seeking to place a pending case or filed document under seal shall file an ex parte motion to seal, along with supporting memorandum and a proposed order with the court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading. Portions of a document cannot be placed under seal. Instead, the entire document must be placed under seal in order to protect confidential information.

(c) *Public Information.* The Clerk of Court shall file and docket the motion to seal in the public record of the court. All lodged documents under seal will not be docketed, scanned or available for public inspection unless otherwise ordered by the court.

(d) *Format of Lodged Documents Under Seal.* Counsel lodging the material to be sealed shall submit the material in an UNSEALED 8½ x 11 inch manila envelope. The envelope shall contain the title of the court, the case caption, and case number.

(e) *Procedures.* The Clerk of Court will forward the lodged documents to the assigned judge for consideration. The assigned judge will direct the clerk to:

(1) File the documents under seal with any further specific instructions; or

(2) Return the documents to the offering party with appropriate instructions; or

(3) File the documents or materials in the public record.

(f) *Return of Sealed Documents to Public Record.* Because the Federal Records Center prohibits the storage of sealed records or documents, the clerk must unseal all documents and cases prior to shipment of any record to the Federal Records Center. Absent any other court order, the sealed documents will be returned to the submitting party after the case is closed and the appeal time has expired, or if appealed, after the conclusion of all appeals.

ILLINOIS

State of Illinois

No relevant statute or rule.

Central District of Illinois

No relevant local rule.

Northern District of Illinois

Analysis: The court must find that good cause has been shown before ordering a settlement agreement to be filed as a restricted or sealed document. A restricted or sealed settlement agreement may not remain restricted or under seal indefinitely. Except where the court in response to a request of a party or on its own motion orders otherwise, the clerk will place the restricted settlement agreement in the public file 63 days following final disposition including appeals of the case. If a party on written motion filed not more than 63 days following the closing of the case period requests to have the restricted settlement agreement turned over, the court may authorize the clerk to turn over the settlement agreement to the party, destroy it, or retain the settlement agreement as a restricted document no longer than a 20 year period and then destroy it.

Northern District of Illinois Local Rule 5.8

Filing Materials Under Seal

Any document to be filed as a restricted or sealed document as defined by LR 26.2 must be accompanied by a cover sheet which shall include the following:

(A) the caption of the case, including the case number;

(B) the title "Restricted Document Pursuant to LR 26.2";

(C) a statement indicating that the document is filed as restricted in accordance with an order of court and the date of that order; and

(D) the signature of the attorney of record or unrepresented party filing the document.

Any document purporting to be a restricted or sealed document as defined in LR 26.2 that is presented for filing without the cover page or copy of the order shall not be treated as a restricted or sealed document, but shall be processed like

any other document. In such instances the clerk is authorized to open the sealed envelope and remove the materials for processing.

Northern District of Illinois Local Rule 26.2
Protective Orders; Restricted Documents

(a) *Definitions.* As used in this rule the term:

"Restricted document" means a document or an exhibit to which access has been restricted either by a written order or by a rule;

"Sealed document" means a restricted document which the court has directed be maintained within a sealed enclosure such that access to the document requires breaking the seal of the enclosure;

"Document awaiting expunction" means a document or an exhibit which the court has ordered held for possible expunction pursuant to 21 U.S.C. Section 844(b)(2) but for which the period for holding prior to final destruction has yet to pass; and

"Protective order" means any protective order entered pursuant to Fed.R.Civ.P. 26(c), or any other order restricting access to one or more documents filed or to be filed with the court.

(b) *Restricting Order.* The court may on written motion and for good cause shown enter an order directing that one or more documents be restricted. The order shall also specify the persons, if any, who are to have access to the documents without further order of court. The minute order accompanying the order shall specify any qualifications as to access and disposition of the documents contained in the order.

(c) *Docket Entries.* The court may on written motion and for good cause shown enter an order directing that the docket entry for a restricted document show only that a restricted document was filed without any notation indicating its nature. Absent such an order a restricted document shall be docketed in the same manner as another document except that the entry will indicate that the document is restricted.

(d) *Inspection of Restricted Documents.* The clerk shall maintain a record in a manner provided for internal operating procedures approved by the Court of persons permitted access to restricted documents. Such procedures may require anyone seeking access to show identification and to sign a statement to the effect that they have been authorized to examine the restricted document.

(e) *Disposition of Restricted Documents.* When a case is closed in which an order was entered pursuant to section (b) of this rule, the clerk shall maintain the documents as restricted documents for a period of 63 days following the final disposition including appeals. Except where the court in response to a request of a party made pursuant to this section or on its own motion orders otherwise, at the end of the 63 day period the clerk shall place the restricted documents in the public file.

Any party may on written motion request that one or more of the restricted documents be turned over to that party. Such motions shall be filed not more than 63 days following the closing of the case period.

In ruling on a motion filed pursuant to this section or on its own motion, the court may authorize the clerk to do one of the following for any document covered by the order:

(1) turn over a document to a party; or

(2) destroy a document; or

(3) retain a document as a restricted document for a period not to exceed 20 years and thereafter destroy it.

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Restricted Documents.

(a) *Separate Filing Area for Restricted Documents.* The clerk shall maintain restricted documents, sealed documents, and documents awaiting expunction as defined by LR 26.2(a) separately from the files of documents to which access has not been restricted. Any area used to store documents to which access has been restricted shall be secure from entry by any persons other than the clerk or those designated in writing by the clerk as authorized to have access. The clerk shall designate in writing deputies authorized to accept restricted documents either from chambers or for filing pursuant to protective orders. Materials accepted for filing as restricted shall be maintained in a secure area until collected by one of the designated deputies. Where the materials so accepted are being filed pursuant to a protective order, the deputy accepting them will stamp the cover of the document with a FILED stamp indicating the date of filing.

(b) *Handling Sealed Documents.* Where a document is ordered to be sealed, it is to be delivered for filing pursuant to LR5.9 with the seal on the enclosure intact. If the document is sent from chambers or returned from an appellate court with the seal broken, one of the deputies authorized to handle restricted materials pursuant to section (a) will forthwith deliver the document to the courtroom deputy assigned to the judicial officer to whose calendar the proceedings to which the sealed document was filed is assigned. If that judicial officer is no longer sitting, the deputy will forthwith deliver the document to the courtroom deputy assigned to the emergency judge. The courtroom deputy will promptly bring the document to the attention of the judge. The judicial officer will either order that the document be re-sealed, or order that it continue to be handled as a restricted document, but not as a sealed document, or enter such other order as required to indicate the status of the document. Where the document is to be re-sealed, the judicial officer or courtroom deputy will re-seal the document and transmit it to the appropriate deputy in the clerk's office. Where under the terms of a protective order a party is permitted to inspect a sealed document and that party appears in the clerk's office and requests the document, one of the deputies authorized to handle restricted materials pursuant to section (a) will obtain the

document and provide an area where the person may inspect the document other than in the public area of the clerk's office. The deputy will complete a form showing the date, description of the document, the name of the person requesting access to the document, a statement indicating that the deputy has checked the protective order and it does indeed authorize the person to inspect the document, and a statement that the deputy requested of and was shown identification by the person requesting access to the document. Any person wishing to break the seal and inspect the document must sign the form completed by the deputy to indicate that they are authorized to inspect the document and have broken the seal. After the person has completed the inspection, the deputy will follow the procedures set out in the previous paragraph for handling the re-sealing of the document. . . .

Southern District of Illinois

No relevant local rule.

INDIANA

State of Indiana

Indiana Code Section 5-14-3-5.5
Sealing of Certain Records by Court; Hearing; Notice

(a) This section applies to a judicial public record.

(b) As used in this section, "judicial public record" does not include a record submitted to a court for the sole purpose of determining whether the record should be sealed.

(c) Before a court may seal a public record not declared confidential under section 4(a) of this chapter, it must hold a hearing at a date and time established by the court. Notice of the hearing shall be posted at a place designated for posting notices in the courthouse.

(d) At the hearing, parties or members of the general public must be permitted to testify and submit written briefs. A decision to seal all or part of a public record must be based on findings of fact and conclusions of law, showing that the remedial benefits to be gained by effectuating the public policy of the state declared in section 1 of this chapter are outweighed by proof by a preponderance of the evidence by the person seeking the sealing of the record that:

(1) a public interest will be secured by sealing the record;

(2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;

(3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record;

(4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; and

(5) it is reasonably necessary for the record to remain sealed for a period of time. Sealed records shall be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records no longer exist.

Northern District of Indiana

No relevant local rule.

Southern District of Indiana

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations required to be placed in the sealing order by this rule.

Southern District of Indiana Local Rule 5.3
Filing of Documents Under Seal

(a) *General Rule.* No document will be maintained under seal in the absence of an authorizing statute, Court rule, or Court order.

(b) *Filing of Cases Under Seal.* Any new case submitted for filing under seal must be accompanied by a motion to seal and proposed order. Any case presented in this manner will be assigned a new case number, District Judge and Magistrate Judge. The Clerk will maintain the case under seal until a ruling granting the motion to seal is entered by the assigned District Judge. If the motion to seal is denied, the case will be immediately unsealed with or without prior notice to the filing party.

(c) *Filing of Documents Under Seal.* Materials presented as sealed documents shall be inside an envelope which allows them to remain flat. Affixed to the exterior of the envelope shall by an 8½ x 11" cover sheet containing:

i. the case caption;

ii. the name of the document if it can be disclosed publicly, otherwise an appropriate title by which the document may be identified on the public docket;

iii. the name, address and telephone number of the person filing the document; and

iv. in the event the motion requesting the document be filed under seal does not accompany the document, the cover sheet must set forth the citation of the statute or rule or the date of the Court order authorizing filing under seal.

(d) *Prohibition of Electronic Filing of Sealed Documents.* Sealed documents will not be filed electronically, but rather manually on paper. The party filing a sealed document shall file electronically a Notice of Manual Filing (see Form in Electronic Case Filing Administrative Policies and Procedures Manual for the Southern District of Indiana). The courtroom deputy to the District or Magistrate Judge should be contacted for instructions when filing certain *ex parte* documents which could not be disclosed by the electronic Notice of Manual Filing.

IOWA

State of Iowa

Iowa Code Section 22.13
Settlements – Governmental Bodies

A written summary of the terms of settlement, including amounts of payments made to or through a claimant, or other disposition of any claim for damages made against a governmental body or against an employee, officer, or agent of a governmental body, by an insurer pursuant to a contract of liability insurance issued to the governmental body, shall be filed with the governmental body and shall be a public record.

Northern and Southern Districts of Iowa

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Thirty days after a judgment has become final (60 days if the United States is a party), or, if an appeal from the judgment is filed, 30 days after the issuance of the mandate by the circuit court, the Clerk of Court may unseal a settlement agreement not claimed and withdrawn after (1) the Clerk gives notice to the attorneys of record in the case and to any pro se parties of the Clerk's intention to unseal the settlement agreement; and (2) no response to the notice is filed within 30 days after the notice was sent. If a timely objection is filed, the settlement agreement will be unsealed only upon an order of the court.

Northern and Southern Districts of Iowa Local Rule 1.1(k)
Public Records

All filings with the Clerk of Court's Office are public records and are available for public inspection unless otherwise ordered by the court or provided by a Local Rule or a statute of the United States. Materials may be filed under seal with the Clerk of Court, but only in accordance with the procedures prescribed in LR 5.1(e).

Northern and Southern Districts of Iowa Local Rule 5.1(e)
Sealed Documents and Exhibits

A party seeking to file under seal a pleading, motion, document, or exhibit first must file a written request for leave to do so. The pleading, motion, document, or exhibit thereafter may be filed under seal only if the court so orders. If the court enters an order permitting or directing the parties to file certain designated materials under seal, the parties thereafter must file all such materials under seal without filing a further request to do so.

A request for leave to file materials under seal may be filed under seal ex parte and without prior court order. The request must be delivered by the Clerk of Court in a sealed envelope marked with the caption of the case and the notation, "FILED UNDER SEAL PURSUANT TO LR 5.1(e)."

Materials to be filed under seal must be filed in a sealed envelope marked with the caption of the case and the notation, "SEALED PURSUANT TO COURT ORDER ENTERED [DATE]."

All materials filed in response to or in connection with other materials filed under seal also must be filed in a sealed envelope marked with the caption of the case and the notation, "SEALED PURSUANT TO COURT ORDER ENTERED [DATE]."

Envelopes containing materials filed under seal may be opened only by the Clerk of court, deputy clerks, federal judges, and their staff members.

Thirty days after a judgment has become final (60 days if the United States is a party), or, if an appeal from the judgment is filed, 30 days after the issuance of the mandate by the circuit court, sealed materials not claimed and withdrawn pursuant to LR 83.7(e) may be unsealed by the Clerk of Court after the following occurs: (1) The Clerk of Court gives notice to the attorneys of record in the case and to any pro se parties of the Clerk of Court's intention to unseal the materials; and (2) No response to the notice is filed within 30 days after the notice has been sent. If a timely objection is filed, the document or exhibit will be unsealed only upon an order of the court.

A party intending to object to a notice of intention to unseal a document must, before filing the objection, confer with opposing counsel and any pro se parties and attempt to reach an agreement on the disposition of the exhibit pursuant to LR 83.7(e) in lieu of the unsealing of the exhibit. An objection to a notice of intention to unseal must contain a statement describing the results of these efforts.

The procedures in this section do not apply to preindictment ex parte filings by the government in criminal cases or to cases where other procedures are required by statute.

KANSAS

State of Kansas

Kansas Statutes, Article 2, Section 45-217
Records Open To Public, Definitions

(f)(1) "Public record" means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.

District of Kansas

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. A settlement agreement placed under seal after October 22, 1998, will be unsealed 10 years after a final judgment or dismissal was entered in the case unless the court ordered

otherwise at the time of entry of such judgment or dismissal. If a settlement agreement placed under seal before October 22, 1998 is contained in a case that has been closed by entry of final judgment or order of dismissal for 10 years or more, the clerk will lift the seal on the settlement agreement after notifying the parties by written notice, unless a motion to extend the seal, served on all parties to the action, is filed within six months.

District of Kansas Local Rule 79.4
Sealed Files and Documents in Civil Cases

(a) *Documents/files Sealed After the Effective Date of this Rule.* Any file, pleading, motion, memorandum, order or other document placed under seal by order of this court in any civil action shall be unsealed by operation of this rule ten years after entry of a final judgment or dismissal unless otherwise ordered by the court at the time of entry of such judgment or dismissal. Any party, upon motion filed no more than six months before the seal is to be lifted, with notice to the remaining parties, may seek to renew the seal for an additional period of time not to exceed ten years. There shall be a rebuttable presumption that the seal shall not be renewed, and the burden shall be on the moving party to establish an appropriate basis for renewing the seal.

(b) *Documents/files Under Seal Before the Effective Date of this Rule.* On an ongoing basis, for a term of ten years from the effective date of the adoption of this rule, the clerk of the court will identify all civil files which have been sealed, or civil files in which sealed pleadings, motions, memoranda, orders or other documents are contained, and which files have been closed by entry of final judgment or order of dismissal, for a term of ten years or more, and at that time shall notify the parties, by written notice mailed to the last known address of counsel representing each party to the action, that:

(1) unless a motion to extend the seal, served on all parties to the action, is filed within six months, the seal will be lifted; and

(2) if a motion to extend the seal is filed, the burden shall be on the moving party to overcome a rebuttable presumption that the seal shall not be renewed and to establish an appropriate basis for renewing the seal.

In the event of a pro-se litigant all notices required by this rule shall be mailed to the last known mailing address of such litigant as reflected in the records of the Clerk of the District court in the file in issue.

(c) By its terms, this rule applies only to civil actions and does not apply to sealed files, documents, records, transcripts, or any other matter sealed in criminal cases.

KENTUCKY

Commonwealth of Kentucky

No relevant statute or rule.

Eastern and Western Districts of Kentucky

No relevant local rule.

LOUISIANA

State of Louisiana

No relevant statute or rule.

District of Louisiana

No relevant local rule.

District of Louisiana

No relevant local rule.

District of Louisiana

No relevant local rule.

MAINE

State of Maine

Maine Rules of Court, Rule of Civil Procedure 79
Books and Records Kept by the Clerk and Entries Therein

(b)(1) *Motion to Impound.* Upon the filing of a motion or other request to impound or seal documents or other materials, the clerk shall separate such materials from the publicly available file and keep them impounded or sealed pending the court's adjudication of the motion.

(2) *Confidential Materials.* Requests for inspection or copying of materials designated as confidential, impounded or sealed within a case file must be made by motion in accordance with Rule 7.

District of Maine

No relevant local rule.

MARYLAND

State of Maryland

No relevant statute or rule.

District of Maryland

Analysis: To file a settlement agreement under seal, the court must consider the parties joint motion to seal portions of the court record (i.e., the settlement agreement) and any opposition thereto; refrain from ruling on the joint motion for at least 14 days to permit interested parties to file objections; and consider any objections by interested parties. Then, the court must find and hold that al-

ternatives to sealing would not provide sufficient protection and that sealing of the specified portion of the record (i.e., the settlement agreement) would be appropriate. A sealed settlement agreement may not remain under seal indefinitely. Upon final termination of an action, if any counsel fails to remove from the record the sealed settlement agreement within 30 days of receiving notice from the Clerk, the clerk may return the settlement agreement to the parties, destroy it, or otherwise dispose of it.

District of Maryland Local Rule 105.11
Sealing

Any motion seeking the sealing of pleadings, motions, exhibits or other papers to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection. The Court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties. Materials that are the subject of the motion shall remain temporarily sealed pending a ruling by the Court. If the motion is denied, the party making the filing will be given an opportunity to withdraw the materials.

[*See also* form "Order Sealing Portions of the Court Record (Local Rule 105.11)" which includes several additional provisions not stated in LR 105.11: "That the Sealed Record (as defined above) be, and hereby is, PLACED UNDER SEAL by the Clerk of the Court and that the Sealed Record shall be placed in an envelope or other container which is marked 'SEALED, SUBJECT TO ORDER OF COURT DATED _____.' . . . A copy of this Order shall be mailed to all counsel of record and to any other person entitled to notice hereof, and shall be docketed in the Court file."]

District of Maryland Local Rule 113.2
Disposition of Exhibits, Upon Final Termination of Action

Upon the final termination of an action, the Clerk shall send a notice to counsel advising them to remove from the record within thirty days of the notice all trial and hearing exhibits and all sealed materials which they presented at any time during the pendency of the action. If any counsel fails to do so, the clerk may return the materials to the parties, destroy the materials, or otherwise dispose of them.

MASSACHUSETTS

Commonwealth of Massachusetts

No relevant statute or rule.

District of Massachusetts

No relevant local rule.

MICHIGAN

State of Michigan

Michigan Court Rule 8.119
Court Records and Reports; Duties of Clerks

(F) *Sealed Records.*

(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals court records, in whole or in part, in any action or proceeding, unless

(a) a party has filed a written motion that identifies the specific interest to be protected,

(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and

(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(2) In determining whether good cause has been shown, the court must consider the interests of the public as well as of the parties.

(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C).

(5) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(6) Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.129 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D).

(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

Eastern District of Michigan

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise, a sealed settlement agreement will be unsealed and placed in the case file two years after the date on which it was sealed.

Eastern District of Michigan Local Rule 5.3
Civil Discovery Material Sealed Under Protective Orders

Sixty days after the entry of a final judgment and an appellate mandate, if appealed, attorneys of record in a case must present to the court a proposed order specifying whether the material sealed with protective orders is (a) to be returned to the parties or (b) unsealed and placed in the case file. Failure to present the order will result in the court ordering the clerk to unseal the materials and place them in the case file.

Eastern District of Michigan Local Rule 5.4
Sealed Settlement Agreements in Civil Cases

Absent an order to the contrary, sealed settlement agreements will remain sealed for two years after the date of sealing, after which time they will be unsealed and placed in the case file.

Western District of Michigan

Analysis: The court must find that there was good cause shown in order to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise, a sealed settlement agreement will be unsealed thirty days after the case is terminated or any appeal is terminated, whichever is later.

Western District of Michigan Local Civil Rule 10.6.
Form of Pleadings and Other Papers; Filing Requirements; Filing Under Seal.

(a) *Request to Seal* - Requests to seal a document must be made by motion and will be granted only upon good cause shown. If the document accompanies the motion, it shall be clearly labeled "Proposed Sealed Document" and shall include an envelope suitable for sealing the document. The envelope shall have the caption of the case, case number, title of document, and the words "Contains Sealed Documents" prominently written on the outside. The document shall not be considered sealed until so ordered by the Court.

(b) *Documents Submitted Pursuant to Court Order* - A document submitted pursuant to a previous order by the Court authorizing the document to be filed under seal shall be clearly labeled "Sealed Document," shall be submitted in an envelope suitable for sealing the document, and identify the order or other authority allowing filing under seal. The caption of the case, case number, title of document, and the words "Contains Sealed Documents" shall be prominently written on the outside of the envelope.

(c) *Expiration of Seal* - Unless otherwise ordered by the Court, thirty days after the termination of a case or any appeal, whichever is later, sealed documents and cases will be unsealed by the Court.

MINNESOTA

State of Minnesota

No relevant statute or rule.

District of Minnesota

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise on its own motion or on the motion of any party or nonparty, four months after the case is closed, or if appealed, 30 days after the filing and recording of the mandate of the Appellate Court finally disposing of the cause, a sealed settlement agreement in the Clerk's custody must be taken away by the parties. If the settlement agreement remains in the Clerk's custody after the expiration of the above time periods, the Clerk shall destroy the sealed settlement agreement 30 days after the Clerk notified counsel in the case by mail, unless the court orders otherwise.

District of Minnesota Local Rule 79.1
Custody and Disposition of Records, Exhibits and Documents Under Seal

(c) *Documents Subject to a Protective or Confidentiality Order.* Original documents filed subject to a protective or confidentiality order shall be separately stored and maintained by the Clerk and shall not be disclosed or otherwise made available to any person except as provided by the terms and conditions of the relevant order.

(d) *Removal of Models, Diagrams, Exhibits and Documents under Seal.* All models, diagrams, exhibits and documents subject to a protective or confidentiality order remaining in the custody of the Clerk shall be taken away by the parties within four months after the case is finally decided unless an appeal is taken. In all cases in which an appeal is taken, they shall be taken away within 30 days after the filing and recording of the mandate of the Appellate Court finally disposing of the cause. On motion of any party, or on the request of any nonparty, or on the court's own initiative, the court may order that any model, diagram, exhibit or document shall be retained by the Clerk for such longer period of time as may be determined by the court, notwithstanding any of the foregoing requirements of this paragraph (d).

(e) *Other Disposition by the Clerk.* When models, diagrams, exhibits and documents subject to a protective or confidentiality order in the custody of the Clerk are not taken away within the time specified in the preceding paragraph of this rule, it shall be the duty of the Clerk to notify counsel in the case, by mail, of the requirements of this rule. Any articles, including documents subject to a protective or confidentiality order, which are not removed within 30 days after such notice is given shall be destroyed by the Clerk, unless otherwise ordered by the Court.

MISSISSIPPI

State of Mississippi

No relevant statute or rule.

Northern and Southern Districts of Mississippi

Analysis: In order to seal a settlement agreement the court must find good cause for placing the document under seal. A sealed settlement agreement cannot remain sealed indefinitely. A sealed settlement agreement will be unsealed and placed in the case file thirty days following final disposition (including direct appeal) of the action, unless the court (upon motion) orders otherwise. Any order permitting a settlement agreement to be maintained under seal longer than 30 days must set a date for unsealing.

Northern and Southern Districts of Mississippi Local Rule 83.6
Sealing of Court Records.

(A) *Court Records Presumptively in Public Domain.* Except as otherwise provided by statute, rule, or order, all pleadings and other materials filed with the court ("court records") shall become a part of the public record of the court.

(B) *When and How Sealed; Redactions.* Court records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of the court specifying those court records, categories of court records, or portions thereof, which shall be placed under seal. The court may, in its discretion, receive and review any document *in camera* without public disclosure thereof and, in connection with any such review, determine whether good cause exists for the sealing of the document. Unless the court orders otherwise, the party seeking sealing shall file with the court redacted versions of court records when only a portion thereof is to be sealed.

(C) *Criminal Matters; Unsealing.* The Office of the United States Attorney shall present to the court a proposed order in connection with any indictment, complaint, or bill of information that the United States Attorney wishes to file under seal. Unless otherwise ordered by the Court, indictments, complaints, and bills of information filed under seal shall be unsealed after all defendants have made an appearance before the court.

(D) *Duration of Sealing.* Court records filed under seal in civil and criminal actions shall be maintained under seal for thirty days following final disposition (including direct appeal) of the action. After that time, all sealed court records shall be unsealed and placed in the case file unless the court, upon motion, orders that the court records be maintained under seal beyond the thirty-day period. All such orders shall set a date for unsealing of the court records.

MISSOURI

State of Missouri

Missouri Circuit Court of Jackson County [Sixteenth Judicial Circuit] Rule 100.4.14

Sealing Records by Protective Order of the Court

1. A protective order entered in any cause shall be by independent order, titled "Protective Order" and shall: identify with particularity the item(s) that are to be sealed or specify that the entire case file is to be sealed, and identify the person(s) to whom access to the sealed item(s) is permitted without order of the court.

2. When a protective order is entered in any cause, the party requesting such an order shall deliver a copy of the protective order to the Director of the Department of Civil Records.

3. A pleading, paper or document affected by a previously entered protective order shall carry the notation: "sealed by order of court ____, 19_," conspicuously in the caption of the filing, below the assigned case number. If the filing is protected by the order but the entire case file folder is not sealed, the filing shall be secured in an 8 ½" x 14" envelope containing: the caption of the case, a notation of the protective order as stated above, and the nature of the document being filed. In addition, the filing must be accompanied by a pleading designated "Notice of Filing Sealed Document" which shall identify the nature of the pleading, paper or document and the party filing the same.

4. Any item affected by a protective order shall be filed with the Director of the Department of Civil Records.

Eastern District of Missouri

Analysis: The court must find that good cause exists before ordering a settlement agreement to be placed under seal. A sealed settlement agreement may not remain under seal indefinitely. Unless otherwise ordered by the court, a settlement agreement filed under seal will be placed in the public file thirty (30) days after a final order or other disposition has been issued in a civil action in the district court, or thirty (30) days after the receipt of a mandate from the court of appeals in a case in which an appeal has been taken. Prior to the expiration of the thirty day period following the termination of a case, a party may move for an order of the court either extending the seal for a specified additional time period or returning the sealed settlement agreement to the filing party upon a showing of good cause.

Local Rule 83–13.05(A)

Pleadings and Documents Filed Under Seal, Pleadings and Documents in Civil Cases.

(1) Upon a showing of good cause in a written motion of any party, the court may order that a document or series of documents filed in a civil case be received

and maintained by the clerk under seal. The clerk of court shall maintain such documents in a restricted area apart from the case file to which the public has access. Unless the docket reflects prior entry of an order to file under seal or the party offering a pleading or document presents the clerk with an order of the court authorizing a filing under seal or a motion for such order, all pleadings and documents received in the office of the clerk shall be filed in the public record of a civil case, except as otherwise required by law.

(2) Not less than thirty (30) days after a final order or other disposition has been issued in a civil action in the district court, or thirty (30) days after the receipt of a mandate from the court of appeals in a case in which an appeal has been taken, the clerk shall place in the public file all documents previously filed under seal, unless otherwise ordered by the court. Prior to the expiration of the thirty day period following the termination of a case, a party may move for an order of the court either extending the seal for a specified additional time period or returning sealed documents to the filing party upon a showing of good cause.

Western District of Missouri

No relevant local rule.

MONTANA

State of Montana

Montana Code Section 2-9-303
Compromise or Settlement of Claim Against State

(1) The department of administration may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the terms of insurance, if any. A settlement from the self-insurance reserve fund or deductible reserve fund exceeding $10,000 must be approved by the district court of the first judicial district except when suit has been filed in another judicial district, in which case the presiding judge shall approve the compromise settlement.

(2) All terms, conditions, and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.

Montana Code Section 2-9-304
Compromise or Settlement of Claim Against Political Subdivision

(1) The governing body of each political subdivision, after conferring with its legal officer or counsel, may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the terms of insurance, if any.

(2) All terms, conditions, and details of the governmental portion of a compromise or settlement agreement entered into pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.

District of Montana

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

Local Rule 77.6
Filing Under Seal

Unless otherwise provided by statute or rule, no case or document shall be filed under seal without prior approval by the Court. If a filing under seal is requested, a written application and a proposed order shall be presented to the judge along with the document submitted for filing under seal. Unless otherwise ordered by the Court, the application and proposed order and document shall not be served on opposing parties. The original and judge's copy of the document shall be sealed in separate envelopes with a copy of the title page attached to the front of each envelope. Conformed copies need not be placed in sealed envelopes.

NEBRASKA

State of Nebraska

No relevant statute or rule.

District of Nebraska

No relevant local rule.

NEVADA

State of Nevada

Nevada Statutes Section 41.0375
Agreement to Settle: Prohibited Contents; Required Contents; Constitutes Public Record; Void Under Certain Circumstances.

1. Any agreement to settle a claim or action brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator:

(a) Must not provide that any or all of the terms of the agreement are confidential.

(b) Must include the amount of any attorney's fees and costs to be paid pursuant to the agreement.

(c) Is a public record and must be open for inspection pursuant to NRS 239.010.

2. Any provision of an agreement to settle a claim or action brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator that conflicts with this section is void.

District of Nevada

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

District of Nevada Local Rule 9018
Secret, Confidential, Scandalous, or Defamatory Matter

(a) Papers submitted for the court's *in camera* inspection shall be accompanied by a captioned cover sheet complying with LR 9004, indicating that it is being submitted *in camera*. Counsel shall provide to the court an envelope of sufficient size into which the *in camera* papers can be sealed without being folded. Counsel shall be permitted to tender to the clerk of the court papers *in camera* without a prior court order authorizing same.

(b) The court will review the *in camera* submission and enter an appropriate order directing that it be filed under seal, be made part of the official public file, or be permitted to be withdrawn. In the event the court orders such paper sealed, the moving party shall submit an order in compliance to LR 9022, which order shall be docketed by the clerk.

NEW HAMPSHIRE

State of New Hampshire

New Hampshire Rules of Court, Guidelines for Public Access to Court Records, Guideline I
Introduction

It is the express policy of the Judicial Branch of New Hampshire to allow public access to court records. This policy is intended to recognize and effectuate the public's rights to access proceedings under the New Hampshire Constitution. . . .

New Hampshire Rules of Court, Guidelines for Public Access to Court Records, Guideline II
Records Subject to Inspection

A presumption exists that all court records are subject to public inspection. The public right of access to specific court records must be weighed and balanced against nondisclosure interests as established by the Federal and/or New Hampshire Constitution or by statutory provision granting or requiring confidentiality. Unless otherwise ordered by the court, the following categories of cases shall not be open to public inspection . . . and any other record to be kept confidential by statute, rule or order. Before a court record is ordered sealed, the court must determine if there is a reasonable alternative to sealing the record and must use the least restrictive means of accomplishing the purpose. Once a court record is sealed, it shall not be open to public inspection except by order of the court. Any case records not subject to disclosure except upon order of the court shall be kept in a separate section of the court files, accessed only by the court and the clerk's staff.

District of New Hampshire

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule. The court may specify the duration of the sealing order in the court's order sealing the settlement agreement.

District of New Hampshire Local Rule 83.11
Sealed Documents

(a) *Filings, Orders, and Docket Entries.* All filings, orders, and docket entries shall be public unless:

(1) a filing, order, or docket entry must be sealed pursuant to state law, federal law, the Federal Rules of Criminal or Civil Procedure, or these rules;

(2) a filing, order, or docket entry has been sealed by order of another court or agency; or

(3) this court issues an order sealing a filing, order, or docket entry.

(b) *Levels of Sealed Filings, Orders, and Docket Entries.*

(1) Level 1. Filings, orders, and docket entries sealed at Level I may be reviewed by any attorney appearing in the action without prior leave of court.

(2) Level II. Filings, orders, and docket entries sealed at Level II may be reviewed only by the filer or, in the case of an order, the person to whom the order is directed without prior leave of court.

(c) *Motions to Seal.* A motion to seal must be filed before the sealed material is submitted or, alternatively, the item to be sealed may be tendered with the motion and both will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. The motion must explain the basis for sealing, specify the proposed duration of the sealing order, and designate whether the material is to be sealed at Level I or Level II. Any motion to seal, upon specific request, may also be sealed if it contains a discussion of the confidential material. If the court denies the motion to seal, any materials tendered under provisional seal will be returned to the movant.

(d) *Filing Procedures.* All material submitted by a party either under seal or requesting sealed status, provisionally or otherwise, shall be placed in a sealed envelope with a copy of the document's cover page affixed to the outside of the envelope. The party shall designate the envelope with a conspicuous notation such as "DOCUMENTS UNDER SEAL," "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent. If the basis for the document's sealed status is not apparent, an explanatory cover letter should also be attached to alert the clerk's staff of its special status.

Parties cannot seal otherwise public documents merely be agreement or by labeling them "sealed."

NEW JERSEY

State of New Jersey

No relevant statute or rule.

District of New Jersey

No relevant local rule.

NEW MEXICO

State of New Mexico

New Mexico Rules of Court, Local Rule of the First Judicial District Court 1–208

Sealing of Court Files

A. It is the policy of the court to allow free public access to official court files of each case docketed and filed in the First Judicial District.

B. No court file, except those matters required by law to remain confidential, shall be ordered sealed from public inspection, except in extraordinary cases to be determined by the court:

(1) Upon a written and verified application for the sealing of such file;

(2) A showing of good cause; and

(3) A showing that significant and irreparable harm will result unless the file is sealed.

C. Every file sealed in accordance with this rule shall be unsealed after one hundred and eighty (180) days unless the order sealing the file is extended upon a showing of good cause.

New Mexico Rules of Court, Local Rule of the Eighth Judicial District Court 8–207

Sealing of Court Files

[Similar to First Judicial District Court LR1-208 except for following provision: "Every order sealing a court file shall state the reasons therefor, and shall state the duration of the time within which the file shall be sealed."]

New Mexico Rules of Court, Local Rule of the Second Judicial District Court 2–111.

Sealing of Court Records

The court's policy is to allow public access to official court files and other records. Accordingly, no court file or other record shall be sealed from public inspection, with the exception of records containing matters made confidential by law and court clinic records. In extraordinary cases the court may seal a file or other record upon a party's written motion or the court's own motion, and showing of good cause. The sealed records shall remain part of the court file or other record.

District of New Mexico

No relevant local rule.

NEW YORK

State of New York

Uniform Rules for the New York State Trial Courts, Section 216.1
Sealing of Court Records

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

Eastern District of New York

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. A settlement agreement filed under seal in a case that has been closed since 1995, and after February 21, 2001, a settlement agreement sealed in a civil case that has been closed for at least 5 years, will be indexed and archived at the Federal Records Center and remain sealed for 20 years at which time it will be disposed of after notice has been given to the Court.

Eastern District of New York Administrative Order 2001-02
***In re* Sealed Records (E.D.N.Y. February 21, 2001)**

Whereas the Clerk of Court has within his possession in the Clerk's Office vault scores of boxes of sealed records in civil and criminal cases that have been closed for at least five (5) years;

it is ORDERED that all sealed records in civil and criminal cases that have been closed through calendar year 1995 be indexed and archived at the Federal Records Center, and remain sealed, with disposition within prescribed guidelines, after twenty years' time and upon prior notice to the Court,

and it is further ORDERED that records sealed in civil and criminal cases after the effective date of this Order be reviewed periodically and when closed for at least five (5) years, also shall be indexed and archived at the Federal Records Center.

SO ORDERED.

Northern District of New York

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational requirements imposed by this rule. A settlement agreement sealed by court order will remain under seal until the court enters a subsequent order unsealing the settlement agreement, either on its own motion or in response to a motion of a party.

Northern District of New York Local Rule 83.13
Sealed Matters

Cases may be sealed in their entirety, or only as to certain parties or documents, when they are initiated, or at various stages of the proceedings. The court may on its own motion enter an order directing that a document, party or entire case be sealed. A party seeking to have a document, party or entire case sealed shall submit an application, under seal, setting forth the reason(s) why the document, party or entire case should be sealed, together with a proposed order for approval by the assigned judge. The proposed order shall include language in the "ORDERED" paragraph stating the referenced document(s) to be sealed and should include the phrase "including this sealing order." Upon approval of the sealing order by the assigned judge, the clerk shall seal the document(s) and the sealing order. A complaint presented for filing with a motion to seal and a proposed order shall be treated as a sealed case, pending approval of the order. Once a document or case is sealed by court order, it shall remain under seal until subsequent order, upon the court's own motion or in response to the motion of a party, is entered directing that the document or case be unsealed.

Southern District of New York

No relevant local rule.

Western District of New York

No relevant local rule.

NORTH CAROLINA

State of North Carolina

North Carolina General Statutes Section 132-1.3.
Settlements made by or on behalf of public agencies, public officials, or public employees; public records.

(a) Public records, as defined in G.S. 132-1, shall include all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility. No agency of North Carolina government or its subdivisions, nor any coun-

sel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.

(b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.

(c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts.

Eastern District of North Carolina

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. If counsel fails to retrieve the sealed settlement agreement after the action concludes and all appeals are completed, within 30 days after final disposition the court may order the settlement agreement to be unsealed upon 10 days' notice by mail to counsel for all parties.

Eastern District of North Carolina Local Civil Rule 79.2
Sealed Documents.

(a) *Filing Sealed Documents.* Absent statutory authority, no cases or documents may be sealed without an order from the court. A party desiring to file material under seal must first file a motion seeking leave to file the information under seal, or have a court-approved protective order in place.

(b) *Proposed Sealed Documents.* All proposed, sealed material which accompanies a Motion to Seal shall be received by the clerk and temporarily sealed, pending a ruling on the motion to seal. The filing of a Motion to Seal documents will toll the time for filing the material. If the Motion to Seal is allowed, the sealed material shall be filed on the same date as the order allowing the filing under seal. If the motion to file the material under seal is denied, the movant will be given an option of retrieving the material or having it filed the same date as the order denying the filing under seal.

(c) *Docketing Sealed Documents.* When material is filed under seal, the docket will indicate generically the type of document filed under seal, but it will not contain a description that would disclose its identity.

(d) *Return of Sealed Materials.* After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within 30 days after final disposition, the court may order the documents to be unsealed and they will thereafter be available for public inspection.

(e) *Form.* All under seal or potentially under seal documents shall be delivered to the clerk's office enclosed in a red envelope, marked with the case caption, case number, and a descriptive title of the document, unless such information is to be, or has been, among the information ordered sealed. Additionally, the following information will be prominently displayed:

SEALED PURSUANT TO THE
PROTECTIVE ORDER
ENTERED ON ___/___/98

or

PROPOSED SEALED MATERIAL:
SUBMITTED PURSUANT TO MOTION
TO SEAL FILED ON __/__/98

Middle District of North Carolina

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Within 30 days after the time for appeal has expired or 30 days after an appeal has been decided, the Clerk may return a sealed settlement agreement to the parties or destroy it. If the case file is transferred to the GSA for records holding, the court cannot assure the confidentiality of a sealed settlement agreement.

Local Rule 83.5(c)
Disposition of Exhibits, Sealed Documents, and Filed Depositions by Clerk.

Any exhibit, sealed document, disk, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired, or an appeal had been decided and mandate received, may be returned to the parties or destroyed by the clerk. Complaints, answers, motions, responses and replies, whether sealed or not, must be forwarded to the General Services Administration for permanent storage. The confidentiality of sealed documents cannot be assured after the case file is transferred to the General Services Administration for records holding.

Western District of North Carolina

Analysis: No restriction on court's authority to seal a settlement agreement. At final disposition of the case, a sealed settlement agreement will be unsealed unless the court orders otherwise.

Western District of North Carolina Local Rule 5.1.
Filing of Papers, Presenting Judgments, Orders, and Communications to Judge and Sealed Records.

(D) Sealed Matters.

(1) *New Civil Cases.* A civil complaint may be sealed at the time the case is filed if the complaint is accompanied by an ex parte motion of the plaintiff/petitioner accompanied by an order sealing the case. The case will be listed on the clerk's index as Sealed Plaintiff vs. Sealed Defendant.

(2) *Pending Cases.* A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless otherwise specified in the order, neither the clerk's case index nor the existing case docket will be modified.

(3) *Documents.* Documents ordered sealed by the court or otherwise required to be sealed by statute shall be marked as such within the document caption and submitted together with the judge's copy prepared in the same manner. If the document is sealed pursuant to a prior order of the court, the pleading caption shall include a notation that the document is being filed under court seal and include the order's entry date.

No document shall be designated by any party as "filed under seal" or "confidential" unless:

(a) it is accompanied by an order sealing the document;

(b) it is being filed in a case that the court has ordered sealed; or

(c) it contains material that is the subject of a protective order entered by the court.

(4) *Case Closing.* Unless otherwise ordered by a court, any case file or documents under court seal that have not previously been unsealed by the court order shall be unsealed at the time of final disposition of the case.

(5) *Access to Sealed Documents.* Unless otherwise ordered by the court, access to documents and cases under court seal shall be provided by the clerk only pursuant to court order. Unless otherwise ordered by the court, the clerk shall make no copies of sealed case files or documents.

NORTH DAKOTA

State of North Dakota

North Dakota Supreme Court Administrative Rule 41
Access to Judicial Records

Section 1. *Policy.* Judicial records are generally open to the public for examination, inspection, and copying during regular office hours, subject to reasonable

inspection restrictions to ensure the integrity of those records. . . . This rule seeks to balance the competing interests of disclosure and confidentiality by providing guidelines to courts and court personnel in determining the accessibility of judicial records in the custody of the judicial system. . . .

Section 5. *Other Prohibitions or Limitations on Disclosure.* Records subject to inspection, examination, and copying under Section 3 and not exempt from disclosure under Section 4, may be prohibited or limited from disclosure by order of the court on a case-by-case basis. In ruling on whether specific records should be disclosed or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest for closure exceeds the interest in public disclosure. If the court prohibits or limits a disclosure, it must fashion the least restrictive exception from disclosure. In applying these rules, the court is referred to traditional legal concepts in the law of North Dakota. . . .

Section 9. *Motion Regarding Sealing of Records.* Any person, or the court on its own motion, may move, in the judicial proceeding in which records are filed, to seal or unseal a part or all of the records in the proceeding. The custodial judge shall hear the motion after the moving party gives notice of the hearing to all parties to the proceeding and any other person designated by the judge. The custodial judge shall issue a written decision on the motion to seal or unseal records, which the court may reconsider, alter, or amend at any time. A record that is the subject of a motion to seal is confidential until a written decision on the motion is issued.

District of North Dakota

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless otherwise ordered by the court, the clerk must return a settlement agreement filed under seal to the submitting party, upon entry of a final judgment or termination of appeal, if any.

District of North Dakota Local Rule 5.1(F)
Sealed Documents and Files

(1) The clerk must return documents filed under seal in civil actions to the party submitting them, upon entry of a final judgment or termination of appeal, if any, unless otherwise ordered by the court.

(2) The clerk must retain custody of documents filed under seal in criminal cases, unless otherwise ordered by the court.

(3) The clerk must retain custody of entire files which are permanently sealed by statute or court order.

NORTHERN MARIANA ISLANDS

Commonwealth of the Northern Mariana Islands

No relevant statute or rule.

District Court for the Northern Mariana Islands

No relevant local rule.

OHIO

State of Ohio

No relevant statute or rule.

Northern District of Ohio

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders to continue the seal for a specified period, the court will order the settlement agreement to be unsealed 30 days after the case is terminated or any appeal, whichever is later.

Northern District of Ohio Local Civil Rule 5.2
Filing Documents Under Seal

No document will be accepted for filing under seal unless a statute, court rule, or prior court order authorizes the filing of sealed documents. If no statute, rule, or prior order authorizes filing under seal, the document will not be filed under seal.

Materials presented as sealed documents shall be in an envelope which shows the citation of the statute or rule or the filing date of the court order authorizing the sealing, and the name, address, and telephone number of the person filing the documents.

If the sealing of the document purports to be authorized by court order, the person filing the documents shall include a copy of the order in the envelope. If the order does not authorize the filing under seal, or if no order is provided, the Clerk will unseal the documents before filing them. Before unsealing the documents, the Clerk will notify the person whose name and telephone number appears on the envelope in person (if he or she is present at the time of filing) or by telephone. The filer may withdraw the documents before 4:00 p.m. the day the Clerk notifies him or her of the defect. If not withdrawn, the documents will be unsealed and filed.

New cases submitted for filing without a signed sealing order will be assigned a new case number, District Judge and Magistrate Judge. The Clerk, without further processing, will send the file to the assigned District Judge for a sealing order. If a sealing order is signed, the Clerk will enter as much information as is permitted by the sealing order into the system to open and identify the case.

Thirty days after the termination of the case or any appeal, whichever is later, sealed documents and case will be unsealed pursuant to court order, unless either a motion to continue the seal for a specified period of time or a motion to withdraw the document is filed and granted by the Court.

Southern District of Ohio

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise, counsel must withdraw the sealed settlement agreement within six months after final termination of the action; if not withdrawn by counsel, the Clerk will dispose of the settlement agreement after the six month withdrawal period has expired.

Southern District of Ohio Local Rule 79.3
Sealed, or Confidential Documents

(a) Unless otherwise ordered or otherwise specifically provided in these Rules, all documents submitted for a confidential *in camera* inspection by the court, which are the subject of a Protective Order, which are subject to an existing order that they be sealed, or which are the subject of a motion for such orders, shall be submitted to the Clerk securely sealed in an envelope approximately 9 x 12" in size, or of such larger size as needed to accommodate the documents.

(b) The envelope containing such documents shall contain a conspicuous notation that it carries "DOCUMENTS UNDER SEAL," "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent.

(c) The face of the envelope shall also contain the case number, the title of the court, a descriptive title of the document and the case caption, unless such information is to be, or has been, included among the information ordered sealed. The face of the envelope shall also contain the date of any order, or the reference to any statute permitting the item to be sealed. The date of filing of an order formally sealing documents, submitted in anticipation of such an order, shall be added by the Clerk when determined.

(d) The Clerk's file stamp and appropriate related information or markings shall be made on the face of the envelope. Should the document be ordered opened and maintained in that manner in the case records, the actual date of filing will be noted on the face of the document by the Clerk and the envelope retained therewith.

(e) Sealed or confidential documents shall be disposed of in accordance with Rule 79.2.

Southern District of Ohio Local Rule 79.2
Disposition of Exhibits, Models, Diagrams, Depositions, and Other Materials

(a) *Withdrawal By Counsel.* All models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed in an action or offered in evidence shall not be considered part of the pleadings in the action and, unless otherwise ordered by the Court, shall be withdrawn by counsel without further Order within six (6) months after final termination of the action.

(b) *Disposal By The Clerk.* All models, diagrams, depositions, x-rays and other exhibits and materials not withdrawn by counsel shall be disposed of by the Clerk as waste at the expiration of the withdrawal period.

OKLAHOMA

State of Oklahoma

Oklahoma Statutes Title 51, Section 158
Settlement or Defense of Claim – Effect of Liability Insurance

A. The state or a political subdivision, after conferring with authorized legal counsel, may settle or defend against a claim or suit brought against it or its employee under this act subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, and may appropriate money for the payment of amounts agreed upon. When the amount of any settlement exceeds Ten Thousand Dollars ($10,000.00), and any payment required by the settlement will not be paid through an applicable contract or policy of insurance, the settlement shall not be effective until approved by the district court and entered as a judgment as provided by law. . . . Judgments, orders, and settlements of claims shall be open public records unless sealed by the court for good cause shown.

Eastern District of Oklahoma

No relevant local rule.

Northern District of Oklahoma

Analysis: The court must find that good cause exists before ordering a settlement agreement to be placed under seal. A sealed settlement agreement may remain under seal indefinitely; no durational limitations imposed by this rule. Only the court or a court order can unseal the settlement agreement.

Northern District of Oklahoma Local Rule 79.1(D)
Sealing of Records

No pleading, document, or record shall be placed under seal without a prior, specific order of the court finding good cause to do so. No seal shall be lifted, except by the court, or by court order.

Western District of Oklahoma

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

Frequently Asked Questions (www.okwd.uscourts.gov/faq)
Filing Documents

What is the procedure for filing a motion/document under seal?

When filing a motion/document under seal, you should follow these steps:

* Place the motion/document to be sealed in an open, large manila envelope.

* Prepare a cover motion requesting permission to file your motion/document under seal.

* Attach the cover motion by stapling it outside the envelope containing the motion/document to be sealed.

* File the motion/document to be sealed at the intake counter. The intake clerk will stamp both the documents and will immediately give it to the Chief Deputy Clerk or the Operations Manager for docketing and delivery to the presiding judge or magistrate judge.

*Once the judge or magistrate judge has ruled upon the cover motion to seal, the sealed motion/document will be sealed and placed in the vault or, in the case of denial of the motion, will be placed in the case file.

OREGON

State of Oregon

No relevant statute or rule.

District of Oregon

No relevant local rule.

PENNSYLVANIA

Commonwealth of Pennsylvania

No relevant statute or rule.

Eastern District of Pennsylvania

No relevant local rule.

Middle District of Pennsylvania

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless good cause is shown, the court will unseal a settlement agreement that is still under seal after the case is terminated no later than two years after the final judgment or the exhaustion of all appeals.

Middle District of Pennsylvania Local Rule 79.5
Unsealing of Civil Cases/Documents

Unless good cause is shown, all civil cases and/or documents in those cases which still remain under seal after the case is terminated will be unsealed by the court no later than two (2) years after the final judgment and/or the exhaustion of all appeals.

Western District of Pennsylvania

No relevant local rule.

PUERTO RICO

Commonwealth of Puerto Rico

No relevant statute or rule.

District of Puerto Rico

No relevant local rule.

RHODE ISLAND

State of Rhode Island

General Laws of Rhode Island, Section 38-2-14
Information Relating to Settlement of Legal Claims

Settlement agreements of any legal claims against a governmental entity shall be deemed public records.

District of Rhode Island

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule. The settlement agreement will remain under seal until the court vacates or amends the order to seal.

District of Rhode Island Amended General Order #2002-01 (January 31, 2003)
Motions to Seal

A motion to seal shall be accompanied by the document(s) sought to be sealed and a written memorandum not exceeding 5 pages which sets forth the basis for seeking an order to seal. Upon receipt of a motion to seal and the supporting memorandum, the clerk shall docket the items received and transmit them immediately to the chambers of the judge to whom the case has been assigned. Any opposition to the motion to seal likewise shall be docketed and transmitted to the judge to whom the case has been assigned. If the Court grants the motion to seal, all documents sealed shall be placed in an envelope and a copy of the Court's order shall be affixed thereto. The sealed envelope and its contents shall be retained by the clerk in a secure location until such time as the Court vacates or amends the order to seal. If the Court denies the motion to seal, the document shall be placed in the Court file in accordance with this Order and the Local Rules.

SOUTH CAROLINA

State of South Carolina

No relevant statute or rule.

District of South Carolina

Analysis: The court is explicitly prohibited from sealing a settlement agreement.

District of South Carolina Local Rule 5.03
Service and Filing of Pleadings and Other Papers, Filing Documents Under Seal

Absent a requirement to seal in the governing rule, statute, or order, any party seeking to file documents under seal shall follow the mandatory procedure described below. Failure to obtain prior approval as required by this Rule shall result in summary denial of any request or attempt to seal filed documents. Nothing in this Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the Court. See Local Civil Rule 26.08.

(A) A party seeking to file documents under seal shall file and serve a "Motion to Seal" accompanied by a memorandum. See Local Civil Rule 7.04. The memorandum shall:

(1) identify, with specificity, the documents or portions thereof for which sealing is requested;

(2) state the reasons why sealing is necessary;

(3) explain (for each document or group of documents) why less drastic alternatives to sealing will not afford adequate protection; and

(4) address the factors governing sealing of documents reflected in controlling case law. E.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); and *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). A non-confidential descriptive index of the documents at issue shall be attached to the motion. A separately sealed attachment labeled "Confidential Information to be Submitted to Court in Connection with Motion to Seal" shall be submitted with the motion. This attachment shall contain the documents at issue for the Court's *in camera* review and shall not be filed. The Court's docket shall reflect that the motion and memorandum were filed and were supported by a sealed attachment submitted for *in camera* review.

(B) The Clerk shall provide public notice of the Motion to Seal in the manner directed by the Court. Absent direction to the contrary, this may be accomplished by docketing the motion in a manner that discloses its nature as a motion to seal.

(C) No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule.

SOUTH DAKOTA

State of South Dakota

No relevant statute or rule.

District of South Dakota

No relevant local rule.

TENNESSEE

State of Tennessee

Local Rules of Practice for the Circuit Court, Chancery Court, Criminal Court and Probate Court of Davidson County, Rule 7.02
Papers, Documents or Files Under Seal

All papers, documents and files shall be available for public inspection except as specifically exempted by court order or statute. The motion seeking such an order must contain sufficient facts to overcome the presumption in favor of disclosure.

Comment: The standards relating to the appropriateness of sealing documents and/or court files is set forth in *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996).

Eastern District of Tennessee

Analysis: The court must find that good cause exists before ordering a settlement agreement to be placed under seal. Unless the court, upon motion, orders otherwise, a settlement agreement filed under seal will be unsealed and placed in the case file 30 days following final disposition (including direct appeal) of the action. If the court orders that a settlement agreement is to be maintained under seal longer than 30 days, the court order must set a date for unsealing the settlement agreement.

Eastern District of Tennessee Local Rule 26.2
Sealing of Court Records.

(a) *Public Record.* Except as otherwise provided by statute, rule or order, all pleadings and other papers of any nature filed with the Court ("Court Records") shall become a part of the public record of this court.

(b) *Procedure.* Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of the Court specifying those Court Records, categories of Court Records, or portions thereof which shall be placed under seal. The Court may, in its discretion, receive and review any document in camera without public disclosure thereof and, in connection with any such review, determine whether good cause exists for the sealing of the document. Unless the Court orders otherwise, the parties shall file with the Court redacted versions of any Court Record where only a portion thereof is to be placed under seal.

(c) *Criminal Matters. . . .*

(d) *Expiration of Order.* Court Records filed under seal in civil and criminal actions shall be maintained under seal for thirty (30) days following final disposition (including direct appeal) of the action. After that time, all sealed court re-

cords shall be unsealed and placed in the case file unless the Court, upon motion, orders that the Court Records be maintained under seal beyond the thirty (30) days. All such orders shall set a date for the unsealing of the Court Records.

Middle District of Tennessee

No relevant local rule.

Western District of Tennessee

No relevant local rule.

TEXAS

State of Texas

Texas Government Code Section 552.022
Categories of Public Information; Examples

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law: . . .

(18) a settlement agreement to which a governmental body is a party.

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

Texas Rule of Civil Procedure 76a
Sealing Court Records

1. *Standard for Sealing Court Records.* Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. *Court Records.* For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) Settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probably adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to reserve bona fide trade secrets or other intangible property rights.

3. *Notice.* Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. *Hearing.* A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. *Temporary Sealing Order.* A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervener, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order

shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. *Order on Motion to Seal Court Records.* A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1, has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. *Continuing Jurisdiction.* Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervener who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1, shall always be on the party seeking to seal records.

8. *Appeal.* Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervener who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings. . . .

Eastern District of Texas

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Thirty days after the civil action has been finally disposed of by the appellate courts or thirty days from the date the appeal time lapsed, the clerk may destroy the paper original of the settlement agreement after the clerk has scanned it. The clerk will maintain the database and prevent unauthorized access to the scanned settlement agreement for the foreseeable future.

Eastern District of Texas Local Rule CV-79
Books and Records Kept by the Clerk

(a) *Disposition of Exhibits And/or Sealed Documents by the Clerk.* Thirty days after a civil action has been finally disposed of by the appellate courts or from the date the appeal time lapsed, the clerk is authorized to take the following actions: . . .

(2) *Sealed Documents.* Scan the original documents into electronic images that are stored on the court's computer system in lieu of maintaining the original paper copies. The clerk shall ensure that the database of scanned im-

ages is maintained for the foreseeable future, and that no unauthorized access of the stored images occurs. Once a document has been scanned, the paper original will be destroyed.

Northern District of Texas

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless the court orders otherwise, a sealed settlement agreement will be unsealed 60 days after final disposition of the case.

Northern District of Texas Local Rule 79.3
Ex Parte and Sealed Documents

(a) Unless exempted by subsection (b) of this rule –

(1) An ex parte document, or a document that a party desires to be filed under seal, shall not be filed by the clerk under seal absent an order of a judge of the court directing the clerk to file the document under seal. The term "document," as used in this rule, means any pleading, motion, other paper, or physical item that the Federal Rules of Civil procedure permit or require to be filed.

(2) A party who desires to file a document under seal must at the time the document is presented to the clerk for filing either present a motion to file the document under seal or demonstrate that a judge has ordered that the document be filed under seal. If no judge has been assigned to a case in which a motion is filed, the clerk may direct the motion to the duty judge or to another judge of the court for consideration.

(3) The clerk of court shall defer filing an ex parte document, or document that a party desires to be filed under seal, until a judge of the court has ruled on the motion to file the document under seal.

(b) The clerk shall file under seal any document that a statute or rule requires or permits to be so filed.

Northern District of Texas Local Rule 79.4
Disposition of Sealed Documents

Unless an order of the court otherwise directs, all sealed documents will be deemed unsealed 60 days after final disposition of a case. A party who desires that such a document remain sealed must move for this relief before the expiration of the 60-day period. The clerk may store, transfer, or otherwise dispose of unsealed documents according to the procedure that governs publicly available court records.

Southern District of Texas

No relevant local rule.

Western District of Texas

No relevant local rule.

UTAH

State of Utah

Utah Code 1953 Section 63-2-405
Confidential Treatment of Records for Which No Exemption Applies

(1) A court may, on appeal or in a declaratory or other action, order the confidential treatment of records for which no exemption from disclosure applies if:

(a) there are compelling interests favoring restriction of access to the record; and

(b) the interests favoring restriction of access clearly outweigh the interests favoring access. . . .

Utah Code 1953 Section 63-2-909
Records Made Public After 75 Years

(1) The classification of a record is not permanent and a record that was not classified public under this act shall become a public record when the justification for the original or any subsequent restrictive classification no longer exists. A record shall be presumed to be public 75 years after its creation. . . .

District of Utah

Analysis: The court must find that good cause has been shown before ordering a settlement agreement to be sealed. A sealed settlement agreement may not remain under seal indefinitely. Unless otherwise ordered by the court, a sealed settlement agreement will be unsealed upon final disposition of the case.

District of Utah Local Civil Rule 5–2
Filing Cases and Documents Under Court Seal

(a) *General Rule.* On motion of one or more parties and a showing of good cause, the court or, upon referral, a magistrate judge may order all or a portion of the documents filed in a civil case to be sealed.

(b) *Sealing of New Cases.*

(1) *On Ex Parte Motion.* A case may be sealed at the time it is filed upon ex parte motion of the plaintiff or petitioner and execution by the court of a written order. The case will be listed on the clerk's case index as Sealed Plaintiff vs. Sealed Defendant.

(2) *Civil Actions for False Claims.* When an individual files a civil action on behalf of the individual and the government alleging a violation of 31 U.S.C. Section 3729, the clerk will seal the complaint for a minimum of sixty (60) days. Extensions may be approved by the court on motion of the government.

(c) *Sealing of Pending Cases.* A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless the court otherwise orders, neither the clerk's automated case index nor the existing case docket will be modified.

(d) *Procedure for Filing Documents Under Seal.* Documents ordered sealed by the court or otherwise required to be sealed by statute must be placed unfolded in an

envelope with a copy of the cover page of the document affixed to the outside of the envelope. The pleading caption on the cover page must include a notation that the document is being filed under court seal. The sealed document, together with a judge's copy prepared in the same manner, must be filed with the clerk. No document may be designated by any party as Filed under Seal or Confidential unless:

(1) it is accompanied by a court order sealing the document;

(2) it is being filed in a case that the court has ordered sealed; or

(3) it contains material that is the subject of a protective order entered by the court.

(e) *Access to Sealed Cases and Documents.* Unless otherwise ordered by the court, the clerk will provide access to cases and document under court seal only on court order. Unless otherwise ordered by the court, the clerk will make no copies of sealed case files or documents.

(f) *Disposition of Sealed Documents.* Unless otherwise ordered by the court, any case file or documents under court seal that have not previously been unsealed by court order will be unsealed at the time of final disposition of the case.

VERMONT

State of Vermont

Vermont Rules of Court, Rules for Public Access to Court Records, Section 7 Exceptions

(a) *Case Records.* Except as provided in this section, the presiding judge by order may grant public access to a case record to which access is otherwise closed, may seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access. All parties to the case to which the record relates, and such other interested persons as the court directs, have a right to notice and hearing before such order is issued, except that the court may issue a temporary order to seal or redact information from a record without notice and hearing until a hearing can be held. An order may be issued under this section only upon a finding of good cause specific to the case before the judge and exceptional circumstances. In considering such an order, the judge shall consider the policies behind this rule. If a statute governs the right of public access and does not authorize judicial discretion in determining to open or seal a record, this section shall not apply to access to that record.

. . .

(c) *Appeals.* Appeals from determination under this section shall be made to the Supreme Court. Report's Notes: Section 7(a) states an exception to the general access policy stated in Section 4 of these rules. Under this provision the presiding judge is authorized to allow access to an otherwise closed record or to seal, or redact information contained in, an open record. It also sets forth the process and standards that apply whenever the court considers such actions. . . . The exception permits the court to use its discretion when addressing special situations

that cannot be anticipated and specifically dealt with in these rules. However, this authority should be exercised by the court only in truly exceptional situations and only for good cause. It is not intended that the exception be used to create new categories of records or information that are generally closed to the public. This exception does not apply if the access issue is governed by a statute that does not authorize judicial discretion. . . .

District of Vermont

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

District of Vermont Local Rule 83.8
Sealed Documents

(a) *Order Required.* All official files in the possession of the court are considered to be public documents available for inspection unless otherwise ordered. Cases or documents cannot be sealed without an order from the court.

(b) *Filing Procedure.* To request that a filing be sealed, a separate Motion to Seal must accompany the specific item to be sealed.

(c) *Documents Filed Under Protective Order.* Any party filing a prospectively sealed document must place the document in a sealed envelope and affix a copy of the document's cover page (with confidential information deleted) to the outside of the envelope. The party must designate the envelope with a conspicuous notation such as "DOCUMENTS SUBJECT TO PROTECTIVE ORDER," or the equivalent."

VIRGIN ISLANDS

Territory of the United States Virgin Islands

No relevant statute or rule.

District Court for the Virgin Islands

No relevant local rule.

VIRGINIA

Commonwealth of Virginia

No relevant statute or rule.

Eastern District of Virginia

No relevant local rule.

Western District of Virginia

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may not remain sealed indefinitely. Unless a District

Judge or Magistrate Judge expressly provides otherwise, a sealed settlement agreement will be unsealed within thirty (30) days from the date that it was ordered sealed.

Western District of Virginia Local Rules XIII.A
Standing Order *in re* Unsealing of Documents Placed Under Seal With The Court.

This Standing Order governs the unsealing of documents, pleadings and files (except presentence reports, pretrial service reports, psychiatric and psychological reports and any other matter required by statute or rule of court to be sealed) placed under seal with the Court in criminal, civil or miscellaneous matters unless the provisions of this Order are expressly countermanded by a District Judge or Magistrate Judge in a matter pending before him or her. Nothing in this Standing Order shall be construed to prevent a District Judge or Magistrate Judge from expressly excepting a document, pleading or file pending before him or her from this Standing Order. This Standing Order is not retroactive.

Unless a District Judge or Magistrate Judge of this Court expressly orders to the contrary in a matter pending before him or her, it is hereby ORDERED as follows as to documents, pleadings and files that have been ordered sealed:

(1) search warrants are to be unsealed within twenty-four (24) hours of execution;

(2) arrest warrants are to be unsealed after execution;

(3) indictments are to be unsealed within thirty (30) days of return of the indictment or when all defendants are in custody or summoned, whichever is sooner;

(4) criminal complaints are to be unsealed within thirty (30) days off issuance or when all defendants are in custody or summoned, whichever is sooner;

(5) motions to seal shall be unsealed when the documents, pleadings or files to which they pertain are unsealed;

(6) all other documents, pleadings and files are to be unsealed within thirty (30) days from the date of the order to seal; and

(7) each defendant shall be provided an unredacted copy of the charges against him or her even if the matter is otherwise sealed.

Unless a District Judge or Magistrate Judge expressly orders to the contrary in a matter pending before him or her, the sealing of any document, pleading or file shall be considered only upon written motion.

It is further ORDERED that the Clerk of the Court shall maintain a list of sealed matters assigned to each District Judge and Magistrate Judge for that Judge's review.

The Clerk is directed to enter this order in the order books for each division of this Court and to send certified copies to the District Judges, Magistrate Judges and United States Attorney for this District.

ENTERED this 19th day of December 1997.

WASHINGTON

State of Washington

Washington Court Rule 15
Destruction and Sealing of Court Records

(a) *Purpose and Scope of the Rule*. . . . The clerk shall maintain all documents and materials filed with the court, and shall make available for public examination all files, cases, records, documents, or materials which have not been ordered destroyed or sealed. . . .

(c) *Grounds and Procedure for Requesting the Sealing or Destruction of Court Records*. . . .

(2) *Civil Cases*. . . .

(B) *Sealing of Files or Records*. On motion of any party to a civil proceeding, or on the court's own motion, and after reasonable notice to the nonmoving party and a hearing, the court may order the sealing of any files and records in the proceeding (i) to further an order entered under CR 12(f) or a protective order entered under CR 26(c); or (ii) under compelling circumstances where justice so requires.

(d) *Grounds and Procedure for Requesting the Unsealing of Sealed Records*. . . .

(2) *Civil Cases*. After the entry of an order to seal all or part of a court file in a civil proceeding, the records shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof of compelling circumstances, or pursuant to RCW 4.24 or CR 26(j). . . .

(e) *Clerk's Duties*. . . .

(2) *Sealing of Entire File*. Upon receipt of a court order to seal the entire file under the primary control of the clerk, the clerk shall:

(A) Seal the automated file.

(B) Seal the file and secure it and all subsequently filed documents from public access except for the order to seal. . . .

(4) *Sealing of Specified Documents*. Upon receipt of a court order to seal specified documents or material within a file under the primary control of the clerk, the clerk shall:

(A) On the automated docket, preserve the docket code, document title, document or subdocument number and date of the original documents or material;

(B) Remove the documents or material from the file, seal them, and return them to the file under seal or store separately, substituting a filler sheet for the removed sealed document. In the event the document ordered sealed exists in a microfilm, microfiche or other storage medium, the clerk shall limit access to the alternate storage medium so as to prevent unauthorized viewing of the sealed document; and

(C) File the order to seal.

(D) If the file is made available for examination, the clerk shall prevent access to the sealed records before the rest of the file is made available.

Eastern District of Washington

No relevant local rule.

Western District of Washington

Analysis: In order to seal a settlement agreement, the court must find that the strong presumption in favor of public access has been overcome by a compelling showing that this presumption has been outweighed by the facts justifying the need to seal the settlement agreement. A sealed settlement agreement cannot remain sealed indefinitely. If the court has ordered only the settlement agreement in a civil action to be placed under seal, the court will return the sealed settlement agreement to the submitting counsel or party after the case has terminated and the time for appeal has run. In civil actions in which the court ordered that the entire case file including the settlement agreement be placed under seal, the court will destroy the sealed case file after the case has terminated, the time for appeal has run, and the parties were given 60 days' notice.

Western District of Washington Local Civil Rule 5
Service and Filing of Pleadings and Other Papers

(g) *Sealing of Court Records.*

(1) This rule sets forth a uniform procedure for sealing court files, cases, records, exhibits, specified documents, or materials in a court file or record. There is a strong presumption of public access to the court's files and records which may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting files, records, or documents from public review. Nothing in this rule shall be construed to expand or restrict statutory provisions for the sealing of files, records, or documents.

(2) The court may order the sealing of any files and records on motion of any party, on stipulation and order, or on the court's own motion. If no defendant has appeared in the case, the motion to seal may be presented ex parte. The law requires, and the motion and the proposed order shall include, a clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access.

(3) Each document to be filed under seal must be submitted in a separate envelope, clearly identifying the enclosed document and stating that the document is "FILED UNDER SEAL." For example, if both the motion and the accompanying affidavit should be filed under seal, the two documents must be submitted in separate, clearly marked envelopes so that each may be entered on the docket. If only one exhibit or document needs to be filed under seal, only that exhibit or document should be submitted in an envelope.

(4) Sealed files and records, or any part thereof, shall remain sealed until the court orders unsealing on stipulation of the parties, motion by any party or intervener, or the court's own motion. Any party opposing the unsealing must make a compelling showing that the interests of the parties in protecting files, records, or documents from public review continue to outweigh the public's right of access.

(5) If the court orders the sealing of any files or documents pursuant to the above provisions, the clerk shall:

(A) file the order to seal;

(B) seal the file, record, or documents designated in the order to seal and secure it from public access;

(C) in civil actions in which only portions of the file have been placed under seal, return sealed documents to the submitting counsel or party after the case has concluded and the time for appeal has run;

(D) in civil actions in which the entire file has been placed under seal, destroy the sealed file after the case has concluded, the time for appeal has run, and the parties have been given sixty days' notice of the proposed destruction.

WEST VIRGINIA

State of West Virginia

No relevant statute or rule.

Northern District of West Virginia

No relevant local rule.

Southern District of West Virginia

No relevant local rule.

WISCONSIN

State of Wisconsin

No relevant statute or rule.

Eastern District of Wisconsin

Analysis: No restriction on court's authority to seal a settlement agreement. A sealed settlement agreement may remain sealed indefinitely; no durational limitations imposed by this rule.

General Local Rule 79.4
Confidential Matters

(b) All documents which a judge or magistrate judge has ordered to be treated as confidential must be filed in a sealed envelope conspicuously marked "SEALED".

(c) Subject to General L.R. 83.9(c) and Civil L.R. 26.4, the Court will consider all documents to have been filed publicly unless they are accompanied by a separate motion requesting that the documents, or portions thereof, be sealed by the Court.

(d) All documents which a party seeks to have treated as confidential, but as to which no sealing order has been entered, must be filed in a sealed envelope conspicuously marked "Request for Confidentiality Pending," together with a motion requesting an appropriate order. The separate motion for sealing must be publicly filed and must generally identify the documents contained in the sealed envelope. The documents must be transmitted by the Clerk of Court in a sealed envelope to the judge or magistrate judge, together with the moving papers. If the motion is denied, the documents must be filed by the Clerk of Court in an open file, unless otherwise ordered by the judge or magistrate judge assigned to the case.

Western District of Wisconsin

No relevant local rule.

WYOMING

State of Wyoming

No relevant statute or rule.

District of Wyoming

No relevant local rule.

Appendix B
Analyses of Case Records for Sealed Settlement Agreements

This appendix includes descriptions of cases with sealed settlement agreements, based on our review of unsealed court files. Because this is a work in progress, we have descriptions of cases in only a few districts at this time.

Method

We decided to look at cases terminated over a two-year period. Because we include all calendar months there are unlikely to be any hidden seasonal biases. Looking at two years of terminations ensures that our data will not be based only on an idiosyncratic year.

We are downloading all docket sheets for cases terminated in 2001 and 2002,[1] except for cases in the Northern Mariana Islands, because docket sheets are not available electronically for that district.

Our search for sealed settlement agreements is a process of step-by-step elimination – upon closer and closer review – of cases that do not have sealed settlement agreements.

We search each district's docket sheets for the word "seal." The search finds "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc. in a party name. Docket *entries* (and headers) with the word "seal" in them are extracted and assembled into a text file. If a docket *sheet* has the word "seal" in it, then we also search for the word "settle" (which will find "settle," "settled," "settlement," etc.), extract docket *entries* with the word "settle" in them, and assemble them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries will have both the word "seal" in them and the word "settle" in them.

We examine the text file assembled for a district containing docket entries with the word "seal" and docket entries with the word "settle" from dockets with the word "seal." If the docket entries from the same case suggest that the case might or does have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example,

[1] At the beginning of this project we looked only at cases terminated in 2001 and the first half of 2002, because we did not yet have electronic data on terminations in the second half of 2002.

a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[2]

The types of sealed documents filed that this process eliminates include sealed documents filed at the beginning of qui tam actions and sealed attachments to discovery motions, motions for summary judgment, and motions in limine.

When we review a complete docket sheet, we determine two things. First, we determine whether the case might or does include a sealed settlement agreement. If it might, or does, then we identify which documents in the case file to review in order to learn what the case is about and to learn as much as possible about the sealed settlement agreement. Generally we review complaints, cross- and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

This appendix includes descriptions of cases that we believe contain sealed settlement agreements. We summarize relevant local rules and we also interview the clerk of court and sometimes members of the clerk's staff to determine if there are any special local practices not captured by the local rules.

To do this project we put the 93 districts with electronic docket sheets[3] in a modified random order. At the top of the list, we put North Carolina, in order to begin our work with the district that is home to the subcommittee's chair[4] so that his additional knowledge about cases in his district would serve as a check on our work. After that we put three states including districts with particularly interesting local rules – Michigan, Florida, and South Carolina.[5] The only other modification to random order was to

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[2] For this project, researchers who examine docket sheets and court documents all have law degrees – either a J.D. or an M.L.S. (master of legal studies, which typically requires approximately one year of law school). Tim Reagan reviewed documents from districts in Michigan, North Carolina, South Carolina, and Virginia; Marie Leary reviewed documents from Idaho; Shannon Wheatman reviewed documents from districts in Florida and Washington; Natacha Blain reviewed documents from districts in Minnesota and Mississippi.

[3] This excludes the Northern Mariana Islands.

[4] The Honorable Brent McKnight is magistrate judge for the Western District of North Carolina.

[5] The Eastern District of Michigan has a rule calling for the unsealing of settlement agreements after two years. E.D. Mich. L.R. 6.4. The Southern District of Florida provides for the sealing of documents for no longer than five years, "absent extraordinary circumstances." S.D. Fla. Gen. L.R. 5.4.B.2. The District of South Carolina has a brand new rule forbidding the sealing of settlement agreements. D.S.C. L.R. 5.03(C). Of course, by "particularly interesting," we mean particularly interesting with respect to this project.

move some of the larger districts – such as districts in New York and Pennsylvania – down the list a bit so that we would be more experienced by the time we got to them. Table B shows our progress on the 18 districts at the head of our modified random list.

Table B. Research Progress

District	Docket Sheets Searched for "Seal"	Docket Entries Examined	Docket Sheets Read	Documents Examined
North Carolina Eastern	NC-E	NC-E	NC-E	NC-E
North Carolina Middle	NC-M	NC-M	NC-M	NC-M
North Carolina Western	NC-W	NC-W	NC-W	NC-W
Michigan Eastern	MI-E	MI-E	MI-E	MI-E
Michigan Western	MI-W	MI-W	MI-W	MI-W
Florida Middle	FL-M	FL-M	FL-M	
Florida Northern	FL-N	FL-N	FL-N	FL-N
Florida Southern	FL-S	FL-S	FL-S	FL-S
South Carolina	SC	SC	SC	SC
Idaho	ID	ID	ID	ID
Minnesota	MN	MN	MN	
Washington Eastern	WA-E	WA-E	WA-E	WA-E
Washington Western	WA-W			
Virginia Eastern	VA-E	VA-E	VA-E	
Virginia Western	VA-W	VA-W	VA-W	VA-W
Guam				
Mississippi Northern	MS-N	MS-N	MS-N	
Mississippi Southern				
Total	**16**	**15**	**15**	**11**

The following pages contain case descriptions along with information about local rules and practices. For each state we include a brief description of state rules that would apply in state court to provide local context for the federal rules. For each district we briefly summarize local rules and practices and provide statistics on how many cases we searched to find sealed settlement agreements. For some districts, we have only prelimi-

nary statistics at this point, but are working to add case descriptions as court files become available.

FLORIDA

Florida's Sunshine in Litigation statute forbids confidential or sealed agreements that conceal a public hazard. Fla. Stat. § 69.081. The sealing of court documents otherwise must be "no broader than necessary to protect the interests" justifying sealing, Fla. R. Jud. Admin. 2.051(c)(9)(B), and there must be "no less restrictive measures ... available," *id.* R. 2.051(c)(9)(C).

Middle District of Florida

No relevant local rule.

Statistics: 10,306 cases searched; 362 cases (3.5%) had the word "seal" in their docket sheets; 54 complete docket sheets (0.52%) were reviewed; actual documents were examined for 27 cases (0.26%).

Northern District of Florida

No relevant local rule.

Statistics: 2,264 cases searched; 107 cases (4.7%) had the word "seal" in their docket sheets; 10 complete docket sheets (0.44%) were reviewed; actual documents were examined for 5 cases (0.22%); 4 cases (0.18%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

United States v. Clinical Practice Assoc. (FL-N 1:96-cv-00116 filed 06/25/1996).

Qui tam action under the False Claims Act for fraudulent Medicare billing. Many filings in this case are under seal, including the settlement agreement, but not the complaint.

Rzepka v. Daimler Chrysler (FL-N 5:00-cv-00023 filed 02/01/2000).

Motor vehicle action against another driver and the manufacturer and distributor of plaintiffs' Dodge Caravan for wrongful death in a rollover accident. Plaintiffs alleged that design defects caused the plastic roof to cave in, windows to burst, and the restraint system to fail. A sealed settlement agreement was filed.

Thomas v. Florida Power Corp. (FL-N 4:00-cv-00231 filed 06/14/2000).

Employment discrimination case for hostile work environment on the basis of race. The harassment included hanging two rope nooses in the workplace. A sealed settlement agreement was attached to the consent order of dismissal.

Blankenship v. Gilchrist County (FL-N 1:01-cv-00052 filed 05/16/2001).

Employment discrimination case involving sexual harassment by a former deputy sheriff. The plaintiff alleged that some employees of the Sheriff's Department made inappropriate and unwelcome sexual advances towards her and that after she reported the harassment she was made a target of ridicule and retaliation. At the pretrial conference a settlement agreement was reached and the announcement and transcript of the settlement agreement were sealed.

Southern District of Florida

"Unless the Court's sealing order permits the matter to remain sealed permanently, the Clerk will dispose of the sealed matter upon expiration of the time specified in the Court's sealing order by unsealing, destroying, or returning the matter to the filing party." S.D. Fla. Gen. L.R. 5.4.D. "Absent extraordinary circumstances, no matter sealed pursuant to this rule may remain sealed for longer than five (5) years from the date of filing." *Id.* R. 5.4.B.2.

A large proportion of the sealed settlement agreements in this district are in cases under the Fair Labor Standards Act. Settlement agreements in such cases are filed for court approval to comply with *Lynn's Food Sores Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982).

Statistics: 12,005 cases searched; 495 cases (4.1%) had the word "seal" in their docket sheets; 165 complete docket sheets (1.3%) were reviewed; actual documents were examined for 81 cases (0.67%); 73 cases (0.61%) appear to have sealed settlement agreements.[6]

[6] Two of these cases are companion cases, described together.

Cases with Sealed Settlement Agreements

Arnold Palmer Enterprises v. Gotta Have It (FL-S 1:97-cv-00978 filed 04/14/1997).

Trademark infringement action involving sale of unlicensed photographs and false reproductions. A sealed document was filed a week before the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Parris v. Miami Herald (FL-S 1:97-cv-02524 filed 08/05/1997).

Wrongful termination action under the Family Medical Leave Act. Seventeen days after the settlement conference a sealed document was filed and the case was dismissed. Four days after the case was dismissed an amended order of dismissal was filed stating that the court would retain jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Sosa v. American Airlines (FL-S 1:97-cv-03863 filed 12/03/1997).

Airplane action for wrongful death of a passenger on a flight that crashed at the Cali, Colombia, airport, allegedly due to lack of ground navigational aids. The case settled for $1,000,000 and details of the settlement were provided in the guardian ad litem report. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

United States v. University of Miami (FL-S 1:97-cv-04304 filed 12/19/1997).

Qui tam action under the False Claims Act for fraudulent Medicare billing. A sealed document was filed four days prior to an order dismissing the case. In the order for dismissal "all other presently existing contents of the Court's file" (except the complaint) were to remain sealed. A sealed settlement agreement apparently was filed.

Rando v. Slingsby Aviation (FL-S 1:98-cv-02224 filed 09/22/1998).

Wrongful death action against manufacturer of fuel injection system and manufacturer and distributor of airplane in which an Air Force Academy cadet was killed when a Firefly Aircraft crashed. The case was dismissed as to the distributor of the airplane. Plaintiffs alleged the aircraft had a faulty fuel system. In March 1999, a joint stipu-

lation of dismissal was ordered for the manufacturer of the fuel injection system. A sealed document was filed two days prior to dismissal. A sealed settlement agreement apparently was filed. In April 2001, a settlement agreement was reached with the manufacturer of the airplane. In the order of dismissal the court retained jurisdiction to enforce the terms of this settlement agreement.

Martin v. Underwood Karcher (FL-S 1:99-cv-01440 filed 05/19/1999).

Employment action for sexual harassment and wrongful termination after plaintiff reported harassment. A sealed document was filed six days before the joint stipulation of dismissal. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

First Impressions v. All That Style (FL-S 1:99-cv-02353 filed 08/26/1999).

Trademark action removed from state court in which defendant allegedly marketed and sold a theater-style chair and falsely represented this product as identical to plaintiff's "CineLounger." In the order of dismissal the court approved the settlement agreement. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Oviedo v. Crystal Art (FL-S 1:99-cv-02391 filed 08/31/1999).

Action, removed from state court, under the Fair Labor and Standards Act by a crystal art assembler for failure to pay overtime wages. A sealed settlement agreement was filed.

United States v. Bon-Bone Medical (FL-S 9:99-cv-08841 filed 10/08/1999).

Qui tam action under the False Claims Act for fraudulent Medicare billing. Sealed documents were filed the same day the case was dismissed.

Island Developers v. Martin Lumber (FL-S 1:99-cv-02969 filed 11/03/1999).

Contract action removed from state court involving breach of implied warranty when defective wood windows were installed. In the

order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. Two months after the case was dismissed a sealed document was filed the same day the plaintiff filed a motion to expedite enforcement of the settlement agreement. A sealed settlement agreement apparently was filed. The court denied the motion for oral argument and the plaintiff withdrew the motion to expedite enforcement since the parties resolved the issue.

Hays v. Martinengo (FL-S 1:99-cv-03000 filed 11/08/1999).

Admiralty action by owners of a motorboat for exoneration from or limitation of liability arising from an accident which resulted in the death of three people. A sealed document was filed four days after the order approving the settlement. A sealed settlement agreement apparently was filed.

Regalado v. Airmark Engines (FL-S 0:99-cv-07579 filed 11/29/1999); *Acevedo v. Airmark Engines* (FL-S 0:99-cv-07590 filed 11/29/1999).

Two airplane personal injury and product liability actions for wrongful death against manufacturer and distributor of an aircraft for installing an incorrect fuel pump system which allegedly caused the aircraft to crash, killing the pilot. The court appointed a guardian ad litem to approve the minor child of decedents' settlement agreement. In the minutes of the motion to approve a settlement hearing it was noted that the "parties will file settlement under seal." In the order dismissing the case the court retained jurisdiction for 60 days to enforce the terms of the settlement agreement. A sealed document was filed one week after the case was dismissed. A sealed settlement agreement apparently was filed.

Gornescu v. United Cable (FL-S 0:99-cv-07637 filed 12/15/1999).

Action under the Fair Labor Standards Act by a cable company employee for failure to pay overtime wages. A sealed settlement agreement was filed.

DC Comics v. Burglar Alarm (FL-S 0:99-cv-07641 filed 12/16/1999).

Trademark action involving the "Batman" logo against a burglar alarm company. A sealed settlement agreement was filed as an attachment to the order of dismissal.

Zurich-American Insurance v. Perez (FL-S 1:00-cv-00559 filed 02/10/2000).

Action for declaratory judgment regarding disputes over an insurance contract where distributor demanded a refund of the deposit on undelivered vehicles. A sealed document was filed three days before the case was dismissed. The order of dismissal refers to a "Confidential Settlement Agreement and Release." A sealed settlement agreement apparently was filed.

Guillen v. Northwest Airlines (FL-S 1:00-cv-01300 filed 04/06/2000).

Action for damages for personal injuries suffered by a three-year-old child when a flight attendant spilled hot coffee on her. In the guardian ad litem report the settlement amount of $145,000 was disclosed. The sealed settlement agreement was filed as an attachment to the guardian's report.

Jacobs v. Pine Crest Preparato (FL-S 0:00-cv-06564 filed 04/21/2000).

Employment action for wrongful termination of a teacher based on gender and age. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Williams v. Office Depot (FL-S 1:00-cv-01466 filed 04/24/2000).

Employment civil rights action where a black plaintiff sued a former employer for race discrimination and wrongful termination. One day after the stipulation of dismissal was filed a sealed document was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Johns v. Viking Life-Saving (FL-S 1:00-cv-01998 filed 06/05/2000).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed document was filed one week before the case was dismissed. The order of dismissal approved the settlement agreement. A sealed settlement agreement apparently was filed.

Mencia v. Crystal Art (FL-S 1:00-cv-02053 filed 06/08/2000).

Class action under the Fair Labor Standards Act by warehouse employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Sakr v. University of Miami (FL-S 1:00-cv-02294 filed 06/28/2000).

Action under the Americans with Disabilities Act alleging defendant dismissed plaintiff from a doctoral program on account of his disability. Plaintiff's counsel filed an emergency motion to enforce the settlement agreement, alleging that plaintiff had agreed to accept the settlement reached at the settlement conference but later refused to sign the agreement. The defendant filed an emergency motion to seal the settlement agreement and filed a sealed copy of the agreement. The motion to enforce the settlement agreement was denied. Subsequently, the court granted the defendant's motion for summary judgment. The plaintiff filed an appeal one month after the case was dismissed and the appeal currently is pending.

Dolan v. Ancicare PPO (FL-S 0:00-cv-07099 filed 08/03/2000).

Employment discrimination case based on sexual harassment and retaliation. The joint stipulation for dismissal asked the court to retain jurisdiction to enforce the settlement agreement. The order of dismissal does not contain any language of retaining jurisdiction. One month after the case was dismissed a sealed document was filed. A sealed settlement agreement apparently was filed.

Runnels v. The City of Miami (FL-S 1:00-cv-02930 filed 08/10/2000).

Civil rights action for wrongful death that occurred when a police officer killed a man threatening to commit suicide. The decedent was alone in his house when the police officer shot him through a window. A sealed document was filed one week before the notice of settlement. A sealed settlement agreement apparently was filed.

Association for Disabled Americans v. Beekman Towers (FL-S 1:00-cv-02951 filed 08/14/2000).

Action under the Americans with Disabilities Act for an injunction requiring defendant to remove from its hotel architectural barriers to the physically disabled. A sealed settlement agreement was

filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Rivera v. Lentine Marine (FL-S 2:00-cv-14266 filed 08/30/2000).

Action under the Fair Labor Standards Act by a mechanic for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

American Disability Ass'n v. Mavis Development (FL-S 0:00-cv-07278 filed 09/05/2000).

Action for injunctive relief seeking enforcement under the Americans with Disabilities Act for defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed document was filed two days before the case was dismissed. In the order dismissing the case the court retained jurisdiction to enforce the stipulation for settlement. A sealed settlement agreement apparently was filed.

Genao v. Joe Allen Miami (FL-S 1:00-cv-03689 filed 10/02/2000).

Class action under the Fair Labor Standards Act by kitchen workers for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

Singh-Chaitan v. Nova Southeastern (FL-S 1:00-cv-04553 filed 11/30/2000).

Employment action where a black office manager sued a former employer for race discrimination. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement was filed as an attachment to the plaintiff's motion to enforce the settlement agreement. The parties were unable to agree on a separate settlement agreement that was to be the final settlement agreement, so the plaintiff wanted to enforce the original settlement agreement. The defendant filed a motion to compel a settlement agreement revising the confidentiality provision. The court granted the plaintiff's motion to enforce the original settlement agreement and denied the defendant's motion to compel a revised settlement agreement. The defendant filed a revised sealed settlement agreement as an attachment to a renewed motion to compel a settlement agreement. The defendant objected to the court order enforcing the original settlement agreement and the court heard oral arguments on this issue.

After oral argument the parties amicably resolved the dispute involving the confidentiality clause. The court retained jurisdiction to enforce the terms of the settlement agreement.

Darch v. Cafe Iguana (FL-S 1:00-cv-04813 filed 12/18/2000).

Class action under the Fair Labor Standards Act by restaurant workers for failure to pay minimum wage and overtime wages. A sealed document was filed two weeks after the notice of settlement was filed by plaintiff. A sealed settlement agreement apparently was filed.

United States v. Kantor (FL-S 0:00-cv-07851 filed 12/19/2000).

Qui tam action under the False Claims Act for fraudulent Medicare billing. A sealed document was filed three days before the case was dismissed. A sealed settlement agreement apparently was filed.

Barnuevo v. BNP Paribas (FL-S 1:01-cv-00005 filed 01/02/2001).

Action under the Fair Labor Standards Act by bank employee for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Egli v. Martino Tire Co. (FL-S 9:01-cv-08013 filed 01/04/2001).

Action under the Fair Labor Standards Act by an automobile repair shop employee for failure to pay overtime wages. A sealed settlement agreement was filed. The order of dismissal stated "the documents filed under seal shall remain under seal until the closing of this case, at which time they shall be destroyed."

Weiss v. Ferraro (FL-S 2:01-cv-14025 filed 01/22/2001).

Action under the Fair Labor Standards Act by a legal assistant for failure to pay overtime wages. A sealed settlement agreement was filed.

Rodriguez v. Fresh King (FL-S 1:01-cv-00304 filed 01/23/2001).

Class action under the Fair Labor Standards Act by warehouse employees for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Artcom Technologies v. Mastec (FL-S 1:01-cv-00351 filed 01/29/2001).

RICO action involving a management buyout with allegations of conversion, fraud, and breach of fiduciary duty. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Biosample v. Biosamplex (FL-S 9:01-cv-08107 filed 02/06/2001).

Trademark action concerning the sale of "biological products." The court ordered a permanent injunction against the defendant's use of the trademark Biosamplex. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the injunction and settlement agreement.

Flores v. Albertson's (FL-S 1:01-cv-00534 filed 02/09/2001).

Class action under the Fair Labor Standards Act by grocery store employees for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. In the order of dismissal the court approved the settlement agreement. A sealed settlement agreement apparently was filed.

Stortini v. LDC General Contract (FL-S 1:01-cv-00531 filed 02/09/2001).

Action under the Fair Labor Standards Act by a construction worker for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Doe v. Metropolitan Health (FL-S 1:01-cv-00546 filed 02/12/2001).

Civil rights action arising from refusal to disclose a minor's AIDS diagnosis to the minor. A sealed document was filed the same day the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Access Now v. Winn-Dixie (FL-S 1:01-cv-00764 filed 02/21/2001).

Action for injunctive relief seeking enforcement under the Americans with Disabilities Act for defendant to remove from its grocery stores architectural barriers to the physically disabled. A sealed document was filed one day before the case was dismissed. In the or-

der of dismissal the settlement was approved and the court ordered the settlement agreement to be returned to the parties rather than be permanently under seal.

Pierre-Louis v. Archon Residential (FL-S 1:01-cv-00794 filed 02/22/2001).

Employment civil rights action removed from state court where a black maintenance worker sued his former employer for race discrimination and wrongful termination. A sealed document was filed five days before the case was dismissed. In the order of dismissal the court approved the settlement agreement and retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Jones v. Air Compressor Works (FL-S 9:01-cv-08164 filed 02/23/2001).

Action under the Fair Labor Standards Act by an office manager for failure to pay overtime wages. A sealed document was filed on the same day the case was dismissed. The order dismissing the case approved the settlement agreement. A sealed settlement agreement apparently was filed.

Taks v. Martinique 2 (FL-S 9:01-cv-08199 filed 03/05/2001).

Employment action by a general manager alleging hostile work environment due to sexual harassment and wrongful termination based on age and disability. In the order of dismissal the court approved the settlement agreement. A sealed settlement agreement apparently was filed.

Planet Solution v. European Cosmetics (FL-S 0:01-cv-06448 filed 03/21/2001).

Trademark action removed from state court filed under the Uniform Trade Secrets Act involving trade secrets for cleaning products. The complaint also included Florida statutory and common law claims. In August 2002, seventeen days after the order granting a stay pending arbitration, the court granted the joint stipulation of dismissal and permanent injunction. In March 2003, the defendant filed a motion to seal the settlement agreement in order for the court to rule upon the motion to vacate the permanent injunction on grounds that the plaintiff breached the terms of the confidential settlement agree-

ment. A sealed settlement agreement was filed along with the motion to vacate. No other documents were filed in the case.

Vigo v. American Sales (FL-S 1:01-cv-01245 filed 03/26/2001).

Action under the Fair Labor Standards Act by a security guard for failure to pay overtime wages. A sealed settlement agreement was filed. In the amended order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Lil Joe Records v. Worldwide Pants (FL-S 1:01-cv-01377 filed 04/05/2001).

Copyright action involving the use of a sound recording on "The Late Show with Craig Kilborn." A sealed document was filed five days before the notice of settlement was filed. The court retained jurisdiction for 60 days to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Aguilera v. Quail Investments (FL-S 1:01-cv-01384 filed 04/06/2001).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay overtime wages. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Brito v. Shoma Development (FL-S 1:01-cv-01421 filed 04/10/2001).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to the notice of stipulation for voluntary dismissal. In the order approving settlement the court ordered that the settlement agreement remain under seal until the case was dismissed.

Signal Communications v. Motorola (FL-S 0:01-cv-06676 filed 04/25/2001).

Contract action removed from state court involving breach of a non-competition covenant of an asset purchase agreement of a two-way Radio Service Division. The joint stipulation of dismissal notes that the parties entered into a separate settlement agreement. A sealed document was filed three days before the case was dismissed. In the order of dismissal the court retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

Taylor v. Arrowpac (FL-S 1:01-cv-01948 filed 05/11/2001).

Employment civil rights action where a black plaintiff sued his employer for race discrimination. A sealed settlement agreement was filed and the plaintiff asked for the enforcement of the settlement agreement 11 days later. The day after the motion to enforce the settlement agreement was filed the motion was withdrawn. In the final order of dismissal the court retained jurisdiction for 90 days to enforce the terms of the settlement agreement.

Medley Industria v. Da Matta (FL-S 1:01-cv-02132 filed 05/24/2001).

Action involving breach of contract involving repayment for sponsorship and support of defendant's career as a race car driver. A sealed document was filed one day before the joint stipulation of dismissal was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed.

Israel v. Mayrsohn (FL-S 1:01-cv-02172 filed 05/25/2001).

Employment action under the Americans with Disabilities Act by a disabled employee alleging wrongful termination. A sealed document was filed on the same day the case was dismissed. In the order of dismissal the court retained jurisdiction only to enforce the terms of the settlement agreement. A sealed settlement agreement apparently was filed. Three months after the case was dismissed the final judgment ordered that the defendant pay $15,876 to the plaintiff.

Morkos Group v. Amoco Oil Co. (FL-S 0:01-cv-06911 filed 05/29/2001).

Contract action for breach of "Right of First Option to Purchase when Available for Sale" by an independent contractor for a gasoline station. The sealed settlement agreement was filed as an exhibit to the notice regarding settlement. In the order dismissing the case the court retained jurisdiction to enforce the terms of the settlement agreement. On the same day the case was dismissed the court granted the defendant's motion to enforce the settlement agreement. The plaintiff filed an appeal five months after the case was dismissed and the appeal currently is pending.

Dede v. City Furniture (FL-S 1:01-cv-02696 filed 06/25/2001).

Class action under the Fair Labor Standards Act by furniture store employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Fort Lauderdale Auto Leasing v. Sunshine Auto Rentals (FL-S 1:01-cv-02682 filed 06/25/2001).

Trademark action concerning the use of the service mark "Sunshine" by a rental car company. The court granted the parties' joint motion for stipulated permanent injunction. A sealed settlement agreement was filed.

Vargas v. Shoma Development (FL-S 1:01-cv-02738 filed 06/27/2001).

Action under the Fair Labor Standards Act by a construction worker for failure to pay minimum wage and overtime wages. A sealed settlement agreement was filed.

Fleurimond v. United Enterprises (FL-S 1:01-cv-02938 filed 07/06/2001).

Class action under the Fair Labor Standards Act by construction workers for failure to pay overtime wages. The confidential settlement agreement was filed under seal with a motion to enforce the settlement agreement. The court denied the motion to enforce on the grounds that the defendant had satisfied its obligations. The parties' request that the settlement agreement be returned was granted. The court ordered that the motion to file the settlement agreement under seal be unsealed and that the docket entry referring to a "sealed document" also be unsealed to reflect that the sealed document was a settlement agreement.

National Installers v. Harris (FL-S 1:01-cv-02964 filed 07/06/2001).

Action for declaratory judgment regarding disputes under the Fair Labor Standards Act for failure to pay overtime wages. A joint stipulation of settlement ordered that the "Settlement Agreement is to remain permanently under seal."

Tapia v. Extendicare Homes (FL-S 1:01-cv-03104 filed 07/17/2001).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed document was filed on the same day the

case was dismissed. A sealed settlement agreement apparently was filed.

Tyson v. Martin Tire Co. (FL-S 9:01-cv-08661 filed 07/19/2001).

Class action under the Fair Labor Standards Act by service managers of an auto repair shop for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Giraldo v. One World (FL-S 1:01-cv-03172 filed 07/20/2001).

Action under the Fair Labor Standards Act for failure to pay overtime wages and retaliatory discharge after plaintiff complained of non-payment. A sealed settlement agreement was attached to the motion for fees and costs.

Palco Labs v. Vitalcare Group (FL-S 1:01-cv-03480 filed 08/10/2001).

Patent infringement case involving an adjustable tip for a blood lancet device. The court granted the plaintiff's motion for permanent injunction. A sealed settlement agreement was filed and the order of dismissal noted that the settlement agreement will be unsealed on June 4, 2006.

McConnel v. Capri Miami Beach Hotel Condo (FL-S 1:01-cv-03572 filed 08/20/2001).

Wrongful termination based on the Pregnancy Discrimination Act. The case was dismissed in April 2002 and the court retained jurisdiction to enforce the terms of the settlement agreement. In May 2002, a sealed settlement agreement was attached to the first motion to enforce the settlement agreement for $89,500. The court placed a lien on a property of the defendant's sister company as security for the balance of the judgment. In July 2002 there was a renewed motion to enforce the settlement agreement. A final judgment ordered the defendant to transfer the lien of the property to the defendant as security for the balance of judgment for $57,000. Defendants were denied the motion for relief from the final judgment. In December 2002 a third motion to enforce the settlement agreement sought sanctions of the unpaid outstanding judgment of $51,000. The last document filed on the docket sheet in February 2003 involves a plaintiff's memorandum

on the effect of bankruptcy by the defendant's sister company on the outstanding judgment.

Mastercard International v. T&T Sports (FL-S 1:01-cv-03632 filed 08/24/2001).

Contract action involving fraudulent misrepresentations and breaches of material provisions in a written contract for media promotional rights to a sporting event. A sealed settlement agreement was filed.

Stubbs v. Art Express (FL-S 1:01-cv-03760 filed 09/05/2001).

Action under the Fair Labor Standards Act by an employee of a custom art framing business for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. The order of dismissal approved the settlement agreement. A sealed settlement agreement apparently was filed.

Sanchez v. Drusco (FL-S 1:01-cv-03796 filed 09/07/2001).

Class action under the Fair Labor Standards Act by employees of an export company for failure to pay overtime wages. Three weeks after the case was dismissed the court granted a motion to extend time to sign settlement papers. A sealed document was filed one day after the order to extend time. A sealed settlement agreement apparently was filed.

Rivera v. KB Toys (FL-S 0:01-cv-07607 filed 10/17/2001).

Class action under the Fair Labor Standards Act by assistant store managers for failure to pay overtime wages. A sealed document was filed two days before the case was dismissed. In the final order of dismissal the court states it considered the settlement agreement before dismissing the case. A sealed settlement agreement apparently was filed.

Alvarez v. Professional Aviation (FL-S 1:01-cv-04444 filed 10/30/2001).

Action under the Fair Labor Standards Act by a flight dispatcher for failure to pay overtime wages. A sealed settlement agreement was filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Baumgarten v. Children's Center (FL-S 1:01-cv-05040 filed 12/17/2001).

Action under the Fair Labor Standards Act by a psychiatric aide for minimum wage and failure to pay overtime wages. A sealed settlement agreement was filed.

Marinaro v. Miller (FL-S 0:02-cv-60089 filed 1/22/2002).

Class action under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to the motion to seal the settlement agreement. Parties asked the court to destroy the motion to seal, motion to approve the sealed settlement agreement, and the settlement agreement when the court entered the order to dismiss. In the order dismissing the case the court retained jurisdiction to enforce the terms of the settlement agreement for 60 days, but did not mention destroying any documents.

Nunez v. Acosta Tractors (FL-S 1:02-cv-20417 filed 02/06/2002).

Action under the Fair Labor Standards Act by a dirt digger operator for failure to pay overtime wages. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement for 60 days. Sealed documents were filed four and 11 days after the case was dismissed. A sealed settlement agreement apparently was filed.

Reyes Cigars v. Adworks of Boca (FL-S 9:02-cv-80290 filed 04/30/2002).

Contract action against advertising company for intentionally shutting down plaintiff's e-commerce Web site in breach of an agreement that the plaintiff would own the rights to the Web site. The plaintiff's request for injunctive relief to reinstate the Web site was denied. A sealed document was filed four days before the case was dismissed. A sealed settlement agreement apparently was filed.

IDAHO

The sealing of court records in Idaho state courts requires written findings justifying the sealing. Idaho Ct. Admin. R. 32(f).

District of Idaho

Absent a court order to the contrary, sealed documents are returned to the submitting party at the end of the case. D. Idaho L.R. 5.3(f).

Statistics: 1,005 cases searched; 289 cases (29%) had the word "seal" in their docket sheets; 8 complete docket sheets (0.80%) were reviewed; actual documents were examined for 5 cases (0.50%); 4 cases (0.40%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Bursch v. Residential Funding Corp. (ID 99-cv-00385 filed 09/03/1999).

Class action under the Truth in Lending Act by plaintiffs who entered into loan transactions pursuant to a home sales program under which defendants allegedly "marked up" the cost of construction materials. Following mediation the parties agreed to a confidential settlement agreement and pursuant to Local Civil Rule 5.3, the court sealed the agreement.

EEOC v. JR Simplot Co. (ID 99-cv-00439 filed 09/30/1999).

Employment discrimination case challenging an English language reading skills test as having an adverse impact on Hispanic and Asian-American employees and applicants. The court approved a consent decree, which was not sealed. Provisions of the consent decree required the EEOC to file with the court as a separate exhibit the specific amount of lost wages and interest each claimant was entitled to and a list of claimants who timely returned the claim form. One year later the court agreed to seal the exhibit and incorporate it as part of the consent decree.

Shinski v. McDonnell-Douglas Corp. (ID 00-cv-00280 filed 05/23/2000).

Product liability action against manufacturer of a helicopter for wrongful death in a crash. The court approved and sealed the settlement agreement.

McKee v. Young (ID 00-cv-00713 filed 12/08/2000).

Motor vehicle action against a truck driver and the truck's owner for injuries sustained when the semi-truck and trailer rear-ended the

plaintiff's vehicle. A stipulation of compromise and settlement was filed and sealed.

MICHIGAN

State court records may be sealed only upon a showing of good cause, Mich. Ct. R. 8.119(F)(1)(b), "consider[ing] the interests of the public as well as of the parties," *id.* R. 8.119(F)(2). "A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record." *Id.* R. 8.119(F)(5).

Eastern District of Michigan

Sealed settlement agreements become unsealed two years after the date of sealing, absent an order to the contrary. E.D. Mich. L.R. 5.4. Court staff members say that the rule is difficult to implement, because no rule specifies that sealed settlement agreements be designated as anything other than a sealed document, so it is difficult to know what documents are covered by the rule. Sealed *discovery* documents are returned or unsealed 60 days after the case is over. *Id.* R. 5.3.

Statistics: 7,072 cases searched; 152 cases (2.1%) had the word "seal" in their docket sheets; 37 complete docket sheets (0.52%) were reviewed; actual documents were examined for 15 cases (0.21%); 13 cases (0.18%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Herman Miller Inc. v. Palazzetti Imports and Exports (MI-E 2:96-cv-75833 filed 06/25/1996).

Trademark and trade dress action concerning high-quality reproductions of Eames chairs and ottomans. There was a jury trial, a judgment, an appeal, and a remand. On the eve of the second trial the case settled pursuant to a sealed settlement agreement "to remain under seal for a period of ten (10) years" (until January 3, 2013).

Smith v. Chrysler Financial Corp. (MI-E 2:97-cv-76338 filed 06/25/1996).

Employment case. [File requested from records center in Chicago.]

Relume Corp. v. Dialight Corp. (MI-E 2:98-cv-72360 filed 06/09/1998).

Patent case. [Large file will take court some time to copy.]

Solomon v. City of Sterling Heights (MI-E 2:98-cv-73900 filed 09/04/1998).

Civil rights case where defendants include a city, police officers, and a newspaper. [Large file will take court some time to copy.]

Pasque v. Frederick (MI-E 2:99-cv-75113 filed 10/20/1999).

Motor vehicle action for wrongful killing of a bicyclist by a truck driver. A sealed document was filed the same day as a "settlement on the record," and the case was dismissed on an approved settlement the following month. Five days before the settlement on the record, plaintiff filed a petition to determine settlement specifying a $2 million settlement.

Wagner v. Ford Motor Co. (MI-E 2:99-cv-75567 filed 11/17/1999).

Employment discrimination case was dismissed without prejudice in November, with the court retaining jurisdiction for two months in the event that "the settlement is not consummated." Two months later the court agreed to retain jurisdiction for an additional month. One month later – in early March – the court dismissed the case with prejudice. A sealed document was filed by the judge nearly two months later. This may be a sealed settlement agreement.

Fitch v. Sensormatic Electronics (MI-E 2:00-cv-71603 filed 04/03/2000).

Complaint under the Fair Labor Standards Act for wrongfully requiring field technicians to deduct one hour from each work day. A stipulated order for dismissal states that the court facilitated a settlement conference, which resulted in a confidential settlement agreement that the court will hold under seal. The docket sheet, however, does not show the filing of such an agreement.

Intra Corp. v. Air Gage Co. (MI-E 5:00-cv-60234 filed 04/19/2000).

Patent case concerning an "apparatus for inspecting an engine valve seat." The case was dismissed with the court retaining jurisdiction to enforce a sealed settlement agreement.

Parkhill v. Starwood Hotels (MI-E 2:00-cv-71877 filed 04/24/2000).

Personal injury action for quadriplegic spinal cord injuries sustained while swimming in the ocean at defendant's hotel. The case settled, and approximately three months after the filing of the stipulated order of dismissal on the termination date a civil sealed matter of unknown contents was filed. This may be a sealed settlement agreement.

Hoy v. Pet Greetings (MI-E 2:00-cv-72308 filed 05/19/2000).

Patent case concerning edible pet greeting cards. Sealed matter filed same day as termination date. The unsealed judgment contains several terms of a settlement agreement, but states that some terms are sealed.

Baker v. Bollinger (MI-E 4:00-cv-40239 filed 06/26/2000).

Employment case against University of Michigan and some of its employees. The case file includes a protective order concerning confidential health information. The court granted the parties' joint motion for a stipulated permanent injunction and sealing of the record.

Smith v. City of Detroit (MI-E 4:00-cv-40273 filed 07/21/2000).

Civil rights action against Detroit for wrongful killing by a police officer. A sealed document was filed by the judge six days before the case was dismissed as settled. The case was dismissed without prejudice to give plaintiffs 60 days to move to enforce the settlement agreement if it is not consummated.

Allegiance Telecom v. Hopkins (MI-E 2:01-cv-74310 filed 11/09/2001).

Designated a trademark case, this is really a business tort case – with the seventh of eleven claims arising under the Lanham Act – against former employees for siphoning business. Sealed matter was filed nine days before the case was closed. The stipulated order for dismissal specifies the terms of settlement, but also refers to an "accompanying Confidential Settlement and Mutual General Release Agreement" and represents that an attached exhibit contains true information and is filed under seal.

Western District of Michigan

Documents may be filed under seal only with prior permission from the court, W.D. Mich. L. Civ. R. 10.6(a)-(b), and will be unsealed 30 days after termination of the case, absent an order to the contrary, *id.* 10.6(c).

Statistics: 2,025 cases searched; 122 cases (6.0%) had the word "seal" in their docket sheets (many of these included only docket entries made under the identification "seal" because the docket clerk had been accessing sealed documents in other cases, or only notation of whether a sealed mediation award was accepted or rejected); 7 complete docket sheets (0.35%) were reviewed; actual documents were examined for 4 cases (0.20%); 4 cases (0.20%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Tompkins v. Anderson (MI-W 4:99-cv-00124 filed 09/10/1999).

Fraud action concerning ownership and operation of a radio station. The case settled at a settlement conference, with the proceedings sealed. Eight months after the case was dismissed, plaintiffs moved to enforce the confidential settlement agreement. Plaintiffs attached the settlement agreement, which called for 23 monthly payments of $500 from each defendant. Plaintiffs' motion was denied on the ground that the court had not retained jurisdiction to enforce the settlement agreement.

C.S. Engineered Castings v. deMco Technologies (MI-W 4:01-cv-00024 filed 02/20/2001).

Negotiable instrument action for nonpayment of loans, with counterclaims for fraud and related injuries. The amount in controversy allegedly was $75,000 in principal and $2,445.45 in interest. The case settled, but plaintiff moved to enforce the confidential settlement agreement, claiming $72,800 still owed. The motion stated that a copy of the confidential agreement would not be attached, but would "be delivered to the court for consideration with this motion." The motion was unopposed and granted. It appears that the court subsequently filed the confidential settlement agreement under seal.

Stryker Corp. v. Neodyme Technologies Corp. (MI-W 4:01-cv-00031 filed 02/26/2001).

Contract action for failure to pay $91,500 in invoices on hospital "goods and/or services." The court agreed to file a confidential settle-

ment agreement under seal so that the court could retain jurisdiction to enforce it. The order to seal stated "that within 30 days after termination of the case, the Court will return the Settlement Agreement to either of the attorneys." The motion to seal the settlement agreement was filed two days after the case was dismissed and the order was granted the following month. The docket sheet shows the sealed settlement agreement filed the same day as the order to seal and does not show a return of the sealed document. Less than two months later defendant filed a notice for bankruptcy protection.

Hale-DeLaGarza v. Spartan Travel Inc. (MI-W 1:01-cv-00557 filed 08/28/2001).

Employment action for persistent unwanted sexual advances. A minute docket entry states that a settlement was placed on the record under seal. A stipulated order dismissing the case gives no additional information.

MINNESOTA

No relevant state statute or rule.

District of Minnesota

Absent an order to the contrary, sealed documents should be reclaimed by the parties four months after the case is over if there is no appeal and 30 days after the case is over if there is an appeal. D. Minn. L.R. 79.1(d). The court will destroy documents not retrieved within 30 days of notice to retrieve them. *Id.* R. 79.1(e).

Statistics: 3,612 cases searched; 225 cases (6.2%) had the word "seal" in their docket sheets; 25 complete docket sheets (0.69%) were reviewed; actual documents were examined for 22 cases (0.61%).

MISSISSIPPI

No relevant state statute or rule.

Northern District of Mississippi

Court records may be sealed only upon a showing of good cause. N. & S. D. Miss. L.R. 83.6(B). Absent an order to the contrary, sealed documents are unsealed 30 days after the case is over. *Id.* R. 83.6(D). If a court orders a document sealed beyond that time period, the order "shall set a date for

unsealing." *Id.* (Note that the Northern and Southern Districts of Mississippi have the same local rules.)

Statistics: 2,603 cases searched;[7] 53 cases (2.0%) had the word "seal" in their docket sheets; 19 complete docket sheets (0.73%) were reviewed.

Southern District of Mississippi

Court records may be sealed only upon a showing of good cause. N. & S. D. Miss. L.R. 83.6(B). Absent an order to the contrary, sealed documents are unsealed 30 days after the case is over. *Id.* R. 83.6(D). If a court orders a document sealed beyond that time period, the order "shall set a date for unsealing." *Id.* (Note that the Northern and Southern Districts of Mississippi have the same local rules.)

NORTH CAROLINA

North Carolina law disfavors confidential settlement agreements with state actors. "It is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." N.C. Gen. Stat. § 132-1(b). Public records include settlement documents in cases against state actors, except for medical malpractice actions against hospitals. *Id.* § 132-1.3(a). Confidential settlement agreements are proscribed in such cases. *Id.* Settlement documents may be sealed in these cases only upon a determination that (1) good cause overrides the presumption of openness and (2) the good cause cannot be achieved another way. *Id.* § 132-1.3(b).

Eastern District of North Carolina

The court amended its local rule on sealed documents effective January 1, 2003. Absent statutory authority, court filings may be sealed only on court order obtained by motion. E.D.N.C. L. Civ. R. 79.2(a). Sealed documents must be delivered to the court in red envelopes with three lines of specified text designating the date of filing and that the document is to be filed under seal. *Id.* 79.2(e). The docket designates "generically the type of document filed under seal, but it will not contain a description that would disclose its identity." *Id.* 79.2(c). "After the action concludes and all appeals have been completed, counsel is charged with the responsibility of retrieving and maintaining all sealed documents. Upon 10 days notice by mail to counsel for all parties, and within 30 days after final disposition,

[7] These data are based on a full two-year termination cohort.

the court may order the documents to be unsealed and they will thereafter be available for public inspection." *Id.* 79.2(d).

Statistics: 2,143 cases searched; 112 cases (5.2%) had the word "seal" in their docket sheets (but 54 of these merely had Crown Cork and Seal Company as a party); 12 complete docket sheets (0.56%) were reviewed; actual documents were examined for 4 cases (0.19%); 3 cases (0.14%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Lloyd v. Newton (NC-E 7:00-cv-00034 filed 02/22/2000).

Housing/accommodations action under the Americans with Disabilities Act and state law for failure to rent a hotel room to a disabled person who has a service dog but who is not blind. The parties filed a consent protective order and the transcript of the settlement conference was sealed. The case ended in a stipulation of dismissal. Because the complaint included a claim for negligent supervision, settlement discussions may have included trade secrets on employee training.

Ramirez v. Beaulieu (NC-E 5:00-cv-00536 filed 07/25/2000).

Action by carpenters for unpaid wages under the Fair Labor Standards Act and state law. The parties reached a confidential settlement agreement and filed a joint stipulation of dismissal. The stipulation specified that if the plaintiff notified the court within 90 days that defendants had breached the agreement, then an attached sealed consent order would become effective. The 90 days elapsed without such notice and the case was closed.

Watson v. Life Insurance Co. of North America (NC-E 5:01-cv-00870 filed 11/07/2001).

ERISA action for wrongfully denied disability benefits to a processing clerk. Disabled beneficiary was represented by her mother, who had power of attorney. The case settled and the court approved the settlement. A sealed settlement agreement was filed.

Middle District of North Carolina

Sealed documents are sent to the records center in Atlanta along with the rest of the case file, where "[t]he confidentiality of sealed documents cannot be assured." M.D.N.C. L.R. 83.5(c). At the end of the case, after the

opportunity for appeal is exhausted, the clerk sends the parties a notice that they may retrieve sealed documents.

Statistics: 1,724 cases searched; 50 cases (2.9%) had the word "seal" in their docket sheets; 5 complete docket sheets (0.29%) were reviewed; actual documents were examined for 5 cases (0.29%); 4 cases (0.23%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Queen v. rha Health Services (NC-M 1:00-cv-00101 filed 02/01/2000).

Class action under the federal Fair Labor Standards Act and state law by employees of residential facility for developmentally disabled adults alleging that the employees working a night shift were required to remain on premises without compensation for eight hours of their 18-hour shifts. The court dismissed the state law claims as preempted by the federal claim. The case settled and the parties filed a joint motion under seal for an order approving the settlement. Such an order was granted, but the order says nothing about the terms of the settlement.

Saine v. Bristol-Myers Squibb Co. (NC-M 1:00-cv-00271 filed 03/20/2000).

ERISA action by drug sales employee to challenge denial of short-term disability benefits sought because of migraine headaches. The court gave defendants summary judgment on the ERISA claim, but denied them summary judgment on a counterclaim for return of mistakenly issued salary checks. The parties settled the counterclaim before trial, but plaintiff apparently violated the settlement agreement (before the case was dismissed), so defendant employer moved for enforcement of the agreement, attaching the agreement as a sealed exhibit. Plaintiff apparently violated the court's order to enforce the agreement by failing to return money and sales supplies, including a car, a computer, and drugs, so the employer moved for an order of contempt. The court did not rule on this motion, because the parties settled their dispute and filed a stipulated dismissal.

Parks v. Alteon Inc. (NC-M 1:00-cv-00657 filed 07/13/2000).

Product liability case where plaintiff sued drug companies for kidney failure allegedly resulting from an experimental diabetes drug.

The parties reached a confidential private settlement agreement, but one defendant apparently was late in making its settlement payment. The settlement agreement was filed under seal as an exhibit to a motion to enforce it. The case was dismissed without action on the motion.

Gaskins v. Carolina Manufacturer's Service (NC-M 1:00-cv-01219 filed 12/01/2000).

Employment civil rights action where black plaintiffs sued their employer for race discrimination. One plaintiff had second thoughts about the confidential settlement agreement and moved pro se to set it aside. Defendant attached a sealed copy of the settlement agreement to a motion to enforce it. The court ruled against plaintiff's motion and ordered her to pay a $3,600 sanction to cover defendant's fees in enforcing the agreement.

Western District of North Carolina

Local Rule 5.1(D)(4) states: "Unless otherwise ordered by a court, any case file or documents under court seal that have not previously been unsealed by the court order shall be unsealed at the time of final disposition of the case." According to the clerk, sealed documents are not sent to the records center in Atlanta. If there were indeed an order to keep a document sealed, the court would probably keep the whole file, because there would be so few.

Statistics: 1,663 cases searched; 71 cases (4.3%) had the word "seal" in their docket sheets; 16 complete docket sheets (0.96%) were reviewed; actual documents were examined for 9 cases (0.54%); 6 cases (0.36%) appear to have sealed settlement agreements.[8]

[8] Five of these cases were consolidated together.

Cases with Sealed Settlement Agreements

Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-23 filed 02/24/1999), *consolidated with Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-24 filed 02/24/1999), *Cardwell v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-25 filed 02/24/1999), *Phillips v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-26 filed 02/24/1999), *and Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-27 filed 02/24/1999).

Consolidated motor vehicle tort action in which five decedents' estates sued the alleged employers of a logging truck driver for decedents' deaths arising from a logging truck driver's becoming distracted while changing a tape in his cab. He veered into oncoming traffic and ran a church van off the road. Swerving back into the correct lane, the truck's logs spilled and crushed the van's five occupants. The district court granted summary judgment to defendants on the grounds that the driver was not their agent, and plaintiffs appealed. The case settled on appeal, and a North Carolina statute apparently required court approval of the settlement agreement, because one of the plaintiffs was a minor representing her father's estate. Terms of the settlement agreement are under seal.

J. M. Huber Corp. v. Potlatch Corp. (NC-W 3:02-cv-00034 filed 01/25/2002).

Trademark action concerning a plywood substitute called oriented strand board. The case was dismissed in reliance on a settlement agreement, which was sealed and filed as an exhibit to the order dismissing the case. The order included the statement that "The parties . . . consent to the Court retaining jurisdiction of this matter to enforce the terms of a confidential Settlement Agreement . . . ."

SOUTH CAROLINA

No relevant state statute or rule.

District of South Carolina

A new local rule prohibits the filing of a sealed settlement agreement. D.S.C. L.R. 5.03(C).

Statistics: 6,031 cases searched; 241 cases (4.0%) had the word "seal" in their docket sheets; 15 complete docket sheets (0.25%) were reviewed; ac-

tual documents were examined for 7 cases (0.12%); 7 cases (0.12%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Doe v. Florence School District (SC 4:99-cv-01007 filed 04/08/1999).

Civil rights action by a developmentally disabled 15-year-old girl for rape by a school security guard, who had been transferred to his current position from another school where parents had complained of his sexually harassing students. The court dismissed the case as settled and scheduled a settlement conference to approve the settlement agreement – there being a minor party – one week later. The settlement agreement is sealed.

Johnson v. Prime Inc. (SC 8:00-cv-01523 filed 05/17/2000).

Motor vehicle action against a truck driver and trucking companies for wrongful death caused by the truck's colliding with traffic stopped for road construction. Plaintiff dismissed the trucker and settled with the trucking companies, whose liability insurer paid the settlement. The court dismissed the action without prejudice and then conducted a sealed settlement conference two weeks later, dismissing the action with prejudice after the terms of the settlement apparently were satisfied.

Seeling v. Norfolk Southern Rwy. (SC 3:00-cv-01893 filed 06/14/2000).

Action under the Federal Employer's Liability Act by a trainman for unspecified injuries allegedly resulting from his employer's negligence in maintaining a safe working environment. Documents filed in the case indicate the trainman may have fallen off a train. The judge issued an order dismissing the case as "settled by the payment of a sum of money" and sealing "the record of this settlement, other than the fact of its existence."

Curry v. Fripp Co. (SC 9:00-cv-02579 filed 08/18/2000).

Contract action for payment of a $4,500,000 commission on facilitating the sale of a golf course business. The court dismissed the action without prejudice as settled, retaining jurisdiction for 60 days to enforce the settlement agreement. Near the end of that 60-day period plaintiff filed a motion to enforce the agreement, attaching a

sealed copy of the agreement. Defendants apparently missed the first settlement payment of $100,000 and raised objections concerning drafts of the settlement documents. Court documents indicate that other material terms of the settlement agreement concern stock certificates and a golf course. Seven months after the motion to enforce the court dismissed the case with prejudice as fully resolved.

Fanning v. Columbia Housing Authority (SC 3:00-cv-02833 filed 09/12/2000).

Housing action for disability discrimination. Plaintiff alleged that she was wrongfully denied public housing on the incorrect ground that she could not live without assistance. The court dismissed the action without prejudice as settled on February 6, 2001, retaining jurisdiction for 30 days to enforce the settlement. On March 20 the court dismissed the action as settled with prejudice, ordering "these documents" sealed. On April 12 the court again dismissed the action with prejudice.

Williams v. Ford Motor Co. (SC 2:00-cv-03398 filed 10/26/2000).

Motor vehicle product liability action for wrongful death resulting from a Ford Aerostar van's rolling over. One plaintiff – who was not involved in the accident – represented himself as well as the estates of his late wife and his late 12-year-old daughter, who were killed. The other plaintiff was a 17-year-old son, who was injured. The court dismissed the action as settled without prejudice, retaining jurisdiction for 60 days to enforce the settlement. One month later plaintiffs moved to reopen the case so that the court could approve the settlement agreement with the minor plaintiff. The court approved the agreement . The amount of the settlement and plaintiffs' attorneys' contingency fee were sealed, but unsealed records show that 59% of the settlement went to the mother's claim, 40% went to the daughter's claim, and 1% went to the son's claim.

White v. Daimler Chrysler Corp. (SC 2:00-cv-03803 filed 12/05/2000).

Motor vehicle product liability action alleging that defective designs of the roof and seatbelts of a Jeep Grand Cherokee caused the death of the driver and two passengers, and the inuries of two additional passengers, in a roll-over caused by another vehicle. The plaintiffs representing estates and a minor filed a sealed petition,

which was granted, along with a sealed order approving a settlement. The court dismissed the action as settled without prejudice, retaining jurisdiction for 60 days to enforce the settlement agreement. Three months later the court granted a motion under seal.

VIRGINIA

No relevant state statute or rule.

Eastern District of Virginia

No relevant local rule. Practices vary among the divisions – in Alexandria a document can be sealed by handwriting the word "sealed" on the document, but in Richmond a motion to seal is required. The district's rules committee will consider a proposed uniform rule this spring.

Statistics: 11,456 cases searched; 234 cases (2.0%) had the word "seal" in their docket sheets; 43 complete docket sheets (0.38%) were reviewed; actual documents were examined for 38 cases (0.33%).

Western District of Virginia

A standing order "governs the unsealing of documents," but a presiding judge may make exceptions. Sealing of a document generally may be considered "only upon written motion." W.D. Va. L.R. XIII.A. Documents generally "are to be unsealed within thirty (30) days from the date of the order to seal." *Id.*

Statistics: 2,602 cases searched; 73 cases (2.8%) had the word "seal" in their docket sheets; 31 complete docket sheets (1.2%) were reviewed; actual documents were examined for 23 cases (0.88%); 20 cases (0.77%) appear to have sealed settlement agreements.[9]

Cases with Sealed Settlement Agreements

Thompson v. Town of Front Royal (VA-W 5:98-cv-00083 filed 11/04/1998); *Blackman v. Town of Front Royal* (VA-W 5:99-cv-00017 filed 03/19/1999).

Employment race discrimination actions by a public works laborer and a public works carpenter who alleged overt and severe racism by the Director of Public Works and another supervisor. Parties agreed to a settlement at a settlement conference before a magistrate

[9] These include a pair of companion cases, a pair of consolidated cases, and a trio of consolidated cases.

judge, who filed the terms of settlement under seal for review by the district judge, who in turn dismissed the action as settled.

Spanky's LLC v. Travelers Commercial Insurance Co. (VA-W 7:99-cv-00095 filed 02/11/1999), *consolidated with Spanky's of Virginia LLC v. Travelers Commercial Insurance Co.* (VA-W 7:99-cv-00096 filed 02/11/1999), *and Macher v. Travelers Commercial Insurance Co.* (VA-W 7:99-cv-00097 filed 02/11/1999).

Insurance action for a pattern of unreasonable practices by an adjuster. After mediation by a magistrate judge, a sealed memorandum of settlement was filed and the case was dismissed.

Rogers v. Pendleton (VA-W 7:99-cv-00164 filed 03/16/1999).

Civil rights action against two police officers for unlawful search and seizure when officers responded to a noise complaint of plaintiff's party. A sealed document was filed the same day as a stipulation of dismissal.

Carter Machinery Co. v. Time Collection Solutions (VA-W 7:99-cv-00255 filed 04/15/1999).

Contract and fraud action for a faulty payroll system. Defendant counterclaimed for unpaid bills. A memorandum of settlement was filed under seal and the case was dismissed four-and-a-half months later. Four months after that parties were ordered to remove sealed materials.

Dean v. Crescent Mortgage Corp. (VA-W 3:00-cv-00035 filed 04/19/2000).

Truth in lending action for defendant's refusal to let plaintiff rescind a $400,000 loan secured by plaintiff's home. After a settlement conference before a magistrate judge a sealed settlement agreement was filed.

Green v. Ford Motor Co. (VA-W 3:00-cv-00049 filed 06/01/2000), *consolidated with Carey v. Ford Motor Co.* (VA-W 3:00-cv-00050 filed 06/01/2000).

Consolidated motor vehicle product liability actions against Ford and U-Haul for the wrongful death of the driver of a U-Haul truck and a passenger when the truck burst into flames – allegedly because of a design defect – in a roll-over accident apparently caused by the

driver's falling asleep at the wheel. Ford cross-claimed against U-Haul for destroying the damaged truck without letting Ford inspect it. The parties reached a confidential settlement agreement, which the court had to approve because Virginia law requires court approval of wrongful death settlements. (An action by an additional passenger who survived also was consolidated, but approval of the settlement in that case apparently was not necessary.) Several sealed documents subsequently were filed.

Longwall-Associates Inc. v. Wolfgang Preinfalk GmbH (VA-W 1:00-cv-00086 filed 06/23/2000).

Contract product liability action against German manufacturer of mining equipment. Defendant's North American distributor alleged that gearboxes sold to a third party were defective. Defendant counterclaimed for 767,520.96 DM and $155,312 US in unpaid bills, plus additional damages. Four days after the court denied defendant's motion for partial summary judgment on two of plaintiff's five claims, a sealed document was filed and the case was closed as settled.

Lashea v. Ringwood (VA-W 7:00-cv-00556 filed 07/12/2000).

Prisoner petition against a prison nurse challenging the quality of medical care for appendicitis. The case settled and on the same day that a stipulation of dismissal was filed a sealed document was filed.

Village Lane Rentals LLC v. Capital Financial Group (VA-W 5:00-cv-00061 filed 07/13/2000).

Securities action by investors in a Texas apartment complex for false and misleading statements about the condition, occupancy rate, and profits of the complex. On the eve of trial an unsuccessful settlement conference was held in the morning and a sealed settlement conference was held in the afternoon. Approximately three weeks later a stipulated dismissal was filed and a sealed document was filed a week-and-a-half after that. This sealed document likely contained terms of the settlement agreement.

Hale v. Elcom of Virginia Inc. (VA-W 3:00-cv-00085 filed 09/28/2000).

Class action under the Fair Labor Standards Act against the CBS television affiliate in Richmond for denial of overtime compensation to television announcers. The parties settled and filed their settlement

agreement under seal for the court's approval pursuant to the court's order "and applicable law." The dismissal order disclosed that one provision of the settlement agreement was that plaintiff's counsel not represent "similarly-situated individuals in future litigation against the defendants."

Advance Stores Co. v. Exide Corp. (VA-W 7:00-cv-00853 filed 11/03/2000).

Breach of contract action by an auto parts retailer against a motor vehicle battery wholesaler. The case was litigated under a protective order with many sealed documents filed. The action was dismissed as settled the same day that a sealed settlement agreement was filed. Three sealed documents were filed three months later, and then an unsealed response to defendant's motion to enforce the agreement was filed. Six sealed documents of renewed litigation followed two to three months later with the matter ultimately dismissed again as settled.

Ebelt v. Dotson (VA-W 4:01-cv-00025 filed 05/04/2001).

Personal property damage action against a car dealer for odometer fraud. The parties filed a sealed document one day, and a sealed motion to dismiss the next day. On the third day the court dismissed the action as settled.

Comsonics Inc. v. TVC Communications Inc. (VA-W 5:01-cv-00053 filed 06/20/2001).

Patent infringement case concerning a portable sampling spectrum analyzer. A sealed settlement and licensing agreement was filed under seal and the case dismissed as settled.

American Red Cross v. Central Virginia Safety Concepts LLC (VA-W 3:01-cv-00068 filed 06/22/2001).

Contract action against former employees who started a competing health training business for improper use of confidential business information. A consent order of dismissal ordered defendants to refrain from soliciting new business from parties on a sealed list.

Smith v. Goodyear Tire & Rubber Co. (VA-W 4:01-cv-00041 filed 07/24/2001).

Employment discrimination action by a quality inspector at a tire plant against a supervisor for sexist harassment and against their employer for failure to stop it. After the case was referred to a magistrate judge for mediation two sealed documents and a sealed motion to dismiss were filed, followed by an order to dismiss the action as settled.

Epperly v. Southstar Corp. (VA-W 7:01-cv-00654 filed 08/27/2001).

Employment action by a person with epilepsy for wrongful failure to rehire because of disability. A memorandum of settlement was filed under seal and the case was dismissed.

WASHINGTON

State court documents may be sealed by motion and hearing. Wash. Ct. R. 15(c)(2(B). Documents may "be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof of compelling circumstances, or pursuant to" discovery rules. Id. R. 15(d)(2).

Eastern District of Washington

No relevant local rule.

Statistics: 962 cases searched; 58 cases (6.0%) had the word "seal" in their docket sheets; 2 complete docket sheets (0.21%) were reviewed; actual documents were examined for 2 cases (0.21%); 2 cases have sealed settlement agreements (0.21%).

Cases with Sealed Settlement Agreements

United States v. Westinghouse Electronics (WA-E 2:96-cs-00171 filed 03/19/1996).

Qui tam action under the False Claims Act for fraudulently billing for workers' fringe benefits. A sealed settlement agreement was filed.

Lohr v. Komatsu Electronic (WA-E 2:00-cs-00225 filed 06/29/2000).

Personal injury case in which two employees were seriously injured and one was killed when a pressure line exploded. Three minor plaintiffs in the case had guardians ad litem appointed as required by Washington statute to recommend to the court whether

their claims should be settled and the allocation of any proposed settlement funds. The court sealed five documents filed during the previous 30 days and ordered that "counsel shall file all further pleadings concerning settlement of this matter under seal." A stipulation order dismissing the case gives no additional information.

Western District of Washington

Federal local rules.

Statistics: 4,657 cases searched; 557 cases (12%) had the word "seal" in their docket sheets.

DISCOVERY SUBCOMMITTEE REPORT
ON ELECTRONIC DISCOVERY

To: Advisory Committee on Civil Rules
From: Myles Lynk and Rick Marcus
Date: April 14, 2003
Re: Proposal for effort to draft possible rule changes to address the problems of electronic discovery

This memorandum introduces the Discovery Subcommittee's proposal that it undertake to draft possible amendments to address seven issues raised by discovery of digital data, and identifies some of the concerns associated with those issues.

I. Initial introduction of these issues

In 1996, when the Advisory Committee launched its Discovery Project and the Discovery Subcommittee was first appointed, the Subcommittee undertook to determine which issues might warrant rule changes. One method of evaluating this question was to convene conferences of lawyers and learn their views on which changes might prove useful. A mini-conference was therefore held in San Francisco in January, 1997, and a full Committee two-day conference followed at Boston College in September, 1997. These and related activities produced a long list of possible changes that were considered by the full Committee at its October, 1997, meeting, leading to instructions to the Discovery Subcommittee to attempt to draft actual amendment proposals in a number of specified areas. Some of those drafting efforts did not bear fruit, but the overall effort led to the 2000 amendments to the discovery rules.

One topic arose repeatedly during the various interactions with the bar in 1997 that had not been raised before -- problems with discovery of electronically-stored, or digital, information. Repeatedly, lawyers told the Committee that this was an area that urgently needed attention, and that the difficulties presented by

this form of discovery could, in some cases, dwarf the problems with hard-copy discovery on which the Committee had focused in light of previous episodes of rule amendment.

It was thought impossible to give sufficient attention to this new subject during the 1997-99 period for a variety of reasons. First, the subject was new and the dimensions of the problems, if any, were not clear. Second, it was not clear whether these discovery problems were so distinctive as to justify special treatment in the rules. Third, there were few, if any, models for responding by rule to these issues. Fourth, it seemed that the terrain was constantly shifting, and that a rule amendment might be overtaken by technological or other developments. Accordingly no effort was made to include rule change proposals about this topic in the package of amendments ultimately adopted in 2000.

II. Subcommittee's study of problem in 2000

The frequent expressions of concern about digital discovery did not abate, and the Subcommittee began to attempt to gain a fuller appreciation of the nature of the issues raised and the range of possible solutions in 2000. David Levi and Rick Marcus attended a meeting of the ABA Section of Litigation in January, 2000, which included an open-mike session on electronic discovery. In March, 2000, the Subcommittee hosted a mini-conference in San Francisco devoted to initial evaluation of the issues, and in October, 2000, it held another mini-conference, in Brooklyn, to give further consideration to the issues and, specifically, to consider the possibility of beginning work on amendments in a number of areas to respond to these concerns.

The returns were mixed. Although there were strong assertions that the problems urgently required attention, there

was also considerable uneasiness about using the rule process to respond to these issues. After these conferences, materials about these questions were circulated to the full Committee. Largely as a consequence of the mixed response, the Subcommittee did not proceed then to attempt to frame possible amendments. Instead, the topic was kept on the Subcommittee's calendar in order to monitor developments.

One set of developments was the emergence in a few places of rules or recommended practices to deal with this set of issues. Texas adopted a civil rule specifically keyed to discovery of electronically-stored materials. See Tex. R. Civ. P. 196.4. At least three district courts adopted local rules addressing this form of discovery. See E. & W. Dist. Ark. L.R. 26.1(4); D. Wyo. L.R. 26.1(d)(3)(B). And the ABA adopted Discovery Standards that, in part, addressed the issues raised by this form of discovery. See ABA Discovery Standard 29. Copies of these various provisions are attached to this memorandum. In addition, we understand that the District of New Jersey has a local rule under consideration, but the fate of that possible amendment effort is not currently know.

Over time, a body of caselaw began to appear, dealing with these questions on an ad hoc basis under the current rules. [1]

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[1] See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. Rules Serv. 3d 168 (E.D. La. 2002); Rowe Ent. v. William Morris Agency, 205 F.R.d. 421 (S.D.N.Y. 2002); In re Bristol-Myers Squibb Securities Litigation, 205 F.R.D. 437 (D.N.J. 2002); Simon Property Group L.P. v. MySimon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000); United States ex rel. Koch v. Koch Indus., Inc. 197 F.R.D. 488 (N.D. Okla. 1999). Please note that these cases are cited as illustrative, and not as embodying rules that the Subcommittee might urge be adopted by amendment.

III. More recent review of these issues

The Subcommittee's activities over the past year have been prompted by a number of developments.

(1) Frequent CLE events and articles: Concern in the bar about this set of issues has continued. One illustration of this concern is the frequency of continuing legal education and similar events that focus on this topic. The Federal Judicial Center has begun monitoring these events, and has logged nearly 250 of them since January 1, 2001 -- more than two per week. The FJC has set up a database with information on these CLE events that can be accessed by Committee members using a protocol that can be obtained from Ken Withers of the FJC. Articles about the questions presented -- often focused on the difficulty of handling these new problems -- have also frequently appeared in the legal press.[2] At the same time, various developments have emphasized the importance of access to electronically stored information to illuminate issues in litigation. Repeatedly, for example, important investigations concerning possible misconduct in the securities or other industries have depended on e-mail and other electronically stored material.[3]

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[2] See, e.g., Ballard, Digital Headache: E-Discovery Costs Soar Into the Millions, and Litigants Seek Guidance, Nat. L.J., Feb. 10, 2003, at A18; Nimsger, Digging for E-Data, Trial Magazine, Jan. 2003, at 56; Mariano, Missing Links: Lawyers Discover an Internet Time Machine that Resurrects Old Web Pages, Calif. Lawyer, Jan. 2003, at 27; Krause, Discovery Channels: Electronic Documents Are Vital to Building a Case, So Don't Get Papered Over, ABAJ, July, 2002, at 49; Noble, Dangers in E-Discovery, Legal Times, June 3, 2002, at 35. These are cited as illustrations, not necessarily as sources of guidance for the Committee.

[3] For illustrations, see Cassidy, The Investigation: How Eliot Spitzer Humbled Wall Street, New Yorker, April 7, 2003, at 54, 57 (reporting that "[s]ince 2001, the Securities and Exchange Commission, Wall Street's primary overseer, has required firms to save all their e-mails for at least three years, in case

(2) The Sedona Conference: In addition, in October, 2002, the Sedona Conference, in Arizona, devoted its session to consideration of issues presented by discovery of electronically-stored materials. This initial examination led to further analysis of the questions presented and produced the publication in March, 2003, of a draft of The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, 40-page document. This document is now in a period of "peer review" that is to be completed by June, 2003, and lead to ultimate publication of a revised set of principles.

(3) The Discovery Subcommittee's invitation for comment: Prompted by these ongoing concerns, the Discovery Subcommittee returned to consideration of the issues presented by electronic discovery in early 2002. In mid-2002, it was decided that an effort should be made to invite input from the bar about the nature of the issues and the utility of various possible solutions. As reported during the Committee's October, 2002, meeting, a letter and companion memorandum were mailed to about 250 lawyers identified as having a prior involvement in addressing these issues in September, 2002, inviting responses by mid-December, 2002.

About a dozen responses were received.[4] A high percentage

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regulators want to inspect them"); Smith, Wall Street Has E-Mail Problems, Wall St. J., Aug. 2, 2002, at C-1; Craig, When Brokers Erase the Past, Wall St. J., May 2, 2002, at C-1; Gasperino, Spitzer Staff Gathers Salomon E-Mails Criticizing Grubman, Wall St. J., July 16, 2002, at C-1; McGeehan, Wall Street Banks May be fined for Discarding E-Mail Traffic, New York Times, Aug. 2, 2002, at C-1; Smith, E-Mails Link CSFB Research With Banking, Wall St. J., Nov. 27, 2002, at C-1.

[4] The reason for saying that "about a dozen" were received is that a total of 12 responses were logged, but it is not clear that all of them were actually directed to the questions raised by the Subcommittee's invitation to comment. One, for example, directed attention to the sender's web page, which contains

of the responses were from organizations. On the basic question whether difficulties with electronic discovery warrant current rulemaking action, there was a considerable division that seemed somewhat to be along plaintiff/defendant lines. Thus, organizations associated with the plaintiff side (the Assoc. of Trial Lawyers of America, the National Assoc. of Consumer Advocates, the Trial Lawyers for Public Justice, and the San Francisco Trial Lawyers Assoc.) urged that rule changes were not warranted. Organizations associated with the defense side (the Defense Research Institute and Lawyers for Civil Justice) argued that rule changes are needed, and that the developing caselaw does not provide sufficient guidance. The Federal Bar Assoc., meanwhile, urged that more local rules be developed to address these problems.

(4) The 2003 ABA Section of Litigation Leadership Meeting: In addition, David Levi and Ed Cooper attended the January, 2003, meeting of the ABA Section of Litigation leadership and participated in an open mike session like the one that occurred in January, 2000. A variety of issues were raised and examined, such as expanding the Rule 26(f) discovery-planning session to include consideration of this form of discovery, expanding initial disclosure under Rule 26(a)(1) to include some information about a party's electronic storage of data, revising the definition of document in Rule 34, developing a system for regulating and promoting preservation of data (perhaps by some sort of safe harbor for those who follow certain practices), addressing the form of production through discovery, and responding in the rules to the problem of privilege waiver.

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information about his set of aggressive proposals to address a host of discovery issues. Another transmitted two lengthy memoranda about related issues that the sender's law firm had drafted before receipt of our inquiry. Both these people were urged to submit responses more focused on the Subcommittee's concerns but did not do so.

IV. Current proposed mode of proceeding

Having reviewed the commentary received and considered other developments, the Discovery Subcommittee met by telephone conference to discuss how to proceed. It appeared that the nature of the responses thus far would neither compel nor preclude rulemaking in the area. The obviously distinctive features of this variety of discovery, and the widespread and continuing interest, showed that the topic warranted serious attention. Controversy and concern about this topic were ongoing and had not abated since the Subcommittee began to study the topic three years ago. And discussion of actual amendment possibilities could not be pursued much longer without undertaking the task of trying to devise actual rule language. With amendment proposals in hand, the Subcommittee (and the full Committee) could more realistically assess the desirability of pursuing certain goals through rule amendment.

Accordingly, the Subcommittee resolved that the most productive approach would be to focus on seven areas and attempt to devise rule language that would be helpful in those areas. This did not constitute a resolution also that rule changes should be made; that issue remains open. But it would be considerably more reasonable to consider that question after confronting the difficulties of devising concrete rule language. The Subcommittee therefore requests authorization from the full Committee to proceed to attempt to develop proposed rule language addressing in the following seven areas, on the understanding that this effort implies no commitment of the Subcommittee or the Committee actually to propose amendments along these lines.

(1) Including discussion of these issues in the early discovery planning -- Rule 26(f), Rule 16(b), and Form 35

Rule 26(f) requires that counsel confer before formal discovery commences and develop a discovery plan that is submitted to the judge before entry of the Rule 16(b) order. There seems to be widespread agreement that thoughtful attention at this early point to the likely needs of discovery of digital information can reduce or eliminate a number of problems that might otherwise arise later. As one of the Subcommittee reported, this "comes up in every case." Indeed, it was also suggested that including this sort of amendment in a package of amendments directed to e-discovery would be a "no brainer." Already a directive that this consideration occur as part of the discovery planning process has been included in the local rules of three districts (E. & W. Dist. Ark., and D. Wyo.). There may be case management practices in other districts that routinely call for consideration of these topics. Altogether this suggests that the time may have arrived for considering a national rule.

Such an amendment might serve to minimize problems related to several of the other areas on which the Subcommittee has focused. To some extent, it might be preferable to have the parties themselves devise solutions to these other problems -- the form of production, retention and preservation of digital material, and privilege waiver -- rather than prescribing solutions in the rules themselves. And even if the rules prescribe a default rule for such problems, the early planning event might be a good occasion for the parties to customize these directives for their case.

Thus, an amendment to Rule 26(f) (and possibly Form 35) could improve the handling of these problems. Additionally, an

amendment to Rule 16(b) adverting to inclusion of directives about these topics in the initial scheduling order might be useful.

(2) Expanding initial disclosure -- Rule 26(a)(1)

Either in addition to, or instead of, adding electronic discovery to the list of topics for consideration at the Rule 26(f) conference, expansion of Rule 26(a)(1) to require disclosure regarding each party's electronic data storage and communication systems might be productive. To some extent, exchange of this sort of information might be essential to meaningful discussion of the issues during the Rule 26(f) conference, but the timing for current Rule 26(a)(1) disclosure (after the Rule 26(f) conference) might not be suitable for that purpose.

More generally, early and fairly detailed disclosure of information of this sort might be beneficial whether or not there is a requirement in the rule that this topic be considered during the Rule 26(f) conference. To the extent it is desirably to encourage more precise discovery requests for digital information, for example, this sort of disclosure should serve a useful purpose in framing discovery.

In addition, early disclosure on these subjects might also serve a valuable purpose in forcing parties to think about what electronic material the possess early in the litigation. Repeatedly, cases arise in which the failure of a party to attend to its electronic information early in the litigation causes later problems about inappropriate destruction or discarding of data. Lawyers -- particularly outside lawyers -- may find it difficult to persuade clients to focus on these topics early in the litigation. Even officials of the client may not be fully

aware of what does and does not exist. There is at least one reported case in which an officer of a party assured outside counsel (who in turn so informed the court) that certain data no longer existed. Later, however, the deposition of the company's information technology head revealed that the data actually had existed when this representation to the court was made, but thereafter been erased. Avoiding this sort of contretemps would be desirable.

(3) Definition of document -- Rule 34

Since 1970, Rule 34 has stated that a document request may seek "data compilations from which information can be obtained." Rule 26(a)(1)(B) similarly refers to "data compilations." Although courts and parties have been managing to operate with this description, it could be improved. Both these rules might be revised to include a more modern and accurate definition of the various types of digital data that can be sought through discovery.[5] And it might be desirable to include some such expression in Rule 45 as well.

Subcommittee discussion identified a number of possible issues that could be addressed by such an effort to improve the definition of document with regard to electronic data. One point is that some view e-mail as a special category that should be handled in a distinctive way. Another is that deleted data constitute an important issue with digital data although no similar issue is found in the hard copy world. Embedded data -- electronic items created by software that do not appear on the printed page -- constitute another definitional perplexity unique to digital data. Some lawyers propose limiting the definition of

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[5] We might also take this opportunity to revisit the definition of "phonorecords" in Rule 34(a).

document to things created intentionally, thus excluding embedded data, which the user probably does not know is coming into existence. Yet another perplexity results from the growing importance of data collections that don't really have an existence in the traditional "document" sense. This issue also arises in relation to form of production. These "dynamic" databases constantly change and yield information only in response to specific queries or directives.[6]

There was consensus that efforts to draft a definition seemed worthwhile, but cautions that devising one will be difficult. One way might be trying to devise a new Rule 34.1 to deal with all aspects of e-discovery, but it is not clear that would be the way to go. Another way might be to focus on the "normal course of business" idea in the Texas Civil Procedure Rule 196.4, and to treat as documents within the rule those things accessible during the normal course of business. But that could raise difficulties should there be a strong reason for investing the effort to unearth items not accessed during the normal course of business.

(4) Form of production

As an alternative to directing the parties to discuss the form of production in their Rule 26(f) conference, or in addition

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[6] Rule 34 also authorizes requests for production of "things." That might be interpreted to cover discovery regarding whatever is on a hard drive or backup tape even if the electronic impulses stored on these media were not called documents. But Rule 34 could be interpreted to distinguish between documents and "things," such as the automobile airbag that allegedly malfunctioned, and to treat "things" that are relevant only because they contain some information we would describe as a document as within the definition of "document" rather than "thing."

to such a requirement, the rules might provide a "default" rule for the form of production.

We have frequently heard about disputes regarding the form of production of electronic material. Hard copies may leave out important data, and they are not searchable unless input into the discovering party's system. But electronic versions of data may be impossible to use without refined (and perhaps proprietary) software. Developing a "starting point" for form of production might, in the view of the Subcommittee, be a useful thing if possible. One might, for example, focus on whether TIFF or PDF or some other technique should be employed, although care would be necessary to avoid embedding a possibly transient technology in the rules. One concern would be whether the materials can be searched in the format in which they are produced. It might be possible to devise a default rule.

Another issue might be handling databases that really don't exist except in response to specific computing directives that produce outputs. On this subject, the goal may be to ensure a relatively specific discovery request. Similar concerns affect discovery of materials connected to computer-aided design. In some sorts of product liability litigation, this is central. And the various models used probably still exist, where with hard copies they would likely have been discarded. The problem with trying to deal with this in a rule is that "every case is different." Perhaps the best thing is to prod people to discuss these issues up front rather than trying to specify what to do with them.

The Subcommittee's consensus was to recommend trying to draft rule provisions on form of production, keeping in mind the various challenges mentioned above.

(5) Addressing the producing party's burden of retrieving, reviewing, and producing data it does not ordinarily access

The capacity to store electronic data dwarfs the capacity to store hard copy materials. Therefore, one could argue that, if the sole concern were storage space, there would never be a reason to discard any electronic data. It is clear that automatic backup systems routinely preserve large amounts of such data that is never intended to be used absent a catastrophic event. But backup systems are not likely to be organized in a way that facilitates locating materials on a specific topic, and the effort to review them may be very costly without yielding information of significant value. Similarly, "deleted" materials may be retrieved by forensic computer operations that can be quite costly. In addition, as software and other aspects of computer systems change, data that were once accessible no longer are (this is the problem of "legacy data").

Often delving into this hard-to-get data requires what are sometimes called "heroic efforts." This form of heroism can be very expensive.[7] And it may produce little or nothing of value to the case. At a general level, Rule 26(b)(2) addresses this

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[7] For example, in McPeek v. Ashcroft, 212 F.R.D. 33, 35 (D.D.C. 2003), the court rejected plaintiff's argument that the mere possibility that a search of backup tapes might yield relevant material was sufficient to justify the cost of the search. The court explained its views:

> The frustration of electronic discovery as it relates to backup tapes is that backup tapes collect information indiscriminately, regardless of topic. One, therefore, cannot reasonably predict that information is likely to be on a particular tape. This is unlike the more traditional type of discovery in which one can predict that certain information would be in a particular folder because the folders in a particular file drawer are arranged by subject matter or by author.

sort of concern by directing the court to limit or forbid discovery that if its cost is disproportionate to the likely value of information that would be generated. But the specialized aspects of digital discovery, and the recurrent problems it can cause, may warrant special provision for these issues in the rules.

Already, the Texas rule suggests one possible approach -- looking to whether electronic data "is reasonably available to the responding party in its ordinary course of business." See Texas R. Civ. P. 196.4. ABA Discovery Standard 29(b)(iii) says that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing requested information." Devising a suitable provision for the Civil Rules would be a challenge. But given the great importance of this question, the Subcommittee concluded by consensus that the effort of trying to do so was justified.

(6) Addressing inadvertent privilege waiver

The difficulties presented by inadvertent waiver of privileges were raised during the 1997 review of discovery issues in regard to hard copy discovery. The Subcommittee has from time to time considered the privilege waiver issues raised by hard copy discovery, and developed two alternative drafts of a possible new provision for Rule 34(b) that would authorize the court to enter an order based on the parties' stipulation that would insulate mistaken production against the waiver consequence. That topic was last discussed by the full Committee during its October 1999 meeting. One concern on this subject is that 28 U.S.C. § 2074(b)[8] limits the scope of rulemaking in the

[8] 28 U.S.C. § 2074(b) says: "Any such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing, or modifying an evidentiary privilege shall have no force or effect

area of privileges. At the same time, some rulemaking that affects the consequences of discovery on privilege protection, such as Rule 26(b)(5), would be proper.

Whether or not the privilege waiver problems for electronic data are qualitatively different or more important than the issues raised by hard copy discovery is not clear. Perhaps the time has come for addressing privilege waiver problems for all types of discovery, not just this one. And it is similarly not clear whether the sort of solution that the Committee has previously discussed for hard copy discovery -- allowing the court to order that a "quick look" at produced material would not work a waiver -- would also work for electronic data. But the topic arises with such frequency in discussions of problems caused by digital discovery that the Subcommittee concluded that it should try to address it.

Texas Rule 193.3(d) (included in Appendix A) offers a possible model of a an alternative approach, but there may be difficulties pursuing such an approach in a Civil Rule due to 28 U.S.C. § 2074(b). If so, it might be desirable enough to request congressional action to accomplish the change. The goal would be to ease the burden and delay of discovery review of documents and electronic data before production.

In the alternative, or additionally, there could be a provision added to Rule 26(f) calling for the parties to discuss this problem at the outset of the litigation, and perhaps to Rule 16(b) authorizing the court to act to relieve these problems from the outset.

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unless approved by Act of Congress."

Given the recurring importance of these issues, and recognizing the difficulty of doing so, the Subcommittee concluded that there was a justification for attempting to draft rule provisions in this area.

(7) Adopting a "safe harbor" for preservation of electronic data

The concept behind this proposal for drafting is to deal with two kinds of concerns in a creative way. One concern is that all to often important data seem to have been deleted or lost by the time that they are sought for litigation purposes. This is a concern for parties seeking access to their opponents' data, frequently plaintiffs. The other concern repeatedly emphasized comes from entities from which data are sought through discovery (usually defendants) that say they can't foresee what methods of data preservation will be deemed sufficient by a court.

The goal, then, is to devise a rule provision that would adopt a preservation protocol and thus provide assurances with regard to both sorts of concerns. It is not clear where such a provision should be placed -- perhaps in Rule 37, as a limitation on sanctions against a party that has adhered to the prescribed protocol -- and the contents of the protocol would obviously need to be considered with great care. Despite the challenges, the Subcommittee concluded that an attempt to draft rule language was justified. As one member put it during the conference call, "You hear about this at every turn."

Goals of the drafting effort

It is important to emphasize again that the Subcommittee is not certain that promising rule language can be drafted to

accomplish all (or most of) the objectives listed above. It is aware that there is disagreement in the bar about the need for rule changes at all. There is no unanimity in favor of specific kinds of changes. Accordingly, the Subcommittee is proceeding with caution and is not committed to proposing any specific rule change.

The goal, however, is to attempt to determine whether a package of rule changes can be devised that would improve the handling of this sort of discovery and also offer beneficial features to the various litigation constituencies affected. Should the initial drafting effort be successful, the Subcommittee expects to present proposed rule language for discussion at the Committee's Fall meeting. The full Committee will then be able to review the Subcommittee's work product and consider whether to proceed with development of amendment proposals. If the Committee then feels that the work should proceed, proposed amendments could be presented during the Committee's Spring 2004 meeting. After more than three years of considering these issues, the Subcommittee believes that the time for more concrete action has arrived.

Appendices

Appendix A: Texas Rules of Civil Procedure 193.3(d) and 196.4
Appendix B: E.D. Ark. Local Rule 26.1
Appendix C: D. Wyo. Local Rule 26.1
Appendix D: ABA Civil Discovery Standard 29

APPENDIX A

Texas Rules of Civil Procedure

Rule 193.3(d) Privilege not waived by production.

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if – within ten days or a shorter time ordered by the Court, after the producing party actually discovers that such production was made – the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

[...]

Notes and Comments
Comments to 1999 change:

[...]

4. Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce the costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. [...] The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake.

(from 61 Texas Bar Journal 1140, 1151-1153 (December 1999))

[...]

Rule 196.4 Electronic or Magnetic Data.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply

with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

[...]

Notes and Comments
Comments to 1999 change:

[...]

3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably useable form.

(from 61 Texas Bar Journal 1140, 1158-1159 (December 1999))

APPENDIX B

United States District Court for the Eastern District of Arkansas

LOCAL RULE 26.1
OUTLINE FOR FED.R.CIV.P. 26(f) REPORT

The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:

(1) Any changes in timing, form, or requirements of mandatory disclosures under Fed.R.Civ.P. 26 (a).

(2) Date when mandatory disclosures were or will be made.

(3) Subjects on which discovery may be needed.

(4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:

> (a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;
>
> (b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;
>
> (c) the format and media agreed to by the parties for the production of such Data as well as agreed procedures for such production;
>
> (d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;
>
> (e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.

(5) Date by which discovery should be completed.

(6) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure.

(7) Any Orders, e.g. protective orders, which should be entered.

(8) Any objections to initial disclosures on the ground that mandatory disclosures are not appropriate in the circumstances of the action.

(9) Any objections to the proposed trial date.

(10) Proposed deadline for joining other parties and amending the pleadings.

(11) Proposed deadline for completing discovery. (Note: In the typical case, the deadline for completing discovery should be no later than sixty (60) days before trial.)

(12) Proposed deadline for filing motions other than motions for class certification. (Note: In the typical case, the deadline for filing motions should be no later than sixty (60) days before trial.)

(13) Class certification: In the case of a class action complaint, the proposed deadline for the parties to file a motion for class certification. (Note: In the typical case, the deadline for filing motions for class certification should be no later than ninety (90) days after the Fed.R.Civ.P. 26.(f) conference.)

Effective December 1, 2000.
Amended and effective May 1, 2002.

APPENDIX C

United States District Court
District of Wyoming

LOCAL RULE 26.1
DISCOVERY (excerpts)

(a) Applicability. This Rule is applicable to all cases filed in this District except where modified by Court order.

(b) Stay of Discovery. Formal discovery, including oral depositions, service of interrogatories, requests for production of documents and things, and requests for admissions, shall not commence until the parties have complied with Fed.R.Civ.P. 26(a)(1).

(c) Initial Disclosure (Self-Executing Routine Discovery Exchange). It is the policy of this District that discovery shall be open, full and complete within the parameters of the Federal Rules of Civil Procedure.

(1) Initial Disclosures. [Excerpted from Fed.R.Civ.P. 26(a)(1)(A)-(O)]. Except in categories of proceedings specified in Fed.R.Civ.P. 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. In cases where it is impractical due to the volume or nature of the documents to provide such copies, parties shall provide a complete description by category and location in lieu thereof;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part

or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

d) Rule 26(f) Meeting of Counsel; Initial Disclosure Exchange. The Court will set an initial pretrial conference no sooner than thirty-five (35) days after the last pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(1) Counsel must meet and confer in person or by telephone in accordance with Fed.R.Civ.P.26(f) no later than twenty (20) days after the last pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court. (See Appendix D)

(2) Counsel on behalf of the parties must exchange the initial disclosures (self-executing routine discovery) pursuant to Local Rule 26.1(c)(1) above, no later than thirty (30) days after the last pleading filed pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(3) Prior to a Fed.R.Civ.P. 26(f) conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in initial discovery (self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.

(A) Duty to Notify. A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than the Fed.R.Civ.P. 26(f) conference of that fact and identify as clearly as possible the categories of information which may be sought.

(B) Duty to Meet and Confer. The parties shall meet and confer regarding the following matters during the Fed.R.Civ.P. 26(f) conference:

(i) Computer-based information (in general). Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoilation;

(ii) E-mail information. Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged e-mail messages.

(iii) Deleted information. Counsel shall confer and attempt to agree whether or not restoration of deleted information may be necessary, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration; and

(iv) Back-up data. Counsel shall attempt to agree whether or not back-up data may be necessary, the extent to which back-up data is needed and who will bear the cost of obtaining back-up data.

(4) Counsel may either submit a written report or report orally on their discovery plan at the initial pretrial conference.

[...]

[Adopted November 30, 1996; amended February 10, 1998; amended effective August 20, 2001.]

[...]

APPENDIX D.
RULE 26(f) CONFERENCE CHECKLIST

Counsel shall be fully prepared to discuss in detail all aspects of discovery during the mandatory Rule 26(f) Conference. The subject matters to be discussed during the Rule 26(f) Conference shall include, but are not limited to, the following:

- Jurisdiction;
- Service of process;
- Initial disclosures (self-executing routine discovery) pursuant to L.R. 26.1(c);
- Formal written discovery--interrogatories, requests for production, requests for admission;
- Computer data discovery pursuant to L.R. 26.1(d)(3);
- Identity and number of potential fact depositions;
- Identity and number of potential trial depositions;
- Location of depositions, deposition schedules, deposition costs;
- Identify the number and types of expert witnesses to be called to present testimony during trial (including the identity of treating medical/psychological doctors);
- Discovery issues and potential disputes;
- Protective orders;
- Potential dispositive motions;

- Settlement possibilities and a settlement discussion schedule.

[Effective August 20, 2001.]

APPENDIX D

American Bar Association Section of Litigation
Civil Discovery Standards
(August 1999)

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

ii. Unless otherwise stated in a request, a request for "documents" should be construed as also asking for information contained or stored in an electronic medium or format.

iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

b. Discovery of Electronic Information.

i. A party may ask for the production of electronic information in hard copy, in electronic form or in both forms. A party may also ask for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (a) whether and when electronic mail was sent or opened by its recipient(s) or *(b)* whether and when information was created and/or edited. A party also may request the software necessary to retrieve, read or interpret electronic information.

ii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, the court should consider such factors as (a) the burden and expense of the discovery; *(b)* the need for the discovery; *(c)* the complexity of the case; *(d)* the need to protect the attorney-client or attorney work product privilege; *(e)* whether

the information or the software needed to access it is proprietary or constitutes confidential business information; *(t)* the breadth of the discovery request; and (g) the resources of each party. In complex cases and/or ones involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues

iii. The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

iv. Where the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:

(a) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;

(b) the relative expense and burden on each side of producing it;

(c) the relative benefit to the parties of producing it; and

(d) whether the responding party has any special or customized system for storing or retrieving the information.

v. The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.

Comment

Subsection (a). Fed. R. Civ. P. 34(a) and various state rules, e.g., Va. Sup. Ct. R. 4:9(a), provide that the term "documents" includes "data compilations from which information can be obtained [or] translated, if necessary, by the respondent through detection devices into reasonably usable form." See also Fed. R. Civ. P. 34(a), 1970 Advisory Committee Note. The 1993 amendment to Fed. R. Civ. P. 26 also makes "data compilations" subject to mandatory disclosure. Tex. R. Civ. P. 196.4 also calls for the production of data or information in electronic or magnetic form, but only if it is specifically requested.

This Standard makes it clear that (a) information contained or stored in an electronic medium or format should be produced pursuant to a "document" request and (b) a party

has the same duty when it is aware of potential or pending litigation to take reasonable steps to preserve potentially relevant electronic information as it does to preserve "hard" copies of documents.

Subsection (a)(iii). Attempting to retrieve previously deleted electronic information can be time-consuming and costly. Just as a party ordinarily has no duty to create documents, or to re-create or retrieve previously discarded ones, to respond to a document request, it should not have to go to the time and expense to resurrect or restore electronic information that was deleted in the ordinary course of business. E.g., Tex. R. Civ. P. 196.4 (duty to produce applies only to electronic data that is "reasonably available to the responding party in its ordinary course of business"); Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996) (plaintiff may search defendant's computer for purged information only if the plaintiff shows the likelihood of retrieving it and there is no less intrusive way to obtain it; any search must have defined parameters of time and scope and ensure that the defendant's information remains confidential and its computer and databases are not harmed).

Subsection (b). The Standard contemplates that whether and, if so, how much electronic information is subject to discovery, along with the allocation of the cost of producing it, depends on the factors specific to each case. See, e.g., Tex. R. Civ. P. 196.4 (if objected to, no out-of-the-ordinary efforts to retrieve electronic information are required unless the court orders them; if it does so, the requesting party must pay for them); In re Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, MDL 997, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) (weighing whether to compel a company to retrieve and produce electronic mail messages at its expense); Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ 2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (neither the fact that material was available in hard copy nor the need for the responding party to create the computerized data necessarily precluded production of the information in computerized form); PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 257 (D.D.C. 1991) (requiring production of computerized records where no program existed to obtain the requested information because the response would require "little effort" and "modest additional expenditures"); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (requiring production of information on computer-readable magnetic tape in addition to hard copy; the discovering parties were required to pay for making the tapes); In re Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 634, 635-36 (E.D. Mich. 1989) (party required to produce simulation data on computer-readable tape in addition to hard copy); Armstrong v. Executive Office of the President, I F.3d 1274, 1280 (D.C. Cir. 1993) (printouts were not acceptable substitute because they did not reveal various information such as directories, distribution lists, acknowledgments of receipts and similar materials); see also Federal Judicial Center, Manual for Complex Litigation, 3d § 21.446 (1995).

An issue arises when responsive information required to be produced is part of a much larger database and no software exists to retrieve only the responsive information. A large database, e.g., the transaction history for every customer of a business, should not be made available as if it was a single "document." The parties should confer in this

situation and attempt to agree on what will be produced, the format and who will bear the cost of extracting the information.

Rule 45. Subpoena

(a) FORM; ISSUANCE

* * *

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

Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner in which a deposition will be recorded. The 1991 amendment to Rule 45, among other things, amplified the protections for nonparty witnesses. See Rule 45(c). At that time, however, the only method for recording a deposition, absent a stipulation or court order, was by stenographic recording.

In 1993, Rule 30(b) was amended to permit use of other means of recording. Rule 30(b)(2) thus directs that the party noticing a deposition state in the notice the manner in which the testimony will be recorded, and Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. Since a Rule 45 subpoena would normally be used for witnesses not identified with a party, and the original notice would ordinarily alert witnesses identified with a party of the manner of recording, ordinarily the witness would know in advance what means of recording would be employed, and any party intending to use an additional means would have to notify the witness of that intention. For nonparty witnesses subpoenaed under Rule 45, however, there has been no requirement that the party noticing the deposition also notify the witness of the manner of recording. This amendment adds that requirement.

A subpoenaed witness does not have a right to refuse to

proceed with a deposition recorded as allowed by Rule 30(b) due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) before the deposition with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Accordingly, this amendment ensures that the witness will know in advance the manner of recording and eliminates the risk of such complication.

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there is no ambiguity.

Reporter's Note

This proposal responds to a suggestion from Magistrate Judge Janice Stewart (D. Ore.) that either Rule 30 or Rule 45 be amended to require notice to the deponent of the intended manner of recording. (99-CV-J) The stimulus behind Magistrate Judge Stewart's suggestion was a case in which a nonparty witness refused to proceed with a deposition on discovering that it would be videotaped.

Such a refusal is not unprecedented. In Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985), a defamation suit by Gen. William Westmoreland, Richard Helms, former Director of the CIA and Ambassador to Viet Nam, refused to proceed with a deposition when he found out that CBS intended to videotape it. CBS sought to have Helms held in contempt. Noting the privacy interests of the witness, the district court concluded that the issue was "whether a non-party witness of some public prominence . . . can or should be compelled to permit his image at a pretrial deposition to be visually preserved, upon an essentially indestructible medium over which he exercises no right of control." Westmoreland v. CBS, Inc. 584 F.Supp. 1206 (D.C.D.C. 1984). It treated the contempt proceeding as, in effect, a request for a protective order, and the Court of Appeals later held that CBS should be sanctioned for pursuing the matter. A few other cases involve similar situations, even in situations not involving nonparty depositions. E.g., International Union, United Auto. Workers v. National Caucus of Labor Committees, 525 F.2d 323 (2d Cir. 1975) (suit had serious political overtones and there was a possibility the videotapes would be misused); Inhofe v. Wiseman, 772 P{.2d 389 (Okla. 1989) (state senator running for re-election had legitimate concern that videotape of deposition would be used to make commercials for his opponent in the upcoming campaign).

This possibility is recognized in the Committee Note to the 1993 amendment to Rule 30(b)(2), which says that "[o]bjections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule

26(c)." Nonetheless, such problems are quite rare, and the 2000 amendment to Rule 5(d), directing the discovery results be filed only when they are used in the action may make the concern even rarer. It would seem that the notice problem exists only in situations in which the witness is not affiliated with a party because a party-affiliated witness will learn the manner of recording from counsel for the party. And changing Rule 30 to require that the party noticing the deposition give notice directly to the witness even though the witness is identified with a party seemed to invite problems. Accordingly, the best solution seemed to be adding such a provision to Rule 45. In addition, the proposed Committee Note above tries to make it clear that the witness has no right unilaterally to refuse to go forward. All that is added is an assurance that the nonparty witness will have a chance to present any arguments that may exist to the court before the deposition begins.

This material is set out in two parts. Part I describes the origins of the proposal to adopt a new rule governing notice of constitutional challenges to a state or federal statute. The new rule would replace part of present Rule 24(c). Part II sets out a draft Rule 5.1 that has been developed in cooperation with the Department of Justice.

I The Origins

Civil Rule 24(c) and Appellate Rule 44 implement 28 U.S.C. § 2403:

> (a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *
>
> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) that took effect on December 1, 2002, provides:

> **(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding to which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> **(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This rule reflects § 2403, but makes some departures from its terms.

Judge Barbara B. Crabb, commenting on the 2002 amendment when it was proposed, added the suggestion that a similar rule should be added to the Civil Rules "to assist district courts in

remembering to make the requir[ed] notification." The comment apparently reflects the view that present Rule 24(c) does not provide an appropriate reminder, perhaps because of its relatively obscure location in the rule on intervention.

The Department of Justice, although not the originator of this project, has expressed the view that a new rule will be useful. The Department's experience has been that notice of constitutional challenges to federal statutes is not given to the Attorney General as often as should be. For whatever reason, the combination of § 2403 with Civil Rule 24(c) is not doing the job.

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, office, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. There is a plausible argument that these provisions should be relocated. They might be added to Civil Rule 5, which includes service requirements, or they might be established as a new Rule 5.1.

The differences between Appellate Rule 44 and Civil Rule 24(c) highlight the issues that might be addressed if revision is undertaken. Rule 44 imposes a more explicit duty on the party who raises the constitutional question. It transfers the notice requirement from "court" to "clerk." It adds an element found neither in § 2403 nor in Rule 24(c) — the duty of notice applies if the parties include an officer or employee who is not sued in an official capacity. It refers broadly to a "proceeding" rather than the "action" referred to in statute and Rule 24(c). It does not reflect the words that limit the statute to a challenge to an Act of Congress or state statute "affecting the public interest." Finally, Rule 44 seems to apply only if a party raises the constitutional question; both § 2403 and Rule 24(c) apply when constitutionality "is drawn in question," thus reaching a case in which the court raises the question.

The departures of Appellate Rule 44 from § 2403 raise the interesting question whether Rule 44 is intended to supersede the statute to the extent of the departures. Does it require the clerk to give notice without inquiring whether the challenged statute affects the public interest? Does it — as seems apparent — supersede the seeming statutory rule that notice (certification) is not required when an officer or employee is sued in an individual capacity? Would a Civil Rule modeled on Appellate Rule 44 have the same effects?

Because Rule 24(c) does most of the work, there is no urgent need to add this project to the agenda. But there is no particular reason to defer. The issues go far beyond mere style. These questions seem ripe for consideration when agenda time allows.

In working from Appellate Rule 44, attention should focus on the differences between district-court and appellate-court proceedings. The most specific difference is that Civil Rule 4(i)(2)(B) requires service on the United States when an officer or employee is sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The United States will have notice of the action, although it may not have notice of the constitutional challenge if it does not assume the burden of defense. It would be possible to draft the rule to dispense with notice and certification when a United States employee is sued in an individual capacity but not an official capacity. Remember that the statute requires notice only if "the United States or any agency, officer or employee thereof is not a party." A rule goes beyond the statute if it requires notice to the court — and certification by the court to the Attorney General — when an officer of the United States is sued in an individual capacity, whether or not the claim is related to official duties. There is room to dispense with the notice requirement if we wish. But it seems better to adhere to Appellate Rule 44. Reliance on Rule 4(i)(2)(B) alone may not ensure adequate or timely notice to the Attorney General.

It would be possible to adopt Appellate Rule 44 nearly verbatim, changing only the words that describe the court of appeals and the circuit clerk. The Department of Justice, however, believes that more complicated provisions are desirable for district-court proceedings. Appellate Rule 44 expands on the statute by requiring a party to give written notice to the circuit clerk of a constitutional challenge. Civil Rule 24(c) requires a party to "call the attention of the court to its consequential duty." Both rules recognize the court's § 2403 obligation to "certify" or "notify" the Attorney General. Draft Rule 5.1 adds a requirement that the party who questions the constitutionality of a statute not only file a notice but also send the notice to the Attorney General. This double requirement is designed to provide added assurance of notice. The Department believes that notice is particularly important at the district-court level to ensure an opportunity to participate in developing the record. It adds that the "streamlined nature of appeals" puts circuit clerks in a better position to ensure prompt dispatch of notice early in the appeal process.

The Appellate Rules Committee worked hard in developing the Appellate Rule 44 amendments that took effect in 1998 and 2002. It will be important to work with them to determine whether there are sound reasons to distinguish the Civil Rule from the Appellate Rule, and whether some of the Civil Rule proposals might profitably be adopted into the Appellate Rule. The Standing Committee will demand justification for any distinctions that remain after working through the coordination process. As one more illustration: Rule 24(c) now protects against forfeiture of a constitutional objection. The draft rules carry this provision forward, despite the lack of any comparable provision in Appellate Rule 44.

II Rule 5.1 Drafts

(A) Draft More Like Appellate Rule 44

The first draft Rule 5.1 follows the structure of Appellate Rule 44 more closely than the second draft. The differences of content dictate some changes in structure, and the provisions of

Appellate Rule 44 are rearranged to bring the party's notice obligation closer to the beginning of the first sentence in each subdivision:

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) Notice and Certification of Constitutional Challenge to Act of Congress; Intervention.

(1) ***Notice.*** A party who questions the constitutionality of an Act of Congress must, if no party to the action is the United States, or an agency, officer, or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) serve [send][1] the Notice, along with the pleading or other paper that raises the question, on [to] the Attorney General of the United

[1] The choice between "serve" and "send" is not easy. Rule 4(i) governs service on the United States. But the element of service on the United States by Rule 4(i)(1)(B) is "by also sending a copy * * * to the Attorney General * * *."

States in the manner provided by[2] Rule 4(i)(1)(B).

(2) ***Certification.*** The court must certify to the Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(a)(1), and

(B) any question raised by the court as to the constitutionality of an Act of Congress.

(3) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(a)(2) certification for intervention by the Attorney General.

(b) Notice and Certification of Constitutional Challenge to State Statute.

(1) ***Notice.*** A party who questions the constitutionality of a state statute must, if neither the state nor any of its officers, agencies, or employees is a party:

---

[2] "[U]nder" might seem better style. But Rule 4(i) directly governs only service of summons and complaint. "[I]n the manner provided by" is the Department of Justice suggestion, and seems wise.

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) send the Notice, along with the pleading or other paper that raises the question, to the State Attorney General.

(2) ***Certification.*** The court must certify to the State Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(b)(1), and

(B) any question raised by the court as to the constitutionality of a state statute.

(3) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(b)(2) certification for intervention by the Attorney General.

(c) No Forfeiture. A party's failure to file and send the Notice or the court's failure to certify the constitutional challenge as required by Rule 5.1(a) or (b) does not

forfeit any constitutional right otherwise timely asserted.

(B) More Compact Alternative Draft

This draft departs further from the structure of Appellate Rule 44, recognizing that increased complexity may dictate greater revision:

(a) ***Notice.*** A party who questions the constitutionality of a statute must:

(1) if the statute is an Act of Congress and no party to the action is the United States, or an agency, officer, or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) serve [send] the Notice, along with the pleading or other paper that raises the question, on [to] the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B);

(2) if the statute is a state statute and neither the state nor any of its officers, agencies, or employees is a party:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) send the Notice, along with the pleading or other paper that raises the question, to the State Attorney General.

(b) ***Certification.*** The court must certify to the Attorney General or to the State Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(a), and

(B) any question raised by the court as to the constitutionality of an Act of Congress or a state statute.

(c) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General.

(d) ***No forfeiture.*** A party's failure to file and send a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted.

(C) "Fully Styled" Draft

This draft seeks to economize by combining the provisions for an Act of Congress and for a state statute. Probably it is too compact — it may be an illustration of drafting that clearly says what it is intended to say only after the reader knows what it means. It is offered for sacrifice.

(a) ***File Notice.*** A party who questions the constitutionality of a statute must file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question:

(1) if the statute is an Act of Congress and neither the United States nor an agency, officer, or employee of the United States sued in an official capacity is a party, or

(2) if the statute is a state statute and neither the State nor a State officer, agency, or employee is a party.

(b) ***Send Notice.*** A party who files a Rule 5.1(a) notice must send the notice, and the pleading or other paper that raises the question, to:

(1) the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B), or

(2) the State Attorney General if the notice addresses a state statute.

(the balance would be certification, intervention, no forfeiture as above.)

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who questions the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and send it to the United States Attorney General or State Attorney General. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States or State Attorney General. The notice will better ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene. The court's § 2403 certification obligation remains unchanged.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and former Rule 24(c) by requiring notice and certification of a constitutional

challenge to any Act of Congress or state statute, not only those "affecting the public interest." It is better to enable the Attorney General to determine whether the Act or statute affects a public interest.

Rule 5.1 __ provides that the court may limit the time for intervention by the Attorney General, but must allow at least 60 days. The 60-day period mirrors the time to answer set by Rule 12(a)(3)(A). [To make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded.]

RULE 6(E): CALCULATING 3 ADDED DAYS

The Appellate Rules Committee has referred to the Civil Rules Committee a "nice" time-counting problem that arises from the interaction between Rule 6(e) and the time-counting conventions of Rule 6(a). The problem was raised in comments on amendments of the Appellate Rules designed to make the time-counting provisions in the Appellate Rules similar to the Civil Rules. Because the problem arises from the Civil Rules, the Appellate Rules Committee believes that the Civil Rules Committee should take the lead in proposing a solution.

As recently amended, Rule 6(e) says:

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

The problem described below could be addressed by changing the final clause to say explicitly that the 3 days are added after expiration of the prescribed period. That is not the only solution, but it corresponds to the reading that apparently has been adopted by most practicing lawyers. In the arena of counting the days, it seems wise to confirm general practice. And it certainly is wise to provide a clear answer.

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days." The Appellate Rules had used 7 days in the parallel rule, but are switching to the less-than-11-days rule to establish uniformity with the Civil Rules. In the course of deliberating the change, the Appellate Rules Committee was asked to address the integration of the additional 3 days. There are at least three possible choices to be made. They are described, with citations to apparently conflicting decisions, in 4B C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil 3d, § 1171, beginning at p. 595.

The first choice is to add the three days to the underlying period; if it begins as a 10-day period, it becomes a 13-day period when applying Rule 6(a). Because it is a 13-day period, intermediate Saturdays, Sundays, and legal holidays are counted. The result is that the time to respond after mail service is shorter than the time to respond after personal service. Not smart.

The second choice is to treat the 3-day addition independently for purposes of Rule 6(b). If the original period is 10 days, there are two exclusions of intervening "dies non". Saturdays, Sundays, etc. are excluded from the 10-day period and also from the 3-day period. This gives a lot of extension: the three days can easily become five, and with the help of a legal holiday perhaps six.

The third choice is to count the 3-day addition as an addition, not as a period of time prescribed by the rules. This approach corresponds to the apparent intent, and also to the language: "3 days shall be added." Dies non count only if the 3-day addition causes the time to begin or expire

on one. (E.g., time, as enlarged by the 3 days, runs out on a Saturday; the time is extended to the next weekday that is not a legal holiday.)

Treating the 3 days as an addition does not determine whether the addition should be made at the beginning or end of the prescribed period. It is not hard to illustrate circumstances in which it makes a difference whether the Rule 6(e) 3-day addition is inserted at the beginning or at the end of a prescribed 10-day period. The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the 3 days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

Illustration is easier than articulation. The reason for the difference is that adding 3 days at the beginning of the period means that if service is made on a Wednesday, Thursday, or Friday, the first Saturday and often Sunday are double counted. Saturday is omitted both because it is one of the three added days and also because it is Saturday. (An intervening legal holiday may trigger the same phenomenon.) If the 3 days are added at the end, there is no opportunity for double counting. The extension may be greater.

So it makes a difference. Should the 3 days be added before or after the prescribed period? Wright & Miller opt for before, reasoning that the 3 days were added because 3 days may be required to deliver the mail. (Similar concerns about "delivery" time led the committee to include electronic service, other agreed-upon means of service, and service on the court clerk when Rule 5(b)(2) was amended.) A further argument might be that it is better to add 3 days at the beginning because often the result will be a shorter extension.

Adding the 3 days after expiration of the prescribed period, on the other hand, can be supported on at least two grounds. One is that it is better to allow as much time as possible. That seems questionable. But the other ground is compelling. The question of actual practice was put to a group of perhaps 100 lawyers at the January 2003 leadership meeting of the ABA Litigation Section. The overwhelming majority indicated that they routinely add the 3 days after expiration of the prescribed period. Only two or three indicated that they had interpreted the rule to add the 3 days before the prescribed period begins. One member noted that a local rule had been adopted in her district to resolve confusion about the question.

Although far from a scientific survey, this demonstration of actual practice argues strongly for amending Rule 6(e) to add 3 days after expiration of the prescribed period. The conceptual reasons for adding the 3 days before the prescribed period begins are strong. But they do not seem so strong as to justify a rule change that will upset existing practice. Any rule change that departs from common practice would be absorbed into practice only after years of confusion. There is no indication that the common practice has caused undue delays in responding to papers served by means other than personal service.

Although the general course of practice may be set, a rule amendment seems desirable to provide a clear answer. Clarity is more important in this rule than achieving an elegant ideal. The draft that follows attempts to provide a clear answer by adding 3 days after the prescribed period expires.

Almost every discussion of these day-counting problems produces the suggestion that there is a better solution. We should abandon the unnecessarily cumbersome practice of setting short response periods and then lengthening them to account for weekends and holidays. Instead, we should determine the platonically correct times for response and stick by them, taking account of days off in determining the correct time. These suggestions have always failed because no one wants to undertake the inquiry.

Drafting can begin with the Style Draft. (Unless we choose to publish all of Style Rule 6 now, we will publish this as 6(e), restoring the Style Draft designation as 6(d) in the Style process.)

Rule 6. Time

(e) Additional Time After Certain Kinds of Service

~~**Under Rule 5(b)(2)(B), (C), or (D)**~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the prescribed period expires.

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period expires. All the other time-counting rules apply unchanged.

[One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.]

Addendum

Rule 6(e) - (a): Less than Ten Days

It is important to keep an eye on the details. Rule 6(a) applies generally to computing any period of time; the "less than 11 days" provision is the same.

Rule 6(e), on the other hand, applies only to actions taken "within a prescribed period after the service of a notice or other paper." It aims at service, after all. So the number of 10-day periods it reaches is far less than the set of 10-day periods. The Rules 50, 52, and 59 10-day periods, for example, do not turn on service. So:

Non-service 10-day periods: 12(a)(4); 23(f)(after entry of order); Rules 50, 52, 59

Service 10-day periods: 15(a)(time to plead in response to an amended pleading); 31(a)(4)(7 days for redirect and recross questions for deposition on written questions); 38(b)(c)(demand for jury trial; add issues to another party's limited demand); 53(e)(2)(as it now is — the amendment extends to 20 days); 68 (accept offer of judgment); 72(a), (b) (objections to magistrate judge report)

Ambiguous: 14(a) allows impleader by the third-party plaintiff if the complaint is filed "not later than 10 days after serving the original answer." Does this mean that if the third-party plaintiff mails the original answer, it gets an extended period because it has made that choice? An incentive to

mail.... Admiralty Rule C(6)(b)(i)(A) sets the time to assert a right of possession in an admiralty proceeding at 10 days after execution of process: does that count as service of a notice or other paper? (Can execution ever be made by means other than physical delivery?)

Out of it: Rule 56(c) provides that a party opposing summary judgment may serve opposing affidavits prior to the day of the hearing. This is a period less than 11 days, but it makes no sense even to apply Rule 6(a).

RULE 27(A)(2): AN OVERDUE CORRECTION

Rule 27(a)(2) has long provided that a Rule 27(a)(1) petition to perpetuate testimony be served on each expected adverse party "either within or without the district or state in the manner provided in Rule 4(d) for service of summons." Rule 4 was amended in 1993. Rule 4(d) now governs waiver of service, not service. A decade of oversight is long enough. A correct cross-reference should be supplied.

This glitch in Rule 27(a)(2) was one of the examples used in earlier discussions to test the limits within which the Style Project might undertake modest substantive revisions. If the correction could be effected without any change of meaning, this chore might be left to the Style Project — the question arises from reading the rules, not from any outcry of bench or bar. But the correction is not so simple. The nature of the complication and a suggested resolution are set out below. It may be that this topic can be addressed without need to refer to the Discovery Subcommittee, since the question does not in any way involve the scope or practice of discovery as such.

Former Rule 4(d) governed service in the following circumstances: "(1) Upon an individual other than an infant or incompetent person"; "(2) Upon an infant or an incompetent person"; "(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name"; "(4) Upon the United States"; "(5) Upon an officer or agency of the United States"; and "(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit * * *."

Present Rule 4 distributes these former provisions among other subdivisions. The new subdivisions frequently combine methods of service that were not contained in former Rule 4(d). It is clear that the former cross-reference to 4(d) included present (e), (g), (h), (i), and (j)(2). Those subdivisions, however, have been substantially changed from their pre-1993 counterparts.

Before attempting a mechanical translation into the new vocabulary, some thought should be given to these changes.

Present Rule 4(e) permits service on an individual other than an infant or incompetent person under the law of the state in which the district court is located or in which service is made; this provision is new, and goes beyond the provisions in former Rule 4(e) for service on a party not an inhabitant of, or found within, the state.

Present Rule 4(f) provides for service on individuals in a foreign country, substantially revising provisions that were set out in former Rule 4(i). None of these provisions were found in former 4(d).

Present Rule 4(g) provides for service on infants and incompetent persons. It expands former Rule 4(d)(2) by adding provisions for service outside any judicial district of the United States.

Present Rule 4(h) likewise expands the provisions for service on corporations by adding a new paragraph (2) for service outside any judicial district of the United States.

Present Rule 4(i) continues the provisions for service on the United States or federal agencies without significant changes.

Present Rule 4(j) adds a paragraph (1) that invokes 28 U.S.C. § 1608 for service on a foreign state or political subdivision. The provision for service on state and municipal defendants is continued without substantial change as paragraph (2).

Present Rule 4(k)(2) is an entirely new provision permitting service anywhere in the world "with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state." It does not directly prescribe a method of service. There is an esoteric possibility that it may authorize service by any functional means in circumstances that fall outside all of the method-of-service provisions, but it seems fair to conclude that 4(k)(2) will not have any effect if all of Rule 4 is incorporated in Rule 27(a)(2).

The central question is whether Rule 27(a)(2) should not include all of these service provisions. An omission might be made for either of two reasons. One approach would be to provide that some expected adverse parties need not be served because the burden of service is great. If that approach is taken, the further provision for appointing an attorney to represent a person not served should be adapted to reach a person who perhaps could be served but need not be served. The other approach would be to conclude that a petition to perpetuate testimony should not be available if one or more expected adverse parties are sufficiently remote to require service under the more extended provisions of Rule 4.

The more persuasive argument is to incorporate all of the Rule 4 service provisions. Service should be attempted on every expected adverse party, to increase the quality of the discovery through full participation. And the Rule 27 petition may be particularly useful in cases that involve far-flung parties and correspondingly sympathetic showings that the petitioner is presently unable to bring the action. The petition should be available as to any expected adverse party who will be subject to the court's personal jurisdiction in the anticipated action.

It might be objected that the Rule 4(f) methods of serving a defendant in a foreign country are cumbrous, that notice should be provided but by some method more direct and efficient than the methods often required to serve process. The cumbrous methods of service, however, result from national sensitivities about the performance of governmental functions. Direct notice of an opportunity to participate in a pre-filing discovery adventure might rub the same sensitivities.

(The very source of the wrong cross-reference naturally suggests a further question: should Rule 27(a)(2) incorporate the provisions of new Rule 4(d) for waiver of service? At least two concerns suggest that the waiver provisions do not fit well in this context. Wading through the waiver process will take time — even if the petitioner is willing, other parties may prefer

prompt action. And the incentives and sanctions built into the waiver process do not seem appropriate in this setting.)

Amendment is simple (subject to the imminent style revision) if the argument to incorporate all of Rule 4 prevails, and the possibility of adding waiver of service is put aside:

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

* * * * *

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

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

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected party that comes within Rule 4.

March 2003

«Name»
«Address1»
«Address2»
«Address3»
«Address4»
«Address5»
«CityStateZip»

Re: «Docket» «Caption»

Dear «Name»,

This letter is to ask you to provide assistance to the United States Judicial Conference's Advisory Committee on Civil Rules. The Committee is continuing its study of class actions under Rule 23 of the Federal Rules of Civil Procedure. As part of that study, we are asking a small group of attorneys from around the country, with recent class action litigation experience, to provide information not available in reported decisions or in law review articles. As chairs of the Civil Rules Committee and Class Actions Subcommittee, we are working with the Federal Judicial Center to gather empirical data helpful to deciding whether further revisions of Rule 23 should be proposed. One area we are trying to understand better concerns the facts that influence decisions to file, litigate, and settle class actions in state courts or in federal courts, including the impact of recent Supreme Court decisions. The Federal Judicial Center has prepared a questionnaire to help us in this effort. We hope that you will help us by filling out the questionnaire and returning it to the Center.

Please do not be put off by the apparent length of the questionnaire. It should take less than thirty minutes to complete. The Committee has been helped enormously in the past by responses to similar questionnaires. In an area as complex and difficult as class actions, it is particularly important that we have the benefit of information from lawyers with recent and varied experience with Rule 23. Your response is important.

The first page of the questionnaire should answer questions you may have about who is receiving the questionnaire, the confidentiality of your responses, and how to obtain a summary of the survey results. If you have any questions, contact Tom Willging (202-502-4049; twillgin@fjc.gov) or Bob Niemic (202-502-4074; bniemic@fjc.gov). Please accept in advance our personal thanks and those of the Advisory Committee on Civil Rules for your response.

Lee H. Rosenthal
Chair, Subcommittee on Class Actions

David F. Levi
Chair, Advisory Committee on Civil Rules

National Survey of Class Action Counsel in Federal Class Actions

Regarding Federal and State Class Action Practices

Designed and administered by the Federal Judicial Center

For the Advisory Committee on Civil Rules of the Judicial Conference of the United States

Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented the plaintiff(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in state court as a class action or raised the issue of class certification at a later stage of the litigation. A defendant removed the action to federal court where it was either litigated or remanded to state court. **If the named case was not filed in state court and removed to federal court,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the plaintiff(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box ❑ if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

❑ All claims were based on state law.
❑ The majority of claims were based on state law.
❑ Claims were based on state and federal law about equally.
❑ The majority of claims were based on federal law.
❑ All claims were based on federal law.
❑ I don't know/Not applicable

2. How many members were in the class?----------> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----------->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?---------->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed?----------> approximately _____%

6. Did the federal district court remand the named case to state court?

Please check one:

❑ Yes---------->*Answer questions 7-20 with respect to case events in the **state court** after remand.*
❑ No---------->*Answer questions 7-20 with respect to case events in **federal court**.*
❑ I don't know/Not applicable.---------->*Answer questions 7-20 with respect to case events in **federal court**.*

7a. The outcome on class certification in the named case was:

Please check one:

❑ The trial court decided not to certify a class for trial or settlement.---------->*Proceed to question 8.*
❑ The trial court took no action on class certification.---------->*Proceed to question 8.*
❑ The trial court certified a class for trial or settlement.---------->*Proceed to question 7b.*

7b. The court certified a class:

Please check all that apply:

❑ For trial---------->*Proceed to question 9.*
❑ For settlement purposes only, *before* the parties presented a settlement to the trial court. ---------->*Proceed to question 9.*
❑ For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.---------->*Proceed to question 9.*

8. If no class was certified, what happened?

Please check all that apply:

❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ The court dismissed the case for lack of jurisdiction.
❑ The court dismissed the case on the merits.
❑ Class representative(s) settled on an individual basis.
❑ Parties voluntarily dismissed the case.
❑ The court granted summary judgment motion.
❑ Cases were tried on an individual basis.
❑ Other (specify) _____
❑ I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check all that apply:

❑ Parties proposed a classwide settlement, and the court approved that settlement.
❑ Parties proposed a classwide settlement, and the court approved a revised settlement.
❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ Class representative(s) settled their own claims on an individual basis.
❑ Trial on class claims resulted in a judgment for the class.
❑ Trial on class claims resulted in a judgment for the defendant(s).
❑ The court dismissed all claims on the merits.
❑ Other (specify) _____
❑ I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check all that apply:

❑ Certification for trial as a class action.
❑ Certification for settlement as a class action.
❑ Amount of attorney fees.
❑ Terms of the proposed class settlement.
❑ Class representatives' settlement of their individual claims.
❑ No opposition filed to certification for settlement or to settlement terms.----------*>Proceed to question 12.*
❑ I don't know/Not applicable.----------*>Proceed to question 12.*

11. Indicate the outcome in the trial court of each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for all that apply:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 14.*
❑ I don't know/Not applicable----------*>Proceed to question 14.*

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for all that apply:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

❑ There was a monetary recovery.
How much was the total monetary recovery?----------->approximately $_____
How much of this amount was distributed to class members, if you know?----->approximately $_____
❑ There was no monetary recovery.
❑ I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?---------->approximately $_____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?---------->approximately $_____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

❑ There was no recovery.
❑ Transferable coupons, securities, or other instruments
❑ Nontransferable coupons or other instruments
❑ Injunctive or declaratory relief
❑ Medical monitoring of potential injuries to class members
❑ Other (specify) _____
❑ There was only a monetary recovery
❑ I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

❑ Yes
❑ No---------->*Proceed to question 21.*
❑ I don't know/Not applicable---------->*Proceed to question 21.*

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

❑ Yes
❑ No---------->*Proceed to question 21.*
❑ I don't know/Not applicable---------->*Proceed to question 21.*

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

❑ Federal court
❑ State court
❑ Both Federal and State court
❑ I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

❑ Same as the outcome in the named case
❑ The outcome in the other case(s) differed from the named case in the following ways (specify):

_____

❑ I don't know/Not applicable

Part II. Reasons for selecting a state forum

21. *Please check **each box** that indicates a reason you filed the named case in state court:*

Applicable Law

❑ All or most claims were based on state law.

❑ All or most claims were based on the law of the state in which we filed the case.

❑ State substantive law was more favorable to our claims than federal substantive law.

Convenience

❑ A majority of claims-related transactions or events took place within the state of filing.

❑ A majority of claims-related witnesses lived or worked in the state of filing.

❑ A majority of members of the proposed class lived or engaged in relevant activity in the state of filing.

❑ My co-counsel and I were more familiar with the procedures in state court.

❑ The location of the state court was more convenient for us, our clients, or witnesses in the named case.

Rules

❑ State discovery rules were more favorable to our case.

❑ State expert evidence (*Daubert/Frye*) rules were more favorable to our case.

❑ State evidentiary rules were more favorable to our case.

❑ State class action rules in general imposed less stringent requirements for certifying a class action.

❑ State class action rules imposed less stringent requirements for notifying class members.

❑ Interlocutory appeal was less likely to be available in state court.

Judicial Receptiveness

❑ The state court was generally more receptive to motions to certify a class.

❑ The state court was generally more receptive to motions to approve a class settlement.

❑ The state court was generally more receptive to the claims on the merits.

❑ The state court was able to more expeditiously resolve this class action.

❑ The state court had more resources available to handle this class action.

Costs and Fees

❑ The cost of litigation for my client would be lower in state court.

❑ The state court would be more likely to act favorably on our request for attorney fees.

Strategy

❑ We wanted to avoid being included in a federal multidistrict litigation transfer.

❑ The state court would be more likely to appoint my client and our law firm to represent the class.

❑ We wanted to present similar claims in a number of state courts.

Other

❑ I generally prefer to litigate in state court.

❑ A jury award in state court would likely be higher.

❑ Please specify any other reasons why you filed this action in state court.

_____

_____

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to file the named case in state court rather than in federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you* ***expected*** *at the time you chose to file the named case in state court.*

Source of advantage/disadvantage	By filing in state court, we expected:					
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	Not Applicable/ I Don't Know
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you filed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check <u>one</u>:

❑ Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
❑ State judges were more likely than federal judges to rule in favor of interests like those of my clients.
❑ We perceived no differences between state and federal judges in this regard.
❑ I don't know/Not applicable

Part III. Impact of *Amchem*[1] and *Ortiz*[2]

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about where to file the named case?

Please check all that apply:

- ❑ One or both cases provided the main reason we filed the named case in state court.
- ❑ One or both cases were among a number of factors that led us to file the named case in state court.
- ❑ Neither case had an effect on our decisions about where to file the named case.
- ❑ I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- ❑ Sole practitioner
- ❑ Private firm of 2-10 lawyers
- ❑ Private firm of 11-49 lawyers
- ❑ Private firm of 50 or more lawyers
- ❑ Legal staff of a for-profit corporation or entity
- ❑ Legal staff of a nonprofit corporation or entity
- ❑ Government
- ❑ Other (specify) _____

28. How many years have you practiced law?----------> _____ years

29. What type of clients do you generally represent?

Please check one:

- ❑ Primarily plaintiffs
- ❑ Primarily defendants
- ❑ Plaintiffs and defendants about equally
- ❑ Primarily class action objectors
- ❑ Other (specify): _____

30. In the past three years or so, how many class actions have you filed (including those filed as part of a team of plaintiffs' attorneys)?----------> approximately _____ class actions

[1] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
[2] *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999).

31. Of these class action lawsuits, what percentage did you file in state court(s)?---------->approximately _____ %

32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %

33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %

34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?---------->approximately _____ %

35. Comments. Please add any additional comments you may have about your experiences with filing or removal of class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

National Survey of Class Action Counsel in Federal Class Actions Regarding Federal and State Class Action Practices

Designed and administered by the Federal Judicial Center

For the Advisory Committee on Civil Rules of the Judicial Conference of the United States

Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial-branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented defendant(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in state court as a class action or raised the issue of class certification at a later stage of the litigation. Defendant(s) removed the action to federal court where it was either litigated or remanded to state court. **If the named case was not filed in state court and removed to federal court,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the defendant(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box ❑ if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

- ❑ All claims were based on state law.
- ❑ The majority of claims were based on state law.
- ❑ Claims were based on state and federal law about equally.
- ❑ The majority of claims were based on federal law.
- ❑ All claims were based on federal law.
- ❑ I don't know/Not applicable

2. How many members were in the class?----------> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----------->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?---------->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed? ----------> approximately _____%

6. Did the federal district court remand the named case to state court?

Please check one:

- ❑ Yes---------->*Answer questions 7-20 with respect to case events in the **state court** after remand.*
- ❑ No---------->*Answer questions 7-20 with respect to case events in **federal court**.*
- ❑ I don't know/Not applicable.---------->*Answer questions 7-20 with respect to case events in **federal court**.*

7a. The outcome on class certification in the named case was:

Please check one:

- ❑ The trial court decided not to certify a class for trial or settlement.---------->*Proceed to question 8.*
- ❑ The trial court took no action on class certification.---------->*Proceed to question 8.*
- ❑ The trial court certified a class for trial or settlement---------->*Proceed to question 7b.*

7b. The court certified a class:

Please check all that apply:

- ❑ For trial---------->*Proceed to question 9.*
- ❑ For settlement purposes only, *before* the parties presented a settlement to the trial court.---------->*Proceed to question 9.*
- ❑ For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.---------->*Proceed to question 9.*

8. If no class was certified, what happened?

Please check all that apply:

- ❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
- ❑ The court dismissed the case for lack of jurisdiction.
- ❑ The court dismissed the case on the merits.
- ❑ Class representative(s) settled on an individual basis.
- ❑ Parties voluntarily dismissed the case.
- ❑ The court granted summary judgment motion.
- ❑ Cases were tried on an individual basis.
- ❑ Other (specify) _____
- ❑ I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check all that apply:

❑ Parties proposed a classwide settlement, and the court approved that settlement.
❑ Parties proposed a classwide settlement, and the court approved a revised settlement.
❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ Class representative(s) settled their own claims on an individual basis.
❑ Trial on class claims resulted in a judgment for the class.
❑ Trial on class claims resulted in a judgment for the defendant(s).
❑ The court dismissed all claims on the merits.
❑ Other (specify) _____
❑ I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check all that apply:

❑ Certification for trial as a class action.
❑ Certification for settlement as a class action.
❑ Amount of attorney fees.
❑ Terms of the proposed class settlement.
❑ Class representatives' settlement of their individual claims.
❑ No opposition filed to certification for settlement or to settlement terms.----------*>Proceed to question 12.*
❑ I don't know/Not applicable.----------*>Proceed to question 12.*

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for all that apply:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 14.*
❑ I don't know/Not applicable----------*>Proceed to question 14.*

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for all that apply:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

❑ There was a monetary recovery.
How much was the total monetary recovery?---------->approximately $_____
How much of this amount was distributed to class members, if you know?--->approximately $_____
❑ There was no monetary recovery.
❑ I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?---------->approximately $ _____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?---------->approximately $_____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

❑ There was no recovery.
❑ Transferable coupons, securities, or other instruments
❑ Nontransferable coupons or other instruments
❑ Injunctive or declaratory relief
❑ Medical monitoring of potential injuries to class members
❑ Other (specify) _____
❑ There was only a monetary recovery
❑ I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

❑ Yes
❑ No---------->*Proceed to question 21.*
❑ I don't know/Not applicable---------->*Proceed to question 21.*

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

❑ Yes
❑ No---------->*Proceed to question 21.*
❑ I don't know/Not applicable---------->*Proceed to question 21.*

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

❑ Federal court
❑ State court
❑ Both Federal and State court
❑ I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

❑ Same as the outcome in the named case
❑ The outcome in the other case(s) differed from the named case in the following ways (specify):

_____

❑ I don't know/Not applicable

Part II. Reasons for selecting a federal forum

21. *Please check **each box** that indicates a reason you removed the named case from state to federal court:*

Applicable Law

❑ At least one claim was based on federal law.

❑ At least one claim called for defenses based on federal law.

❑ At least one claim was based on the laws of many states.

❑ Federal substantive law was more favorable to our defense than state substantive law.

Convenience

❑ My client prefers to litigate cases in federal court.

❑ My co-counsel and I were more familiar with the procedures in federal court.

❑ The location of the federal court is more convenient for us, our clients, or witnesses in the named case.

Rules

❑ Federal discovery rules were more favorable to our case.

❑ Federal expert evidence (*Daubert/Frye*) rules were more favorable to our case.

❑ Federal evidentiary rules were more favorable to our case.

❑ Federal class action rules in general imposed more stringent requirements for certifying a class action.

❑ Federal class action rules imposed more stringent requirements for notifying class members.

❑ Interlocutory appeal of a certification order was more likely to be available in federal court.

Judicial Receptiveness

❑ The federal court was generally less receptive to motions to certify a class.

❑ The federal court was generally more receptive to motions to approve a class settlement.

❑ The federal court was generally more receptive to the claims on the merits.

❑ The federal court was able to more expeditiously resolve this class action.

❑ The federal court had more resources available to handle this class action.

Costs and Fees

❑ The cost of litigation for my client would be lower in federal court.

Strategy

❑ We wanted to centralize cases into a federal multidistrict litigation proceeding.

❑ We wanted to avoid having similar claims in a number of state courts.

Other

❑ I generally prefer to litigate in federal court.

❑ A jury award in federal court would likely be lower.

❑ Please specify any other reasons why you removed this case to federal court.

_____

_____

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to remove the named case to federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you* ***expected*** *at the time you chose to remove the named case to federal court.*

Source of advantage/disadvantage	By removing to federal court, we expected:					
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	Not Applicable/ I Don't Know
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you removed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check <u>one</u>:

❑ Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
❑ State judges were more likely than federal judges to rule in favor of interests like those of my clients.
❑ We perceived no differences between state and federal judges in this regard.
❑ I don't know/Not applicable

Part III. Impact of *Amchem*[1] and *Ortiz*[2]

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about whether to remove the named case?

Please check all that apply:

- ❑ One or both cases provided the main reason we removed the named case to federal court.
- ❑ One or both cases were among a number of factors that led us to remove the named case to federal court
- ❑ Neither case had an effect on our decisions about whether to remove the named case.
- ❑ I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- ❑ Sole practitioner
- ❑ Private firm of 2-10 lawyers
- ❑ Private firm of 11-49 lawyers
- ❑ Private firm of 50 or more lawyers
- ❑ Legal staff of a for-profit corporation or entity
- ❑ Legal staff of a nonprofit corporation or entity
- ❑ Government
- ❑ Other (specify) _____

28. How many years have you practiced law?----------> _____ years

29. What type of clients do you generally represent?

Please check one:

- ❑ Primarily plaintiffs
- ❑ Primarily defendants
- ❑ Plaintiffs and defendants about equally
- ❑ Primarily class action objectors
- ❑ Other (specify): _____

30. In the past three years or so, how many class actions have you filed or defended (including those filed as part of a team of plaintiffs' attorneys)?----------> approximately _____ class actions

[1] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
[2] *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999).

31. Of these class action lawsuits, what percentage did you file or defend in state court(s)?----->approximately _____ %

32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %

33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %

34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----------->approximately _____ %

35. Comments. Please add any additional comments you may have about your experiences with filing, defending or removing class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

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For the Advisory Committee on Civil Rules of the Judicial Conference of the United States

Origin and Purpose

The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. This questionnaire was designed by the Federal Judicial Center at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Who Should Complete the Questionnaire?

Court records show that you represented plaintiff(s) in the case identified in the cover letter (the "named case"). Plaintiff(s) filed that case in federal court as a class action or raised the issue of class certification at a later stage of the litigation. **If the named case was not filed originally in federal court,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope.

We ask that an attorney who represented the plaintiff(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box ❑ if you would like a summary of the survey results.

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

❑ All claims were based on state law.
❑ The majority of claims were based on state law.
❑ Claims were based on state and federal law about equally.
❑ The majority of claims were based on federal law.
❑ All claims were based on federal law.
❑ I don't know/Not applicable

2. How many members were in the class?----------> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----------->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?---------->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed?----------> approximately _____%

6. Did the federal district court transfer the named case to another federal district?

Please check one:

❑ Yes
❑ No
❑ I don't know/Not applicable

7a. The outcome on class certification in the named case was:

Please check one:

❑ The trial court decided not to certify a class for trial or settlement.---------->*Proceed to question 8.*
❑ The trial court took no action on class certification.---------->*Proceed to question 8.*
❑ The trial court certified a class for trial or settlement---------->*Proceed to question 7b.*

7b. The court certified a class:

Please check all that apply:

❑ For trial---------->*Proceed to question 9.*
❑ For settlement purposes only, *before* the parties presented a settlement to the trial court.---------->*Proceed to question 9.*
❑ For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.---------->*Proceed to question 9.*

8. If no class was certified, what happened?

Please check all that apply:

❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ The court dismissed the case for lack of jurisdiction.
❑ The court dismissed the case on the merits.
❑ Class representative(s) settled on an individual basis.
❑ Parties voluntarily dismissed the case.
❑ The court granted summary judgment motion.
❑ Cases were tried on an individual basis.
❑ Other (specify) _____
❑ I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check all that apply:

❑ Parties proposed a classwide settlement, and the court approved that settlement.
❑ Parties proposed a classwide settlement, and the court approved a revised settlement.
❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ Class representative(s) settled their own claims on an individual basis.
❑ Trial on class claims resulted in a judgment for the class.
❑ Trial on class claims resulted in a judgment for the defendant(s).
❑ The court dismissed all claims on the merits.
❑ Other (specify) _____
❑ I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check all that apply:

❑ Certification for trial as a class action.
❑ Certification for settlement as a class action.
❑ Amount of attorney fees.
❑ Terms of the proposed class settlement.
❑ Class representatives' settlement of their individual claims.
❑ No opposition filed to any of the above.----------*>Proceed to question 12.*
❑ I don't know/Not applicable.----------*>Proceed to question 12.*

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for all that apply:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a trial court ruling in the named case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 14.*
❑ I don't know/Not applicable----------*>Proceed to question 14.*

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for all that apply:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

❑ There was a monetary recovery.
How much was the total monetary recovery?----------->approximately $_____
How much of this amount was distributed to class members, if you know?----->approximately $_____
❑ There was no monetary recovery.
❑ I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?---------->approximately $_____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?---------->approximately $_____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

❑ There was no recovery.
❑ Transferable coupons, securities, or other instruments
❑ Nontransferable coupons or other instruments
❑ Injunctive or declaratory relief
❑ Medical monitoring of potential injuries to class members
❑ Other (specify) _____
❑ There was only a monetary recovery
❑ I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 21.*
❑ I don't know/Not applicable----------*>Proceed to question 21.*

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 21.*
❑ I don't know/Not applicable----------*>Proceed to question 21.*

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

❑ Federal court
❑ State court
❑ Both Federal and State court
❑ I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

❑ Same as the outcome in the named case
❑ The outcome in the other case(s) differed from the named case in the following ways (specify):

_____

❑ I don't know/Not applicable

Part II. Reasons for selecting a federal forum

21. *Please check **each box** that indicates a reason you filed the named case in the federal district that you chose instead of filing the action in state court:*

Applicable Law

❑ All or most claims were based on federal law.

❑ At least one claim was based on federal law.

❑ At least one claim could only be brought in federal court.

❑ At least one claim was based on the laws of many states.

❑ Federal substantive law was more favorable to our claims than state substantive law.

Convenience

❑ My co-counsel and I were more familiar with the procedures in federal court.

❑ The location of the federal court was more convenient for us, our clients, or witnesses in the named case.

Rules

❑ Federal discovery rules were more favorable to our case.

❑ Federal expert evidence (*Daubert*/*Frye*) rules were more favorable to our case.

❑ Federal evidentiary rules were more favorable to our case.

❑ Federal class action rules in general imposed less stringent requirements for certifying a class action.

❑ Federal class action rules imposed less stringent requirements for notifying class members.

❑ Interlocutory appeal was less likely to be available in federal court.

Judicial Receptiveness

❑ The federal court in the district you chose was generally more receptive to motions to certify a class.

❑ The federal court in the district you chose was generally more receptive to motions to approve a class settlement.

❑ The federal court in the district you chose was generally more receptive to the claims on the merits.

❑ The federal court in the district you chose was able to more expeditiously resolve this class action.

❑ The federal court in the district you chose had more resources available to handle this class action.

Costs and Fees

❑ The cost of litigation for my client would be lower in federal court.

❑ The federal court would be more likely to act favorably on our request for attorney fees.

Strategy

❑ We wanted to be included in a federal multidistrict litigation transfer.

❑ The federal court would be more likely to appoint my client and our law firm to represent the class.

❑ We wanted to avoid having similar claims in a number of state courts.

Other

❑ I generally prefer to litigate in federal court.

❑ The defendant was likely to remove the action to federal court.

❑ A jury award in federal court would likely be higher.

❑ Please specify any other reasons why you filed this action in federal court.

_____

_____

22. To achieve the most favorable outcome for your client, you may have weighed certain party characteristics in your decision to file the named case in the federal court you chose rather than in state court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you* ***expected*** *at the time you chose to file the named case in federal court.*

Source of advantage/disadvantage	By filing in this federal district, we expected:					
	Strong advantage for our client	**Advantage for our client**	**No advantage or disadvantage for our client**	**Disadvantage for our client**	**Strong disadvantage for our client**	**Not Applicable/ I Don't Know**
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

23. When you filed the named case, which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? *Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.*

Please check <u>one</u>:

❑ Federal judges were more likely than state judges to rule in favor of interests like those of my clients.
❑ State judges were more likely than federal judges to rule in favor of interests like those of my clients.
❑ We perceived no differences between state and federal judges in this regard.
❑ I don't know/Not applicable

Part III. Impact of *Amchem*[1] and *Ortiz*[2]

24. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about where to file the named case?

Please check all that apply:

- ❑ One or both cases provided the main reason we filed the named case in federal court.
- ❑ One or both cases were among a number of factors that led us to file the named case in federal court.
- ❑ Neither case had an effect on our decisions about where to file the named case.
- ❑ I don't know/Not applicable

25. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

26. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

27. Which of the following best describes your law practice?

Please check one:

- ❑ Sole practitioner
- ❑ Private firm of 2-10 lawyers
- ❑ Private firm of 11-49 lawyers
- ❑ Private firm of 50 or more lawyers
- ❑ Legal staff of a for-profit corporation or entity
- ❑ Legal staff of a nonprofit corporation or entity
- ❑ Government
- ❑ Other (specify) _____

28. How many years have you practiced law?----------> _____ years

29. What type of clients do you generally represent?

Please check one:

- ❑ Primarily plaintiffs
- ❑ Primarily defendants
- ❑ Plaintiffs and defendants about equally
- ❑ Primarily class action objectors

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[1] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

[2] *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999).

❑ Other (specify): _____

30. In the past three years or so, how many class actions have you filed (including those filed as part of a team of plaintiffs' attorneys)?----------->approximately _____ class actions

31. Of these class action lawsuits, what percentage did you file in state court(s)?----------->approximately _____ %

32. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %

33. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %

34. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?----------->approximately _____ %

35. Comments. Please add any additional comments you may have about your experiences with filing or removal of class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

National Survey of Class Action Counsel in Federal Class Actions Regarding Federal and State Class Action Practices

Designed and administered by the Federal Judicial Center

For the Advisory Committee on Civil Rules of the Judicial Conference of the United States

Origin and Purpose

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Who Should Complete the Questionnaire?

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We ask that an attorney who represented the defendant(s) in this case complete the questionnaire. We would like that attorney to be knowledgeable about key attorney decisions in the case. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If no attorney with knowledge of key decisions is available,** please check this box ❑ and return the cover letter and blank questionnaire in the enclosed envelope. We are sending a similar questionnaire to attorneys for other parties in the litigation.

Confidentiality

All information you provide that would permit anyone to identify the named case, the lawyers, or the parties is strictly confidential. Only a small number of staff within the Center's Research Division will have access. Findings will be reported only in aggregate form. No individual litigant, attorney, or case will be identifiable. Center researchers will use the code number on the back of the questionnaire for administrative purposes only.

Please check this box ❑ if you would like a summary of the survey results.

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Please return the questionnaire by March 31, 2003

Part I. Case Characteristics in the Named Case (See Cover Letter)

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law at the time the named case was filed?

Please check one:

❑ All claims were based on state law.
❑ The majority of claims were based on state law.
❑ Claims were based on state and federal law about equally.
❑ The majority of claims were based on federal law.
❑ All claims were based on federal law.
❑ I don't know/Not applicable

2. How many members were in the class?----------> approximately _____ members

3. Members of the proposed class resided in how many state(s)?----------->approximately _____ states

4. What percentage of claimants resided in the state where the class action was filed?---------->approximately _____%

5. What percentage of claims-related transactions/events occurred in the state where class action was filed? ----------> approximately _____%

6. Did the federal district court transfer the named case to another federal court?

Please check one:

❑ Yes
❑ No
❑ I don't know/Not applicable

7a. The outcome on class certification in the named case was:

Please check one:

❑ The trial court decided not to certify a class for trial or settlement.----------*>Proceed to question 8.*
❑ The trial court took no action on class certification.----------*>Proceed to question 8.*
❑ The trial court certified a class for trial or settlement----------*>Proceed to question 7b.*

7b. The court certified a class:

Please check all that apply:

❑ For trial----------*>Proceed to question 9.*
❑ For settlement purposes only, *before* the parties presented a settlement to the trial court.----------*>Proceed to question 9.*
❑ For settlement purposes only, *after or at the same time* the parties presented a settlement to the trial court.----------*>Proceed to question 9.*

8. If no class was certified, what happened?

Please check all that apply:

❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ The court dismissed the case for lack of jurisdiction.
❑ The court dismissed the case on the merits.
❑ Class representative(s) settled on an individual basis.
❑ Parties voluntarily dismissed the case.
❑ The court granted summary judgment motion.
❑ Cases were tried on an individual basis.
❑ Other (specify) _____
❑ I don't know/Not applicable

9. If a class was certified, whether for trial or for settlement purposes only, what was the outcome of the class claims?

Please check all that apply:

❑ Parties proposed a classwide settlement, and the court approved that settlement.
❑ Parties proposed a classwide settlement, and the court approved a revised settlement.
❑ Parties proposed a classwide settlement, but the court did not approve any settlement.
❑ Class representative(s) settled their own claims on an individual basis.
❑ Trial on class claims resulted in a judgment for the class.
❑ Trial on class claims resulted in a judgment for the defendant(s).
❑ The court dismissed all claims on the merits.
❑ Other (specify) _____
❑ I don't know/Not applicable

10. Identify whether anyone filed an opposition or objection in the trial court to any of the following:

Please check all that apply:

❑ Certification for trial as a class action.
❑ Certification for settlement as a class action.
❑ Amount of attorney fees.
❑ Terms of the proposed class settlement.
❑ Class representatives' settlement of their individual claims.
❑ No opposition filed to certification for settlement or to settlement terms.----------*>Proceed to question 12.*
❑ I don't know/Not applicable.----------*>Proceed to question 12.*

11. Indicate the outcome in the trial court to each type of opposition or objection listed in the table below:

Please place a check (✓) in the appropriate box for all that apply:

	Opposition or Objection Granted	Opposition or Objection Denied	Opposition or Objection Withdrawn	No Action Taken	Not Applicable/ I Don't Know
Certification for trial as a class action					
Certification for settlement as a class action					
Amount of attorney fees					
Terms of the proposed class settlement					

12. Did any party or objector file an appeal (including interlocutory) of a court ruling in the named case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 14.*
❑ I don't know/Not applicable----------*>Proceed to question 14.*

13. What was the outcome of each type of appeal?

Please place a check (✓) in the appropriate box for all that apply:

	Appeal Affirmed	Appeal Reversed	Appeal Remanded	Appeal Withdrawn/ Dismissed	Appeal Settled	No Action Taken	Not Applicable/ I Don't Know
Interlocutory appeal of class certification or denial of certification							
Appeal of certification after final judgment							
Approval of settlement							
Disapproval of settlement							
Appeal of judgment on the merits							
Other appeal. Specify: _____							

14. When the litigation was concluded, whether by pretrial ruling, trial, settlement, or appeal, what was the total monetary recovery for the class? *Exclude* attorney fees and all expenses, monetary value of coupons, securities, or other non-monetary relief.

Please check one:

❑ There was a monetary recovery.
How much was the total monetary recovery?---------->approximately $_____
How much of this amount was distributed to class members, if you know?--->approximately $_____
❑ There was no monetary recovery.
❑ I don't know/Not applicable

15. How much did the trial court award or approve for attorney fees and expenses?---------->approximately $ _____

How much of that amount was for out-of-pocket attorney expenses (not including costs of settlement notices and costs of administering any settlement)?---------->approximately $_____

16. When the litigation was concluded, in addition to or in lieu of the monetary recovery, relief was distributed to class members in the form of:

Please check all that apply:

❑ There was no recovery.
❑ Transferable coupons, securities, or other instruments
❑ Nontransferable coupons or other instruments
❑ Injunctive or declaratory relief
❑ Medical monitoring of potential injuries to class members
❑ Other (specify) _____
❑ There was only a monetary recovery
❑ I don't know/Not applicable

17. In addition to the named case, were other lawsuit(s) filed in state or federal court(s) dealing with the same subject matter and around the same time period (give or take a year or so)?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 21.*
❑ I don't know/Not applicable----------*>Proceed to question 21.*

18. Was a settlement of similar class claims proposed to any other court in any other case?

Please check one:

❑ Yes
❑ No----------*>Proceed to question 21.*
❑ I don't know/Not applicable----------*>Proceed to question 21.*

19. Were the other cases(s) referred to in question 17 or 18 originally filed in:

Please check one:

❑ Federal court
❑ State court
❑ Both Federal and State court
❑ I don't know/Not applicable

20. What were the outcomes of those other cases?

Please check one:

❑ Same as the outcome in the named case
❑ The outcome in the other case(s) differed from the named case in the following ways (specify):

_____

❑ I don't know/Not applicable

Part II. Reasons for preferring a federal forum

21. This question is hypothetical: assume – contrary to fact – that plaintiff(s) had filed the named case in state court.

Would you have removed this action to federal court?

Please check one:

❑ Yes
❑ No
❑ I don't know/Not applicable

*Please check **each box** that indicates a reason that **would have influenced** your decision to remove the case to federal court.*

Applicable Law

❑ At least one claim was based on federal law.

❑ At least one claim called for defenses based on federal law.

❑ At least one claim was based on the laws of many states.

❑ Federal substantive law was more favorable to our defense than state substantive law.

Convenience

❑ My client prefers to litigate cases in federal court.

❑ My co-counsel and I were more familiar with the procedures in federal court.

❑ The location of the federal court is more convenient for us, our clients, or witnesses in the named case.

Rules

❑ Federal discovery rules were more favorable to our case.

❑ Federal expert evidence (*Daubert/Frye*) rules were more favorable to our case.

❑ Federal evidentiary rules were more favorable to our case.

❑ Federal class action rules in general imposed more stringent requirements for certifying a class action.

❑ Federal class action rules imposed more stringent requirements for notifying class members.

❑ Interlocutory appeal of a certification order was more likely to be available in federal court.

Judicial Receptiveness

❑ The federal court was generally less receptive to motions to certify a class.

❑ The federal court was generally more receptive to motions to approve a class settlement.

❑ The federal court was generally more receptive to the claims on the merits.

❑ The federal court was able to more expeditiously resolve this class action.

❑ The federal court had more resources available to handle this class action.

Costs and Fees

❑ The cost of litigation for my client would be lower in federal court.

Strategy

❑ We wanted to centralize cases into a federal multidistrict litigation proceeding.

❑ We wanted to avoid having similar claims in a number of state courts.

Other

❑ I generally prefer to litigate in federal court.

❑ A jury award in federal court would likely be lower.

❑ Please specify any other reasons why you might have removed this case to federal court.

22. Continuing the hypothetical, assume that plaintiff(s) had filed the named case in state court and that you were considering whether to remove the named case to federal court. You may have had to weigh certain party characteristics in considering whether to remove to federal court. *For each possible source of advantage or disadvantage listed below, please circle the appropriate number for the degree of advantage you* ***would have expected.***

Source of advantage/disadvantage	In considering a motion to remove to federal court, we would have expected:					
	Strong advantage for our client	Advantage for our client	No advantage or disadvantage for our client	Disadvantage for our client	Strong disadvantage for our client	Not Applicable/ I Don't Know
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state	1	2	3	4	5	N/A
Local residence(s) of class representative(s)	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, religion or socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class as a whole	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class's reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other party characteristic (specify) _____	1	2	3	4	5	N/A
Other source(s) of advantage or disadvantage (specify) _____ _____	1	2	3	4	5	N/A

Part III. Impact of *Amchem*[1] and *Ortiz*[2]

23. In *Amchem* and *Ortiz*, the U.S. Supreme Court announced requirements for approving proposed class action settlements and raised questions about including future claimants in class actions. Which of the following statements best describes any effect one or both of those cases may have had on your decisions about whether to remove class actions during the past three years?

Please check all that apply:

- ❑ We did not consider removing any class actions during the past three years.
- ❑ One or both cases provided the main reason we removed one or more class actions to federal court.
- ❑ One or both cases were among a number of factors that led us to remove one or more class actions to federal court
- ❑ Neither case had an effect on our decisions about whether to remove class actions.
- ❑ I don't know/Not applicable

24. What effect, if any, do you think the *Amchem* and *Ortiz* cases had on the management of the named case?

25. How do you think the *Amchem* and *Ortiz* cases have affected class action litigation generally in federal and state courts?

Part IV. Nature of Law Practice

26. Which of the following best describes your law practice?

Please check one:

- ❑ Sole practitioner
- ❑ Private firm of 2-10 lawyers
- ❑ Private firm of 11-49 lawyers
- ❑ Private firm of 50 or more lawyers
- ❑ Legal staff of a for-profit corporation or entity
- ❑ Legal staff of a nonprofit corporation or entity
- ❑ Government
- ❑ Other (specify) _____

27. How many years have you practiced law?----------> _____ years

28. What type of clients do you generally represent?

Please check one:

- ❑ Primarily plaintiffs
- ❑ Primarily defendants
- ❑ Plaintiffs and defendants about equally
- ❑ Primarily class action objectors
- ❑ Other (specify): _____

[1] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
[2] *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999).

29. In the past three years or so, how many class actions have you filed or defended (including those filed as part of a team of plaintiffs' attorneys)?---------->approximately _____ class actions

30. Of these class action lawsuits, what percentage did you file or defend in state court(s)?----->approximately _____ %

31. What percentage of your work time has been devoted to *civil litigation* in *state* courts during the past five years*?--> approximately _____ %

32. What percentage of your work time has been devoted to *civil litigation* in *federal* courts during the past five years*? approximately _____ %

33. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years*?---------->approximately _____ %

34. Comments. Please add any additional comments you may have about your experiences with filing, defending or removing class actions.

Please return the questionnaire by March 31, 2003

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.

* During the time you have been in practice, if less than five years.

"Indicative Rulings"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

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

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the

burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from "final" judgments.

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

Rule 62.1 Indicative Rulings

(a) A district court may entertain an otherwise timely motion to alter, amend, or vacate a judgment that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court] and

(1) deny the motion, or

(2) indicate that it would grant the motion if the appellate court should remand for that purpose.

(b) A party who makes a motion under Rule 62.1(a) must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) If the district court indicates that it would grant a motion under Rule 62.1(a)(2), a party may move the appellate court to remand the action to the district court. The appellate court has discretion whether to remand.

(d) This Rule 62.1 does not apply to relief sought under Federal Rule of Appellate Procedure 8, nor to proceedings under Title 28, U.S.C., §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission.

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]

00-04

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 14, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to FRAP to Establish a New Rule Governing "Indicative Rulings" by District Courts

Dear Judge Garwood:

The Department of Justice proposes creation of a new provision in the Federal Rules of Appellate Procedure (FRAP) to cover the use of a procedure commonly referred to in civil cases by the courts of appeals as seeking an "indicative ruling." An indicative ruling procedure allows a district court that has lost jurisdiction over a matter due to the filing of a notice of appeal to notify the court of appeals how it would rule on a motion if it still had jurisdiction. If the district court would grant the motion, the court of appeals can then remand the matter for entry of a new order. The indicative ruling is commonly used in the context of a motion that would be filed under Federal Rule of Civil Procedure 60(b), but it can also be used in an interlocutory appeal when the district court's ruling is needed on the specific issue appealed.

We are suggesting a new provision in the FRAP to cover this indicative ruling procedure for civil cases because it is widely employed by the Circuits on the basis of case law, but is nowhere mentioned in the federal civil or appellate rules. There is no relevant rule in the FRAP. FRCP 60(a) provides that a district court may grant relief from a "clerical mistake" while an appeal is pending "with leave of the appellate court." But the civil rules mention no other situations and do not explain the procedure to be used.

A federal rule is warranted because our experience in dealing with many counsel in appellate civil cases over the years has revealed that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals. In addition, the Circuits use somewhat differing procedures, although there appears to be no good reason for local variation.

The indicative ruling procedure is discussed in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), and is currently used by nearly every Circuit.[1] Under this procedure, "when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial." The Circuits that follow this procedure appear to accept that a district court has some form of jurisdiction to allow it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. The Ninth Circuit, however, maintains that the district court has no jurisdiction to entertain a Rule 60(b) motion, and therefore requires a remand from the court of appeals before a district court can even deny such a motion.

By contrast, the Second Circuit has on some occasions used a different procedure. For example, in Haitian Centers Council, Inc. v. Sale, Acting Commissioner, INS, No. 93-6216 (Oct. 26, 1993), the court declined to use the indicative ruling procedure and instead dismissed the appeal without prejudice for 60 days. The Second Circuit then reinstated the case in the court of appeals after the district court had ruled on the relevant motion. We have found this procedure to be commonly used in the Second Circuit.

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[1] See Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F. 2d 39 (1st Cir. 1979); Toliver v. Sullivan, 957 F. 2d 47 (2nd Cir. 1992); United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 (3d Cir. 1992); Fobian v. Storage Tech. Corp., 164 F.3d 887 (4th Cir. 1999); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, (5th Cir. 1994); Detson v. Schweiker, 788 F. 2d 372 (6th Cir. 1986); Brown v. United States, 976 F. 2d 1104 (7th Cir. 1992); Pioneer Insurance v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Aldrich Enterprises, Inc. v. United States, 938 F. 2d 1134 (10th Cir. 1991).

Originally, the Circuits used the indicative ruling procedure solely or principally for parties who wished to move for a new trial based on newly-discovered evidence. In other circumstances, however, this procedure has been deemed applicable -- for example, when new methodologies or procedures change the impact of evidence used below; when the law has changed subsequent to judgment; when settlement negotiations are contingent on the district court's judgment being vacated; or when there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issues on appeal.

Indicative rulings are procedurally superior to other possible methods of handling these situations. The district court, being familiar with the case, is often in the best position to evaluate a motion's merits quickly. If a motion should clearly not be granted, the district court will usually recognize that fact faster than the appellate court. If the motion has possible merit, there is no need for the appellate court to have discovered that first. Most importantly, an early indication of the district court's view can avoid a pointless remand in those cases where the trial court would deny the motion.

In addition, indicative rulings have become critical in modern settlement negotiations, following the Supreme Court's ruling in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), for cases that are on appeal. In that opinion, the Supreme Court ruled that, in most circumstances, a court of appeals need not vacate the decision of a district court if an appeal becomes moot through a settlement. The Court made clear, however, that the district court remains free to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b). See 513 U.S. at 29. Vacatur of a district court ruling is often a key element in a negotiated settlement. The indicative ruling procedure can be used effectively to determine if a district court would be willing to vacate its judgment as part of an overall settlement of a case. If the district court indicates a willingness to issue such an order, more cases on the docket of the appellate courts can be settled and dismissed without taking up scarce appellate judicial resources.

A formal amendment to the FRAP is warranted for several reasons. While the indicative ruling procedure is commonly used, its inclusion in the federal rules would ensure that all practitioners are aware of it. In addition, while nearly every Circuit currently employs this procedure, courts have used other mechanisms to achieve the same end. By making our recommended change to the FRAP, the courts would have

one standardized procedure to rely on under these circumstances, which would promote efficiency, consistency, and predictability in judicial proceedings.

Therefore, we propose a new rule, and suggest that it be located after current FRAP 4. At this point, it appears appropriate to provide for this procedure only in civil cases; our understanding is that post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters. In addition, Federal Rule of Criminal Procedure 33 already states that, if an appeal is pending, a district court may grant a new trial in a criminal case "based on the ground of newly discovered evidence," "only on remand of the case." Because our proposal does not apply to criminal cases, we also make clear that it does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, FRAP 4 does not apply to appeals from the Tax Court (see FRAP 14), but we make clear in the explanatory note that the courts of appeals are free to use this same procedure in Tax Court cases.

We suggest a new FRAP 4.1, to read as follows:

> "**Rule 4.1. Indicative Rulings**. When a party to an appeal in a civil case seeks post-judgment relief in district court that is precluded by the pendency of an appeal, the party may seek an indicative ruling from the district court that heard the case. A party may seek an indicative ruling by filing a motion in district court setting forth the basis for the relief requested, and stating that an indicative ruling appears to be necessary because an appeal is pending and the district court lacks jurisdiction to grant the relief absent a remand. The movant must notify the clerk of the court of appeals that a motion requesting an indicative ruling has been filed in the district court, and must notify the clerk of any disposition of that motion. If the district court indicates in an order that it would grant the relief requested in the event of a remand, the movant may seek a remand to the district court for that purpose. Nothing in this rule governs relief sought under FRAP 8, and it does not apply to matters under 28 U.S.C. §§ 2241, 2254, and 2255."

We also propose the following as an Advisory Committee Note:

> "This rule is designed to make known, and to make uniform, a procedure commonly used by the courts of appeals in civil cases for obtaining 'indicative

rulings' by the district courts when an appeal is pending. (The problem arises because a district court loses jurisdiction over a judgment when an appeal is filed.) The D.C. Circuit described this procedure in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), as follows:

> When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial."

Nearly all of the Circuits have adopted this procedure in their case law; they appear to accept that a district court has some form of jurisdiction that allows it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. Accordingly, a uniform procedure is needed so that a district court may notify the parties and the court of appeals that it would grant or seriously entertain a post-judgment motion, and that a remand from the appellate court is thus warranted for that purpose. This procedure is currently used by the courts of appeals in a variety of situations other than simply seeking a new trial based on recently discovered evidence: new methodologies or other procedures change the impact of evidence used below; there has been a post-judgment change in the law; settlement negotiations are contingent on a decision that the district court's judgment be vacated, see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994); or there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issue on appeal. Thus, the indicative ruling procedure should be used in appropriate circumstances for filing post-judgment motions in civil cases, such as under FRCP 60(b), and may also be used when an interlocutory appeal is pending. The procedure provided by this Rule 4.1 will not be necessary or appropriate, of course, where the movant seeks relief pending appeal under Rule 8 FRAP (i.e., a stay or injunction pending appeal) or seeks other relief in aid of the appeal, since such relief is available in the district court without a remand even after the notice of appeal is filed. Moreover, nothing in this rule would foreclose a district court from exercising any authority it retains during the pendency of an interlocutory appeal. There does not appear to be a need for this procedure in

criminal cases, and FRCrP 33 already provides that a district court may grant a new trial in a criminal case 'based on the ground of newly discovered evidence,' 'only on remand of the case.' Because this new rule does not apply to criminal cases, it also does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, although Rule 4 does not apply to appeals from the Tax Court, the courts of appeals are free to use this same procedure in Tax Court cases."

Thus, I am submitting this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Seth P. Waxman

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

Minutes of Spring 2001 Meeting of
Advisory Committee on Appellate Rules
April 11, 2001
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 11, 2001, at 8:35 a.m. at the Hotel Inter-Continental in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Samuel A. Alito, Jr., Chief Justice Richard C. Howe, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Also present were Judge Anthony J. Scirica, Chair of the Standing Committee; Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and former Advisory Committee members Chief Justice Pascal F. Calogero, Jr., and Mr. John Charles Thomas.

Judge Garwood introduced Chief Justice Howe and Mr. Roberts, who replaced Chief Justice Calogero and Mr. Thomas, respectively, as members of this Committee. Judge Garwood thanked Chief Justice Calogero and Mr. Thomas for their devoted service to this Committee and presented both with certificates of appreciation. Judge Garwood also introduced Judge Murtha, who replaced Judge Phyllis A. Kravitch as the liaison from the Standing Committee. Finally, Judge Garwood welcomed Judge Scirica from the Standing Committee and Prof. Cooper from the Civil Rules Committee.

II. Approval of Minutes of April 2000 Meeting

The minutes of the April 2000 meeting were approved.

III. Report on June 2000 and January 2001 Meetings of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2000 meeting, the Standing Committee approved for publication all of the rules forwarded by this Committee — including the proposed amendments to Rules 4(a)(7), 5(c), 21(d), and 26.1, as well as the electronic service package — with one

D. Item No. 00-04 (FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

The Justice Department's proposal was discussed at some length at this Committee's April 2000 meeting. At that time, members raised several concerns. Some members objected to the exclusion of proceedings under 28 U.S.C. §§ 2241, 2254, and 2255 from the rule. Other members expressed confusion over how the rule would operate in the case of interlocutory appeals. Still other members questioned the need for rulemaking on this subject or expressed concern about particular language in the Committee Note. The Justice Department agreed to give the matter further study.

Mr. Letter reported that the Justice Department continued to believe that habeas proceedings should be excluded from the rule, but did not feel strongly about it. Likewise, the Department was willing to drop any reference to interlocutory proceedings from the rule or Committee Note.

After further Committee discussion, the Reporter suggested that any rule on indicative rulings should be placed in the FRCP, not in FRAP. Placement in the FRCP would be more logical; after all, the rule authorizes parties to file the post-judgment motions authorized by *the FRCP* in the *district* court and authorizes the *district* court to issue a particular type of ruling. The appellate court has no real involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. The rule on indicative rulings is a rule governing a district court's consideration of post-judgment motions listed in the FRCP; as such, it belongs in the FRCP. This point is reinforced by the fact that FRCrP 33, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

Several members agreed with the Reporter. A member moved that the proposal of the Justice Department on indicative rulings be referred to the Civil Rules Committee and removed from the study agenda of this Committee. The motion was seconded. The motion carried (unanimously).

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers. To date, there is only one decision on this issue. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999). However, the issue is pending before the Fourth Circuit, so the possibility of a future conflict exists.

Judge Motz asked that further discussion of this matter be postponed. She stated that the Fourth Circuit had not yet issued its decision on this issue. The Reporter said that it is likely that the panel is holding the case in anticipation of the Supreme Court's decision in *Becker v. Montgomery*, which is scheduled for argument on April 16. In *Becker*, the Sixth Circuit held that it was required to dismiss an appeal because the pro se appellant failed to sign the notice of appeal.

By consensus, the Committee agreed to postpone further discussion of this matter until its fall 2001 meeting.

F. Items Awaiting Initial Discussion

1. Item No. 00-06 (FRAP 4(b)(4) — failure of clerk to file notice of appeal)

Judge Easterbrook forwarded to this Committee a copy of his opinion for the Seventh Circuit in *United States v. Hirsch*, 207 F.3d 928 (7th Cir. 2000), and asked this Committee to consider amending Rule 4(b)(4) to address the failure of a district clerk to file a notice of appeal in a criminal case when requested by a defendant under FRCrP 32(c)(5).

The Reporter suggested that this matter be removed from this Committee's study agenda. Judge Easterbrook himself said in *Hirsch* that the situation that he wishes Rule 4(b)(4) to address "is rare and may be unique," given that he was "unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step." Moreover, *Hirsch* itself was not such a case. The transcript made clear that the defendant in *Hirsch* had not, in fact, asked the clerk to file a notice of appeal on his behalf. Until this situation actually arises, this would not be a fruitful subject of rulemaking.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Chambers of
WILL GARWOOD
Circuit Judge

903 San Jacinto Boulevard
Austin, Texas 78701
512/916-5113

May 14, 2001

The Honorable David F. Levi
United States District Court for
the Eastern District of California
501 I Street — 14th Floor
Sacramento, CA 95814

Dear Judge Levi:

Last year, the Department of Justice asked the Advisory Committee on Appellate Rules to amend the Federal Rules of Appellate Procedure ("FRAP") to explicitly authorize the use of a procedure known as an "indicative ruling." A copy of Solicitor General Waxman's March 14, 2000 letter to me is enclosed. The letter describes the indicative ruling procedure at some length.

The Appellate Rules Committee discussed this proposal at both its April 2000 and April 2001 meetings. The members of the Committee seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule and Committee Note submitted by the Department of Justice. However, the Committee concluded unanimously that if the rules of practice and procedure are to be amended to include provisions authorizing and regulating indicative rulings, those provisions should be located in the Federal Rules of Civil Procedure ("FRCP"), and not in FRAP.

The proposed rule would authorize parties to file post-judgment motions found in the FRCP (not in FRAP) in the district court (not in the appellate court) and would authorize the district court (not the appellate court) to issue a particular type of ruling. The appellate court has almost no involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. At bottom, the proposed rule on indicative rulings is a rule that would govern a district court's consideration of post-judgment motions listed in the FRCP; as such, the proposed rule belongs in the FRCP. This point is reinforced by the fact that Rule 33 of the Federal Rules of Criminal Procedure, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

For these reasons, our Committee has decided to leave this proposal in the good hands of your Committee. Please don't hesitate to contact me if you have any questions. I look forward to seeing you in Philadelphia in June.

Sincerely,

Will Garwood

Enclosure

cc: Dean Patrick J. Schiltz (w/o enc.)
Prof. Edward H. Cooper (w/ enc.)
Mr. Douglas Letter (w/o enc.)
Mr. John K. Rabiej (w/o enc.)

RULE 50(B): TRIAL MOTION PREREQUISITE FOR POST-TRIAL MOTION

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

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

The alternative proposed below is:

> **(b) RENEWING MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL.** If, for any reason, the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.

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

This proposal renews a question that was considered by the Advisory Committee when it developed the 1991 Rule 50 amendments. Failure to move in this direction appears to have been affected by lingering Seventh Amendment concerns. The concerns may have been affected by considering a proposal that would eliminate any requirement for a pre-verdict motion. There was little doubt then that a more functional approach would provide real benefits. It is difficult to believe that lingering Seventh Amendment concerns dictate the precise point at which a pre-verdict motion must be made during trial. There is at least good reason to believe that the Seventh Amendment permits a more aggressive approach that would ask only whether the issue raised by a post-verdict motion was clearly disclosed to the opposing party before the close of all the evidence. This proposal does not go that far, for the reasons suggested in Part IV.

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

that will follow when a lawyer fails to honor even this easily-remembered stricture.

I Seventh Amendment History

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

> When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before.
>
> * * * [T]his procedure was regarded as of real value, because, in addition to fully recognizing [the right of trial by jury], it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant * * *. 228 U.S. at 380-381.

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

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

(Justice Hughes was joined in dissent by Justices Holmes, Lurton, and Pitney. He concluded that the result achieved by a judgment n.o.v. could "have been done at common law, albeit by a more cumbrous method." There is no invasion of the jury's province when there is no basis for a finding by a jury. "We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have

according to the record. * * * [T]his court is departing from, instead of applying, the principles of the common law * * *." 228 U.S. at 428.

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

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

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

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

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

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

As to the Slocum decision,

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

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

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

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

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

II Functional Values

Sixty-five years of fiction is enough. The question today is not whether the Seventh Amendment commands that a post-verdict motion for judgment be supported by a motion at the close of all the evidence in order to rely on the ancient practice of reserving a ruling. The question is whether there are functional advantages in a close-of-the evidence motion that might be read into the Seventh Amendment and that in any event justify carrying forward the requirement as a matter of good procedure.

The central functional purpose in requiring a close-of-the-evidence motion is to afford the opposing party one final notice of the evidentiary insufficiency. Courts repeatedly state this purpose. The benefits flow to the court and the moving party as well as to the opposing party. The opposing party, given this final notice, may in fact supply sufficient evidence that otherwise would not be provided. But if the opposing party does not fill in the gap, the final clear notice makes it easier for

the court after verdict to deny any second opportunity by way of a new trial or dismissal without prejudice. Another advantage may be reflected in statements that the close-of-the-evidence motion enables the trial court to reexamine the sufficiency of the evidence (e.g., Polanco v. City of Austin, 5th Cir.1996, 78 F.3d 968, 973-975). Although courts commonly prefer to take a verdict in order to avoid the retrial that would be required by reversal of a pre-verdict judgment, there are advantages in directing a verdict. These advantages are more likely to be realized if a ruling is prompted by a close-of-the-evidence motion.

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

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

III Relaxations of Rule 50(b)

Rule 50(b) does not say directly that a post-trial motion for judgment as a matter of law must be supported by a motion made at the close of all the evidence. In its present form, it is captioned: "Renewing Motion for Judgment After Trial * * *." It begins much as it began in 1938: "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law * * *." The 1991 Committee Note makes express the apparent implication that only a motion made at the close of all the evidence may be renewed. Subdivision (b) "retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion."

Since the 1991 amendments, courts have continued to recognize the close-of-the-evidence motion requirement. The most straight-forward cases are those in which the issue raised by post-verdict motion or by the court was not raised by any pre-verdict motion. See American & Foreign Ins. Co. v. Bolt, 6th Cir.1997, 106 F.3d 155, 159-160. In others, a motion made at the close of the plaintiff's case but not renewed at the close of the evidence is held not sufficient to support a post-verdict motion. E.g., Mathieu v. Gopher News Co., 8th Cir.2001, 273 F.3d 769, 774-778, stating

that Rule 50(b) cannot be ignored simply because its purposes have been fulfilled; Frederick v. District of Columbia, D.C.Cir.2001, 254 F.3d 156, ruling that a motion at the close of the plaintiff's case cannot stand duty as a close-of-the-evidence motion merely because the district court took the motion under advisement.

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

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

Other cases directly relax the close-of-the-evidence motion requirement. Many of them are summarized in the Committee on Federal Procedure submission. In some ways the least adventuresome are those that emphasize action by the trial court that seemed to induce reliance by expressly reserving for later decision a motion for judgment as a matter of law made at the close of the plaintiff's case. Tamez v. City of San Marcos, C.A.5th, 1997, 118 F.3d 1085, 1089-1091, presented a variation. The court denied the motion at the close of the plaintiff's case but "agree[d] to revisit the issue after the jury verdict." At the close of the evidence, the defendant requested that the court consider judgment as a matter of law after the verdict and the court agreed. The extensive discussion with the court at that point was tantamount to a renewed motion.

A somewhat similar principle is involved in cases that treat a Rule 51 request for jury instructions as satisfying the functions of a close-of-the-evidence motion. See Bartley v. Euclid, Inc., 5th Cir.1998, 158 F.3d 261, 275 (objection to any instruction on an issue not supported by evidence); Bay Colony, Ltd. v. Trendmaker, Inc., 5th Cir.1997, 121 F.3d 998 (objection to instruction on same grounds as advanced in motion for judgment at close of the plaintiff's case); Scottish Heritable Trust,

PLC v. Peat Marwick Main & Co., 5th Cir.1996, 81 F.3d 606, 610-611 & n. 14. When the instruction request explicitly presents a "no sufficient evidence" argument, it seems easy enough to treat it as equivalent to a motion for judgment as a matter of law on that issue.

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

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

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

The Fifth Circuit has taken an openly flexible approach in a number of opinions that may represent the furthest general reach of the pragmatic view. In Polanco v. City of Austin, 5th Cir.1996, 78 F.3d 968, 973-975, the court confessed that it has strayed from the strict requirement of Rule 50(b) only where "the departure from the rule was 'de minimis,' and the purposes of the rule were deemed accomplished." The purpose is to enable the trial court to reexamine the sufficiency of the evidence and to alert the opposing party to the insufficiency of the evidence. "This generally requires (1) that the defendant made a motion for judgment as a matter of law at the close of the plaintiff's case and that the district court either refused to rule or took the motion under advisement, and (2) an evaluation of whether the motion sufficiently alerted the court and the opposing party to the sufficiency issue." In Serna v. City of San Antonio, 5th Cir.2001, 244 F.3d 479, 481-482, the court took this approach to the point of ordering judgment as a matter of law on the basis of a motion made after the jury had retired and begun deliberating. It noted that the district court chose to rule on the merits of the motion — if the district court had rejected the motion as untimely "we would be faced with a very different situation."

IV How Much Flexibility?

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

Collectively, the voice of experience speaks through these and other decisions. The

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

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

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.

Committee Note

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

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

requirement. The courts are slowly working away from the formal requirement, but amendment carries the process further and faster.

B. Require Sufficiency Issue To Be Raised

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

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

V Other Rule 50(b) Issues

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

A. Renewed Motion Requirement

Rule 50(b) should continue to permit renewal after trial of a motion made during trial. But the express provision that the action is submitted to the jury subject to later deciding the motion suggests

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

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

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

B. Time For Motion After Mistrial

Judge Stotler, while chair of the Standing Committee, urged that Rule 50(b) should be amended to impose a time limit for renewing a trial motion after a mistrial. The rule now allows a motion to be renewed by filing a motion no later than 10 days after entry of judgment. Earlier versions set the limit at 10 days after the jury is discharged. A series of amendments, culminating in 1995, established uniform time limits for post-trial motions under Rules 50, 52, and 59. It is easy enough to restore a special pre-judgment time limit for a Rule 50(b) motion after a mistrial.

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

Rule 50(b): Alternative Draft

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

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

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

(A) ***Renewed Motion.*** The movant may renew the Rule 50(a) motion by filing a motion no later than 10 days after entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10

days after the jury was discharged. The movant also may move for a new trial under Rule 59 as joint or alternative relief. Failure to renew the Rule 50(a) motion does not waive review of the court's failure to grant the motion.

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

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

(A) enter judgment on the verdict;

(B) order a new trial; or

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

Committee Note

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

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

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

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February 25, 2003

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On February 12, 2003, the Section approved the enclosed report entitled Eliminating a Trap for the Unwary: A Proposed Revision of Federal Rule of Civil Procedure 50. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

GKA:sm
Enclosure

cc: Cathi A. Hession, Esq., Chair (w/encl.)
Thomas McGanney, Esq. (w/encl.)
Ronald Kennedy, Esq. (w/encl.)
A. Thomas Levin, Esq. (w/encl.)
Ms. Lisa Bataille (w/encl.)

Eliminating a Trap for the Unwary:

A Proposed Revision of Federal Rule of Civil Procedure 50

Introduction

Federal Rule of Civil Procedure 50, now entitled "Judgment as Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings" (hereinafter "Rule 50"), was extensively amended in 1991. The 1991 amendment eliminated the terminology of "directed verdict" and "judgment notwithstanding the verdict (hereinafter "judgment n.o.v.") and substituted the term "judgment as a matter of law" for both. The rule provides that "motions for judgment as a matter of law may be made at any time before submission of the case to the jury." (Fed. R. Civ. P. 50(a)(2)) (hereinafter "Rule 50(a)(2)"). The motion is no longer required to be made when a party has completed its case and formally rested, but may be granted at any time when "a party has been fully heard on an issue." (Fed. R. Civ. P. 50(a)(1)) It is relatively rare that such a motion is granted; the trial court usually either reserves decision or denies such a motion, and leaves the initial determination to the jury. "[A]ppellate courts have often indicated that in general the better and safer practice is for trial courts to wait for a verdict and rule on the sufficiency of the evidence in a post-verdict motion for judgment." Moore's Federal Practice (3d ed.) § 50.02(2) at 50-14. See Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163, 166 n.2 (2d Cir. 1980).

The rule retains the requirement that, in order for a motion for judgment made after the verdict to be considered, there must have been a motion made for judgment "at the close of all the evidence." (See Fed. R. Civ. P. 50(b) (hereinafter "Rule 50(b)") and Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (b)). Thus, even if a party has made a motion for

judgment at the end of the opposing party's case (or when the opposing party has been heard), but fails to renew it at the close of the evidence, such party can not make a motion for judgment after the verdict is rendered. Instead, under the language of Rule 50, that party is limited to a motion for a new trial under Rule 59.

The Advisory Committee stated in 1991 that it is desirable for the motion for judgment to be made before the case is submitted to the jury "so that the responding party may seek to correct any overlooked deficiencies in the proof." Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (a). However, the Advisory Committee did not address why such a motion must again be made at the close of all the evidence, if it has already been made at a time when the responding party has been fully heard.

Numerous commentators have criticized the structure of Rule 50 in this regard as "a trap for the unwary." Paul D. Carrington, The Federal Rule–Making Process, 137 U. Pa. L. Rev. 2067, 2110-2111 (1989). Both New York and California have abolished the rule that a pre-submission motion must have been made as a prerequisite to entering judgment for a party despite a jury verdict in favor of the other party. See N.Y.C.P.L.R. 4404 (McKinney 2003) (permitting a post-verdict motion by a losing party or on the court's own motion without requiring a pre-verdict motion.) and Cal. Civ. Proc. § 629. 7 B.E. Witkin California Procedure (4th ed. 1997) refers to the prior procedure as "a useless and annoying formality." (Section 448). The New York Advisory Committee stated in its 1958 Report:

> The motion at the close of the evidence is a mere formality today which does not give either the court or litigants any fair notice in time to cure defects. It seems only a trap for the unwary or inadvertent which should not be an absolute condition for judgment notwithstanding the verdict.

Advisory Comm. on Practice & Procedure, Second Preliminary Report, N.Y. Leg. Doc. No. 13 at 312 (1958).

Perhaps more significantly, several federal appellate and trial courts have refused to enforce Rule 50 as written in this regard, finding that the procedure has no practical justification. Other courts do enforce the rule as written, creating uncertainty within and among the various circuits as to the state of the law.

The varied and unpredictable approach of the courts to the procedure under Rule 50 creates a problem that should be addressed. At least four significant alternatives present themselves:

(1) Rule 50 should be enforced as written;

(2) Rule 50 should be amended to eliminate the requirement for any pre-verdict motion to be made as a prerequisite to a post-verdict motion for judgment;

(3) Rule 50 should be amended to eliminate the need for making a motion for judgment "at the close of all the evidence" as a prerequisite to making a post-verdict motion, if a motion for judgment in accordance with Rule 50(a) has already been made prior to that time.

(4) The issue should be decided by weighing the prejudice to each side based on the facts of the case.

For the reasons discussed below, the Section concludes that alternative 3 should be adopted.

Discussion

A. Constitutional Background

The procedure under Rule 50 (and its predecessors) has been shaped by Supreme Court decisions interpreting the Seventh Amendment. The Supreme Court in 1913 held that a motion for judgment notwithstanding the verdict could not be granted in federal courts because its grant would have the effect of depriving the victorious party of his right to a jury trial. The Court found no analogue to the motion in the pre-Constitution common law procedure. The Court made specific reference to the clause of the Seventh Amendment that provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States." Slocum v. New York Life Ins. Co., 228 U.S. 364, 376 (1913) (5-4 decision). The Court did hold in that case that the trial court had erroneously denied a directed verdict motion, but held that the appropriate remedy was a new trial.

Twenty-two years later, in Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654 (1935), the Court found a way around Slocum. The Court held that if the district court expressly reserved the point whether a directed verdict should be granted, both it and the appellate court were thereby empowered to enter judgment n.o.v., if they determined that the directed verdict motion should have been granted.

Rule 50(b), as it was promulgated in 1937, eliminated the need for a formal reservation by the district court. The Rule provided that the court was "deemed" to have reserved the determination of legal issues whenever a pre-verdict motion for a directed verdict was not granted. The language has been modified, but the same concept is embodied in the current

version of Rule 50(b). The Supreme Court has upheld post-verdict judgment as a matter of law pursuant to Rule 50 as consistent with the Seventh Amendment. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321 (1967).

The Fed. R. Civ. P. 50, 1991 Advisory Committee Note to Subdivision (a) makes clear that the Advisory Committee considers the constitutional thinking of Slocum anachronistic:

> [A]ction taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment . . ..

However, the historical development of the Supreme Court cases and Rule 50 does indicate that there may be a constitutional objection to eliminating the requirement that at least one pre-verdict motion for judgment be made. If such a motion has not been made at all, then there would be nothing upon which to base the fiction[1] that decision has been reserved. In light of this, alternative (2) – the procedure adopted in New York and California – cannot easily be adopted in the federal courts. The question remains as to whether there is any justification for requiring renewal of the motion if it has once been made.

[1] There is no question that it is a fiction: "A judge may issue a definitive ruling denying the pre-verdict motion for judgment as a matter of law. . . yet that seemingly definitive ruling is somehow deemed to constitute nothing more than a reservation of decision on the motion." Moore's Federal Practice (3d ed.) ¶ 50.04(2) at 50.21.

B. The Advisory Committee's Rationale for Requiring Pre-Verdict Motions

The Advisory Committee in 1991 addressed the practical justification for requiring a pre-verdict motion in several places. In commenting on subdivision (a), the Advisory Committee Note states:

> Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment.

The Note also refers to the second sentence of Rule 50(a)(2) which requires that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The Note goes on to say that the "revision thus alters the result in cases in which courts have used various techniques to avoid the requirement" that a pre-verdict motion be made as a predicate for a motion notwithstanding the verdict. This provision does require that at least one such pre-verdict motion be made; it does not, however, provide a rationale for the position that the motion, once made, has to be renewed. The Note then quotes from Farley Transp. Co. v. Sante Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986) and Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), both discussed below (see pages 10-11).

A similar comment is made by the 1991 Advisory Committee with respect to Subdivision (b):

> **Subdivision (b).** This provision retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-

> verdict motion. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion. *E.g., Kutner Buick, Inc. v. American Motors Corp.*, 848 F.2d 614 (3d Cir.1989).

Again, this statement does not address the issue of why it should be necessary to renew a motion for judgment at the close of all the evidence.

C. The Conflicting Case Law

Prior to the 1991 amendment, the then Advisory Committee Reporter, Paul Carrington, in an article in the University of Pennsylvania Law Review,[2] commented on the status of the case law under Rule 50:

> The concern with Rule 50 is not that it sends too many or too few cases to a jury, or that too many or too few verdicts are being disregarded at the point of judgment. The concern is rather that Rule 50 and the practice under it are anachronistic, too complex, and a trap for the unwary.
>
> An old rule of questionable value requires a motion for directed verdict under Rule 50(a) as a predicate for a motion for judgment notwithstanding the verdict under Rule 50(b). The rule rests on the fiction that denial of a motion for directed verdict automatically reserves the issue for reconsideration when the post-verdict motion is made. Courts interpreted a 1913 decision to require the fiction, but a 1935 holding substantially undermined the 1913 ruling. Also questionable is the old rule, possibly abiding, that a party waives a motion for directed verdict by presenting evidence.
>
> These otherwise anachronistic rules protected opposing parties from being surprised by a motion for a judgment notwithstanding the verdict based on a legal theory or a factual contention not previously raised or considered.

[2] Paul D. Carrington, The Federal Rulemaking Process, 137 U. Pa. L. Rev. 2067, 2110-2111 (1989).

> Absent these provisions, parties might have been tempted to save an objection to the legal sufficiency of an adversary's case until it was too late to cure the defect by submission of additional evidence on a fact not previously recognized by the adversary as material.
>
> On the other hand, requiring a formal motion for directed verdict has several unfortunate consequences. It is a trap: Failing to make a timely motion that a judge very likely would have denied could force a party to undergo a new trial. The refusal to consider a motion for judgment notwithstanding the verdict on the sole ground that the party did not make a motion for directed verdict is an empty formalism out of keeping with the Rules. Moreover, the requirement forces some parties to make motions contrary to their own tactical interests; in doubtful cases, litigants may prefer sending their cases to the jury in the hope of a favorable factual termination rather than risking a reversal of a directed verdict resulting in yet another trial. A number of courts have used techniques designed to avoid the effect of the requirement and in the process they have created some complex doctrine. (footnote omitted).

Despite Professor Carrington's views, the Advisory Committee maintained the requirement of a pre-verdict motion for making a post-verdict motion.

As Professor Carrington noted, one of the results of literal enforcement of the rule is that noncompliance can mean that a party, which may deserve judgment as a matter of law, is limited to seeking the relief of a new trial. See DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) (defendant moved for directed verdict at end of plaintiff's case, but failed to renew the motion at the close of all the evidence; held, although defendant deserved judgment as matter of law, failure to renew motion in accordance with Rule 50's terms, precluded such relief). This result is intolerable to many courts, and they have devised ways to avoid this result.

As a practical matter, if a party is entitled to judgment as a matter of law, it makes little sense to require another trial to present factual evidence, when the result is foreordained by the resolution of the legal issue.

A note in the Michigan Law Review of March 1993[3] collects numerous cases and compares the approach of the various circuits to the requirements of Rule 50. This survey detailed five or six different rules applied in ten different circuits. No cases were then found in the D.C. Circuit or the Fourth Circuit. As further discussed below, since that time the Fourth Circuit has adopted a lenient approach to Rule 50, but the Seventh Circuit has criticized its previous decisions and adopted a strict approach.

(1) The Third and the Eleventh Circuits have taken a literal, strict approach. Even if a directed verdict motion was made, a post-verdict motion for judgment as a matter of law should not be considered if the motion had not been renewed at the close of all the evidence. See Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9 (3d Cir. 1976); Mark Seitman & Assoc. Inc. v. R.J. Reynolds Tobacco Co., 837 F.2d 1527 (11th Cir. 1988).

(2) Four circuits - the First, Sixth, Eighth and Tenth – have held that the post-verdict motion could be entertained, even if the directed verdict motion had not been renewed, if two conditions were met: (1) the district judge, at the time of hearing the directed verdict motion, had somehow specifically indicated that the failure to renew the motion at the close of the evidence would not result in a waiver; and (2) the evidence put on by the moving party after denial of the

[3] Note, Rollin A. Ransom, Toward A Liberal Application of the "Close of all the Evidence "Requirement of Rule 50(B) of the Federal Rules of Civil Procedure: Embracing Fairness over Formalism, 91 Mich. L. Rev. 1060 (1993).

directed verdict motion was not extensive. Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969); Boynton v. TRW Inc., 858 F.2d 1178, 1186 (6th Cir. 1988); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 294 (8th Cir. 1982) (however, the Eighth Circuit has also required that a motion for judgment n.o.v. be renewed, without reference to the Halsell case, in Duckworth v. Ford, 83 F.3d 999, 1001 (8th Cir. 1996); Armstrong v. Fed. Nat'l. Mortgage Ass'n, 796 F.2d 366, 370 (10th Cir. 1986).

(3) The Fifth Circuit also permitted consideration of post-verdict motions where there has been no renewal of the directed verdict motion, but formulated the test somewhat differently: (1) the district judge need only have "reserved" decision on the motion — it was not necessary that the judge give specific assurance to the moving party that its rights were being preserved; and (2) the evidence introduced after reservation of the directed verdict motion may be substantial, so long as it is essentially unrelated to the motion. Miller v. Rowan Cos., 815 F.2d 1021, 1024-25 (5th Cir. 1987). See also Bay Colony, Ltd. v. Trendmaker, Inc., 121 F.3d 998, 1003 (5th Cir. 1997) ("Thus, this Court has not required strict compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirements have been satisfied.").

(3A) The Second Circuit articulated a variant of the Fifth Circuit rule that: (1) required that the trial judge indicate that the movant's rights were preserved; but (2) phrased the test relating to the evidence introduced after the motion as being of such a nature that the opposing party could not "reasonably have thought that the moving party's initial view of the insufficiency of the evidence had been overcome and there was no need to produce anything more in order to avoid the risk of judgment n.o.v." Ebker v. Tan Jay Int'l Ltd. 739 F.2d 812, 824 (2d Cir. 1984). The Second Circuit has also held that it will not enforce the strict provisions of Rule 50, if the

opposing party fails to raise the issue in the district court. See Gibeau v. Nellis, 18 F.3d 107, 109 (2d Cir. 1994).

(4) The Ninth Circuit has held that it was permissible to entertain a post-verdict motion for judgment, just so long as the district court had taken an earlier motion for a directed verdict under advisement, rather then deciding it. Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342 (9th Cir. 1986). In a later case, the Ninth Circuit held that the motion had to be renewed at the close of the evidence, when the district court had denied a prior motion for judgment made after plaintiff's opening statement. Patel v. Penman, 103 F.3d 868 (9th Cir. 1996). The court noted that plaintiff had called six witnesses and defendant one witness, after the motion was made.

(5) Prior to the 1991 amendments, the Seventh Circuit had adopted a rule that depended upon a showing of prejudice by the opposing party. If the movant had made a motion for a directed verdict, and even if the district court had denied it outright, the movant was entitled to renew the motion post-trial if there was no prejudice to the other party. Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986). However, in Downes v. Volkswagen of Am., Inc., 41 F.3d 1132 (7th Cir. 1994), the Seventh Circuit held that since the Advisory Committee had the chance to revise Rule 50 in 1991, but instead had retained the requirement of renewing a pre-verdict motion for judgment, Benson should not be followed. Id. At 1139-40. Other Seventh Circuit decisions have followed Downes. See Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1364 (7th Cir. 1996) (collecting cases).

(6) The Fourth Circuit, which had not taken a position prior to 1991, adopted a lenient approach in Singer v. Dungan, 45 F.3d 823 (4th Cir. 1995). In that case, the court, after quoting

from Moore's Federal Practice (2d ed. 1994)¶ 50.08[4], and noting the decisions of various courts applying a limited approach to Rule 50(a), determined that defendant's motion for judgment should have been granted, despite defendant's failure to renew the motion at the close of the evidence, "because the spirit behind Rule 50 was served" in that case. Id. at 828-829.

One conclusion that can be drawn from this survey is that a large amount of judicial effort has been expended to determine whether the literal requirements of Rule 50(a) should be enforced, and that, as a result, this rule has quite different application in various federal courts throughout the United States.

Conclusion

In 1991, the Advisory Committee articulated a practical justification for the procedure of requiring a motion for judgment to be made before submission to the jury. It found the justification to be "that the responding party may seek to correct any overlooked differences in the proof." The Advisory Committee cited to decisions in the Ninth and Seventh Circuits (Farley Transp. Corp. v. Sante Fe Trail Transp. Co., supra, and Benson v. Allphin, supra) which had articulated these justifications. However, the holdings of these cases were both to excuse the failure to renew, before submission to the jury, a directed verdict motion.

---

[4] "[G]uided by the general principle that the Federal Rules are to be liberally construed, some courts have held that a motion for judgment under Rule 50(b) may be granted, despite the movant's failure to renew a previous motion under Rule 50(a) at the close of all the evidence, where the purposes of Rule 50 have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury."

Moore's Federal Practice, ¶ 50.08, at 50-91 (footnote omitted). This statement does not appear in the third edition of Moore's Federal Practice (1997).

The Advisory Committee's rationale does not support a requirement that a directed verdict motion must be renewed at the close of all the evidence, as Rule 50(b) now requires. At most, it supports the position that at some time prior to submission to the jury, a motion for judgment as a matter of law should be made and the basis for the motion clearly articulated. Such motions can be made after the non-moving party has been fully heard on the issue, or after it has rested.

We do not believe that the question of whether the motion should be reserved should be resolved on a case-by-case basis by weighing the comparative prejudice to each party. Nor do we believe that the complicated formulations adopted by some courts on this issue are helpful; indeed they seemed designed to encourage further litigation directed to procedural, not substantive, issues. There should be a clear rule which makes practical sense.

We thus suggest that the first sentence of Rule 50(b) be amended to add the underlined phraseology:

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

We believe that such an amendment satisfies the purpose of Rule 50 – to give notice to the non-moving party of correctable deficiencies in its case – but lessens the potential of the rule to be simply a "trap for the unwary."

February 12, 2003

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

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RULE 12(F): ORDER TO STRIKE

Judge D. Brock Hornby has invited the Committee's attention to a Rule 12(f) question. What happens when a court grants a motion to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"? Is the offending matter physically (or electronically) expunged? Or does the need to preserve the opportunity for appellate review require that a record be maintained? If a record is maintained, should there be a limit on access to "scandalous" material? Judge Hornby's letter to the Standing Committee is attached.

Professor Marcus has undertaken a preliminary inquiry into this question. His memorandum is attached.

The migration to electronic records may create technical difficulties in implementing an order that particular materials be both preserved in the record and shielded from general access. That question is being studied by Administrative Office staff.

There is no present recommendation for action. Professor Marcus will prepare a general "substantive" redraft of all of Rule 12 to reflect questions that arose while studying the Style Draft. It seems better to consolidate all Rule 12 revisions into a single package.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

D. BROCK HORNBY
CHIEF JUDGE

156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

October 29, 2002

02-CV-J

Peter G. McCabe, Secretary
Judicial Conference Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Motions to Strike

Dear Peter:

I have spoken with you and Dan Coquillette and perhaps others on the subject of what it means to grant a motion to strike under Fed. R. Civ. P. 12(f). As near as I can determine, clerks' offices have no instructions what they should do with a pleading, all or portions of which are ordered "stricken." Is the offending paragraph (perhaps "scandalous") materials to be blackened out or excised? Or does the order simply stand as a separate entry on the docket? The answer to this question has become particularly pressing with electronic case filing. If a lawyer or party files a document electronically, and later (days? weeks?), a judge orders that all or portions of it be stricken, what is a court's system administrator to do? If a lawyer or party or member of the news media tries to access the document, should they be told that access is denied because it is stricken? Or is access provided with an annotation that it is "stricken"? Or something else? I'm not sure that any of us have ever had a clear idea what it means to "strike" a document or a paragraph or a sentence, but I fear we cannot delay the issue any longer. I invite the Committee's immediate attention to the question.

Very truly yours,

D. Brock Hornby

dlh
cc: Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure
Professor Daniel Coquillette, Reporter
Hon. David F. Levi, Chair, Advisory Committee on Civil Rules
Professor Edward H. Cooper, Reporter
John K. Rabiej
via fax

Richard Marcus
<marcusr@uchastings.edu>

03/24/2003 02:14 PM
Please respond to
marcusr

To: John_Rabiej@ao.uscourts.gov
cc: dlevi@caed.uscourts.gov, coopere@umich.edu
Subject: Re: Sealing Orders

Dear John:

I've spent a bit of time rummaging around in books to try to come up with useful material on the consequences of granting a motion to strike. To be frank, this has not yielded much, and I'm not sure that more effort would yield more. So I thought I'd write with some initial information.

My untutored reaction was that courts granting motions to strike do not usually physically excise material from pleadings or otherwise obliterate it. The similar idea of a motion to "strike" affidavits or something filed in connection with a motion ordinarily does not, so far as I know, result in removal of the affidavits from the court's file or sealing of that file.

That, at least, is my impression of what's going on. But I don't know whether it is correct. I would imagine that redacting or obliterating court files would be a rare thing. If it were done, how could there ever be appellate review? Although there is a relaxed standard of review of the grant of a motion to strike, it is nonetheless possible. And a motion to strike is often granted with leave to amend, suggesting to me that what would happen is that the party would file an amended pleading without the offending material, not that the original one would be removed from the court's file or sealed.

Finding out whether this is correct in a law library may not work very well. The two leading treatises both discuss the motion to strike at some length, but say little or nothing about how one gives effect to granting such a motion. Moore's Federal Practice (written by Judge Milton Shadur) twice says that the motion provides a way to "remove" material from a pleading, but it is not clear that this really means physically removal. See sections 12.37[3] & 12.37[5].

Fed. Prac. & Pro. sheds little more light. It does say that the motion may be granted on grounds that the pleading contains scandalous assertions harmful to a nonparty "in order to purge the court's files and to protect the subject of the allegations." (Sec. 1382 at 714.) But more generally, the main concern seems to be whether the jury will become aware of the stricken allegations. Thus, even with regard to scandalous allegations, "if the complaint will not be submitted to the jury, or if the case will be tried to the court, or if the pleadings will be subject to continuing 'judicial supervision,' there is less need to strike scandalous allegations." Id. at 715.

If the motion is made on grounds other than scandalousness, the central concern appears to be possible impact on the jury. Thus, the court might strike insufficient defenses to avoid prejudice to the parties, "which might occur, for example, should the pleadings be given to the jury." (Id., sec. 1381, at 666) Similarly, a motion to strike redundant material might be denied when no prejudicae would result from its presence, as, "for example, if the pleadings will be withheld from the jury." (Id., sec. 1382, at 692)

There are a few cases saying that courts may strike materials from the record as well as from the pleading in question. See id. at 716 n.65. A quick look at these shows that they are pro se cases (generally involving vexatious litigants), and also that it appears that the record continues to exist sufficiently to permit appellate review.

All in all, then, there is scant basis in the books for saying what is the ordinary way of striking material from a pleading. Actually, the treatment seems likely to be much like granting a Rule 12(b)(6) motion. If the third claim is dismissed, for example, that does not result in its excission from the court's record, or in sealing it.

I hope that this is of some use. It might be useful to find out how the question is actually handled in the clerk's offices of the courts represented on the Committee. At least from the materials available to me, there seems no basis for concluding that physical removal or revision is the frequent result of granting a motion to strike.

Finally, I don't myself know how such things are handled for documents filed in electronic form and accessible via the Internet. I doubt, however, that it's much different from the way paper materials have been handled. I would think that there are substantial protections against alteration of materials filed in this way, and that those protections would cut against excissions from the documents.

I'd be happy to try to delve deeper into this question, but don't know for sure what that might turn up that would be helpful.

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RULE 15

A number of Rule 15 proposals have been advanced in recent years. The most recent have emerged from the Style Project. The most familiar addresses the relation-back provisions of Rule 15(c)(3), a topic that has been on the agenda for recent meetings. Older proposals address more general problems. All are gathered in this memorandum to establish a framework for deciding whether to undertake comprehensive revision.

In 1995, possible Rule 15 revisions were framed around suggestions from two judges — one urged that the right to amend once as a matter of course should be abolished, while the other urged that it should be terminated by a Rule 12(b)(6) motion to dismiss. The 1995 memorandum is copied below, with a few variations. Action on these proposals was postponed indefinitely in November 1995.

During the initial review of Style Rule 15, Professor Marcus made some suggestions for substantive revision. They are summarized in conjunction with the 1995 proposals. Still other revisions might be considered; the purpose of this memorandum is to open Rule 15 for general discussion.

Finally, the Rule 15(c)(3) materials are carried forward from the October 2002 agenda. Judge Becker has made a persuasive case for a "simple" correction of the gloss that courts have placed on the requirement that there be a "mistake concerning the identity of the proper party." But the matter is not as simple as it might appear. One practical concern is that further expansion of the opportunity to escape limitations problems by changing parties will pull federal practice deeper into the morass of "Doe" pleading. A more conceptual concern is that Rule 15(c)(3) already pushes the limits of Enabling Act authority, particularly with respect to state-law claims. It may be better to leave old trespasses alone without pushing further along perhaps prohibited paths.

Rule 15: The 1995 Proposals: Amendment of Course

The proposal.

Rule 15(a) begins:

> **(a) AMENDMENTS.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. * * *

The Style version currently begins:

> **(a) Amendments Before Trial.**
> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
> **(A)** before being served with a responsive pleading; or
> **(B)** within 20 days after serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

A Rule 12 motion — most commonly a 12(b)(6) motion to dismiss for failure to state a claim — is a motion, not a responsive pleading, and does not cut off the right to amend.

District Judge John Martin wrote to suggest that the rule should be amended to cut off the right to amend when a motion addressed to the pleading is served. His suggestion was prompted by experience in a case in which the plaintiff served an amended complaint just as a decision on a motion to dismiss was about to be released. The amendment was available as a matter of right. He observed that while application of Rule 15(a) seems clear in this setting — and is clearly undesirable — it becomes more confused after announcement of a decision granting a motion to dismiss. If the decision also grants leave to amend, there is no problem. But some courts have held that a decision granting a motion to dismiss without addressing leave to amend does not cut off the right to amend, which survives until a responsive pleading is served or a final judgment of dismissal is entered. This problem also becomes entangled with questions of appeal finality, where a variety of answers have been given. See 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.1.

Magistrate Judge Judith Guthrie also wrote about Rule 15(a), suggesting a different problem that arose from the practice in the Eastern District of Texas of holding hearings in prisoner civil rights cases before requiring an answer from any defendant. Many cases are dismissed without an answer being filed. But some prisoner-plaintiffs manage to continually file amended pleadings, raising new claims and joining new parties, before a dismissal can be entered. She suggested that Rule 15(a) should be amended by deleting the right to amend even once as a matter of course. As an alternative, she suggested that an amendment made as a matter of course

may not add new parties or raise events occurring after the original pleading was filed.

Judge Guthrie's suggestion raises the basic question whether there is any need to permit amendment even once as a matter of course. There is a fair argument that amendment should be available only by leave. This approach would encourage more careful initial pleading, supplementing Rule 11. It might permit more efficient disposition of attempted amendments by denying leave without going through renewal of a motion to dismiss and renewed consideration of the motion. Rule 15(a) still would encourage a free approach to amendments. The drafting chore would be simple. The first sentence of present Rule 15(a), to be Style 15(a)(1), would be deleted. "Otherwise" would be deleted from the second sentence in present Rule 15(a); "other than as allowed in Rule 15(a)(1)" would be deleted from the Style rule.

There may be sufficient benefit from permitting amendment as a matter of course to continue some version of the present rule. As careful as we want pleaders to be, it may be thought that occasional slips are inevitable and should not be taken seriously. It also may be thought that leave to amend is so freely given that a limited right to amend "once as a matter of course" simply avoids the bother of making a request that almost always would be granted.

If there should be a limited right to amend once as a matter of course, it remains to determine what event should cut off the right. The least forgiving approach would allow the amendment only if made before an adversary has pointed out a defect. A more generous approach would allow the amendment after an adversary has pointed out the defect. The present rule muddles these choices by adopting a strange middle ground: there is a right to amend if an adversary presents the defect by motion to dismiss, but there is not a right to amend if an adversary presents the defect by a responsive pleading. Although more time, expense, and strategic disclosure may be involved in framing an answer than in making a motion, it is difficult to guess why the reward should be cutting off the right to amend.

The most modest reaction, in line with Judge Martin's suggestion, would be to cut off the right to amend when a responsive motion is filed as well as when a responsive pleading is filed. It may be possible to do this clearly by adding two or three words. Using the Style Draft:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
>
> **(A)** before being served with a responsive pleading <u>or [responsive] motion</u>; * * *

[Although it is subject to style objections, it may be safer to say "responsive motion." A motion for an extension of time to answer would not qualify. A motion to dismiss for lack of subject-matter jurisdiction might present some uncertainty: an argument could be made that it should cut off the right to amend the jurisdiction allegations but not to amend the claim.]

An alternative approach would be to cut off the right to amend after 20 days or some other brief period, unless a responsive motion or pleading is filed earlier:

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if:

(A) a responsive pleading or motion has not been served, or

(B) a responsive pleading is not permitted and the action is not yet on the trial calendar.

April 1995 Minutes: The April 1995 minutes include this: "Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried forward on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course, treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course. (The November 1995 Minutes are indirect: "Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process.")

Variations: Mix-and-match variations abound. One would create a right to amend without regard to responses or the trial calendar, but limit it to a tight period:

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if the action is not yet on the trial calendar.

Another would expand the present rule by allowing amendment as a matter of course within 20 days after either a responsive pleading or motion:

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after:

(A) a responsive pleading or motion has been served if a responsive pleading is permitted, or

(B) serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

Yet another, more complicated, approach would allow amendment as a matter of course until some later event. The possibilities include such events as a ruling on the sufficiency of the pleading, placing the case on the trial calendar, or dismissal of the claim addressed by the pleading:

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course until:

(A) the court has ruled on the sufficiency of the pleading;

(B) the claim addressed by the pleading is dismissed; or
(C) the action is placed on the trial calendar.

Style Process Suggestions

"Trial calendar" cut-off. The provision of Rule 15(a)(1)(B) that cuts off the right to amend if the action is on the trial calendar was questioned on the ground that many courts do not have a "trial calendar." One approach would be to delete this provision, relying on Rule 15(b), Rule 16, and perhaps inherent authority to authorize whatever control is needed when it would be disruptive to have an amendment as a matter of course within 20 days after serving a pleading to which no responsive pleading is required. Another would be to find some substitute. None has yet been suggested.

Relation of Rule 15(a), 15(b) standards. Professor Marcus reviewed Rules 8 through 15 at a time when it was unclear whether the Style Project would include modest changes in the substance of the rules. He raised an important question — whether the language of Rule 15(b) encourages trial amendments more than should be.

Style Rule 15(a)(1)(B) carries forward the standard for pretrial amendments: "The court should freely give leave when justice so requires." Style Rule 15(b)(1) carries forward the standard for amendments during trial: "The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting the evidence would prejudice that party's action or defense on the merits."

The close parallel between "freely give leave" and "freely allow an amendment" may unduly encourage amendments at trial. Or it may suggest a liberality that is not reflected in actual practice. And it may cause confusion in conjunction with Rule 16(e). Rule 16(e) allows amendment of an order following a final pretrial conference "only to prevent manifest injustice." If a final pretrial order specifies the claims, issues, or defenses for trial, Rule 16(e) should not be subverted by allowing free amendment of the pleadings.

The question, then, is whether Rule 15(b) should be revised for any of three reasons: it gives a false impression of actual practice; it accurately reflects a practice that is too liberal; or it causes confusion with Rule 16(e). No work has yet been done to determine whether any of these possibilities reflects a real need to revise the rule. Practical advice on the need for further work is essential.

Complete Replacement Pleading. Professor Marcus also raised a question whether Rule 15 should provide that any amendment must be made by filing a complete new pleading. Particularly given the ease of reproducing a complete amended pleading by word processing, the advantages of having a single document to consider would be offset only by the added bulk of paper files. But this may be a level of detail that the national rules should not address.

Integration with Rule 13(f). Another question put out of the Style Project is whether Rule 13(f) should be directly integrated with Rule 15 or simply deleted. Integration could be accomplished simply enough. In the Style version, Rule 13(f) says: "The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires." Rule 15 could be added: "The court may permit a party to amend a pleading under Rule 15 to add a counterclaim * * *." Express incorporation would clearly apply the relation-back provisions of Rule 15(c) to the new counterclaim. But there might be a dissonance between the Rule 13(f) standard and Rule 15: Rule 13(f) does not require free leave to amend, and instead requires a showing of "oversight, inadvertence, or excusable neglect or if justice so requires." Yet Style Rule 15(a)(2) is more than free leave: "The court should freely give leave when justice so requires." Rule 13(f) permits amendment when justice so requires, and also on a mere showing of "oversight" or "inadvertence." It might be better to incorporate Rule 15 and delete any semblance of an independent standard from Rule 13(f): "The court may permit a party to amend a pleading under Rule 15 to add a counterclaim," or "A party may amend a pleading under Rule 15 to add a counterclaim."

Integration by such means would not address the failure of Rule 13(f) to address an omitted crossclaim. So we could include crossclaim: "to add a counterclaim or crossclaim." (Third-party claims are governed by Rule 14(a): a third-party complaint may be served after the action is commenced, but the court's leave is required if the third-party complaint is filed more than 10 days after serving the original answer.)

An alternative would be to delete Rule 13(f), relying on Rule 15 to apply directly. That would include the right to amend as a matter of course, without requiring the court's permission.

Rule 15(c)(3)

The agenda carries forward a "mailbox" suggestion that Rule 15(c)(3)(B) be amended to overrule several appellate decisions. This proposal has been urged again by the Third Circuit opinion in Singletary v. Pennsylvania Department of Corrections, 2001, 266 F.3d 186.

The nature of the problem is illustrated by the Singletary case. The plaintiff's decedent committed suicide in prison. On the last day of the applicable 2-year limitations period, the plaintiff sued named defendants and "unknown corrections officers." The claim was deliberate indifference to the prisoner's medical needs. Eventually the plaintiff sought to amend to name a prison staff psychologist as a defendant. The court concluded that relation back was not permitted because it was clear that the new defendant had not had notice of the action within the period prescribed by Rule 15(c)(3)(A). It took the occasion, however, to address the question whether there is a "mistake" concerning the proper party when the plaintiff knows that the identity of a proper party is unknown. The court counts seven other courts of appeals as ruling that there is no mistake, and relation back is not permitted even though all other requirements of Rule 15(c)(3) are met, when the plaintiff knows that she cannot name a person she wishes to sue. For this case, the psychologist could not be named as an added defendant. The court also concludes that its own earlier decision had taken a contrary view; if the other requirements of

Rule 15(c)(3) are satisfied, the psychologist could be named.

The Third Circuit concludes its opinion by recommending that the Advisory Committee modify Rule 15(c)(3) to permit relation back in these circumstances. The specific recommendation, taken directly from the Advisory Committee agenda materials, would allow relation back when the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" the new defendant.

The Rule 15(c) memorandum invoked by the Third Circuit is set out below. It identifies a welter of problems posed by Rule 15(c)(3) as it was amended in 1991. The problems almost certainly arise from focusing on the specific desire to overrule an unfortunate Supreme Court interpretation of the former requirement that the new defendant have notice of the action "within the period provided by law for commencing the action." If amendments are justified whenever an active imagination can show genuine difficulties with a rule, extensive amendments may be warranted.

There are good reasons to avoid the thicket of Rule 15(c)(3) amendments. Perhaps the most important is that the questions that can be raised on reading the rule do not appear to have emerged in practice. At least one leading treatise, for example, gives no hint of these problems. A second reason is that amendments should be made only when good answers can be given. Good answers are not immediately apparent, at least as to many of the questions. A third reason arises from the interplay between Erie principles and the Rules Enabling Act. Rule 15(c)(1) allows relation back whenever "relation back is permitted by the law that provides the statute of limitations applicable to the action." Putting aside for the moment the settings in which state limitations periods are borrowed for federal claims, diversity actions present obvious problems. Limitations periods are "substantive" for Erie purposes. Any attempt to adopt limitations periods for state-law claims through the Rules Enabling Act would surely be challenged as abridging, enlarging, or modifying the state-created substantive claim. As they stand, the relation-back provisions of Rule 15(c)(2) and (3) invite the same challenge whenever they permit litigation and judgment on a claim that would be barred by limitations in the courts of the state that created the claim. Why is this a matter of pleading procedure, necessary to make effective the notice-pleading regime of Rule 8, not a direct adoption of limitations policies?

Three alternative courses of action appear most likely: (1) Invest substantial time and energy in a thorough reconsideration of Rule 15(c)(3). (2) Make the simple change to protect the plaintiff who knows that an intended defendant cannot be identified. (3) Do nothing, concluding that it is better not to attempt to fix one identified incoherence created by judicial interpretation than to expand the reach of a rule that needs more drastic revision.

A revised Rule 15(c) can be put together by choosing from the menu suggested in the memorandum that follows:

Rule 15. Amended and Supplemental Pleadings

*****

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, ~~or~~

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading or the opposing party's pleading, or

(3) the amendment changes[1] the party or the naming of the party against whom a claim is asserted ~~if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for~~

[1] Should we make a further amendment to reflect the use of relation back when a defendant is added, not simply substituted? One possible formulation would be: "the amendment asserts a claim against a new party or changes the party or the naming of the party against whom a claim is asserted, and:"

~~service of the summons and complaint~~ and:

(A) Rule 15(c)(2) is satisfied;

(B) the party asserting the claim has acted diligently to identify the party to be brought in by amendment;

(C) the party to be brought in by amendment has received ~~such~~ notice of the institution of the action that meets the requirements of Rule 15(c)(3)(D) within 120 days after expiration of the limitations period for [commencing the action]{filing the claim},[2] or within the[3] period for effecting service in an action filed

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[2] This formulation makes more apparent a problem that inheres in the 1991 version, and for that matter in the earlier version as well. Should we attempt to address the questions raised by the many doctrines that may separate the conduct giving rise to the claim from the start of the limitations period? The plaintiff is a minor; a "discovery" rule applies; there is "fraudulent concealment"; and so on. The underlying theory that it is enough to get notice to the proper defendant at a time that would satisfy limitations requirements if the proper defendant had been properly named suggests that all of these complications should be included in the rule. But that may seem too much to endure when we consider the difficulty of determining when the proper defendant actually learned of the action and how good the information was. Probably these problems should bask in benign neglect.

[3] An earlier draft had "a shorter" period. But if state law allows more than 120 days, there is no apparent reason to adhere to the 120 day limit.

on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action;[4] and

(D) the notice received within the time set by Rule 15(c)(3)(C) is such that the party to be brought in by amendment ~~(A)~~ **(i)** will not be prejudiced in maintaining a defense on the merits, and ~~(B)~~ **(ii)** knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party. ~~The d~~Delivery~~ing~~ or mailing ~~of~~ process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the

[4] This could be made still more complicated by invoking state time-of-service requirements only as to claims governed by state law: "or — if a claim is governed by state law — within the period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action * * *."

requirement of items (i) and (ii) ~~subparagraphs (A) and (B) of this paragraph (3)~~ with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.[5]

Committee Note

Rule 15(c)(2) is amended to make clear the application of Rule 15(c) to an omitted counterclaim set up by amendment under Rule 13(f). The better view is that Rule 15(c) applies because Rule 13(f) provides for adding an omitted counterclaim by amendment, see 6 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1430. When an answer or like pleading sets forth no claim at all, however, some difficulty might be found in present Rule 15(c)(2)'s reference to a claim set forth or attempted to be set forth in the original pleading. The amendment allows relation back if the claim arises out of the conduct, transaction, or occurrence set forth in the opposing party's pleading. A counterclaim in an answer, for example, will relate back if it arises out of the same conduct, transaction, or occurrence as the complaint.

Rule 15(c)(3) was amended in 1991 "to change the result in *Schiavone v. Fortune*[, 477 U.S. 21 (1986)]." Several changes are made to better implement that purpose.

The central purpose of relation back under Rule 15(c)(3) has been clear from the beginning. The purposes of a statute of limitations are fulfilled if a defendant has notice of the action within the time

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[5] Is this right? Suppose the officer is brought into the action in an individual capacity?

allowed for making service in an action filed on the last day of the limitations period. If the defendant is not named in the action, the notice must meet the standards first articulated in 1966: the notice must be such that the defendant will not be prejudiced in defending on the merits, and also such that the defendant knows (or should know) that the plaintiff meant to sue the defendant. The *Schiavone* decision thwarted this purpose by ruling that a defendant not correctly named must have this notice before the limitations period expires, relying on the 1966 requirement that the notice be received "within the period provided by law for commencing the action against" the new defendant. The 1991 amendment changed this phrase, requiring that notice be received "within the period provided by Rule 4(m) for service of the summons and complaint." If an action is filed on the last day of the limitations period, the apparent result is that notice to a defendant not named is timely so long as it occurs within 120 days after filing and expiration of the limitations period. The 1991 Committee Note, further, states that in addition to the 120 days, Rule 15(c)(3) allows "any additional time resulting from any extension ordered by the court pursuant to" Rule 4(m).

Incorporation of Rule 4(m) seemed to provide a convenient means of restoring the purpose of relation back. But it creates several difficulties. If the action is filed more than 120 days before expiration of the limitations period, the time for notice to a defendant not named seems to end before the limitations period. There is little apparent reason, on the other hand, to impose on a defendant not named the open-ended uncertainty that arises from the prospect that the court may have extended the time to serve someone else for reasons that have nothing to do with the situation of the defendant not named. And there is no apparent provision at all for cases that fall outside Rule 4(m) entirely — by its terms, Rule 4(m) does not apply "to service in a foreign country pursuant to [Rule 4] (f) or (j)(1)." Further perplexities may arise if a claim for relief is stated in a cross-claim or counterclaim, followed by a later attempt to amend to add an additional defending party.

The amended rule deletes the reliance on Rule 4(m). Instead, it requires that notice to the defendant not named be received within the shorter of two periods. The first period is 120 days after expiration

of the limitations period for [commencing the action]{filing the claim}. This period corresponds with the most direct application of the present rule in an action that in fact is filed on the final day of the limitations period. To this extent, it does not change the period in which a defendant is vulnerable to amendment and relation back. But it alleviates any uncertainty that might arise from the prospect that the period may extend beyond 120 days because an extension was granted under Rule 4(m), and applies to cases of foreign service that fall outside Rule 4(m). [It also gives a clear answer for counterclaims, cross-claims, and the like: the new defending party must have had notice of the required quality no later than 120 days after expiration of the limitations period for commencing the action.] {As to a claim stated by counterclaim, cross-claim, or the like, the amended rule is open-ended. By referring to the time for filing the claim, it allows 120 days from whatever limitations rule governs the counterclaim, cross-claim, or other claim.} The alternative period is less than 120 days. This period applies when the limitations law governing the claim requires service in less than 120 days after filing. A federal court may be bound by a state limitations statute that requires service within a defined period after the action is filed. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). There is no reason to subject a defendant not named in the original complaint to a longer period for receiving notice of the action than applies to a defendant who is named in the original complaint.

A new requirement is introduced in addition to deleting the reliance on Rule 4(m). Relation back is permitted under Rule 15(c)(3) only if the party asserting the claim has acted diligently to identify the party to be brought in by amendment. The rule should not encourage a plaintiff to prepare poorly during the limitations period, relying on relation back to save the day.

An unrelated change is made in describing the quality of the notice that must be received by a defendant not named in the complaint. A common problem arises when a plaintiff is not able to identify a proper defendant. Several courts have ruled that a plaintiff who knows that an intended defendant has not been identified has not made a "mistake concerning the identity of the proper party." The result is that a diligent plaintiff whose thorough investigation has

proved inadequate is less protected than a less diligent plaintiff who mistakenly thought to have identified the proper defendant. This result cannot be justified by looking to differences in the position of a defendant not named — if anything, a defendant not named may be put on better notice by a complaint naming an "unknown named police officer" than by a complaint that incorrectly names a real police officer.[6] The reasons for allowing relation back against a defendant who knew that the lack of identification arose from a diligent plaintiff's lack of information are clearly stated in *Singletary v. Pennsylvania Department of Corrections*, F.3d (3d Cir.2001).

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[6] This is the point to consider whether to say anything about suing "unknown named" defendants. The question may arise if there is at least one defendant who can be identified with enough confidence to satisfy Rule 11. That is the easier case: there is sufficient ground to sue that person, and — unless things go awry at the outset — to launch discovery. Adding "unknown named" defendants may provide additional notice to the anonymous potential defendants, particularly if a further category is added — "unknown-named police officers." The question also may arise if there is no reasonably identifiable defendant: it is a large police force, and there is no reasonable way to identify even one plausible defendant. Filing an action then becomes primarily a tool for launching discovery, and — if filed toward expiration of the limitations period — winning an extension of the limitations period. There is likely to be substantial resistance to an amendment that clearly contemplates this practice.

Rule 15(c)(3) Puzzles

The excuse for addressing Rule 15(c)(3) is 98-CV-E, a law student's suggestion that something should be done to overturn the unfortunate result in Worthington v. Wilson, 7th Cir.1993, 8 F.3d 1253, and like cases. That suggestion will be addressed in due course. As often happens, however, consideration of one possible defect in a rule suggests consideration of others. Rule 15(c)(3) was amended in 1991 to supersede the decision in Schiavone v. Fortune, Inc., 1986, 477 U.S. 21. It seemed like a good solution at the time. But literal reading leads to a number of puzzles. The puzzles may have satisfactory answers, but they present genuine difficulties.

A first warning may be useful. These problems all involve statutes of limitations, commonly state statutes of limitations. There are real questions about the propriety of using the Enabling Act to achieve what seems to be sound limitations practice that supersedes practices bound up with the underlying statute.

Limitations Background

28 U.S.C. § 1658 provides a general four-year limitations period for federal statutes enacted after December 1, 1990, apart from statutes that contain their own limitations provisions. Some statutes enacted before December 1, 1990 have their own limitations provisions. Most do not. Federal courts have long chosen to adopt analogous state limitations periods for these statutes. (In some settings, the analogy instead is drawn to the limitations period in a different federal statute.) The alternatives of having no limitations period, or creating limitations periods in the common-law process, are very unattractive. One frequently encountered illustration — the one involved in the Worthington case — is 42 U.S.C. § 1983.

State limitations periods also are applied by federal courts when enforcing state-created claims. One of the well-known wrinkles occurs when the state limitations scheme provides time limits not only for commencing the action but also for effecting service. Walker v. Armco Steel Co., 1980, 446 U.S. 740, confirmed the rule that Civil Rule 3 does not supersede the state service requirements in these settings. The Rule 3 provision that an action is commenced by filing a complaint was not intended to address this issue.

Civil Rule 15(c) generally addresses the question whether an amendment to a pleading "relates back" to the time of the initial pleading. Rule 15(c)(1) provides the most general rule: if "relation back is permitted by the law that provides the statute of limitations applicable to the action," relation back is permitted. If federal law provides the statute of limitations, relation back can be addressed as a matter of federal law, supplemented if need be by Rule 15(c) paragraphs (2) and (3). If state law provides the statute of limitations, state-law relation-back doctrine is the first fall-back.

Rule 15(c)(2) allows a claim or defense asserted in an amended pleading to relate back if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This is a nice functional provision that of itself creates few problems. It may raise a question when an attempt is made to add a new plaintiff, a separate issue described below.

Rule 15(c)(3) deals with relation back when an amendment "changes the party or the naming of the party against whom a claim is asserted." The first requirement for relation back is that the claim satisfy Rule 15(c)(2) by arising from the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. So far, so good. Beyond that point, the rule has been framed in response to the Schiavone ruling.

In the Schiavone case the plaintiff claimed that he had been defamed in an article in Fortune Magazine. Ten days before the last day that could be argued to be the end of the limitations period, he filed an action captioned against "Fortune." "Fortune" exists only as a tradename and as an unincorporated division of Time, Inc. The complaint was mailed to Time, Inc.'s registered agent, who refused to accept service because Time was not named as defendant. The plaintiff promptly amended the complaint to name "Fortune, also known as Time, Incorporated." The amendment was not allowed to relate back, and the action was dismissed as time-barred.

The critical phrase in the 1966 version of Rule 15(c)(3) allowed relation back if the new or renamed defendant had notice of the action satisfying specified criteria "within the period provided by law for commencing the action against" the new defendant. The Court concluded that the "plain language" of the rules defeated relation back. The time permitted to commence the action — to file the complaint — is the limitations period. The complaint must be filed by the end of the limitations period. That is the period in which the "new" defendant must have notice of the action.

The difficulty with the Schiavone conclusion is that it requires notice to the "new" defendant at a time earlier than would be required if the new defendant had been properly identified in the initial complaint. As the practice then stood, if a complaint was filed on the last day of the limitations period, it sufficed to accomplish service on the defendant within a reasonable time. Time, Inc. had actual notice of the lawsuit — and surely knew exactly what was intended — at a time that satisfied all limitations requirements. There was an obvious reason to conclude that Rule 15(c)(3) should be amended to allow the action to proceed in such circumstances.

The amended version of Rule 15(c)(3) allows the amendment changing or renaming the defendant to relate back if the defendant had notice "within the period provided by Rule 4(m) for service of the summons and complaint." The base-line Rule 4(m) period is 120 days from filing. If the action is filed on the last day of the limitations period, it is good enough to effect notice within 120 days (or more, as discussed below). So far, so good. But it seems likely that the many questions that arise from this incorporation of Rule 4(m) were engendered by focusing on the "last-day" filing;

if the complaint is filed well within the limitations period, awkward results seem to follow. These results are discussed below after beginning with the "mistake" question that prompts the discussion.

Mistake

Notice to the new defendant must satisfy two Rule 15(c)(3) criteria that are crafted to reflect the major purposes of limitations statutes. Within the Rule 4(m) period, the new party must have:

> (A) * * * received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party.

The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering. Knowing that the new party would have been sued if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period.

The Worthington case involved a not uncommon problem. The plaintiff was arrested. The plaintiff believed that the arresting officers had used unlawful force, causing significant injuries. The plaintiff did not know the names of the arresting officers. At the end of the two-year limitations period provided by Illinois law, the plaintiff sued the village and three unknown-named police officers. There was in fact no tenable § 1983 claim against the village, given the limits on respondeat superior liability in § 1983 actions and the inability to claim a village policy or the like. But the plaintiff was able to discover the names of two arresting officers and sought to amend to name them as defendants. It was conceded that the officers had notice of the action within 120 days, and that the notice satisfied the Rule 15(c)(3) requirements. Relation back was denied, however, because there was no "mistake." It was not as if the plaintiff thought that Sergeant Preston had arrested him, and discovered only later that in fact it was Officers Wilson and Wall. The plaintiff knew from the beginning that he did not know the identity of the proper defendants. This was ignorance, not mistake.

On its face, the result in the Worthington case seems strange. The plaintiff very well may have faced insuperable difficulties in learning the identities of the arresting officers. Neither the arresting officers nor their police-department compatriots may have been willing to come forward. Many departments may lack sufficiently rigorous internal investigation procedures to ensure a reasonable opportunity to penetrate the wall of silence. Filing an action and discovery may be the only way to force production of the critical information. Why should the plaintiff be left out in the cold when state law does not provide a tolling principle that would invoke Rule 15(c)(1)?

If the result is in fact untoward, it would be easy to amend Rule 15(c)(3) to correct the result in a rough way. Subparagraph (2) could require that the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" it. This approach is rough because it does not look to the

diligence of the plaintiff who lacked information. It might be enough to add one more word: "but for a mistake or reasonable lack of information." But this too is rough, because the setting requires that the new defendant know that it is a reasonable lack of information, and how is the new defendant to know that? More complicated redrafting will be required to specify that the plaintiff's lack of information remained after diligent effort to identify the proper defendants, and that the new defendant knew it would have been named but for a mistake or lack of information.

That leaves, first, the question whether there is some principled ground to be more demanding when the plaintiff knows that he does not know the identity of one or more proper defendants. It can be argued that indeed there is. The plaintiff in these circumstances knows that if he waits to file until the end of the limitations period, it will not be possible to get notice to the proper defendants within the limitations period or even very soon after it has expired. Perhaps this plaintiff should be forced to file well before the limitations period has expired, to facilitate notice to the defendant within the limitations period or within a brief time after the limitations period. This argument could be bolstered by observing that it minimizes the intrusion on state law when it is state law that supplies the limitations period. If state law does not allow relation back, why should a federal court, even if the federal court is enforcing federal law?

That argument may not seem forceful, but it is the most plausible one that comes to mind. It may gain some force from a different consideration. The problem facing the plaintiff in the Worthington case is not easily met by filing an action well within the limitations period. Who is to be the defendant? The plaintiff escaped Rule 11 sanctions for suing the village only because the complaint was filed in state court, and under the version of Rule 11 then in effect the court concluded that it could not apply sanctions. The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts. See, e.g., Petition of Ford, M.D.Ala.1997, 170 F.R.D. 504. Perhaps it would not do much good to allow corrrection when the defendant lacks information as to the identity of the defendant. But there will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.

An amendment supplementing the "mistake" language in Rule 15(c)(3)(B), in short, is attractive, but it may not reach very many cases. Drafting also may not be as easy as might be wished.

Any draft should confront — at least in Committee Note — the distinction between two problems. In one, the plaintiff can — within the limits of Rule 11 — identify one real defendant, but hopes to enhance the quality of notice to unidentified defendants by pleading that there are others who will be sued when they can be identified. Adding a "Doe" or "unknown-named" defendant, as an "unknown-named police officer," does carry a message to the unidentified defendant that the plaintiff wants to sue. That practice might well be blessed in the Note, to avoid Rule 10 questions. In the other, the plaintiff is unable to name any real defendant without violating Rule 11. What advice do we give for that situation? That it is, after all, proper to sue only unknown-named defendants, so long as Rule 11 is satisfied as to the existence of a claim against someone unidentifiable? Does an action against parties who are real but who cannot be identified satisfy Article III — is there a real case or controversy? If the only purpose of protecting the opportunity

to sue is to provide a vehicle for discovery, would it be better after all to create a procedure for discovery in aid of framing a complaint?

Rule 4(m) Incorporation

The specification that the new defendant must know of the mistake within the period provided by Rule 4(m) for effecting service of the summons and complaint is easily understood when the complaint is filed at the end of the limitations period. Suppose a 2-year, 730-day limitations period applies. The complaint is filed on Day 730. If the proper defendant is properly named, the effect of Rule 4(m) — putting aside Erie complications for the moment — is that service up to Day 850 is proper. Since a properly identified defendant is exposed to actually learning of the suit as late as Day 850, it seems to make sense to say that it also is enough that the properly intended defendant, although not named, should be exposed to substitution if knowledge of the mistake was brought home at any time up to Day 850. That is the problem of the Schiavone case, and it is cured by the incorporation of Rule 4(m).

The snag is that Rule 4(m) begins to run with the filing of the complaint, not the expiration of the limitations period. If the complaint is filed on Day 180, the plaintiff has until Day 300 to effect service. If the new defendant learns of the mistake on Day 190, everything is fine, even if the plaintiff does not become aware of the problem until Day 735. But if the defendant learns of the mistake on Day 350, the Rule 4(m) period has expired and the condition of Rule 15(c)(3) seems not to be satisfied. Of course there is no problem if the plaintiff also learns of the problem before Day 730 and amends to bring in the new defendant — the limitations period is met without any need for relation back. But if the plaintiff learns of the problem on Day 735, it is too late. It is too late even though the plaintiff would have been protected if the plaintiff had waited to file until Day 730 and the new defendant had learned of the action on day 734, not day 350.

The problem of the new defendant who learned on day 350 of an action filed on day 180 is made more curious by comparison to the pre-1991 version of Rule 15(c)(3). Until 1991, it was enough that the new defendant have notice within the period provided by law for commencing the action against him. With a two-year limitation period, notice on day 350 is adequate with more than a year to spare. Curiously, an amendment designed to make sufficient notice received on day 740 — so long as filing occurred on or after day 620 — bars relation back.

This consequence of incorporating Rule 4(m), gearing the time for notice to the new defendant to filing the complaint rather than expiration of the limitations period, may seem anomalous. Why should the new defendant have the benefit of the plaintiff's diligence in filing earlier than need be?

Again, there may be an answer. It can be argued that once a plaintiff has filed — as on Day 180 — the plaintiff becomes obliged diligently to pursue the litigation and to find out whether the defendants have been properly identified. Filing opens the opportunity for discovery, and so on. This is not a particularly satisfying argument. The time actually used to effect service may use up much of the 120 days. The defendant may manage to postpone filing an actual answer for some time. The Rule 26(d) discovery moratorium, geared to the Rule 26(f) conference, may delay matters

still further. To expect diligent uncovering of the mistake within 120 days is to set a high standard of diligence.

This seeming anomaly may be subject to a cure through another aspect of the incorporation of Rule 4(m) into Rule 15(c)(3). Rule 4(m) allows an extension of the time to serve beyond 120 days. When the new defendant learns of the mistake on Day 350, 170 days after the filing on Day 180, the court might address the problem by allowing a retroactive extension of the time for service. But this solution generates great difficulties of its own.

There are yet other difficulties with incorporating Rule 4(m). One is that Rule 4(m) does not apply to service in a foreign country under Rule 4(f) or (j)(1). There is no period provided by Rule 4(m) for making service in those cases: so what are we to make of Rule 15(c)(3) relation back? Another is that Rule 15(c)(3) is deliberately drafted to refer not to a complaint, but to any pleading that states a claim for relief. If the complaint is filed on the last day of the limitations period, a counterclaim that grows out of the same transaction or occurrence may not be barred by limitations. So the counterclaim is made. Then after a time the counterclaimant seeks to change the party against whom the counterclaim is made: can Rule 4(m) apply in an intelligible way?

Extending Rule 4(m) Period

Rule 4(m) provides that if service is not made within 120 days after filing the complaint, the court shall either dismiss without prejudice or require that service be made by a specified time. Rule 4(m) further provides that the court "shall" allow additional time to serve if the plaintiff shows good cause for failing to make service within 120 days.

The 1991 Committee Note to Rule 15(c)(3) says explicitly that:

> In allowing a name-correcting amendment within the time allowed by Rule 4(m),[7] this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

It is difficult to know what to make of this note. The only reason for incorporating Rule 4(m), rather than providing 120 days from filing the complaint, must be to take account of the flexibility that allows an extension of the time for service. But the context of Rule 15(c)(3) is quite different. Does it mean that the time by which the new defendant must learn of the action is extended only if the court has ordered an extension of time to effect service? If so, service on whom — service on someone else, as the Committee Note seems to suggest? But why should we care whether it was difficult to serve someone else, not the new defendant? Because the plaintiff is more easily excused when there was no defendant to tell it of the mistake, even though the new defendant has little

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[7] This is an awkward locution. Rule 15(c)(3) does not say that the amendment must be made within the Rule 4(m) time. It says that the person to be brought in by amendment must have learned of the action, etc., within the Rule 4(m) time.

concern with that? Or is it an extension of time for service on the new defendant? But if it is an extension of time for service on the new defendant, the scheme takes hold only when the plaintiff has learned of the new defendant and asks for an extension. By then, the determination of the extension period also will involve a discretionary determination of the extent to which the limitations period should be extended.

It may be possible to read the incorporation of Rule 4(m) in a still more expansive way. Although the Committee Note illustrates only an extension actually granted, it does not specify the time when the extension was granted. Perhaps invocation of the Rule 4(m) power to extend the time for service would support an ad hoc determination that the time when the new defendant learned of the action and the mistake was "soon enough," so the court will "extend" the time for "service" to include that time even though there is in fact no problem of service at all. This interpretation would create an open-ended power to suspend the statute of limitations in favor of a plaintiff who mistakes the proper defendant, even though there is no such power to favor a plaintiff who simply waits too long to sue (often in a layman's forgivable ignorance of the limitations period). That would be exceedingly strange, and directly contrary to the general belief that limitations periods should be held as firmly as possible.

Putting these problems together, the drafting decision to incorporate Rule 4(m) into Rule 15(c)(3) seems very strange. Only with brute force can the text of the two rules be made to generate sensible answers, supposing we know what the sensible answers are.

Adding Plaintiffs

The 1966 Committee Note observes that "[t]he relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. * * * [T]he attitude taken * * * toward change of defendants extends by analogy to amendments changing plaintiffs."

There is an ambiguity in the reference to "changing" plaintiffs. If one plaintiff is substituted for another plaintiff, each pursuing a single claim that remains unchanged as to the basis of liability and the measure of damages, the problem is indeed easier. A common illustration, invoked by the 1966 amendments of Rule 17(a), occurs when suit is brought by a plaintiff who is not the real party in interest. Substituting the real party in interest, even after the statute of limitations has run, is not likely to threaten repose or the opportunity to gather evidence.

If the original plaintiff remains and a new plaintiff is added, things are not so simple. Suppose the passenger in one car brings suit against the driver of the other car. After the limitations period expires, a motion is made to amend to add the driver of the passenger-plaintiff's car as a second plaintiff. The defendant is now exposed to greater liability, eroding the repose engendered when the driver did not sue within the limitations period. There will be evidentiary problems at least as to the cause, nature, and extent of the new plaintiff's injuries. And there may also be evidentiary problems as to liability — particularly if there is joint-and-several liability, the negligence of the new plaintiff-driver may play quite a different role in the litigation than it would have played had only the

passenger been a plaintiff. Because Rule 15(c)(3) does not address these issues, it is possible to read Rule 15(c)(2) to allow relation back because the claim asserted by the new plaintiff-driver arises from the same "conduct, transaction, or occurrence" as the claim of the original plaintiff-passenger. The Rule may not be silent. And the apparent answer may not be the right answer.

A good illustration of the problems that may arise from adding a new plaintiff is provided by *Intown Properties v. Wheaton Van Lines, Inc.*, 4th Cir.2001, 271 F.3d 164. A Wheaton truck ran into Intown's motel-restaurant. Transcontinental paid Intown's losses and sued Wheaton. Eventually Intown sued Wheaton in state court for damages not covered by the insurance — loss of revenues and loss of reputation and good will. The state-court action was dismissed on limitations grounds. Then Intown and its insurer moved to amend the complaint in the insurer's action to add Intown as plaintiff. Days later, the insurer settled with Wheaton. The court of appeals ruled that a Rule 15 amendment cannot be used to effect a joinder that would be untimely if attempted by motion to intervene. It suggested that if Intown had been named as plaintiff in the original complaint, its added claims for damages not covered by the insurance might well relate back under Rule 15(c)(2). "But Rule 15 has it limits." A new defendant can be brought in only if there is fair notice. "Similarly, courts have limited the applicability of Rule 15; a motion to amend the pleadings comes too late if it unduly prejudices the opposing party." Here "Wheaton had no timely notice that it faced liability above and beyond those damages sought by Transcontinental. * * * Wheaton might well have negotiated differently or refused to settle with Transcontinental had it been confronted with viable additional Intown claims." (Neither could Rule 17 substitution of Intown as real party in interest do the job. "Those courts that have permitted late amendment under Rule 17 have not exposed defendants to additional liability without notice; they have ordinarily confronted requests to exchange a plaintiff or plaintiffs for another plaintiff or plaintiffs with identical claims. * * * As with Rule 15, Rule 17's liberality evaporates if amendment would unduly prejudice either party.")

The problems that arise from adding a new plaintiff may arise as well when one plaintiff is substituted for another. If the grievously injured driver of the automobile is substituted as plaintiff for the slightly injured passenger, there may be little difference from the addition of a new plaintiff while the original plaintiff remains in the action.

"Erie"

The problem addressed in Walker v. Armco Steel, cited on p. 1, arose from a state statute that holds it sufficient to file a complaint within the defined limitations period only if service is actually made within 60 days. The Court held that the 60-day service requirement binds the federal court in a diversity action. Rule 3, it concluded, is not intended to answer this question for diversity cases.

Rule 15(c)(3) is relevant only when state law does not permit relation back; if state law does permit relation back, Rule 15(c)(1) allows reliance on state law. If any attempt is made to amend

Rule 15(c)(3), it will be important to decide how far to go in superseding state law. The question may yield one answer when state law would apply of its own force under Erie, unless preempted by a valid Civil Rule, and a different answer when state law is simply borrowed to fill the gap resulting from the lack of a federal limitations statute.

The Erie problem may be illustrated by a single example. The complaint in a diversity action is filed on day 730, the last day of the limitations period. State limitations law requires service within 60 days, by day 790. The new defendant learns of the action on day 850, 120 days from filing: should relation back be permitted, even though service on a properly named defendant would be defeated by state limitations law?

Redrafting Rule 15(c)(3)

If an attempt were made to redraft Rule 15(c)(3), the first question to be resolved is the focus of the relation-back doctrine. One plausible focus is to permit relation back whenever a new defendant learned of the action at a time when timely service could have been made in an action naming the new defendant as an original party. This focus draws from a belief that limitations periods are designed to foster and protect the repose interests of defendants, and to protect both defendants and courts by facilitating the task of gathering, preserving, and presenting evidence. The draft might look like this:

(3) the amendment changes the party or the naming of the party against whom a claim is asserted and:

(A) Rule 15(c)(2) is satisfied;

(B) within the time specified in Rule 15(c)(3)(C) the party to be brought in by amendment (i) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party; and

(C) the notice described in Rule 15(c)(3)(B)(i) is received at a time when the party to be brought in by amendment could have been timely served with the summons and complaint in an action naming the party as an original party.

The same approach could be taken in simpler form, combining (B) with (C) and perhaps adding a requirement that the plaintiff have exercised due diligence:

(B) within the time for effecting service on a correctly named defendant, [the party asserting the claim has acted diligently to identify the party to be brought in by amendment, and] the party to be brought in by amendment (i) has received such notice * * *

These time provisions still leave a question akin to the Rule 4(m) question: should the time be measured by hypothetical extensions of the time to serve process? A comment in the Committee Note might suffice to address this issue. One answer could be that an extension of time to serve counts only if in fact an extension was granted to effect service on a party named in the original complaint. That answer would prevent fiddling with the limitations period based on the court's sense of fairness for the specific case. Other answers also could be given.

The "120-day" question could be approached more directly, giving up as a bad idea the incorporation of Rule 4(m):

(B) the party to be brought in by amendment has received notice that meets the requirements of Rule 15(c)(3)(C) within 120 days after expiration of the limitations period for commencing the action, or within a shorter period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action; and

(C) the notice received within the time set by Rule 15(c)(3)(B) is such that the party to be brought in by amendment (i) will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party.

If a different focus is chosen, drafting would proceed in a different direction. There is something to be said for the view that a plaintiff should be required to proceed with dispatch once suit is actually filed, even though filing occurs long before expiration of the limitations period. This approach would require a structure quite different from present Rule 15(c)(3). Even illustrative drafting can await the event.

Quality of Timely Notice

Rule 15(c)(3) requires not only that the new defendant have notice of the action within the defined time, but also that the notice serve the purposes of limitations periods. The new defendant should recognize that the plaintiff wants to sue, and — recognizing that — be put into a position to gather and preserve evidence.

In some cases it may be clear that the new defendant had notice of this quality. A named defendant may tell the new defendant about the litigation and the apparent mistake, and be prepared to say so. If the named defendant has some relationship to the intended defendant, it may be a natural reaction to notify the intended defendant. It also may be natural to notify the plaintiff, unless the named defendant hopes to protect the new defendant by working toward a limitations defense. But there will be many cases in which there is some ground to surmise that the new defendant learned of the action, but no clear showing. Both versions of Rule 15(c)(3), pre- and post-1991, present this factfinding problem. One reason to restrain any enthusiasm about revising Rule 15(c)(3) is that even the clearest theory cannot alleviate the task of application. The Singletary case that prompted the Third Circuit to invite further work on Rule 15(c)(3) was in fact dispatched on the ground that the new defendant clearly had not had any notice of the action within the required time, no matter how the time might be measured. Cases that offer some circumstantial evidence of notice will be more difficult to dispatch.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: ELECTRONIC ISSUANCE OF SUMMONS

DATE: MARCH 12, 2003

The Technology Subcommittee met by teleconference on February 21, 2003, to consider the electronic issuance of a summons under Rule 7004. The Advisory Committee had considered the matter briefly during the meeting in Hyannis this past October and referred the matter to the Technology Subcommittee. The issue was first raised by a deputy clerk who requested that the Committee propose an amendment to the rules to permit the electronic issuance of these summonses.

The Subcommittee identified at least three reasons for amending the rule to permit the issuance of a summons by electronic means. First, the plaintiff can file the complaint electronically. In most CM/ECF courts, the local rules require participants in the system to file all of their pleadings electronically. Thus, it seems logical to allow the clerk to issue a summons electronically. Second, in many bankruptcy cases, the debtor in possession or the trustee may file dozens or even hundreds of cases at the same time. These are typically adversary proceedings to recover preferential or fraudulent transfers, and in larger cases the number of these actions can be extraordinary. Finally, many attorneys are located a great distance from the court, and the issuance of a summons electronically is both more convenient and efficient for that attorney.

Rule 7004(a) provides, *inter alia*, that Rules 4(a) and 4(b) of the Federal Rules of Civil

Procedure apply in adversary proceedings.[1] Those provisions govern the form and issuance of a summons. Under that rule, the clerk must "sign" the summons, and the summons must "bear the seal of the court." If the summons does not bear the signature of the clerk, it is deficient and service of that summons is ineffective. Barrett v. City of Allentown, 152 F.R.D. 46, 49 (E.D.Pa. 1993). Presumably, if the summons includes the clerk's signature but does not include the seal of the court, the summons is likewise deficient and service of such a summons would be ineffective under Rule 4. While one could argue that electronic signatures or encryptions satisfy the requirements of the clerk's signature and the court's seal on the summons, I have been unable to find any case reaching that conclusion. Adoption of a local rule that deems certain actions to constitute the affixing of a signature or the embossing of a seal on a summons might satisfy Rule 4's requirements. Again, however, I have not found any cases that so hold, nor have I found any such local rules.

The Judicial Conference Committee on Court Administration and Case Management has issued Model Local Bankruptcy Court Rules for Electronic Case Filing. Rule 8 of those rules provides that a Filing User's "log-in and password...serve as the Filing User's signature on all electronic documents filed with the court." The term "Filing User is defined only indirectly in those rules. Rule 2 provides that

> Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, bankruptcy administrators and their assistants, and others as the court deems appropriate, may register as Filing Users of the court's

[1] Rule 9014(b) provides that the service provisions of Rule 7004 apply in contested matters. That incorporation of Rule 7004, however, does not include Rule 7004's adoption of the provisions governing the issuance of a summons under Rule 4 of the Federal Rules of Civil Prodedure.

> Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing user's name, address, telephone number, Internet e-mail address, and, in the case of an attorney, a declaration that the attorney is admitted to the bar of this court.

The commentary to the rule does not suggest that the clerk of the court, or any deputy clerk, would be a Filing User. Therefore, the rule validating the electronic signatures of Filing Users would not appear to be apply to the electronic signature of the clerk on a summons. I have searched the local rules of approximately a dozen courts that currently participate in CM/ECF, and I have not found any rules that appear to include the clerk in the category of Filing Users. Moreover, even if the rule is read to include clerks, it would only address the requirement of the clerk's signature on the summons and would not resolve the problem of the need for the summons to bear the court's seal to be effective. Thus, local rules that make electronic signatures effective for rules purposes of the local and national rules will not be sufficient to authorize the electronic issuance of a summons under Rule 4(b). Neither the Model Local Bankruptcy Court Rules for Electronic Case Filing nor other local bankruptcy court rules include any provision relating to the clerk's embossing of a seal on a summons.

Since Rule 7004(a) incorporates Civil Rule 4(a) and (b), the amendment to the Bankruptcy Rule must limit the incorporation of the Civil Rule and substitute new language to authorize the issuance of a summons by electronic means. The amendment need not change any of the service requirements in Rule 7004, so no other amendments are necessary to that Rule. Rule 9014 also need not be amended because the only cross reference in Rule 9014 to Civil Rule 4 relates to the service of the motion and has no application to the issuance of a summons. Thus, the proposed amendment is contained entirely in Rule 7004(a) and is set out below. The

bracketed language at the end of the Committee Note is offered for your consideration. The issue is whether we need to make even more clear that the change in the rule to authorize electronic *issuance* of the summons is not meant to authorize electronic *service* of the summons. The earlier statement in the Committee Note says only that the amendment does not address the matter, but a more forceful statement in the Note might be appropriate.

RULE 7004. PROCESS; SERVICE OF SUMMONS; COMPLAINT

(a) SUMMONS; SERVICE; PROOF OF SERVICE

(1) Except as provided in subdivision (a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under ~~pursuant to~~ Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign and seal a summons electronically by preceding the clerk's name on the summons with "s/", and including the seal of the court on the electronic summons.

COMMITTEE NOTE

There is some doubt that the clerk can issue a summons electronically under F.R.Civ.P. 4(a) and (b), and this amendment resolves that uncertainty by specifically authorizing the clerk to issue a summons electronically. In some bankruptcy cases the trustee or debtor in possession may commence hundreds of

> adversary proceedings simultaneously, and permitting the electronic signing and sealing of the summonses for those proceedings increases the efficiency of the clerk's office without any negative impact on any party. The rule only authorizes electronic issuance of the summons. It does not address the service requirements for the summons. Those requirements are set out elsewhere in Rule 7004. [, and nothing in subpart (a)(2) of the rule should be construed as authorizing electronic service of a summons.]

Amendment of F.R.Civ.P. Rule 4 would be a more direct way to accomplish the goal of authorizing electronic issuance of a summons. It is possible that the Civil Rules Committee will consider amending Rule 4 to authorize electronic issuance, however, that Committee has a number of very substantial issues pending before it that make consideration of this matter unlikely for the near future. Furthermore, there is arguably much less need for this authority in civil actions where it is unlikely that a party will request that the clerk issue hundreds of summonses at the same time. Nonetheless, we have informed the Civil Rules Committee that we are considering an amendment to the Bankruptcy Rules to permit the electronic issuance of a summons. The Civil Rules Committee will likely monitor the matter, and may have some particularly helpful suggestions as we proceed. It is also possible that any amendment to the Bankruptcy Rules on this score could be used as an experiment for the Civil Rules and form the basis of a future amendment to those rules.