ADVISORY COMMITTEE
ON
CIVIL RULES

Sacramento, CA
October 2-3, 2003

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
OCTOBER 2-3, 2003

1. Report on Judicial Conference action

2. **ACTION** — Approving minutes of May 1-2, 2003, committee meeting

3. Administrative Office report

4. **ACTION** — Approving recommending publication of proposed restyled Rules 16-25

5. **ACTION** — Approving recommending publication of proposed restyled Rules 26-37 & 45

6. Report of Forfeiture and Sealing Documents Subcommittee

   A. Status of proposed new Admiralty Rule G
   B. Updated Federal Judicial Center study of sealed-settlement agreements

7. Report of Discovery Subcommittee on electronic discovery issues

   A. Preliminary draft proposals under consideration
   B. Notes of September 5, 2003, subcommittee meeting

8. Report of Class Action Subcommittee

9. Consideration of proposed new Rule 62.1 authorizing "indicative court rulings"

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

11. Consideration of proposed amendments to Rule 15

12. Next Meeting

ADVISORY COMMITTEE ON CIVIL RULES
October 2003

Chair:

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey United States Courthouse
Houston, TX 77002

Members:

Honorable Paul J. Kelly, Jr.
United States Circuit Judge
United States Court of Appeals
120 South Federal Place
Santa Fe, NM 87501

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable Shira Ann Scheindlin
United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway Street
Paducah, KY 42001

Honorable H. Brent McKnight
United States Magistrate Judge
United States District Court
168 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

Honorable C. Christopher Hagy
United States Magistrate Judge
United States District Court
1756 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
201 West 14th Street
Austin, TX 78701

Dean John C. Jeffries, Jr.
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Professor Myles V. Lynk
Arizona State University College of Law
John S. Armstrong Hall
P.O. Box 877906
Tempe, AZ 85287-7906

Andrew M. Scherffius, Esquire
Scherffius, Ballard, Still & Ayres, L.L.P.
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, GA 30361

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Robert C. Heim, Esquire
Dechert
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Frank Cicero, Jr., Esquire
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601

Assistant Attorney General
Civil Division (ex officio)
Honorable Peter D. Keisler
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Liaison Members:

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Reporter:

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Advisors and Consultants:

Professor Richard L. Marcus
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Professor Thomas D. Rowe, Jr.
Duke Law School
(813 Howard Street
Marina del Rey, CA 90292-5516)

Secretary:

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

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Civil Forfeiture/ Settlement Sealing
Judge H. Brent McKnight, Chair
Judge Richard H. Kyle
Dean John C. Jeffries, Jr.
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Class Action
Judge Richard H. Kyle, Chair
Andrew M. Scherffius, Esquire

Subcommittee on Discovery
Professor Myles V. Lynk, Chair
Judge Shira Ann Scheindlin
Justice Nathan L. Hecht
Andrew M. Scherffius, Esquire
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Simplified Procedure
Judge Richard H. Kyle, Chair
Dean John C. Jeffries, Jr.
Professor Richard L. Marcus, Consultant

Subcommittee on Style
Subcommittee A
Judge Thomas B. Russell, Chair
Judge H. Brent McKnight
Dean John C. Jeffries, Jr.
Andrew M. Scherffius, Esquire
DOJ representative
Professor Thomas D. Rowe, Jr., Consultant

Subcommittee B
Judge Paul J. Kelly, Jr. Chair
Judge Shira Ann Scheindlin
Judge Richard H. Kyle
Justice Nathan L. Hecht
Professor Myles V. Lynk
Robert C. Heim, Esquire
DOJ representative
Professor Richard L. Marcus, Consultant

September 16, 2003
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
University of St. Thomas
School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

Public Law 107–347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

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

E-Government Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the General Services Administration, to ensure the development and operation of a Federal bridge certification authority for digital signature compatibility, and for other activities consistent with this section, $8,000,000 or such sums as are necessary in fiscal year 2003, and such sums as are necessary for each fiscal year thereafter.

SEC. 204. FEDERAL INTERNET PORTAL.

44 USC 3501 note.

(a) IN GENERAL.—

(1) PUBLIC ACCESS.—The Director shall work with the Administrator of the General Services Administration and other agencies to maintain and promote an integrated Internet-based system of providing the public with access to Government information and services.

(2) CRITERIA.—To the extent practicable, the integrated system shall be designed and operated according to the following criteria:

(A) The provision of Internet-based Government information and services directed to key groups, including citizens, business, and other governments, and integrated according to function or topic rather than separated according to the boundaries of agency jurisdiction.

(B) An ongoing effort to ensure that Internet-based Government services relevant to a given citizen activity are available from a single point.

(C) Access to Federal Government information and services consolidated, as appropriate, with Internet-based information and services provided by State, local, and tribal governments.

(D) Access to Federal Government information held by 1 or more agencies shall be made available in a manner that protects privacy, consistent with law.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the General Services Administration $15,000,000 for the maintenance, improvement, and promotion of the integrated Internet-based system for fiscal year 2003, and such sums as are necessary for fiscal years 2004 through 2007.

SEC. 205. FEDERAL COURTS.

44 USC 3501 note.

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

Public information.

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines.

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

SEC. 206. REGULATORY AGENCIES. 44 USC 3501 note.

(a) PURPOSES.—The purposes of this section are to—

(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MAY 1-2, 2003

The Civil Rules Advisory Committee met on May 1 and 2, 2003, at the Administrative Office of the United States Courts. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge Anthony J. Scirica, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee members Dean Mary Kay Kane and Judge Thomas W. Thrash, Jr. attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, and James Ishida represented the Administrative Office. Thomas E. Willging, Marie Leary, and Timothy Reagan represented the Federal Judicial Center. Theodore Hirt, Esq. and Stefan Cassella, Esq., Department of Justice, were present. Professor Francis McGovern participated in the report of the Class-Action Subcommittee. Observers included Lorna Schofield, Peter Freeman, and Irwin Warren (ABA Litigation Section); Jim Rooks (ATLA); Ira Schochet (NASCAT); Barry Bowman (Lawyers for Civil Justice); John Beisner; and Alfred W. Cortese, Jr.

Judge Levi opened the meeting by observing that Judge McKnight has been nominated for appointment as a United States District Judge, and wished him a speedy and uninteresting confirmation proceeding.

Judge Levi further noted that the terms of some members are set to expire this year, but that all are expected to attend the October meeting. Lavish but deserved praises will be bestowed then. Judge Scirica is scheduled to vacate the chair of the Standing Committee to adjust his schedule to meet the duties of Chief Judge. He brings to mind the story of the High Court judges who, disagreeing about the seemliness of opening a letter to Queen Victoria with "conscious as we are of our own shortcomings," resolved the problem by beginning instead: "conscious as we are of one another's shortcomings." We are not aware of any shortcoming in Judge Scirica or his stewardship of the Standing Committee and earlier service as a member of the Civil Rules Advisory Committee.

Judge Scirica replied with a reminder of his near encounter with a rattlesnake during a Civil Rules Committee meeting in Arizona. A judge of another circuit patiently explained that the viper had recognized a Philadelphia Lawyer and extended professional courtesy. The explanation was but one of countless great pleasures in these years of rules committees service.

Judge Levi noted that the Supreme Court has sent to Congress the proposed amendments to Civil Rules 23, 51, and 53 recommended by the Standing Committee to the Judicial Conference. The amendments are scheduled to take effect this December 1, absent action by Congress.

Judge Levi reported that "minimal diversity" class-action legislation has been pending in Congress for several years, and that there seems to be heightened interest this year. The main bills appear to be S. 274 and H.R. 1115, which are nearly identical. Some provisions in these bills

overlap the pending Rule 23 amendments that deal with notice and settlement, and appear to supersede the recent amendment that added the permissive interlocutory appeal provisions of Rule 23(f). The provisions that overlap with the pending amendments create the possibility of a supersession nightmare should legislation be enacted before the December 1 effective date of the amendments.

Judge Rosenthal observed that the pending bills call for very detailed class-action notices. Even as it would be amended, Rule 23 does not require so much detail. It is difficult to understand how so much information can meet the desire for plain expression.

Judge Levi concluded the discussion by noting that in March the Judicial Conference adopted a resolution on minimal-diversity class-action legislation that is consistent with the position urged by the Advisory Committee and Standing Committee last year. The resolution was adopted on a joint recommendation of the Standing Committee and the Judicial Conference Federal-State Jurisdiction Committee. This is the first time the Judicial Conference has recognized that minimal-diversity jurisdiction may prove useful in addressing the challenges posed by overlapping, duplicating, and competing class actions. The Judicial Conference has properly refused to advance more specific suggestions, leaving the details to be developed by Congress.

Minutes

The minutes of the October 3-4, 2002 meeting were approved.

Local Rules Project

The Standing Committee launched the Local Rules Project nearly twenty years ago. Congress was concerned then, and continues to be concerned, about the proliferation of local court rules. Local rules are authorized by statute, 28 U.S.C. § 2071, and have proved very useful in addressing details of practice that are too fine for resolution by national rule and that may accommodate distinctive local circumstances. At the same time, local rules may surprise even local practitioners and often prove confusing to lawyers from other districts. And local rules are adopted without review by Congress. Earlier phases of the Local Rules Project identified several good practices developed in local rules and led to adoption of these practices into the national rules. Problem rules were identified and addressed by the individual districts. The impetus was provided for adopting the requirement that local rules conform to a uniform numbering system developed by the Judicial Conference.

After this beginning, the Local Rules Project has once again undertaken a massive catalogue and survey of local rules. Even on a conservative approach to counting, there are nearly 6,000 local rules. Mary Squiers has completed the catalogue and has come a long way with a report that seeks to identify local rules that may be invalid because they violate the command of § 2071, repeated in Civil Rule 83, that local rules must be, as Rule 83 says, "consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075." The first phase of the report focuses on relationships between local rules and the Civil Rules. One hundred forty-six pages of this Report were presented to the Standing Committee in January. The Standing Committee has asked the several advisory committee reporters to review this work, and has asked that the work and the Reporters' comments be presented to the Civil Rules Committee.

Discussion of the Local Rules Report began by examining three general areas of inquiry. How far should the Standing Committee pursue perceived inconsistencies between local rules and national rules? What level and type of duplication deserves challenge? How frequently should the Judicial Conference attempt to develop "model" "local" rules?

Inconsistency between a local rule and a national rule or statute may be apparent. But few district courts are likely to defy controlling law in this way. Inconsistency is more likely to involve an attempt to limit discretion conferred by a national rule, or more vaguely to interfere with the "spirit" of a national rule. Local rules of this sort may be adopted in response to wide and persisting differences among judges of a single court. Achieving consistency in local practices may be a valuable goal. We may not wish to adopt an approach that challenges every practice that may seem to depart from the subtler implications of national law.

Another dilemma arises when a local rule is both inconsistent with a national rule and better than the national rule. One recent episode provides a clear illustration. The Ninth Circuit Judicial Council, surveying local rules within the Circuit, found many rules that authorize a direction to submit proposed jury instructions before trial begins. Those rules are inconsistent with Civil Rule 51. But when the Ninth Circuit suggested that Rule 51 should be amended to authorize these local rules, the Advisory Committee concluded that there is no reason for disparity among district courts — and that Rule 51 should be amended to authorize all districts to follow this practice. This amendment is now pending in Congress. An older illustration is provided by the numerical limits on numbers of Rule 33 interrogatories. The Rule 33 limits were adopted after years of experience with different local rules that were at least arguably inconsistent with Rules 26 and 33.

The interrogatory limits illuminate another dimension of the inconsistency dilemma. Local rules may provide excellent tests of the desirability of new rules. These tests cannot meet the criteria of rigorous social science. Nonetheless, they can provide information far more valuable than intuition and imagination. The Civil Justice Reform Act reflected a great faith in the value of local experimentation. Not long ago, the Advisory Committee considered amending Rule 83 to permit limited-time experiments with local rules inconsistent with the national rules. The idea was put aside, without finally determining its worth, for fear that it would be inconsistent with the § 2071 direction that local rules be consistent with the national rules.

Duplication of the national rules also presents some complications. It is indeed undesirable simply to incorporate large portions of a national rule in a local rule — at best much time is wasted, and at worst the omissions may mislead. Inaccurate paraphrasing is at least as bad. Some duplications, on the other hand, may be useful guides. The Report, for example, notes that 24 districts direct that their local rules must be construed consistently with the national rules and statutes. Although these provisions duplicate § 2071 and Rule 83, they can be important reminders to practitioners who have not thought to look to those sources or who may fear that the local district is not sympathetic to those constraints. Another example is provided by local rules that state that the local arbitration plan is voluntary. Although the underlying statutes make it clear that arbitration is voluntary, a reminder that the court is aware of this fact can provide useful reassurance.

Model rules also present problems. Many difficulties arise if they are drafted by Rules Enabling Act bodies. The full Enabling Act process is bypassed, losing the important contributions made by many different actors. One of the actors bypassed in the model rule process is Congress, a fact that may stir genuine concern both in Congress and the rules committees. Careful development of model local rules, moreover, could distract a rules committee from its central responsibility to attend to the national rules. There even is an inherent contradiction in choosing to work toward uniformity through model local rules, not a national rule.

If it is generally unwise for a national rules committee to sponsor a model local rule, the alternatives are even more fragile. Other Judicial Conference committees, or judicial administration officers, act completely outside the national rules-making process. The danger to the national rules is apparent.

These observations are not meant to deny any role for model rules. Model local rules may be useful as to topics that are not addressed by national rules and that do not seem likely to be soon addressed by national rules. The model rule on attorney conduct is a good example. Years of study by the Standing Committee's project on Federal Rules of Attorney Conduct show that these questions do not yield readily to national rulemaking.

Professor Coquillette noted that the Local Rules Project Report on local civil rules is continuing, and that action will be taken carefully.

Judge Scirica explained further that the troubling instances of inconsistency or duplication will be pointed out to the chief district judges. The circuit councils may become involved. Inevitably there will be some disagreements over the findings of inconsistency or duplication. But it seems likely that satisfactory resolutions will be reached in most cases. The Standing Committee is not now asking for formal reactions by the advisory committees, but all advice is welcome.

Judge Levi observed that one important problem arises when there is no national rule and an aggressive local rule takes on a complicated and sensitive problem. One example might be posed by the local rule in the District of South Carolina that appears to prohibit sealing any settlement agreement filed with the court. A flat-out bar on sealing would be very troubling, given the compelling reasons for protecting privacy and the occasional need to file a settlement agreement. But the force of the local rule is drawn by another local rule that permits a judge to depart from any other local rule when there is good cause. They do permit sealed settlement agreements to be filed when there is good reason. Another illustration is provided by a local rule that prohibits an attorney who seeks to represent a class from seeking out class members before the class is certified. That direction does not seem inconsistent with Rule 23, which is silent on the issue, but it deals with a very important aspect of class-action practice.

Judge Scirica added further cautions about the approach to local rules. The project may identify rules that should be adopted as national rules. On the other hand, the project — like Rule 83 and § 2071 — does not deal with "standing orders." Vigorous attempts to cabin local rules could easily drive distinctive local practices into standing orders or even further underground.

Professor Coquillette concluded this discussion by stating that it is important to remember that the focus of the Local Rules Project is on assisting the district courts. Mutual education is important.

Legislation Report

John Rabiej noted that the Administrative Office has focused its energy on three areas of legislation: minimal-diversity class-action bills; a Senate "sunshine" bill; and the e-government act.

In the class-action area, the Senate Judiciary Committee has reported out S. 274. Action by the Senate could come soon. HR 1115 seems to differ from S. 274 only by retaining a right to appeal a certification decision. The chair of the House Judiciary Committee is interested in pursuing this bill.

Senator Kohl has introduced a "sunshine" bill in each Congress for several years. In the past, the bill has been resisted primarily because of its restrictions on Civil Rule 26(c) protective orders. Attention in the Senate is now being focused on sealed settlement agreements. The District of South Carolina local rule has drawn publicity. The Federal Judicial Center is studying the incidence and use of settlement agreements that are filed under seal; a report on the study's progress will be made at this meeting.

The electronic government statute has been enacted. It requires that in a few years the public have access to all electronically filed cases. The judiciary is working on implementing electronic filing; all courts should have the necessary equipment by 2006. The statute requires that all local rules be posted on the court's web site; almost all districts do that now, and post standing orders as well.

The electronic government statute also requires the Supreme Court to adopt rules that protect privacy. The judiciary is seeking amendment of the statute provision that requires courts to accept unredacted documents. Some courts now, under Judicial Conference policy, require redaction of social security numbers. Legislation has been introduced to undo the statutory provision, and to delete the requirement to adopt court rules. The Federal Judicial Center is working on these privacy issues, particularly for the Court Administration and Case Management Committee, which has primary Judicial Conference jurisdiction in these matters.

The concern with redacted documents arises in part from the Department of Justice's wish to submit unredacted documents as well as redacted documents. It believes that the full unredacted document may become relevant in a later proceeding, and prefers that the court be required to keep it rather than force the parties to keep it.

It was noted that the question of filing unredacted documents ties to our agenda item on Civil Rule 12(f). As electronic filing takes over, it becomes increasingly important to define what it means to "strike" a portion of a pleading. It also becomes important to know just what electronic capabilities the court systems have, or can develop.

Style Project

Subcommittees A and B have worked through Civil Rules 1-7.1 and 8-15 respectively. After further revisions by the Standing Committee Style Subcommittee, these rules are ready for consideration by the Advisory Committee. The goal is to approve these drafts with a recommendation to the Standing Committee for publication. Publication, however, need not be this summer. Instead, additional styled rules will be accumulated for publication in a larger package. It may prove desirable to publish a total of three packages over the course of the project. The length of the comment period to be set for each package remains to be decided.

Rule 1. Earlier style drafts called for the "economical" determination of every action. The present draft reverts to the present rule, calling for "inexpensive" determination. The change back to the present rule was made for fear that "economical" may change the meaning — indeed, the reason for considering "economical" was the weary belief that few actions are determined inexpensively.

The committee decided that "and proceeding" should be added at the end, so the rule will call for the just, speedy, and inexpensive determination of "every action and proceeding." This addition will make the second sentence congruent with the first. The Style Subcommittee suggested that "and proceeding" should not be added because it "doubts whether speed and thrift are as relevant to proceedings as actions." Those doubts themselves seem to reflect a substantive concern. Present Rule 1 calls for these good things in "all suits of a civil nature." That embraces every event that is governed by the Civil Rules. Rule 1 now extends to anything that would be characterized as a "proceeding" rather than an action. One example is a Rule 27 petition to perpetuate testimony before an action can be brought. It was argued that now there are proceedings that are not "suits of a civil nature," so the adoption of "and proceeding" broadens the rule. The proponent of this argument, however, conceded that it is a good thing to broaden the rule in this way, and that the good thing is within the scope of the Style Project. Other proponents of adding "and proceeding" adhered to the

view that in fact Rule 1 now applies to all actions and proceedings and it would change its meaning to omit "and proceeding."

Style Rule 1 was approved, with the addition of "and proceeding."

Rule 2. Style Rule 2 was approved.

Rule 3. Style Rule 3 was approved.

Rule 4. It was agreed that throughout the rules, it is proper to substitute "minor" for "infant." As old understandings fade, there is an increasing risk that "infant" will be mistaken to mean a person of very young years, not the intended meaning of anyone not yet legally an adult.

Style Rule 4(c)(3) reflects a change urged by Subcommittee A. The second sentence now says that the court must direct service by a marshal or by someone specially appointed if the plaintiff is authorized to proceed under 28 U.S.C. § 1915 or § 1916. This expresses the intended meaning better than the original direction that an "appointment" must be made. The new Style Draft was accepted without change.

(Later discussion of Rule 12(a)(1)(A)(ii) led to adoption of a motion that Rule 4(d)(3) be amended to conform to an amendment of Style Rule 12: "until 60 days after the date when the request [for a waiver] was sent — or until 90 days after the request [for a waiver] was sent if the defendant was addressed outside any judicial district of the United States.")

Rule 4(e) is one illustration of a global question that remains under consideration by the Style Subcommittee. The rules refer in seemingly haphazard fashion to statutes, laws, federal, United States, Constitution and laws, Constitution or laws, and so on. For the time being, the style drafts carry forward the present language, although "United States" is substituted for federal. If further research makes it seem safe, a uniform expression will be adopted.

Rule 4 presents puzzling variations in the use of "shall" and "may" in describing the modes of service. Rule 4(e), for example, says that service "may be effected." So does Rule 4(f). Rule 4(g), on the other hand, says service "shall be effected." So do Rules 4(h), (i)(1), and (j); 4(i)(2) says "is effected." Professor Rowe's research suggests that the distinctions were deliberate, but that it is difficult to guess what distinctions were intended. The change to "may," "shall," and "is effected by" occurred about ten years ago. The central notion seems to be that the listed methods are the only valid methods of service. There is much to be said for adhering to "must" as the uniform command. But Professor Carrington, who was the Advisory Committee Reporter at the time, recalls clearly that the distinctions were deliberate. The underlying purpose of the distinctions, however, has been lost.

It was asked whether the best expression would be: "to serve an individual, a party must," and so on. That seems less jarring than to say that you must serve an individual — a plaintiff may name multiple defendants, intending to serve some only if others cannot be served. This practice is so well established that the present language is not likely to be read to mean that all named defendants must be served, but clear expression seems important.

Professor Kimble suggested that any departure from the present words, whether they be may or must, would be substantive.

The Committee voted to adhere to the language of the present rule. Style Rule 4 will reflect "may" or "must" according to the present rule.

The Style Draft of Rule 4(e) refers to an individual "who has not waived service." The present rule refers to an individual "from whom a waiver has not been obtained and filed." The filing

requirement is substantive and cannot be deleted from the Style Rule. The Committee voted to restore "filed." The Style Subcommittee may develop an expression more graceful than the present rule. One possible alternative is illustrated in the materials: " an individual — other than a minor, an incompetent person, or a person whose waiver of service has not been filed — may be served * * *." This might be further improved, for example by referring to "a person for whom a waiver of service has not been filed," dispelling any implication that the description is limited to a person who has waived service, but whose waiver has not been filed.

Other Style Rule 4 questions were discussed. It was decided that Style Rule 4(a)(1)(C) should not be expanded to include a requirement that the summons list an e-mail address — that would be a substantive addition. It also was decided that the rearrangement of provisions in Style 4(d)(1) does not create any implication that a plaintiff has a duty to seek a waiver of service. The reference in Style 4(i)(1)(B) to "a copy of each" is clearly limited by context to mean a copy of the summons and of the complaint. No change need be made.

Style Rule 4(i)(4), drawing from present Rule 4(i)(3), inadvertently refers to allowing a "plaintiff" a reasonable time to cure a failure to serve. A party other than a plaintiff may need to effect service under Rule 4(i). Style 4(i)(1), (2), and (3) all say "party." In each of three places in (i)(4), this should become "party": the court must allow a party a reasonable time if (A) the party has served either the Attorney General or the United States Attorney, or if (B) the party has served an officer or employee of the United States.

With these changes, Style Rule 4 was approved.

Rule 4.1. Again, it was noted that the references to a United States "statute" or "law" will be considered further as the Style Project proceeds. The Style Subcommittee was asked to consider whether the caption should be "serving other process," in line with the caption of Rule 5 and the captions for Rule 4 subdivisions.

Style Rule 4.1 was approved.

Rule 5. The Committee recommended a change in Style Rule 5(a)(1)(E), so it would read: "(i) a written notice, appearance, demand, or offer of judgment, or (ii) a similar paper."

It was observed that present Rule 5(a) provides for service "upon each of the parties." Style Rule 5(a) calls for service "on every party." Does "each" mean "every"? Rule 68(a), for example, directs service of an offer of judgment on "the adverse party." Is service required on every party by Rule 5(a)? A committee member stated that in his practice experience, an offer of judgment is served on all parties. The Committee did not make any recommendation on this question.

Style Rule 5(c)(1)(B) says that when a court orders that designated pleadings not be served on other defendants, crossclaims and the like "will be treated as denied or avoided by all ~~other~~ parties who are not served * * *." Present Rule 5(c) refers to "other" parties. The Committee agreed that "other" parties should be restored unless the change is clearly justified by showing that there is no change in meaning and that the present meaning is better expressed by "who are not served."

Style Rule 5(d)(2)(A) says that a paper is filed by delivering it "to the clerk." The present rule refers to the "clerk of court." It was asked whether an unelaborated reference to "clerk" might be read to mean "law clerk." Professor Kimble noted that the Style Rules refer to "clerk" throughout. It was observed that the Appellate Rules uniformly refer to the circuit clerk. The Bankruptcy Rules refer to the bankruptcy clerk, and Bankruptcy Rule 1001 includes a definition. Further discussion suggested that in this particular instance, there may seem to be a change of meaning if we delete "of

court." The Committee voted to restore "of court," but only in Style Rule 5(d)(2)(A). The Style Subcommittee suggested "court clerk." This was discussed as a question of style. "Clerk" can remain in the other rules, at least until they are considered individually.

Style Rule 5(d)(2)(B) says that a paper is filed by delivering it to a judge who agrees to accept it for filing. Present Rule 5(e) says that "the judge may permit the papers to be filed with the judge." It was asked whether the change is proper — does it change meaning, and in any event should it suffice to persuade any judge of a multi-judge court to accept a paper for filing when the case has been assigned to another judge? It was observed that the present rule was written before common adoption of individual assignments, and that some courts still do not have individual assignments. A committee member suggested that in practice it may be important to be able to file with the first judge who can be found. The judge's role, moreover, is one that does not interfere with the assigned judge's control of the case: all the judge does is note the filing date on the paper and promptly send the paper to the clerk. There is no risk that by accepting the paper for filing the filing judge is interfering with the assigned judge's authority to determine whether the filing occurred after a binding deadline or was otherwise ineffective. A motion to substitute "the" judge for "a" judge failed.

Style Rule 5 was approved.

Rule 6. Rule 6(b) is an early illustration of an issue that recurs throughout the Style Project. The present rule says that "the court for cause shown may at any time in its discretion" act in described ways. The Style Rule has restored "in its discretion" after an original omission, and continues to substitute "for good cause" for "for cause shown." The style consultants believe that it is better to rely on "may" to carry all the freight that the present rules express through "in its discretion," "for good cause," "on terms," "if justice so requires," and like terms. "May" suffices to express discretion, and all of the factors that influence an exercise of discretion to do the right thing. Present Rule 8(c), for example, says that the court may treat a mistaken designation as if it were correct "on terms, if justice so requires." Style Rule 8(c) says simply that the court may do so.

It was observed that "may" means that there is authority to do something. That does not always mean that the court can refuse to do it.

It was asked whether the variations in expression reflect differences of meaning in the present rules. The reply was that many of the present rules provisions were expressly bargained for in the rulemaking process. A further observation was that although the style proponents may be right in theory, these rule provisions have been crafted deliberately and should not all be changed lightly.

Looking specifically to Rule 6(b), it was noted that "for good cause" tells lawyers what they need show to persuade the judge to extend time. It is not enough simply to ask. The rule is much used. It should not be changed. The Style draft has it right.

Turning to Style Rule 6(b)(2), it was noted that present 6(b) says that the court "may not" extend the time limits set by specified rules. The Style draft says "must not." The committee voted to return to "may not," recognizing that this issue may be revisited on a global basis as the project continues.

With the change in Rule 6(b)(2), Style Rule 6 was approved.

Rule 7. Two Rule 7(a) questions were discussed.

First, present Rule 7(a) calls for an answer to a crossclaim "if the answer contains a cross-claim." Style Rule 7(a)(3) omits the limit that the answer contain a crossclaim. Deleting the limit

seems to expand the meaning of the present rule, a step not to be undertaken in the Style Project even if it seems a good idea. A crossclaim is not itself a pleading, but under Rule 13(g) is only something that may be set out in a pleading. The problem is that a crossclaim may appear in a pleading other than an answer. If a defendant counterclaims against two plaintiffs, for example, either plaintiff may wish to crossclaim against the other in its reply to the counterclaim. More exotic examples may occur as well. A reply to a crossclaim is a good idea wherever it occurs.

Judge Thrash pointed to present Rule 12(a)(2), which states that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." This existing provision provides ample authority to restyle Rule 7(a) so that it conforms to the direct command to answer a crossclaim no matter what pleading sets it out. The Committee agreed that Rule 7(a) should call generally for an answer to a crossclaim. The Committee Note will explain that deletion of "if the answer contains a cross-claim" is appropriate to reconcile the two rules.

A proposal to further revise the structure of Rule 7(a) was referred to the Style Subcommittee for action in time for submission to the Standing Committee in June.

Style Rule 7(b) presents a thorny problem. Present Rule 7(b) requires that a motion be in writing, and provides that the writing requirement "is fulfilled if the motion is stated in a written notice of the hearing of the motion." Style Rule 7(b) omits any reference to a written notice that includes the motion.

One part of the difficulty is that most courts do not set motions for hearing. That might suggest that there is no need to carry forward a provision dealing with written notice of a hearing. But there are hearings on some motions. Rule 6(d) requires that a written motion and notice of hearing be served not later than 5 days before the hearing. Some efficiency can be gained by preparing and serving a single document with a single caption, statement, and notice of hearing. Several members noted that in many courts it is common to do this in one paper.

It was concluded that the Style Draft can stand. The Committee Note will state that the statement about combining the motion and notice of hearing in a single document was deleted as redundant. A single document can serve both purposes without need for an express reminder.

Rule 7(b) also illustrates a common question. Present Rule 7(b)(3) states that all motions shall be signed in accordance with Rule 11. Style Rule 7 omits this statement as redundant. Rule 11 applies to written motions by its own express terms. It was urged that the cross-reference should be restored. Many people think of Rule 11 as a "pleading" rule. It is useful to remind them that it applies to motions as well. A rejoinder was offered — present Rule 7(b)(3) is confusing, because it seems to imply that all motions must be in writing. Oral motions are proper in some circumstances, as Rule 7(b) expressly recognizes. The cross-reference "is both redundant and infelicitous."

The theme was repeated. Rule 11 is valuable. We should not assume that all lawyers will remember that Rule 11 applies to written motions as well as to pleadings. It is valuable to remind them.

The same cross-reference question is raised by Rules 8(b) and (e), each of which redundantly reminds the reader that Rule 11 applies to all pleadings. It may be urged that the cross-reference is valuable in each place. Lawyers tend to think of Rule 11 first and foremost as a rule designed to cabin over-eager plaintiffs. Motions, answers, and inconsistent pleadings may each deserve explicit reminders. Each cross-reference, moreover, may reflect specific "deals" that were made in amending

each of the different rules. The deals of once-upon-a-time, however, may have faded from memory. There is no need to honor all old compromises after the passions that forged them have disappeared.

A particular difficulty was urged with respect to the Bankruptcy Rules. The Bankruptcy Rules have their own "Rule 11." Other rules, however, may incorporate the Civil Rules that cross-refer to Rule 11. These indirect cross-reference incorporations could become confusing in bankruptcy practice.

A motion to restore the cross-reference in present Rule 7(b)(3) failed. The explanation in the draft Committee Note included in the agenda materials provides adequate protection.

Style Rule 7 was approved.

Rule 7.1. Rule 7.1 raises a question of the need to maintain style consistency among the different sets of Rules. Rule 7.1(a) now requires a disclosure statement by a party "to an action or proceeding in a district court." None of these words is necessary. Rule 1 applies the Civil rules to all actions or proceedings in a district court. But the Criminal and Appellate Rules have parallel language. The question whether this redundancy should be carried forward was referred to the Style Subcommittee for disposition.

Style Rule 7.1 was approved.

Rule 8. Discussion of Rule 8 began with the distinction between "aver" and "allege." For the present, the Style Rules will adhere to the word in the present rule — when the present rule says "aver," the Style Rule will say "aver." And the use of "allege" will be carried forward when it appears in the present rule.

Style Rule 8(b)(5) offers a change from the present rule's "lacks knowledge or information sufficient to form a belief," to become "lacks sufficient knowledge or information to form a belief." It was suggested that the language of the present rule is deeply embedded in practice, and approaches "sacred phrase" status. The order of words may have meaning. The Committee voted to restore the language of the present rule.

It was noted that Subcommittee B considered a change in Rule 8(c). The draft suggested that "comparative negligence" be added to supplement the increasingly antiquated reference to contributory negligence. Comments on the draft suggested the conceptual superiority of referring to comparative responsibility. Any change was rejected for fear of substantive consequences.

Style Rule 8(c)(2) substantially simplifies the present rule. The present rule says that when a party mistakenly designates a counterclaim or defense, "the court on terms, if justice so requires, shall treat the pleading as if there had been an appropriate designation." The Style Rule says simply that the court "may" do so. The Committee, recognizing the global issues involved with the use of "may" to signify discretion and the exercise of discretion by imposing conditions, voted that the Style Subcommittee should redraft the Style rule to include something about "terms" and justice so requiring.

The Style Subcommittee also was asked to consider whether to delete "inconsistency" from the caption of Rule 8(d).

Style Rule 8 was approved, subject to the Style Subcommittee's reconsideration of 8(c)(2).

Rule 9. Style Rule 9(a)(2) provoked renewed discussion of the difference — if any — between an allegation and an averment. The present rule calls for a "specific negative averment." Some Committee members prefer "allegation," including those who have changed their minds on this issue

as the Style Project continues. To them, "aver" seems antiquated. Others find a nuanced distinction. Some dictionaries give "aver" a stronger meaning. Garner's dictionary says that "aver" "has its place in solemn contexts — it should not be lightly used." Garner says that "[t]o allege is formally to state a matter of fact as being true or provable, without yet having proved it. The word once denoted stating under oath, but this meaning no longer applies. * * * Allege should not be used as a synonym of assert, maintain, declare, or claim. Allege has peculiarly accusatory connotations. One need not allege only the commission of crimes; but certainly the acts alleged must concern misfeasances or negligence." Some of the uses in the present rules seem questionable. Rule 23.1, for example, describes what the complaint is to allege. But it also requires verification, a level of solemnity that is better matched by aver. If we are to make distinctions at this level, we must be very careful. The only way to make sure that meanings are not changed is to carry forward, as the current Style drafts do, whichever word appears in the present rule. For the time being, the drafts will adhere to the present rule. But this question remains open to further consideration as the Style Project goes forward. "Specific negative averment" will remain in Rule 9(a)(2). But "and" will be changed to "that," or perhaps "which": "a party must do so by [a] specific negative averment ~~and~~ that must state any supporting facts * * *"; or "by [a] specific negative averment, ~~and~~ which must state * * *."

The question posed by Rule 9(b) is whether there should be any restyling, beyond changing "shall" to "must." The Style Draft as it stands now seems to do no harm. It was agreed that despite the intense scrutiny that regularly fixes on Rule 9(b), the Style Draft changes are acceptable.

Style Draft Rules 9(c), (d), and (e) all simplify the corresponding present rules. The present rules say "it is sufficient to" plead in the described way. The Style Draft says in each place that a party "may" plead in the described way. The change alters the meaning. The present rule says expressly that such pleading suffices. The Style Draft does not. The Committee voted that the sufficiency concept should be restored. The Style version should find a graceful way to say: "It suffices to aver generally," and so on.

Rule 9(h)(3) provided the occasion for a reminder that the Style Subcommittee continues to consider the question of cross-references within a single rule. The current Style draft of (3) cross-refers to all of subdivision (h) by saying: "within this subdivision." Alternatives include: "this subdivision (h)"; "subdivision (h)"; Rule 9(h)(1); and still others.

With these changes, Style Rule 9 was approved.

Rule 10. Style Rule 10(a) includes a change that was not before Subcommittee B: the pleading must have a caption with ~~stating~~ the court's name * * *." It was agreed that the change is a question of style, and some preferences were expressed for adhering to "with."

So too, it was agreed that the Style Rule 10(b) change from "To facilitate clarity" to "If it would promote clarity" is a matter of style within the discretion of the Style Subcommittee.

Present Rule 10(c) says: "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." An earlier Style draft dropped any reference to writing or an instrument. Writing has been added back: "An written exhibit attached to a pleading is a part of the pleading for all purposes." Discussion of these changes began by asking whether the word "instrument" is broad enough to cover any written exhibit, or whether dropping "instrument" broadens the meaning of the rule. Is "instrument" used in a narrow sense to denote such documents as a contract or a deed, or does it cover any writing? What about a photograph or a drawing?

Turning to "written," it was suggested that it is a good idea to treat nonwritten exhibits as part of the pleading. A videotape of an allegedly defamatory telecast would be an example — the court

should be entitled to view the tape and rule that the offending statements were not defamatory. But deleting "written" is a matter of style only if we are confident that Rule 10 now embraces an exhibit in any medium that can be "attached" to a pleading.

A motion to delete "written" from the Style rule failed.

It was noted that Rule 10(c) does not limit what can be attached as an exhibit. It only addresses the question whether the attachment can be treated as part of the pleading. The most obvious consequence is consideration on a Rule 12 motion without need to convert to summary-judgment procedure. A motion was made to restore two thoughts from present Rule 10(c): "A copy of any written instrument which is an exhibit * * *." It was suggested that "which is an exhibit" is not needed — "a copy of any written instrument attached to a pleading is a part of the pleading for all purposes" says it all. This motion carried, subject to final styling by the Style Subcommittee.

With these changes, Style Rule 10 was approved.

Rule 11. The present Style Draft of Rule 11(a) restores a present-rule word that had been deleted from earlier style drafts: "Unless a rule or statute specifically states otherwise * * *." The restoration was welcomed. A change in Style Rule 11(b)(1) also was approved, deleting three words: "unnecessary delay or expense ~~in the litigation~~."

Rule 11(c) now provides that the court may impose a sanction "upon the attorneys, law firms, or parties that have violated * * * or are responsible for the violation." Style Rule 11(c) calls for a sanction "on the attorney, law firm, or party that violated the rule." The Guidelines call for drafting in the singular. But that makes it all the more important to restore "any," to make it clear that sanctions may be imposed on each of multiple violators. This is not style alone. A motion to restore "any" was adopted.

Present Rule 11(c)(1)(A) introduces the safe harbor added in 1993 by saying that a motion for sanctions "shall not be filed * * * unless." Style Rule 11(c)(2) says the motion "may be filed * * * only if." The Style Rule change was challenged. The emphasis provided by "shall not be filed unless" was important in 1993. Rule 11 is very closely read by the bar. We should be reluctant to change it. Rule 11 is so important that even the "flavor" of present drafting should be protected. A motion to restore the emphasis of "shall not be filed unless" was adopted.

With these changes, Style Rule 11 was approved.

Rule 12. Discussion of Rule 12 began by noting that Subcommittee B found many problems in Rule 12 that cannot be fixed within the limits of the Style Project. Rule 12(b), for example, says that if a responsive pleading is permitted, a motion asserting any of seven enumerated "defenses" must be made before pleading. But Rule 12(h) says that some of those same defenses may be raised later. This and other internal conflicts seem to present matters of substance. An effort will be made to redraft Rule 12 as a "Reform Agenda" item in time to meet or beat adoption of the Style Rules.

The Style Draft of Rule 12(a)(1)(A)(ii) was questioned for clarity and fidelity to the present rule. A motion was adopted to rewrite it: "within 60 days after the request [for a waiver] was sent, or within 90 days after the request [for a waiver] was sent if the defendant was addressed outside any judicial district of the United States." A parallel change should be made in Rule 4(d)(3).

The question was raised whether Style Rule 12(a)(3) should be modified to adhere more closely to the present language. The present language, adopted in 2000, refers to suit against a government employee "sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The Style Draft changes this to "acts

or omissions occurring in connection with duties performed on behalf of the United States." It was pointed out that the draft language may imply actual performance in a way that the present language does not. This question was dispatched by observing that the analogous provision in Rule 4(i) has been changed by the Style Draft in the same way as Rule 12(a)(3), and no one has objected to the change in Rule 4(i) Rule 12(a)(3), indeed, was amended in 2000 only to parallel the simultaneous Rule 4(i) amendment. The Style Draft stands as it is.

Present Rule 12(e) provides for a motion for a more definite statement made "before interposing a responsive pleading." This timing element is missing from Style Rule 12(e). The question whether it should restored went in two directions. One was the observation that in some courts it is common practice to file both an answer and a motion for a more definite statement. The theory seems to be "this is my answer if I have properly unraveled this incomprehensible complaint, but if I have failed to understand I should have a more definite statement." The other direction suggested that the motion should be made before a responsive pleading, and that this practice so inheres in the rule that the present statement is redundant. To file a responsive pleading is to show that the party can reasonably frame a responsive pleading. After brief further discussion the question was dropped without any motion to change the Style Draft.

Subcommittee B originally asked whether an earlier draft of Style Rule 12(h)(3) adequately emphasizes the court's obligation to raise the question of its own subject-matter jurisdiction. The revised Style Draft does nothing to weaken this long tradition, and can stand as it is.

With the change in rule 12(a)(1)(A)(ii), Style Rule 12 was approved.

Rule 13. Style Rule 13 was approved.

Rule 14. The Style Subcommittee was asked to consider whether a few more words may be deleted at the beginning of Style Rule 14(a)(1): ~~After the action is commenced,~~ A defending party may * * *."

A style protest was voiced. The second sentence of Rule 14(a)(1) begins with "But." That is jarring. We should avoid it when possible. The Committee did not recommend any change.

Present Rule 14(a) allows impleader more than 10 days after serving the original answer only on motion "upon notice to all parties." An earlier Style Draft carried forward the notice provision, but it has been deleted. It was asked whether this explicit reference to the notice requirement that Rule 6(d) attaches to all written motions should be deleted. Third-party practice is confusing and confused. The redundancy with Rule 6(d) has always been there, and it may serve a valuable function as a clear reminder. Perhaps there is no confusion now about the notice requirement, but deletion might lead to eventual confusion. This concern was met with the response that one purpose of the Style Project is to delete redundant cross-references. The Committee Notes will all say that there is no change in meaning. Although there will be an interval in which lawyers compare old rule language to new Style Rule language, courts will be alert to prevent changes of meaning. A motion to restore the notice provision failed.

As a matter of style, the Style Subcommittee was asked to consider dividing the lengthy final sentence of Style Rule 14(c)(2) into two sentences.

Style Rule 14 was approved.

Rule 15. It was observed that in many courts there is no meaning in the provision in Rule 15(a) that cuts off the right to amend once as a matter of course if the action is on the trial calendar. These courts do not have a trial calendar. This question was discussed by Subcommittee B, however, and

it was decided that no change should be made. Any change would alter the meaning of Rule 15(a). Some courts still have a trial calendar.

It was noted that the final sentence of present Rule 15(d) provides for pleading in response to a supplemental pleading "if the court deems it advisable." Style Rule 15(d) changes "deems" to "considers." The two words feel different. "Deems" seems to imply a finding. "Considers" is a lesser word. No response was made to this observation.

The protest about beginning a sentence with "but" in Style Rule 14(a)(1) was renewed by protesting the decision to begin the last sentence of Style Rule 15(d) with "And." There was no reaction beyond the observation that this is modern style.

Style Rule 15 was approved.

Rules 1-15: With the revisions to be made in some of the rules, the Committee voted to submit Style Rules 1 through 15 to the Standing Committee in June for approval for publication together with such additional Style Rules to be submitted later as will make a convenient package for the first Style Rules publication.

Rule 5.1

28 U.S.C. § 2403 directs a court of the United States to certify to the Attorney General the fact that the constitutionality of an Act of Congress affecting the public interest has been drawn in question. Certification also must be made to a state attorney general when the constitutionality of a state statute affecting the public interest is drawn in question. Certification is not required, however, if "the United States, or any agency, officer or employee thereof" is a party, or the "State or any agency, officer, or employee thereof" is a party.

The § 2403 requirement is supported by the final three sentences of Civil Rule 24(c). The first two of these sentences repeat the command of § 2403. The last sentence directs a party challenging the constitutionality of legislation to call the court's attention to the court's "consequential duty."

Appellate Rule 44 implements § 2403 in terms that depart in several directions from present Civil Rule 24(c). During the publication period for the Appellate Rule 44 amendment that added Appellate Rule 44(b), expanding Rule 44 to deal with state statutes as well as federal, a United States District Judge commented that the Civil Rules should be amended to provide better notice of the § 2403 obligation. The apparent source of concern is that Rule 24(c) is part of the intervention rule, and is more likely to be consulted by a nonparty who wishes to join a pending action than by a party who is framing an action.

A draft Rule 5.1 has been prepared to locate the § 2403 obligation in a more visible place in the rules. The draft also addresses the question of establishing parallels with Appellate Rule 44 as part of the continuing quest to increase the concurrence of provisions that address the same issue in different sets of rules. The draft has been revised several times in consultation with Department of Justice staff.

The draft presented with the agenda materials expands to some extent the certification obligations imposed by § 2403. Although it duplicates Appellate Rule 44 in some respects, it also departs from Rule 44 in several respects. The Department of Justice believes that the departures are justified by the differences between district-court litigation and appellate litigation. It is most important to ensure notice to the Department at the trial-court stage so that it can exercise the statutory right to intervene and participate in building the record that presents the constitutional

questions. Notice at the appeal stage is important primarily in cases that have not already come to the Department's attention.

The agenda draft has been sent to the Appellate Rules Committee, but they meet in mid-May and have not had an opportunity to respond to the draft.

Although it has been suggested that the Committee Note might describe the reasons for any deviations that are made from Appellate Rule 44, the draft Note does not do that. To the extent that different provisions may be recommended, it should suffice to make the case for differences in the Report to the Standing Committee.

Presentation of the Rule 5.1 draft was accomplished by noting the ways in which it departs from § 2403 and the ways in which it departs from Appellate Rule 44.

Both the Rule 5.1 draft and Appellate Rule 44 depart from § 2403 in at least three ways.

First, each applies to a party who questions the constitutionality of a statute. Section 2403 applies when the constitutionality of a statute is drawn in question. There may be a difference in tone and meaning. Constitutional questions frequently are raised in a conditional and subordinate way by arguing that a statute should be interpreted so as to avoid the need to confront constitutional questions that might be raised by alternative interpretations.

Second, § 2403 applies only to a statute "affecting the public interest." Both draft Rule 5.1 and Appellate Rule 44 delete this restriction, requiring notice when a challenge addresses any Act of Congress or state statute. This expansion of the statutory certification requirement flows from the belief that the Attorney General should be the first to determine whether an act affects the public interest. The court retains control at the stage of determining whether § 2403 establishes a right to intervene.

Third, § 2403 does not require notice to the Attorney general if a United States officer or employee is a party. Both Appellate Rule 44 and draft Rule 5.1 require notice when an officer or employee is a party, but is not sued in an official capacity. With respect to an Act of Congress, the United States Attorney General often will have notice under Civil Rule 4(i) of an action against a United States officer or employee in an individual capacity, but not always.

Draft Rule 5.1 departs from Appellate Rule 44 in six ways, one of them drawing from the provisions of Civil Rule 24(c).

First, draft Rule 5.1 provides greater detail than Rule 44 in addressing the notice that a party must file. The notice must state the question and identify the pleading or other paper that raises the question.

Second, draft Rule 5.1 goes beyond the Rule 44 requirement that the notice be filed with the court. It also requires that the notice be served on (or perhaps sent to) the Attorney General. Service would be accomplished in the manner provided by Civil rule 4(i)(1)(B), which calls for certified or registered mail. The draft does not substitute this requirement for the court's § 2403 duty to certify the fact of the challenge to the Attorney General, but adds to it. The Attorney General thus gets notice twice, once from the party who raises the question and once from the court. This dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion.

Third, adhering to the statute, draft Rule 5.1 provides that the court must certify the question to the Attorney General. Appellate Rule 44 transfers the certification duty to the clerk. (It may be

that on appeal it is easier to substitute the clerk for the court because Rule 44, in common with draft Rule 5.1, dispenses with the need to determine whether the challenged statute affects the public interest. The substitution may be complicated, however, by the need to determine whether a United States officer or employee who is a party has been made a party in an official capacity.)

Fourth, draft Rule 5.1 explicitly provides that a court that raises a question as to the constitutionality of a statute must certify that fact. Appellate Rule 44 is silent on this question, leaving the matter to interpretation of the § 2403 "is drawn in question" phrase.

Fifth, draft Rule 5.1 includes a specific provision for setting a time to intervene. Appellate Rule 44 has no similar provision.

Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure to file the required notice, or a court's failure to make a required certification, "does not forfeit a constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

Discussion began by asking whether there is a difference between an "Act of Congress" and a statute, an issue that also was discussed by Subcommittee B in reviewing Style Rule 24(c). The Department of Justice believes that "Act of Congress," the statutory term, is broader than "statute." Even a private bill may affect the public interest. A Joint Resolution is not a statute, but it is signed by the President and has the force of law. The Department prefers to adhere to Act of Congress as the term used in Rule 24(c).

The Subcommittee B discussion was explored. Perhaps the least helpful term is "legislation," which is used in Rule 24(c) in an apparent effort to include both an Act of Congress and a state statute. "Legislation" is not a term used in official documents. It is not used in Title 1. "Legislation" also might refer to a bill that remains unenacted but within the ongoing legislative process.

Turning to the double notice requirement, it was noted that the Department prefers that a party be required to serve notice on the Attorney General, not merely to send notice. The Department has an internal mechanism for handling mail that includes return receipts — a return-receipt form of mail is the only added burden resulting from a "service" requirement. Ordinary mail may be lost in the maze, particularly if events recur in which mail must be screened for possible contaminating agents. The dual notice provision is justified. The court's duty to certify is set by § 2403. It is appropriate to impose an additional duty on the party. It should be remembered that defendants as well as plaintiffs may raise the constitutional challenge. Some local rules already impose some obligations on a party who raises a constitutional challenge.

It was observed that if the rule requires "service" on the United States Attorney General, it also should require service on a state attorney general.

Of the three drafts presented in the agenda materials, the Department of Justice prefers the first draft because the more compact second draft is written in a way that may cause confusion over the distinction between a statute and an Act of Congress — Rule 5.1(a) begins by addressing a challenge to an Act of Congress, but 5.1(a)(1) begins "if the statute is an Act of Congress." "[S]tatute" in this setting might be used to narrow the reference to Act of Congress. It was pointed out, however, that this drafting issue could easily be addressed within the framework of the more compact draft.

The "official capacity" question was raised by asking about an action against a United States officer or employee in an individual capacity. Commonly the defendant seeks to have the United States assume the burden of defense, and Rule 4(i) requires service on the United States if the suit

is in connection with the performance of duties on behalf of the United States. Why should notice be required in such actions? In response, it was noted that even when the Department of Justice has notice, it may decline to assume the defense. At times, unfortunately, an action against an individual employee may arise from a deliberate and clear violation of a plaintiff's constitutional rights. A constitutional question might be raised in such an action, and the Department should have notice of it.

Turning to a different issue, it was observed that § 2403 speaks of constitutionality "drawn in question." This language seems better than the draft Rule 5.1 reference to a party who questions constitutionality. "Drawn in question" refers more clearly to the conditional arguments often made in support of contending for a particular statutory interpretation. The argument will be that a different interpretation would raise a constitutional problem. "Drawn in question," further, can speak to the court's duty to certify a question when it is the court, not a party, that raises the question. The Department of Justice is aware of the shades of gray that are presented by the "drawn in question" language. There is always a risk that, confronted with a conditional argument addressed to statutory interpretation, a judge will adopt the challenged interpretation and hold the statute unconstitutional.

It was pointed out that it is easy to begin the rule in the active voice by addressing "a party that draws in question the constitutionality of" an Act of Congress or state statute. But if the rule is recast to address any action in which constitutionality "is drawn in question," it will be necessary to reframe the provisions that impose a notice duty on a party.

It was observed that many cases challenging a statute are filed by pro se parties. Many of them are dismissed without further ado. Drafting must take care not to interfere with the practice of threshold screening. And it was observed that many pro se litigants would love a rule that invites them to serve notice on the Attorney General. If the court dismisses the action at the beginning, there is little reason to burden the Attorney General with notice at all. By way of analogy, note that Rule 4 requires service by the marshal in in forma pauperis actions, but screening at the beginning protects against undue burdens. Screening also should remain useful in cases that present constitutional challenges to statutes. Some help might be found by inquiring into experience under similar state statutes — Pennsylvania, for example, has such a statute. In any event, the Department of Justice recognizes that the draft rule might expose it to notices from sophisticated pro se litigants, and is prepared to assume the burden of reviewing the notices to determine whether intervention is warranted.

The Committee Note should point out that the rule does not interfere with the court's authority to dismiss a constitutional challenge before notice or certification to the Attorney General. This formulation may help not only in cases that are dismissed at the very beginning, but also in cases that go forward to a conventional Rule 12 motion to dismiss, to strike, or for judgment on the pleadings. And it seems better than attempting to draft a provision that defers notice until the court has determined that the constitutional challenge has some potential merit. We do not want to impose such an obligation on the court, in part because it might complicate efficient pretrial procedure.

A separate question was asked: what should be done if the argument is raised in closing arguments? It was acknowledged that this is a difficult question that is not addressed by draft Rule 5.1, and that does not have a satisfactory answer under § 2403 itself. It may be important to direct notice to the Attorney General even if the question arises late in the litigation.

The "no forfeiture" provision provoked a question whether a court lacks authority to declare a statute unconstitutional if the § 2403 certification requirement has not been fulfilled. It was noted that the Department of Justice does encounter cases in which it finds out about the ruling only when

the case is in the court of appeals. The Department has not seen the argument made that the judgment must be reversed solely for want of statutory certification. But it might argue for remand if there were a need to add to the record.

It was agreed that draft Rule 5.1 should not attempt to limit the court's § 2403 duty. The rules are properly addressed to parties more than to a court. But it should suffice to refer in the Note to the court's obligation when the question is raised by the court, not by a party. That provision in the draft can be deleted. The Department of Justice will act on certification of a question raised by the court with the same close attention as on certification of a question raised by a party. But there is no need to require service by the court — a notice sent by a court will not be overlooked.

It was asked whether an action must be stayed during the period set for intervention by the Attorney General. The draft rule does not address this point, and does not assume that the action should be stayed. Many pretrial proceedings may and should continue. As in the earlier discussion, one proper action may be to dismiss the constitutional challenge. The central concern is that the court should not act to hold an Act of Congress unconstitutional during the period set for intervention. If the action is dismissed, constitutionality is no longer drawn in question. Section 2403 establishes a right to intervene, not an obligation — the district court must be entitled to proceed with many matters before intervention.

Another observation was that the draft does not set a time limit for making the certification to the Attorney General. The Department of Justice does not believe that there should be a time limit. In the ordinary case there is plenty of time if a legitimate constitutional question is raised. There is time enough both for continuing district-court proceedings and for setting the time to intervene.

Another question addressed to the intervention draft asked whether it should say that the court "may set a time not less than 60 days" for intervention. Should the rule say "must"? It was tentatively decided that "must" is better. But account must be taken of the authority to dismiss a challenge not only before the court's certification but also soon after. Perhaps account also should be taken of the need for immediate action, at least on an interlocutory basis.

It was suggested that one way to begin Rule 5.1 would be: "Whenever the constitutionality of an Act of Congress is drawn in question the court must certify that fact to the United States Attorney General under 28 U.S.C. § 2403." If the rule continues to require notice by a party, this language might instead be used in subdivision (b).

The Committee voted to approve submission of Rule 5.1 to the Standing Committee with a recommendation for publication if the several revisions directed by the discussion can be satisfactorily implemented in time.

Rule 6(e)

Rule 6(e) provides that when a party is to act within a prescribed period after service, "3 days shall be added to the prescribed period" if service is made under Rule 5(b)(2)(B), (C), or (D). During comments on Appellate Rules amendments designed to integrate the Appellate Rules with the Civil Rule 6(a) provisions for counting time when the prescribed period is less than eleven days, the Appellate Rules Committee was asked to clarify the method of applying the 3 additional days. The Appellate Rules Committee referred the question to the Civil Rules Committee.

Several different methods of integrating the three-day addition with Rule 6(a) are possible. As an illustration, one of the times set by Civil Rule 15(a) for pleading in response to an amended

pleading is "within 10 days after service of the amended pleading." The three days could be added to the 10 days, converting this into a 13-day period. The result would be to shorten the time allowed to plead, because intervening Saturdays, Sundays, and legal holidays are excluded from a 10-day period but not from a 13-day period. Or the 10-day period could be counted out to the end, and the added three days could be treated as an independent period for Rule 6(a) purposes, so that any intervening Saturdays, Sundays, or legal holidays are excluded. The result in some cases would be an extra-long period. Neither of these approaches seems sensible.

The two main choices appear to be to count the three days before the time to respond begins to run, or to count them after the time to respond has otherwise ended. There is an attractive argument that the three days should be counted before the time starts to run. The initial concern was that service by mail may take as much as 3 days to arrive. That concern has been extended to service by electronic means and other means described in Rules 5(b)(2)(B), (C), and (D). This approach results in less added time if service is made on a Wednesday, Thursday, or Friday because the intervening Saturday and Sunday are double counted.

The abstract argument for counting the three days at the beginning, however, fails to account for present practice. Informal surveys of practicing lawyers, including discussion at a meeting of the ABA Litigation Section leadership, shows that the overwhelming majority of practicing lawyers routinely add the 3 days after counting the initial period to a conclusion. This reaction represents a natural reading of the "3 days shall be added" language of Rule 6(e). The main reason to amend Rule 6(e) is to establish an authoritative, clear, and uniform answer that lawyers can rely upon. An amendment that conforms to the main course of current practice will be more effective than one that attempts to turn the tide.

The proposed Rule 6(e) amendment says "3 days are added after the prescribed period expires." The Committee voted to delete "expires" as redundant.

The draft Committee Note includes one paragraph explaining the amendment and a second paragraph that illustrates application of the amendment. Committee members thought the illustration very helpful, provided that it is accurate. District-court clerks will be consulted to ensure accuracy. If the illustration is accurate, it will be retained in the Note.

Discussion addressed the common reaction to this and like proposals that the time-counting rules are far too complicated. Lawyers need clear and simple rules that they can rely upon without worry and the risk of miscalculation. Why not eliminate all of the provisions for intervening "dies non" and simply adopt reasonable periods that are extended only if the final day falls on a Saturday, Sunday, or legal holiday? Beyond this common question others lurk. Any time period that runs from service is difficult to administer because the court does not know when service occurs. Filing is a clearer and objective point. Electronic filing, moreover, is causing concern about "midnight filing." And what should be done about calculating a period that is set before, not after a prescribed event? Suppose a rule or order says that a party must act X days before trial, and the Xth day falls on a weekend? Must the act be taken on Friday (or earlier if Friday is a legal holiday), or may it be taken on the first day after that is not a Saturday, Sunday, or legal holiday?

These time-counting questions are not unique to the Civil Rules. It was noted that at some point it might be useful for the Standing Committee to create an ad hoc committee that draws from all the advisory committees to address these problems in a comprehensive way.

Rule 27(a)(2)

Rule 27(a)(2) provides that the notice of hearing on a petition to perpetuate testimony must be served on each person named in the petition as an expected adverse party "in the manner provided in Rule 4(d) for service of summons." Rule 4 was amended in 1993. Rule 4(d) no longer provides for service of summons, but instead governs waiver of service. The now superseded cross-reference must be corrected.

Correction is not as simple as might seem. The service provisions of former Rule 4(d) have been spread out among Rule 4(e), (g), (h), (i), and (j)(2). Some of the new subdivisions include modes of service that were not included in former Rule 4(d). None of them provided for service on a defendant outside the United States. A choice must be made whether to emulate as closely as possible the modes of service incorporated in former Rule 4(d), or instead to change the permitted modes. The need to make a choice forecloses disposition of this question in the Style Project.

The recommended decision is to incorporate all Rule 4 methods of service in Rule 27(a). The object is to get notice to as many expected parties as possible, and to get notice to them in a manner that is reliable and that signifies the importance of the event. As to a defendant in a foreign country, it is important to honor the national sensitivities that are reflected in the Rule 4 service provisions. Rule 27(a) provides sufficient protections both for the petitioner and for the expected adverse parties when service cannot be made with due diligence on an expected adverse party.

The committee decided that the cross-reference should be to all of Rule 4.

The recommendation to publish this change for comment recognized that the Style Project has not finished its work on Rule 27(a)(2). Some advice was offered on the language that addresses appointment of an attorney to represent expected parties who cannot be served. Present Rule 27(a)(2) says the court shall appoint an attorney "who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent." Rather than change the first shall to must and the second to may, it was decided that "to" is better in each place: "to represent them, and, in case they are not otherwise represented, to cross-examine the deponent." Of course the Style Subcommittee and the Advisory Committee may ultimately settle on a structure that dictates a still different expression.

Rule 45(a)

Rule 45(a)(2), which governs a subpoena for attendance at a deposition, does not require that the subpoena state the method for recording the testimony. The deposition notice must state the method for recording, so the deponent will know if the deponent is a party or is sufficiently friendly with a party. The deponent also has notice if another party designates another recording method, since Rule 30(b)(3) requires notice to the other parties and to the deponent. But in other circumstances the deponent may not be aware of the recording method until the time for the deposition. Advance notice may help the deponent to prepare mentally and emotionally. In addition, a deponent may have legitimate concerns about the recording method, leading to a disruptive last-minute request for a protective order.

The Discovery Subcommittee recommended that Rule 45(a)(2) be amended to state that a subpoena for attendance at a deposition "must state the method for recording the testimony."

The Committee recommended that the Rule 45(a)(2) amendment be published for comment. The Special Reporter, Reporter, and subcommittees will work to adapt all of Rule 45(a)(2) to Style Project conventions in time for presentation to the Standing Committee. The draft Committee Note may be shortened by the reporters and Discovery Subcommittee.

Supplemental Admiralty Rule G

Judge McKnight introduced the report of the Forfeiture Subcommittee. The Subcommittee has met twice by conference call to begin work on the current draft Admiralty Rule G that would govern civil asset forfeiture proceedings. There will be further conference calls, and perhaps at the end a face-to-face meeting. Research has been launched to address difficult issues. The impetus for this project comes from the Department of Justice, making it suitable to ask them to describe it.

Stefan Cassella described the evolution of the Rule G undertaking. A working group in the Department of Justice has developed this project. The purpose is to consolidate in one place all of the special procedures that apply to civil asset forfeiture. A similar project led to the adoption of Criminal Rule 32.2, which consolidates in one place all of the special procedures for criminal forfeiture.

The reason for placing forfeiture procedures in the supplemental rules for admiralty and maritime proceedings is that many forfeiture statutes provide that procedure is governed by these rules. "It is not an ideal fit." Once there were more admiralty proceedings than forfeiture proceedings. Now there are many forfeiture proceedings. Both admiralty practice and forfeiture practice will benefit from stripping forfeiture provisions out from the current admiralty rules and bringing them together in a single new rule. The terms "claim" and "claimant," for example have developed a distinctive meaning in admiralty practice, while they are used in forfeiture statutes in a different way. Separation will reduce the risks that different concepts will mistakenly be substituted for each other. The process of separating forfeiture practice from admiralty practice began with amendments that took effect in 2000, but more work remains.

A new rule will achieve better clarity. In addition, it will address topics not now addressed in the rules, such as expanded venue provisions, forfeiture of property located abroad, notice requirements, and other matters. A new rule can address matters that now are not addressed in any of the rules. And at times it may be feasible to fill in gaps in statutory language.

The several provisions of Rule G were then described.

Subdivision (1) states the application of Rule G. By incorporating the other admiralty rules for matters not covered by Rule G, this subdivision incorporates the Rule A provision that the Civil Rules apply to the extent they are not inconsistent with the admiralty rules.

Subdivision (2) covers the complaint.

Subdivision (3) governs service of process, beginning with the arrest warrant. A judicial officer must make a probable cause determination if the property is not already in government possession. The distinctive statutory rules for initiating forfeiture of real property are incorporated.

Subdivision (4) governs notice — when it is to be published, and how. Special rules provide for publication as to property located in a foreign country. Publication on the Internet is provided. For the first time, there is a requirement that direct notice be served on any person "who, appearing to have an interest in the property, is a potential claimant."

Subdivision (5) covers responsive pleading — what does a claim have to say. The time for filing claim and answer are consistent with the Civil Asset Forfeiture Reform Act. This subdivision also carries forward the admiralty practice that requires that answers to interrogatories served with the complaint be served with the answer.

Subdivision (6) governs disposition of property, interlocutory sales, and like matters.

Subdivision (7) governs motion practice, including motions to suppress, standing issues, release for hardship, motions to dismiss, and excessive fines issues.

A question was asked about internet publication. It was noted that traditionally publication has been in newspapers, but that the statute does not specify the medium. More people have access to the internet than to any particular newspaper. The Department of Justice is considering the establishment of a web site that would list all property subject to forfeiture proceedings.

The requirement that a claimant file two separate documents, first a claim and then an answer, was addressed by noting that the statutes require both.

It was asked whether Rule G(8) expands the right to jury trial. It says that any party may request jury trial — does the government now have a right to jury trial? The Department of Justice believes that the government does have this right.

Discussion turned to a summary of the significant issues raised by draft Rule G. The issues noted were identified by drawing from two lengthy sets of comments submitted by the National Association of Criminal Defense Lawyers.

In order of Rule G subdivisions, the first issue that has provoked protest may be subject to resolution without much difficulty. Supplemental Rule E(2)(a) now requires that the complaint in an in rem action "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 and to frame a responsive pleading." Draft Rule G(2)(v) carries forward the particular pleading requirement, but omits the reference to a need to move for a more definite statement. The omission arose from a suggestion that the reference to a motion for a more definite statement is unnecessary, not from an attempt to change the meaning.

Draft Rule G(2)(c) carries forward the provision of Rule C(6)(c) that allows interrogatories to be served with the complaint. The Department of Justice believes that early discovery of issues that bear on standing to file a claim is important. Defense lawyers, on the other hand, fear that massive initial discovery requests may intimidate potential claimants, deterring them from filing a claim. Actual use of this procedure seems to vary from one district to another. It is possible that the Department's interests can be satisfied by providing a later time for serving interrogatories — one possible point would be after a claim is filed — or by limiting the nature of the issues that can be inquired into by interrogatories served before the time otherwise allowed by the Civil Rules. In part, these issues tie to the standing and related issues that begin with Draft Rule G(5).

G(3)(b)(ii)(A) and (C) provide that the warrant to seize property must be executed as soon as practicable unless the complaint is under seal or the action is stayed. Questions about this provision are really challenges to the propriety of sealing the complaint or staying proceedings after the complaint is filed. The Department of Justice believes sealing and stay orders are necessary at times to reconcile the needs of ongoing investigations with requirements for prompt filing. Limitations problems may require prompt filing. More exotic needs arise from the statute that allows all electronic funds to be treated as fungible for a period of one year, but that requires specific tracing of funds credited to an account more than one year before filing. But disclosure of the forfeiture proceeding may jeopardize an ongoing investigation or risk the very lives of undercover investigators. The challenge to this position is that filing and then sealing the complaint or staying the proceedings does not serve the purposes of the underlying statutes.

The Internet notice provision in Draft Rule G(4)(a)(v) also has drawn challenges. Internet notice as such is welcomed. But defense advocates also want print publication.

For the first time, Draft Rule G(4)(b)(i) provides for service of notice of the action and a complaint on a person who, appearing to have an interest in the property, is a potential claimant. G(4)(b)(ii) provides that service is to made "in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail." Although this is the first assurance of notice to be established by rules, adversaries argue that service should be made under Civil Rule 4.

Standing issues generate by far the greatest controversy. Draft Rule G(5)(a)(i) limits standing to contest the action to "a person who asserts an ownership in the property." This provision is avowedly designed to change present law. Several courts of appeals have ruled that claim standing is established by any interest that satisfies the minimal Article III injury-cause-redress tests. The Department of Justice is dissatisfied with these decisions. The reasons for dissatisfaction tie also to the motion-practice provisions in Draft Rule G(7)(b) and (d). The story begins with a change made in 2000 by the Civil Asset Forfeiture Reform Act. Until 2000, the government carried the initial burden by showing probable cause to forfeit the property. The claimant then had the burden of showing by a preponderance of the evidence that the property was not forfeitable or showing a defense. CAFRA now imposes the burden on the government to prove by a preponderance of the evidence that the property is forfeitable. If the government fails, it cannot retain the property unless it initiates a new forfeiture proceeding. The property must be returned to someone, and often the claimant will be the only person to receive it. The government believes that it should not be forced to the burden of proving forfeitability at the behest of someone who has no real interest in the property. The task of proving forfeitability may be difficult. The proof, moreover, may reveal information that jeopardizes continuing investigations or the identity of informants or undercover officers. In addition, the claim may be filed by a mere nominee for the purpose of concealing the owner's identity. The government illustrates its concern by pointing to several cases. In one, a drug conspirator drove an automobile to a rendezvous with another conspirator and an undercover officer. The driver locked the car and handed the keys to the co-conspirator, who in turn handed them to the undercover officer. The Third Circuit assumed that the conspirator who acted to transmit the keys had standing because he had "possession" of the automobile by possessing the keys.

This concern with standing is expressed also in Draft Rules G(7)(b) and (d). G(7)(b) allows the government 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. The emphasis on "to establish" seems designed to require the claimant to offer sufficient evidence to meet a summary-judgment test. G(7)(d) allows a party with an ownership interest to move to dismiss the complaint "at any time after filing a claim and answer." This provision is designed to defeat the ordinary right to file a Rule 12(b) motion to dismiss before answering, and may be tied to the Draft Rule G(5)(b) provision that any objection to in rem jurisdiction or venue must be stated in the answer or will be waived.

These interlaced provisions are challenged on the basic ground that many interests other than "ownership" interests should support standing to claim. CAFRA establishes the "innocent owner" defense in 18 U.S.C. § 983(d)(6), and defines "owner" for this purpose to include one who has a leasehold, lien, mortgage, recorded security interest, or valid assignment. It also includes a bailee if the bailor is identified and the bailee shows a colorable legitimate interest in the property. This example is used to support the broader argument that any possessory interest should suffice. If property has been taken from a person's possession, or if a person has a right to possession, that should suffice to claim the property if the government cannot establish forfeitability.

Some objections also have been made to the Draft Rule G(7)(a) provision that 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. The theory is that suppression should be for all purposes, not merely trial use.

Draft Rule G(7)(e) addresses another new issue that has emerged from case law. It establishes a procedure for seeking mitigation of a forfeiture under the Excessive Fines Clause of the Eighth Amendment. The challenge to this provision rests on the assertion that the draft seeks to establish a procedure that Congress refused to adopt when it enacted CAFRA.

Following this summary it was noted again that the Forfeiture Subcommittee will plan further meetings by conference call or in person, and may seek more detailed discussion of Rule G at the October meeting. The Admiralty Rules do not come often before the Committee. When they are considered, the Department of Justice and the Maritime Law Association have provided important help. Former committee member Mark Kasanin and the Maritime Law Association believe that it is a good idea to separate forfeiture procedure from the other admiralty rules. This is important work. It also is controversial work and will be complicated. Some of the controversies are likely to be ironed out, but other areas are likely to remain controversial when the rule moves ahead to publication and comment.

Sealed Settlements

The subcommittee that is working on forfeiture also is working on the questions that arise when parties to an action seek to file a settlement agreement under seal. The Federal Judicial Center has agreed to study this practice.

Timothy Reagan provided an interim progress report on the FJC study. The study is focused on agreements that are filed with the court — confidential settlement agreements are common, but the study is not directed to those that are not filed with the court.

One phase of the study has been completed. Marie Leary has collected state statutes and local district rules. The state statutes tend to forbid sealed agreements with public agencies. Florida prohibits sealed agreements that conceal a public hazard. Sealing is often associated with good cause. Some rules require weighing interests, or implementation of the least restrictive alternative that accomplishes the desired protection. Some place time limits on sealing. Michigan prohibits sealing the order that directs sealing. The District of South Carolina prohibits filing settlements under seal. The Eastern District of Michigan says that a filed settlement agreement must be unsealed after two years, but the court staff find this difficult to implement because there is nothing in court records to designate which sealed materials are settlement agreements. Time limits on keeping sealed agreements are common, but seem to be motivated by storage concerns — return to the parties or destruction often are accepted alternatives to unsealing.

The study of the actual incidence of filed and sealed settlement agreements in federal courts is based on all cases terminated in 2001 and 2002. The study has been completed for seventeen districts.

The most common reason to file a settlement agreement is to facilitate enforcement. Filing may occur when the settlement is reached, but also occurs as an attachment to a motion to enforce a settlement. Occasionally a court transcript of a settlement conference is filed and sealed. Many cases involve minors and require court approval of the settlement.

It is common to seal the amount paid in settlement. At times trade secrets or other confidential information are protected.

Commonly the complaint is not sealed in the cases that accept sealed settlements for filing. Of 209 cases with sealed settlements, 3 (two of which were consolidated) sealed most or all of the record.

Public hazard may be involved in 10% to 15% of the cases with sealed settlements. Other people beyond the parties may be at risk.

The FJC study is not finished, but already has produced interesting results. Filed, sealed settlements seem to occur in a small proportion of federal cases.

An appendix to the interim report describes the cases on which information has been obtained to date. Some of them involve problems of the sort that give rise to concern about public hazards. But in most of these cases the file materials that are not under seal will reveal the nature of the perceived hazard. This is true of several of the product-defect cases described.

It was noted that public media are directing attention to sealed settlements. Concerns are expressed about dangerous products, bad doctors, and other risks. This subject deserves serious attention and work. The FJC work already is providing a solid basis for evaluating what federal courts are doing.

The state statutes and local district rules are in themselves good models to provoke consideration of a possible national rule. They address such topics as the standard to order sealing; the physical method of sealing; notice before deciding whether to seal; challenges by nonparties; the duration of the seal; and whether some kinds of agreements — such as those made with public entities — should never be subject to sealing.

It was noted that in Texas a settlement agreement involving a matter of public interest is always open. Anyone with standing can seek access. Indeed many of the state statutes that deal with public bodies seem to deal with all settlement agreements, not only those that are filed with a court.

A related confidentiality problem was described. Settlement agreements often require return of discovery materials and impose confidentiality obligations. The parties have used public processes to get the information, Rule 5 bars filing discovery materials before use in the action or court order, and the public interest is thwarted by destruction. The issue is not the need to reveal how much money the plaintiff got, but preserving the discovery information. This, however, is a different problem than the filed-and-sealed settlement agreement that is the sole focus of the current project.

In response, it was noted that a court may be asked to enforce an agreement to return or destroy discovery materials. The motion and all supporting materials are filed under seal.

It was noted that most settlement agreements are not filed. The parties simply stipulate to a dismissal with prejudice. If court review and approval of the settlement is required, the parties may file and seek to seal. There may be trade secrets involved. It is not clear that we need a rule.

The FJC study shows that it is common to find a court retaining jurisdiction for 60 days after the parties announce settlement. Then the settlement agreement is filed under seal as part of a motion to enforce the settlement.

The discussion concluded by noting that any approach to a rule dealing with sealed settlements must be sensitive to substantive issues. And there also may be questions of attorney conduct.

Discovery of Computer-Based Information

Professor Lynk delivered the Discovery Subcommittee report on discovery of computer-based information. At the October meeting the Subcommittee had thought that it might work toward draft rules for consideration at this meeting. The questions continue to evolve at a rapid pace, however, and it seems better to establish a clear rationale before going forward to the initial drafting phase.

A letter prepared by Professor Marcus was sent out to 250 persons and groups, inviting comments on e-discovery and rule language. Twelve responses were received. Because some of the responses were from organizations, it is clear that more than twelve people were involved. The responses were mixed. Some readers will be tempted to conclude that by and large it is defendants who think there is a problem in defining what should be produced, what depth of search is required, and so on, while it is plaintiffs who say that this topic is not suitable for rulemaking.

Further information was gathered at a meeting of the American Bar Association Litigation Section leadership.

Following an intensive October 2002 meeting, the Sedona Conference prepared a report and recommendations in March. Ken Withers of the Federal Judicial Center attended the meeting that was held to discuss the report, which may be amended in light of that debate.

The Federal Judicial Center has logged continuing education courses in electronic discovery. There are many and lengthy programs, with many sponsors. Since January 2001 there have been an average of more than two a week. The very emergence of this cottage industry suggests that there are problems that deserve attention.

The ABA 1999 Civil Discovery Standards address these problems. The need for Standards again suggests that there is a rules gap to be filled.

Local district rules also are emerging to address these questions. The emergence of local rules also suggests that the national rules are unclear or incomplete. Texas led the way in state-court rules.

The Discovery Subcommittee met in March by conference call. The meeting identified seven specific areas of research as the most promising topics to consider for draft rule provisions. Publication of proposed rules, if they progress to that stage, will attract and focus comment.

Professor Marcus described the seven areas to be studied, noting that the work is beginning without specific rules proposals in mind.

One group of proposals is for rules that tell the parties to discuss discovery of computer-based information at the beginning of an action. The Rule 26(f) conference is an obvious occasion. Rule 16(b) and Form 35 also might be amended. Simply directing discussion by the parties may be more useful than attempting to provide greater specificity.

A second group of proposals would amend Rule 26(a)(1) to require disclosures about each party's computer information systems. It may be desirable to require this form of disclosure before the Rule 26(f) conference in order to support intelligent discussion at the conference. Such early disclosure also may be useful to remind lawyers of the need to find out at the beginning what information resources a client has, and to help lawyers impress on clients the importance of drawing on those resources.

A third set of proposals address the definition of what is a document. There are some models to study. These issues tie to the question of heroic efforts — does deleted information count as a "document" if it is possible to retrieve it by special means? Are back-up tapes "documents"?

The form of production presents the fourth group of issues. Hard copy? The electronic version — and if so, in what form (and does software go with the production)? There are many databases of information that is constantly evolving, and that produce a "document" only in response to specific questions put at a specific moment. Often it is not feasible to produce the data base, but is feasible only to put the questions and deliver the response.

"Heroic efforts" frame a fifth and much-discussed group of issues. Most litigation does not justify a demand that every party do everything that is possible to retrieve information that is not readily retrievable by means that track the ordinary course of business. It would be possible to begin with an assumption that no heroic effort is required, but to allow a judge to order it. The Texas rule looks to information reasonably available in the ordinary course of business. The ABA Standards treat this as a question of cost bearing, imposing special expenses on the requesting party.

Inadvertent privilege waiver presents a sixth issue, one that is not unique to discovery of computer-based information. The Committee last considered this question in October 1999, studying two different approaches for paper documents. This topic may deserve general study, remembering that 28 U.S.C. § 2074(b) requires affirmative action by Congress to give effect to a rule creating, abolishing, or modifying an evidentiary privilege.

The seventh topic identified for study is particularly complex. Many firms that expect to be asked for information in discovery want a "safe harbor" rule that tells them what information they must preserve. People that expect to ask for information want rules that assure that reasonable preservation measures will be taken. Creating a rule to address these concerns has never been attempted for paper documents. It will be difficult to attempt for computer-based information.

The Discovery Subcommittee has worked with these issues for more than three years. The time has come to attempt drafting.

Professor Lynk noted that the result is not prejudged by undertaking to draft possible rules. The drafting process itself will be very helpful in demonstrating what may be possible.

Brief discussion asked whether the "safe-harbor" project might attempt to define both what must be preserved and the time when the obligation to preserve arises. Many corporations have information policies. Whether it is feasible to offer useful guidance in court rules is unclear; record-retention policies are shaped by many concerns, including direct commands. The SEC, for example, has imposed explicit retention requirements for e-mail messages on some firms. It was noted that a court rule might attempt to create indirect incentives for record retention by creating consequences for information destruction. But great care should be taken in framing rules that address pre-filing activities.

The Discovery Subcommittee may have a meeting to review preliminary drafts before bringing them to the Committee. And at some point it may be useful to have an invitational conference. The Chicago conference on the Rule 23 proposals following publication in 2001 was helpful. An organized conference can be a valuable complement to the public comments and hearings.

Class-Action Subcommittee

Judge Rosenthal reported that the Class-Action Subcommittee is deliberately taking time before returning to the study of settlement classes. One reason for delay is to await emergence of the current Rule 23 amendments from Congress. Another is to see what comes of the pending minimal-diversity class-action bills. Information continues to be gathered on the impact of the Amchem and Ortiz decisions on the ability to certify settlement classes. Alternatives to the settlement-class proposal published in 1996 will be studied.

Professor Francis McGovern reported on the progress of attempts to find a legislative solution to asbestos litigation, with the thought that there may be some general lessons for settlement classes or some procedure akin to settlement classes.

Four legislative proposals are now converging into a single bill that may emerge in a week or two.

One bill is the long-pending "criteria" bill. This bill would alter state law, denying adjudication of no-symptom cases. It would affect aggregation.

A second bill would establish a defined contribution trust fund. The model is close to the Ortiz settlement. Those suffering the worst illnesses would be compensated first. If the funds available in one year are not adequate to compensate all claims, the lower-ranked claims will spill over to future years.

A third model adopts a distribution plan that sets a specific sum for each asbestos disease. The amount of contributions from businesses and insurers would be set to pay all claims.

A fourth model is "§ 524(g) without bankruptcy." Section 524(g) now permits bankruptcy relief. It requires a 75% vote in favor of a plan. Each asbestos victim is assigned one vote, weighed at $1. A future claims representative is appointed. The result usually is that tort claimants emerge owning 51% of the debtor. The debtor emerges free from any liability for asbestos injuries. (Experience with the Manville Trust helps to shape this. The trust kept getting new contributions, creating a "catch 22" situation in which the victims owned most of Manville and added contributions in effect came from the victims themselves.) This proposal would allow § 524(c) protection without bankruptcy. Judge Schwarzer made a similar proposal many years ago, calling it "product-line bankruptcy."

An asbestos study group of manufacturers, insurers, plaintiffs' lawyers, and the AFL-CIO is working toward a coalescence of these approaches. The current outline calls for $5 billion of annual contributions; defined benefits; and protection of the kind that § 524(g) gives to companies that have gone into bankruptcy. They contemplate an Article I court to oversee the trust fund; a claims administrator; payments from both manufacturers and insurers, perhaps balanced 50/50; and defined tiers of contribution. The system would entirely displace the tort system, achieving finality.

There is an optimistic feeling that the various interested groups may be able to agree. The insurers are anxious that insurance company payments be set in proportion to the reserves that have been set aside. The AFL-CIO likes the idea. There is some ongoing debate about the level of contributions — the manufacturers and insurers think the total should be $90 billion, while plaintiffs want $140 billion. (Differences at this level are likely to be worked out in a range from $100 to $110 billion if other issues are resolved.) The plaintiffs' bar is split, with the mesothelioma-cancer bar upset with caps. ATLA thinks the system makes sense. There is a 25% limit on attorney fees (though 25% of $100 billion or so adds up to a considerable sum).

Although the proponents are optimistic, the opponents think this approach can be blocked. There is not much time to act before the politics of the 2004 election cycle take over.

What might all of this suggest for Civil Rule 23 reform? The 75% approval requirement in § 524(g) is a lot like an opt-in class. Perhaps a similar class-action rule could be developed, allowing class disposition only if most class members choose to opt in. The fen-phen settlement has survived Amchem-Ortiz; some claimants are outside the settlement, and the defendants seem to accept that. Massive though not universal support from plaintiffs may suffice to free us from Amchem-Ortiz. And the approach saves us the burdens of litigation.

There are "some obvious constitutional problems" to be confronted. Legislation rather than Enabling Act rules reform may be necessary. But it is important to find a vehicle to resolve mass-tort cases. It is very cumbersome to undertake settlements on a company-by-company, plaintiffs'-firm-by-plaintiffs'-firm approach.

It would be possible to adapt the opt-in approach by disaggregating into subclasses based on injury type. As compared to present § 524(g) practice, it would be possible to weight votes by severity of injury.

It was noted that the present system gives great power to the lawyers who represent unimpaired claimants — they have a lot of votes, and you have to give them a lot of money to get their votes. But this phenomenon may be qualified by the observation that "the aggregation is among the lawyers": The bulk of mesothelioma cases are held by lawyers who also have the bulk of the unimpaired cases. Account also should be taken of the proposition that there should not be an incentive to find more cases to have more votes.

This opt-in settlement-vehicle approach might well be limited to mature torts where there is a strong basis for assuming liability.

It was suggested that it would be difficult to create a rule that applies to cases other than personal-injury cases.

On a separate issue, the Federal Judicial Center reported briefly on the current stage of its study of the factors that influence plaintiffs and defendants to choose between state and federal courts. 2,100 survey instruments have been sent to lawyers in 1,000 cases. 569 responses are in hand, and a "dynamite" letter has been sent to encourage more responses. Data-gathering will close at the end of May. The ABA Litigation Section was helpful in testing the survey.

The Class-Action Subcommittee will continue its work.

Rule 50(b)

One Rule 50(b) proposal has held a place on the agenda for a few years. A new proposal has been advanced by the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. The new proposal addresses the requirement that a renewed motion for judgment as a matter of law after a jury verdict be supported by a motion made at the close of all the evidence. This requirement was built into Rule 50(b) in 1938 as part of the process of fictionalizing the Seventh Amendment requirements that at first seemed to prohibit judgment notwithstanding the verdict and then permitted judgment n.o.v. if a proper ritual were observed. It was carried forward, albeit in somewhat obscure language, in the 1991 amendments.

The current proposal is to amend Rule 50(b) to permit a post-verdict motion to be based on any pre-verdict motion for judgment as a matter of law that satisfies Rule 50(a).

After 65 years of fiction, it cannot be said that the Seventh Amendment requires this procedure unless some clear functional need can be found. In attempting to explain the persistence of the rule, courts regularly rely on the desire to be sure that the party opposing the motion has had clear notice of the asserted deficiency in the evidence. Clear notice may lead to the offer of sufficient evidence. Notice also affords a court the opportunity to seize the advantages that occasionally attend direction of a verdict on part or all of a case before submission to the jury. In addition, clear notice makes it easier to resist a verdict-winner's argument that rather than judgment notwithstanding the verdict there should be a new trial that affords an opportunity to supply sufficient evidence.

The argument for revising Rule 50(b) runs in two directions. First, the clear-notice function can be — and commonly is — served by means other than a motion at the close of all the evidence. Second, the present rule is frequently overlooked in the flurry of activity at the close of trial, creating a risk that judgment must be entered on an unsupported verdict.

These observations have prompted many appellate opinions to struggle with attempts to mollify the seemingly rigid close-of-all-the-evidence rule. The most common event is that a defendant moves for judgment as a matter of law at the close of the plaintiff's case and forgets to renew the motion at the close of all the evidence. Omission of the later motion is most likely to be forgiven if the trial court expressly took under submission the motion made at the close of the plaintiff's case and if the defendant offered very little evidence before the close. The language of the opinions is not always consistent, even within a single Circuit, and relief is not often granted from the close-of-the-evidence requirement.

Amendment of Rule 50(b) deserves careful study. The central question is whether the party opposing the post-verdict motion is sufficiently protected by a motion made before the close of all the evidence. Protection seems to be provided by any motion that satisfies Rule 50(a), which permits a motion for judgment as a matter of law "[i]f during a trial by jury a party has been fully heard on an issue." A motion that satisfies Rule 50(a) should provide ample notice of the asserted evidentiary failing, and a motion before the close of all the evidence provides a better opportunity to cure the failure. A post-verdict motion under Rule 50(b) can be supported only by grounds urged in support of the pre-verdict motion, avoiding the risk of unfair surprise.

Discussion began with the observation that lawyers are very concerned about the close-of-all-the-evidence requirement. Some tape reminders to the counsel table. There is so much going on at the close of trial that this is a real issue — the problem is not so much that some lawyers are unaware of the requirement as that knowledge does not always translate into a reflexive renewal of an earlier motion when there are many other urgent tasks to accomplish. There is a natural instinct not to repeat a motion that has already been made, particularly if the court has carried the motion forward or has suggested that the question should be decided after the verdict.

Another reason for neglecting the Rule 50(b) limit is that local state practice may be different. In Texas, for example, a post-verdict motion can be made without support in any pre-verdict motion.

One question that will need to be tended to arises when the decision whether to grant judgment as a matter of law is affected by evidence introduced after the Rule 50(a) motion. It is clear that if all of the evidence in the trial record supports the jury verdict, the verdict must stand even though judgment as a matter of law would have been appropriate at the time the Rule 50(a) motion was made. Such is the clearly established rule when an "erroneous" denial of summary judgment is followed by a trial that supplies jury-sufficient evidence. But it is more difficult to know what to do if the Rule 50(a) motion should properly be denied when made, but should be granted on the basis of later evidence that must be believed by the jury even though unfavorable to the party

opposing the motion. If the evidence was obviously unfavorable, there may be sufficient notice to alleviate any concern that a later motion would alert the party opposing the motion to the need to provide additional evidence. But that may not always be so.

Employment-discrimination cases often create Rule 50(b) issues because of the burden shifting that results from making a prima facie case, followed by the defendant's explanation of the employment action. The defendant's explanation often provides evidence unfavorable to the plaintiff, and at times it may be evidence of a quality that the jury must believe. The "pretext" argument becomes entangled with all of this.

The Rule 50(b) proposal will be carried forward for further consideration at the October meeting.

Indicative Rulings: Rule "62.1"

The Appellate Rules Committee referred to the Civil Rules Committee a proposal by Solicitor General Waxman to adopt a rule articulating the "indicative rulings" practice that has been adopted by most circuits.

The problem addressed by this proposal arises most frequently when an appeal is pending from a truly final judgment that is intended to leave no further occasion for district-court action. A party seeks to vacate the judgment by motion under Rule 60(b). Most circuits rule that because the judgment is pending in the court of appeals the district court lacks jurisdiction to grant the motion. But they allow two sorts of action by the district court. The district court may deny the motion, clearing the way for the appeal to proceed without complication. Or the district court may indicate that if the court of appeals is inclined to remand the action, the motion would be granted. The court of appeals then can decide whether to remand for further district-court proceedings.

Although this practice is well established in most circuits, three reasons were offered to support adoption of a new court rule. First, there is some variation among the circuits. Some courts will not allow a district court to deny a Rule 60(b) motion unless the case is remanded. There is no reason for disuniformity; a uniform national rule seems desirable. Second, many lawyers are not aware of the proper practice, which seems to be well-known only to veteran appellate lawyers and the courts of appeals. Third, the occasions for district-court motions have increased since the Supreme Court ruled that a court of appeals need not automatically vacate a district-court judgment that is mooted by a settlement pending appeal. Settlement pending appeal often is possible only if the district-court judgment is vacated. Settlement often is desirable. It is useful to have a clear procedure that directs the parties to move in the district court for a ruling that the district court will vacate the judgment if the case settles and is remanded from the court of appeals.

These questions arise most frequently under Rule 60(b), but it does not seem sufficient to react by amending Rule 60. Rule 60(a) now permits correction of a clerical error during the pendency of an appeal if the district court acts before the appeal is docketed, and also allows correction after the appeal is docketed "with leave of the appellate court." This model might be extended to Rule 60(b), or varied. But these questions also arise in other settings. One setting arises on § 1292(a)(1) appeals from interlocutory orders granting an injunction, whether a preliminary injunction or a permanent injunction issued in continuing proceedings. Civil Rule 62(c) allows the district court to "suspend [or] modify" the injunction, but some courts of appeals have ruled that the district court cannot vacate the injunction. By its terms, Rule 60(b) applies to relief from a "final judgment." Still further complications may arise from judgments that are appealed under § 1291, but that are "final" only by the courtesy of such doctrines as the collateral-order rule. Collateral-order appeals from interlocutory orders denying official immunity are common. Rule 54(b)

establishes open-ended authority to revise the district-court ruling, and there is no reason to invoke the much more limited provisions of Rule 60(b). The purpose of permitting appeal, indeed, is to spare the defendant the burdens of pretrial and trial proceedings; action by the district court pending appeal can serve that purpose. An independent rule thus seems desirable.

Discussion began with the observation that these questions do not arise frequently, but that they are a mess when they do arise. A clarifying and uniform rule would be useful. Many district judges do not recognize that their own circuit permits them to deny a motion pending appeal.

It was further noted that the court of appeals may prefer to retain jurisdiction to proceed with the appeal after the district court takes the indicated action. This course is particularly useful when the district court intends to amend the judgment without further extensive proceedings. It may be useful to add a provision for retained jurisdiction to the draft rule.

Drafting also must take care to ensure that a new rule is not misread to establish a new category of motion for relief from a judgment.

Draft Rule 62.1 will be carried forward for further consideration at the October meeting.

Next Meetings

The next regular meeting of the Advisory Committee was set for October 2-3 at a place to be determined.

Style Rules 26-37 and 45 are proceeding at a rate that should make it possible to schedule meetings of Subcommittees A and B toward the end of August or early September.

Respectfully submitted,

Edward H. Cooper
Reporter

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G McCABE
Assistant Director

Office of Judges Programs

September 11, 2003

MEMORANDUM TO PETER G. McCABE, SECRETARY

From: **Nancy G. Miller**
Associate Project Director, Case Management/Electronic Case Files Project

Subject: **Courts' Authorization of Electronic Filing**

A growing number of federal courts have responded to the electronic filing capabilities of the Case Management/Electronic Case Files (CM/ECF) system by permitting attorneys to file case documents electronically. Courts have taken a number of different approaches in order to encouraging electronic filing. This memo briefly summarizes those approaches in the district and bankruptcy courts.

BACKGROUND

Electronic filing of court documents has been authorized by the Federal Rules of Procedure since 1993. Parallel provisions in all four sets of Federal Rules (civil, criminal, appellate and bankruptcy) authorize a court by local rule to permit case documents to be filed, signed or verified by electronic means. The rules state:

> A court may by local rule permit papers to filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purposes of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as

required by these rules or any local rules or practices.[1]

CM/ECF, the new electronic case management system for the federal courts, presently provides district and bankruptcy courts the ability to accept court filings in electronic form. Courts using CM/ECF can choose to accept filings electronically over the Internet or on diskette or CD-ROM. As of mid-September 2003, approximately 17 district courts, the Court of Federal Claims, and approximately 50 bankruptcy courts are accepting electronic filings.[2]

Documents filed using the CM/ECF system must be in "portable document format" (PDF), which retains the format and look of the document regardless of the hardware used to view or print it. Documents prepared in word processing format can be easily converted to PDF using either specialized software (e.g., Adobe software) or the word processing software itself. Paper documents can be converted to PDF using a scanner.

There are certain efficiencies for courts if documents are filed electronically, especially when filed over the Internet. Attorneys who file documents in electronic form relieve court staff from the task of having to "scan" paper documents to convert them to electronic form. In addition, the electronic filing of a document over the Internet automatically creates the docket entry. Thus, many courts have looked for ways to encourage attorneys to use the electronic filing capabilities of CM/ECF. In order to use the system, an attorney must register with the court and be given a login and password.

DISCUSSION

The federal rule provisions quoted above state that "a court *may* by local rule *permit*" electronic filing (emphasis added). Most (but not all) courts permitting electronic filing have adopted a local authorizing rule. In many cases, the procedures governing electronic filing appear in a combination of local rules, standing orders, and/or administrative procedures.

A number of courts have gone beyond simply authorizing filing in electronic form and leaving the decision up to filers whether to file electronically or in paper. Some courts have

---

[1]Fed. R. Civ. P. 5(e); Fed. R. App. P. 25(a)(2)(D), (4); Fed. R. Bankr. P. 5005, 8008 (substituting the word "document" for "paper"). The Civil Rule provisions are incorporated by reference into Fed. R.Crim.P. 49(d) and Fed. R. Bankr. P. 7005. The Judicial Conference has not established technical standards.

[2]This represents about 60% of the district courts and 80% of the bankruptcy courts that have implemented CM/ECF. The software is designed so that courts can implement the new system in stages.

made stronger efforts to encourage electronic filing.[3]

Courts' local rules, general orders, and administrative procedures reflect a number of different approaches to whether electronic filing will be completely voluntary, strongly encouraged, or approaching mandatory. There are almost as many variations as there are courts, but what follows is an effort to put some of the approaches courts have used into general categories.[4]

- Completely Voluntary

  Many courts, following the lead of the Model Local Rules, create at least a presumption that registered users will file electronically in cases assigned to the electronic filing system, but ultimately leave it to the filer whether to use electronic filing.

- Semi-Voluntary

  Some courts state that registered parties in cases assigned to CM/ECF are to file electronically unless the judge orders otherwise. Some courts require that once a party files electronically in a case, the party must continue to do so in that case.

- Requiring Filings to be in PDF

  Some courts require that all documents be filed with the court in PDF format. If a filer does not file over the Internet (which requires a PDF file), the filer is required to file the document in PDF format on a diskette or CD-ROM. Courts using this approach generally either offer assistance in converting documents or have a mechanism through which a filer can seek a waiver of the requirement.

- "Mandatory" Internet Filing, with Opportunity for Exception

  Some courts require attorneys to participate by registering for CM/ECF and filing over the Internet, but permit an exception on motion for good cause shown, or in response to an order to show cause.

---

[3]Few courts permit, much less require, pro se filers to file documents electronically. In addition, most courts exempt at least some categories of documents from electronic filing. Among the types of documents that courts have exempted are certain social security documents, sealed documents, and some or all documents in criminal cases.

[4]This summary is based on reviewing relevant provisions of the local rules, orders and administrative procedures found on individual courts' websites.

Based on a review of the language in individual courts' rules, orders and procedures, it appears that the district courts currently accepting electronic filings fall fairly evenly among these categories. But it should be kept in mind that actual practice may not always be completely congruent with those provisions. And, in some cases, the language of the relevant provisions is open to interpretation.

Bankruptcy courts began implementing CM/ECF about a year before the district courts, and about 50 are presently accepting electronic filings. The approaches they use to encourage electronic filing largely track those discussed above. With the same caveats, it appears that roughly half of the bankruptcy courts are in the first two categories, and about half in the latter two.

What constitutes voluntary electronic filing versus "mandatory" electronic filing is a matter of degree. No court absolutely requires electronic filing, since every court offers filers at least some ability either to seek a waiver or respond to an order to show cause. However, there is also clearly a wide variation in the degree of persuasion applied by the court. The Administrative Office, in the information it provides to courts implementing CM/ECF, has advised the courts that Civil Rule 5 and the other parallel federal rules do not authorize a court to make electronic filing mandatory, but a court can strongly encourage it.

We are unaware of any serious complaints from the bar.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

- S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 1/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03). Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
  - Related Bills: S. 885
  - Key Provisions:
    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 274 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 2/4/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03). Placed on Senate Legislative Calendar (6/2/03). Report No. 108-123 filed (7/31/03).
  - Related Bills: None
  - Key Provisions:
    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and

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

approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state, the case would remain in state court automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03

- Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).
- Related Bills: H.R. 1586
- Key Provisions:

  — Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

  — Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

  — Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

  — Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S. 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03). Senate Judiciary Committee reported bill without amendment favorably (5/22/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.

    — Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.

    — Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court proceedings.

    — Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch

- Date Introduced: 3/18/03
- Status: Referred to the Senate Judiciary Committee (3/18/03).
- Related Bills: None
- Key Provisions:

  — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).

  — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
  - Related Bills: None
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

    — Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8 /03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends **28 U.S.C. chapter 111** by inserting a new section 1660.

New section 1660 states that a court shall not enter an order pursuant to **Civil Rule 26(c)** that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricting access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

— Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by: Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S. 151
  - Key Provisions:

    — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 1023 - *To increase the annual salaries of justices and judges of the United States*
  - Introduced by: Hatch
  - Date Introduced: 5/7/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/7/03). Ordered to be reported with amendments favorably (5/22/03). Placed on Senate Legislative Calendar (6/18/03).
  - Related Bills: S. 554

    — Section 3 authorizes the presiding judge of an appellate or district court to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides. Section 3 also directs the presiding district judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony. Section 3 provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of the above photographing, televising, broadcasting, or recording of court proceedings. The authority of a district judge under this act shall terminate 3 years after the date of enactment of the act.

- S. 1125 - *Fairness in Asbestos Injury Resolution Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 5/22/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/22/03).

Senate Judiciary Committee held hearing (6/4/03). Markup session held (6/19/03, 6/24/03, 6/26/03). Senate Judiciary Committee reported favorably with amendments (7/10/03). Report No. 108-118 filed (7/30/03). Placed on Senate Calendar (7/30/03).

- Related Bills: None
- Key Provisions:

— Section 101 amends **Part I of title 28, U.S.C.**, to create a new five-judge Article I court called the United States Court of Asbestos Claims. The Act also sets forth procedures governing: filing of claims, medical criteria, awards, funding allocation, and judicial review.

— Section 402 states the Act's effect on bankruptcy laws.

— Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also makes clear that the Act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

HOUSE BILLS

- H.R. 538 - *Parent-Child Privilege Act of 2003*
  - Introduced by: Andrews
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committee on the Judiciary (2/5/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).
  - Related Bills: None
  - Key Provisions:

— Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed **new Evidence Rule 502(b)**, neither a parent or a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and that child.

- H.R. 637 - *Social Security Number Misuse Prevention Act*
  - Introduced by: Sweeney
  - Date Introduced: 2/5/03
  - Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03). Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
  - Related Bills: None
  - Key Provisions:

— Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public display, or purchase of a person's social security number without that person's affirmatively expressed consent.

— Section 4 states that the above prohibition does not apply to a "public record."

Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")

— Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03). Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases: (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03). Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub. L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H.R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/27/03
  - Status: Referred to the House Committees on the Judiciary and Financial Services

(2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).

• Related Bills: None

• Key Provisions:

— Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

— Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

— Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

— Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Advisory Committee on Bankruptcy Rules to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section

156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

— Section 604 expresses the sense of Congress that: (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Advisory Committee on Bankruptcy Rules should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by: Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03). House Judiciary Committee held markup and ordered bill reported, with two amendments, favorably by a vote of 20-14 (5/21/03). House Report No. 108-144 filed (6/9/03). H. Amdt. 167 approved (6/12/03). Passed the House by a vote of 253-170 (6/12/03). Received in Senate and referred to Judiciary Committee (6/12/03).
  - Related Bills: S. 274
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy

exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.
— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.
— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

[As amended on May 21, 2003, the bill conforms the plain English-provisions to the proposed amendments to Civil Rule 23 that were approved by the Supreme Court on March 27, 2003. The second amendment revises the effective date of the legislation. The legislation will apply to all pending cases in which the class certification decision has not yet been made.]

[House Amdt. 167 raises the aggregate amount in controversy required for federal court jurisdiction from $2 million to $5 million. The amendment also gives federal courts discretion to return intrastate class actions to state courts after weighing five factors to determine if the case is of a local character. This discretion would come into play when between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. If less than one-third are citizens of the same state, the case would automatically be eligible for federal court jurisdiction. If more than two-thirds are citizens of the same state, the case would remain in state court.]

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

- Introduced by: Smith
- Date Introduced: 3/18/03
- Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03). House Judiciary Committee held mark-up session, approved amendments, and ordered to be reported (7/16/03). House Report 108-239 filed (7/25/03).

- Related Bills: None
- Key Provisions:

  — As amended, Section 1 amends Section 205(c) of the E-Government Act of 2002 by requiring the Judicial Conference to promulgate rules that protect privacy and security interests pertaining to the filing and public availability of electronic documents. [The bill, as introduced, would have amended Section 205(c) of the E-Government Act of 2002 by providing that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to documents filed electronically with the courts.] Section 1 also amends the E-Government Act of 2002 by allowing a party to file an unredacted document under seal, with the option that the court could require a redacted copy of the document for the public file.

- H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*
  - Introduced by: Cannon
  - Date Introduced: 4/3/03
  - Status: Referred to the House Committee on the Judiciary (4/3/03).
  - Related Bills: S. 413
  - Key Provisions:

    — Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 4/11/03
  - Status: Referred to the House Committee on the Judiciary (4/11/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003). Subcommittee held mark-up session and forwarded to full committee (7/22/03).

- Related Bills: None.
- Key Provisions:

  — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

- H.R. 2134 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Keller
  - Date Introduced: 5/15/03
  - Status: Referred to the House Committee on the Judiciary (5/15/03). Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03). House Judiciary Committee favorably reported by acclamation (9/10/03) (Committee also voted to delete finding 5 in Section 2(a)(5) by a voice vote. That finding iterated that "[i]n the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year.")
  - Related Bills: None.
  - Key Provisions:

    — Section 3 ostensibly amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- H.R. 3037 - *Antiterrorism Tools Enhancement Act of 2003*
  - Introduced by: Feeney
  - Date Introduced: 9/9/03
  - Status: Referred to the House Committee on the Judiciary (9/9/03).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **Criminal Rule 41(b)(3)** by providing that a magistrate judge in a district where an act of terrorism has occurred may issue a warrant for a person or property within or without that district.

SENATE RESOLUTIONS

- S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*
  - Introduced by: Kyl
  - Date Introduced: 1/7/03.
  - Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03). Referred to House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Property Rights (6/10/03).

Subcommittee on Constitution approved without amendment by a vote of 5-4 (6/12/03). Markup sessions held (7/24/03 and 7/31/03). Senate Judiciary Committee reported favorably without amendment and written report (9/4/03).

- Related Bills: H.J. Res. 10, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Royce
- Date Introduced: 1/7/03.
- Status: Referred to the House Committee on the Judiciary (1/7/03).
- Related Bills: S.J. Res. 1, H.J. Res. 48
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res. 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

- Introduced by: Chabot
- Date Introduced: 4/10/03.
- Status: Referred to the House Committee on the Judiciary (4/10/03). Referred to the Subcommittee on the Constitution (5/5/2003).
- Related Bills: S.J. Res. 1, H.J. Res. 10
- Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the

crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CIVIL RULES	
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 6 Time Issues	03-CV-C Irwin H. Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**

Suggestion	Docket Number, Source, and Date	Status
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration **PENDING FURTHER ACTION**
Rule 19 Clarify language regarding dismissal of actions	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 23 Revise to protect the status of the small defendant	03-CV-D William S. Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 23 Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 - Considered by Committee 6/93 - Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 - Forwarded to Standing Committee for submission to Judicial Conference 6/96 - Approved for publication by Standing Committee 8/96 - Published for comment 10/96 - Discussed by Committee 5/97 - Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 - Stotler letter to Congressman Canady 6/97 - Changes to 23(f) were approved by Standing Committee; changes to 23(c)(1) were recommitted to Advisory Committee 10/97 - Considered by Committee 3/98 - Considered by Committee, deferred pending mass torts working group deliberations 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 23 Standards and guidelines for litigating and settling consumer class actions	97-CV-T Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23(e) Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	97-CV-S Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97	12/ 97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended referral to other Committee 4/00 - Committee considered 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 23(e) Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	99-CV-H Brian Wolfman, for Public Citizen Litigation Group 11/23/99	12/99 - Referred to reporter, chair, and Agenda Subcommittee 4/00 - Referred to Class Action Subcommittee 10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 23 Class action attorney fee		10/00 - Committee considered 4/01 - Request for publication 6/01 - Standing Committee approved for publication 8/01 - Published for public comment 10/01 - Committee considered 1/02 - Committee considered 5/02 - Committee approved 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Current Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee's report **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 30(b) Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 41(a) Makes it explicit that actions *and* claims may be dismissed	02-CV-F Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 51 Jury instructions filed before trial	96-CV-E Judge Stotler 97-CV-V Gregory B. Walters, Circuit Executive, Office of the Circuit Executive, U.S. Courts for Ninth Circuit 12/4/97	11/8/96 Referred to chair 5/97 - Reporter recommended consideration of comprehensive revision 1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommended full Committee consideration 4/99 - Committee considered 10/99 - Committee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 53 Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered draft amendments to Civil Rule 16.1 regarding "pretrial masters" 10/94 - Committee considered draft amendments 11/98 - Subcommittee appointed 3/99 - Agenda Subcommittee recommended referral to other Committee 10/99 - Committee considered and requested Federal Judicial Center to conduct survey 4/00 - Committee considered FJC preliminary report 1/02 - Committee held public hearing 5/02 - Committee approved amendments 6/02 - Standing Committee approved 9/02 - Judicial Conference approved 3/03 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 54(b) Define "interlocutory order"	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 55(a) Amend rule to provide that a default may also be entered against a defending party "for failure to comply with these rules or any order of court."	Prof. Bradley Scott Shannon 1/14/03 (02-CV-F Addendum)	1/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. § 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
	FORMS	
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
	SUBJECT MATTER	

Suggestion	Docket Number, Source, and Date	Status
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
New Admiralty Rule Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

STYLE 429F

Style Draft of Rules 16 through 22 and 23.1 through 25, Federal Rules of Civil Procedure

As revised by Subcommittees A and B of the Advisory Committee on Civil Rules

And further revised and annotated by the Style Subcommittee of the Committee on Rules of Practice and Procedure

[Additions to rule text are underlined, deletions are ~~overstruck~~]

With annotations by Professor Cooper
[see footnote text in [ ] brackets]

(and with Committee Notes)

September 16, 2003

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as **(1)** expediting the disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation, and; **(5)** facilitating the settlement of the case.	**(a) Purposes of a Pretrial Conference.** In any action, the court may direct the attorneys and any unrepresented parties to appear for one or more ~~pretrial~~ conferences before trial[1/] for such purposes as: **(1)** expediting disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation; and **(5)** facilitating settlement ~~of the case~~.

1. The Style Subcommittee would prefer to say "pretrial conference," rather than "conference before trial" or "conference under this rule," throughout Rule 16.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time **(1)** to join other parties and to amend the pleadings; **(2)** to file motions; and **(3)** to complete discovery. The scheduling order may also include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; **(5)** the date or dates for conferences before trial, a final pretrial conference, and trial; and **(6)** any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other suitable means. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared ~~in the action~~. **(3)** ***Contents of the Order.*** **(A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. ~~In addition,~~ **(B)** *Permitted Contents.* ~~t~~The scheduling order may: **(i~~A~~)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii~~B~~)** modify the extent of discovery; **(iii~~C~~)** set ~~fix~~ dates for other ~~pretrial~~ conferences[1] and for trial; and **(iv~~D~~)** include other appropriate matters. **(4)** ***Modifying an Schedule ~~Order~~.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

1. Professor Cooper is concerned that an unadorned reference to "other conferences" might be read out of context to extend beyond Rule 16 conferences held before trial. The Advisory Committee may wish to consider whether there is a substantive difference between the restyled language and the language of the current rule.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; **(2)** the necessity or desirability of amendments to the pleadings; **(3)** the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence; **(5)** the appropriateness and timing of summary adjudication under Rule 56; **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;	**(c) Attendance and Matters for Consideration at Pretrial Conferences.** **(1)** ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a ~~pretrial~~ conference before trial. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement. **(2)** ***Matters for Consideration.*** At any ~~pretrial~~ conference under this rule, the court may consider and take appropriate action on the following matters: **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses; **(B)** amending the pleadings if necessary or desirable; **(C)** obtaining[1/] admissions and stipulations regarding facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; **(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702; **(E)** determining the appropriateness and timing of summary adjudication under Rule 56; **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

1. The Style Subcommittee did not insert ", if possible," after "obtaining" because "possibility" is not a limiting term. The Advisory Committee may wish to consider whether the omission creates a substantive difference between the restyled language and the language of the current rule.

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;	**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and fixing dates for further conferences and for trial;
(8) the advisability of referring matters to a magistrate judge or master;	**(H)** referring matters to a magistrate judge or master;
(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;	**(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
(10) the form and substance of the pretrial order;	**(J)** determining the form and content of the pretrial order;
(11) the disposition of pending motions;	**(K)** disposing of pending motions;
(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;	**(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;	**(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);	**(N)** directing the presentation of evidence early in the trial regarding a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and	**(O)** establishing a reasonable limit on the time allowed to present evidence; and
(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.	**(P)** ~~taking other steps to~~ facilitating~~e~~ in other ways the just, speedy, and inexpensive disposition of the action.
At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.	

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.	(d) ~~Final~~ **Pretrial Orders ~~Conference~~.** After any conference under this rule, the court should[1/] enter an order reciting the action taken. This order controls the course of the action unless the court modifies it. ~~The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party.~~
(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.	(e) **Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. ~~After every pretrial conference, the court must enter an order reciting the action taken. This order controls the course of the action.~~ The court may modify an order made after a final pretrial conference ~~it~~ only to prevent manifest injustice.

1. The Style Subcommittee believes that "should" captures current practice better than "must."

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.	**(f) Sanctions.** **(1)** ***In General.*** The court, on motion or on its own, may issue any just orders, including those authorized by Rule 37(b)(2)(B), (C), and (D), if a party or its attorney: **(A)** ~~a party or its attorney~~ fails to appear at a scheduling or other pretrial conference; **(B)** ~~a party or its attorney~~ is substantially unprepared to participate — or does not participate in good faith — in a scheduling or other pretrial conference; or **(C)** ~~a party or its attorney~~ fails to obey a scheduling or other pretrial order. **(2)** ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must require the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

IV. PARTIES **Rule 17. Parties Plaintiff and Defendant; Capacity**	**TITLE IV. PARTIES** **Rule 17. The Plaintiff and Defendant; Capacity**
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.	**(a) Real Party in Interest.** **(1)** ***Requirement and Designation.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: **(A)** an executor; **(B)** an administrator; **(C)** a guardian; **(D)** a bailee; **(E)** a trustee of an express trust; **(F)** a party with whom or in whose name a contract has been made for another's benefit; and **(G)** a party authorized by statute. **(2)** ***Action in the Name of the United States for Another's Use or Benefit.*** When a United States statute so provides, an action for another's use or benefit must[1] be brought in the name of the United States. **(3)** ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ~~a~~ ratification, joinder, or substitution, the action proceeds as if it had been commenced by the real party in interest.

1. The current Rule 17(a) says the action "shall" be brought in the name of the United States. Asked to research whether "shall" should be translated to "must" or "may," Professor Rowe has concluded that the original drafters made a deliberate choice to use the mandatory "shall" in this rule, and so "must" is preferable in the restyled rule (see STYLE 288, p. 2 — copy attached).

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: **(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile; **(2)** for a corporation, by the law under which it was organized; and **(3)** for all other parties, by the law of the state where the court is held ~~located~~, except that: **(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and **(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.
(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.	**(c) Minor or Incompetent Person.** **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person: **(A)** a general guardian; **(B)** a committee; **(C)** a conservator; or **(D)** a like fiduciary. **(2)** ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims and Remedies
(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.	**(a) Joinder of Claims.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternate claims, as many claims as it has against an opposing party.
(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.	**(b) Joinder of Remedies; Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of ~~winning judgment on~~ the other[1]; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a ~~money~~ judgment for the money.

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

1. Professor Rowe was asked to research the meaning of "is one heretofore cognizable only after another claim has been prosecuted to a conclusion" in the current rule, and to advise on how the phrase may be restyled without making a substantive change. He has concluded that "is contingent on the disposition of the other" seems the best of the imaginable alternatives (see STYLE 288, p. 3).

Rule 19. Joinder of Persons Needed for Just Adjudication	Rule 19. Required Joinder of Parties
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.	**(a) Persons Required to Be Joined if Feasible.** **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or **(B)** that person claims ~~appears to have~~[1] an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: **(i)** as a practical matter impair or impede the person's ability to protect the interest; or **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either[2] a defendant or, in a proper case, an involuntary plaintiff. **(3)** ***Venue.*** If a joined party objects to venue and the joinder would render venue improper, the court must dismiss that party.

1. The phrase "claims an interest" in the current rule was replaced with "appears to have an interest" in the Style Subcommittee's earlier drafts because the latter seemed clearer and, based on a First Circuit decision, appeared to carry the same meaning in practice. Additional research, however, revealed a line of cases in which at least three other circuits have required that an absent party affirmatively claim an interest relating to the subject of the action before that party's joinder becomes necessary under Rule 19 (see STYLE 420 – copy attached). To avoid a substantive change, the formulation used in the current rule is restored in this draft.

2. The addition of "either" clarifies that "may" is used to indicate a choice between making the joined party a plaintiff or an involuntary defendant, not permission to avoid joinder altogether.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.	**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.[1] The factors for ~~that~~ the court to ~~should~~ consider include: **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; **(2)** the extent to which any prejudice could be lessened or avoided by: **(A)** protective provisions in the judgment; **(B)** shaping the relief; or **(C)** other measures; **(3)** whether a judgment rendered in the person's absence would be adequate; and **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.
(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.	**(c) Pleading Reasons for Nonjoinder.** When asserting a claim for relief, a party must state: **(1)** the names, if known, of any persons who are required to be joined if feasible but are not joined; and **(2)** the reasons for not joining them.
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.	**(d) Exception for Class Actions.** This rule is subject to Rule 23.

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

1. The restyled rule omits the conclusory phrase ", the absent person being thus regarded as indispensable" as unnecessary. The Advisory Committee may want to consider whether to affirm the omission or restore the phrase.

Rule 20. Permissive Joinder of Parties	Rule 20. Permissive Joinder of Parties
(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.	**(a) Persons Who May Join or Be Joined.** **(1)** ***Plaintiffs.*** Persons may join in one action as plaintiffs if: **(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any legal or factual question common to all plaintiffs will arise in the action. **(2)** ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if: **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any legal or factual question common to all defendants will arise in the action. **(3)** ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.
(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.	**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect an existing party against embarrassment, delay, expense, or other prejudice arising from the joinder of a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 21. Misjoinder and Non-Joinder of Parties	Rule 21. Misjoinder and Nonjoinder of Parties
Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.	Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. Any claim against a party may be severed and adjudicated separately.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 22. Interpleader	Rule 22. Interpleader
(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.	**(a) Grounds.** **(1)** ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though: **(A)** the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or **(B)** the plaintiff denies liability in whole or in part to any or all of the claimants. **(2)** ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim. **(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties permitted by Rule 20. The remedy it provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. Actions under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23.1. Derivative Actions by Shareholders	Rule 23.1. Derivative Actions
In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.	**(a) Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if[1] it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members that are similarly situated in enforcing the right of the corporation or association. **(b) Pleading Requirements.** The complaint must be verified and must: **(1)** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law; **(2)** allege that the action is not a collusive one to confer jurisdiction that the court[2] would otherwise lack; and **(3)** state with particularity: **(A)** the efforts, if any, made by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and **(B)** the reasons for not obtaining the action or not making the effort. **(c) Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily[3] dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary[2] dismissal, or compromise must be given to shareholders or members in the manner that the court directs.

1. [Subcommittee B decided to carry forward the distinctive language in present Rules 23.1 and 23.2. Rule 23.1 says "The derivative action may not be maintained if * * *." Rule 23.2 says "The action may be maintained only if * * *." There is no apparent explanation for the different expressions.]

2. Professor Marcus has researched whether the restyled rule can use "court" rather than "court of the United States." He found no indication that removing the phrase "of the United States" will have a substantive impact (see STYLE 335 — copy attached).

3. "[V]oluntar(il)y" is added to conform to the usage in an amendment to Rule 23(e) recently adopted by the Supreme Court. If that amendment does not take effect as scheduled, the changes to the restyled rules should be dropped.

COMMITTEE NOTE

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Subdivision (c) is amended to refer to "voluntary" dismissal to bring this rule into line with the 2003 amendment of Rule 23. A parallel change is made in Rule 23.2, where the change is more important because Rule 23.2 invokes Rule 23(e) procedures. The change avoids possible confusion, and — because court approval inheres in an involuntary dismissal — does not change meaning.

Rule 23.2. Actions Relating to Unincorporated Associations	**Rule 23.2. Actions Relating to Unincorporated Associations**
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).	This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those ~~set forth~~ in Rule 23(d), and the procedure for settlement, voluntary[1/] dismissal, or compromise must correspond with the procedure in Rule 23(e).

COMMITTEE NOTE

The language of Rule 23.2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23(e) was amended in 2003 to refer to "voluntary" dismissal. Because Rule 23.2 invokes Rule 23(e) procedure, it is amended by adding "voluntary."

1. See note 2 to Rule 23.1.

Rule 24. Intervention	Rule 24. Intervention
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.	**(a) Intervention of Right.** Upon timely motion, the court must permit anyone to intervene who: **(1)** is given an unconditional right to intervene by a United States statute; or **(2)** claims[1/] an interest relating to the property or transaction that is the subject of the action, and is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent the movant's interest.

1. ["Claims" is the word in the present rule and also in present Rule 19(a). The decision to retain "claims" in Style Rule 19(a)(1)(B) is described in Rule 19 note 1.]

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.	**(b) Permissive Intervention.** **(1)** ***In General.*** Upon timely motion, the court may permit anyone to intervene who: **(A)** is given a conditional right to intervene by a United States statute; or **(B)** has a claim or defense that shares a common question of law or fact with the main action. **(2)** ***By a Government Officer or Agency.*** Upon timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: **(A)** a statute or executive order administered by the officer or agency; or **(B)** ~~is based on~~ any regulation, order, requirement, or agreement issued or made under the statute or executive order. **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. 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, officer, 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.	**(c) Procedure.** **(1)** ***Notice and Pleading Required.*** A motion to intervene must be served on the parties. The motion must state the grounds for intervention and be accompanied by a pleading that sets forth the claim or defense for which intervention is sought. ~~The same procedure must be followed when a United States statute gives a right to intervene.~~ **(2)** ***Challenge to a Statute ~~Legislation~~; Court's Duty.***[2] When the constitutionality of a statute ~~legislation~~ affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify: **(A)** the Attorney General of the United States, if ~~a United States statute~~ an Act of Congress[3] is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and **(B)** the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party. **(3)** ***Party's Duty.*** A party challenging the constitutionality of a statute ~~legislation~~ should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

---

2. The Standing Committee has authorized publication of a new Rule 5.1 that would supersede Rule 24(c)(2)-(3).

3. The Style Subcommittee prefers "federal statute," but "Act of Congress" is used in proposed new Rule 5.1 so it is left here for consistency. If Rule 5.1 goes forward after publication next year, the Subcommittee suggests that the term "federal statute" be substituted before resubmitting Rule 5.1 to the Standing Committee for adoption.

Rule 25. Substitution of Parties	Rule 25. Substitution of Parties
(a) Death. **(1)** If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party. **(2)** In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.	**(a) Death.** **(1)** ***Motion to Substitute.*** If a party dies and the claim is not extinguished, ~~and if a statement suggesting the party's death is made on the record,~~ the court may~~, on motion,~~ order substitution of the proper party. A ~~The~~ motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a ~~the~~ statement noting the ~~suggesting~~ death, the action must be dismissed with respect to the decedent. **(2)** ***Action in Favor of or Against the Remaining Parties ~~Not Abated~~.*** If a party dies[1] ~~An action does not abate upon a party's death even~~ and ~~if~~ the right sought to be enforced survives only to or against the remaining parties, ~~:~~ ~~t~~The action does not abate but proceeds in favor of or against the remaining parties~~, and abates only with respect to the decedent~~. **(3)** ***Service.***[2] A motion to substitute ~~under Rule 25(a)(1)~~, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting ~~suggesting~~ death must be served in the same manner. Service may be made in any judicial district.
(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.	**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, allow the action to be continued by or against the party's representative. The motion~~, together with a notice of hearing,~~ must be served as provided in Rule 25(a)(3).
(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.	**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, directs the transferee to be substituted in the action or joined with the original party. The motion~~, together with a notice of hearing,~~ must be served as provided in Rule 25(a)(3).

---

1. [Present 25(a)(2) says explicitly that if a plaintiff or defendant dies, "[t]he death shall be suggested upon the record." Style 25(a)(2) does not include this statement. One reason for omitting it may be the difficulty of deciding whether "shall" should become "must" or "should." But we should omit it only if we are quite certain that we can carry forward from the 25(a)(1) perception that the only function of the suggestion is to enable a party who wishes to do so to set the time running on a motion to substitute. The statement may have some practical use as well. It protects the remaining parties, who may be ignorant of the death, of the burdens that flow from carrying on as if the decedent remained in the action. It also avoids strategic maneuvering. The death of a particularly sympathetic plaintiff, for example, may dramatically change the value of the case even if that plaintiff's estate is formally substituted.
   We could reinstate the requirement easily enough. As a first attempt: "If party dies the death should be stated on the record and if the right sought to be enforced survives * * *."]

2. The Style Subcommittee considered a suggestion to consolidate the Rule 25 service provisions into one subdivision but decided against doing so because the change, while achieving an economy of words, would interrupt the flow of the rule.

(d) Public Officers; Death or Separation From Office. **(1)** When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. **(2)** A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.	**(d) Public Officers; Death or Separation from Office.** **(1)** ***Automatic Substitution.*** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution. **(2)** ***Officer's Name.*** A public officer who sues or is sued in an official capacity may be designated ~~described~~ by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Subdivision (a)(2) omits the provision of former (a)(2) stating that the death shall be suggested upon the record. Subdivision (a)(1) continues to provide that the time to move to substitute for a deceased party does not begin to run until a service of a statement noting the death.[1]

1. [This Committee Note avoids any reference to the other purposes that might be served by requiring a statement of death. See Rule 25(a) note 1.]

Style Draft of Rules 26 through 37 and 45, Federal Rules of Civil Procedure

As revised by Subcommittees A and B of the Advisory Committee on Civil Rules and further revised by the Style Subcommittee of the Committee on Rules of Practice and Procedure

[Additions are underlined, deletions are ~~overstruck~~]

With Annotations by Professor Cooper
[see footnote text in [ ] brackets]

September 16, 2003

V. DEPOSITIONS AND DISCOVERY **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**	**V. DISCLOSURES AND DISCOVERY** **Rule 26. Duty to Disclose; General Provisions Governing Discovery**
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** Except in categories of proceedings specified in Rule 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;	**(a) Required Disclosures.** **(1)** ***Initial Disclosures.*** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated[1] ~~agreed~~ by the parties or ordered ~~directed~~[2] by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** ~~the subjects of that information;~~ ~~**(iii)**~~ a copy — or a description by category and location — of all documents, data compilations, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(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.	**(iii~~v~~)** a computation of each category of damages claimed by the disclosing party — and also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation of damages is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business ~~company~~ may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

1. Subcommittee B believes that references in the current rules to a "stipulation" by the parties or their attorney should not be restyled as "agreement" in the context of Rule 26 or other rules contemplating a written agreement submitted to the court. With a few exceptions, this draft restores "stipulation" (or a form of that word) wherever it is found in the current rule.

2. Subcommittee B was concerned that using "[e]xcept as . . . otherwise . . . directed by the court" in the restyled rule in place of "except . . . to the extent otherwise . . . directed by order" in the current rule might permit a court to create automatic exceptions by local rule. As a result, this draft uses the phrase "ordered by the court" rather than "directed by the court."

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1): (i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.	**(B)** *Proceedings Exempt from Initial Disclosure.* The following categories of proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iii)** an action brought without counsel by a person in the custody of the United States, a state, or a state subdivision; **(iv)** an action to enforce or quash an administrative summons or subpoena; **(v)** an action by the United States to recover benefit payments; **(vi)** an action by the United States to collect on a student loan guaranteed by the United States; **(vii)** a proceeding ancillary to a proceeding in another court; and **(viii)** an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.	**(C)** *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the Rule 26(f) conference unless a different time is set by ~~party~~ stipulation ~~agreement~~ or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined unless a different time is set by stipulation ~~agreement~~ or court order. **(E)** *Basis for Initial Disclosure; Unacceptable ~~Inadequate~~ Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony. **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.	**(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703, or 705. **(B)** *Written Report.* Unless otherwise stipulated ~~agreed~~ by the parties or ordered ~~directed~~ by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express~~;~~ and of the basis and reasons for them~~;~~; **(ii)** the data or other information considered by the witness in forming them[3]~~, and~~ **(iii)** any exhibits that will be used to summarize or support them~~opinions~~; **(ivi)** the witness's qualifications, including a list of all publications authored in the previous ten years; **(iiiv)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and **(ivi)** a statement of the witness's compensation for study and testimony in the case.
(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).	**(C)** *Time for Disclosing Expert Testimony* A party must make these disclosures at the times and in the sequence that the court ~~directs~~ orders. Absent a stipulation by the parties or a court order ~~court directions or an agreement by the parties~~, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure. **(D)** ***Supplementing the Disclosure.*** The parties must supplement these disclosures when required under Rule 26(e).

3. [This is new since the Subcommittee B meeting. "them" in what has become (ii) fit well when it was part of (i). Now we are asked to track "them" at the end of (ii) and (iii) back to "opinions" in the first line of (i) and "them" at the end of (i). "Them" does not appear in items (iv), (v), or (vi). The Style Subcommittee might consider restoring (iii) to its earlier style, and making (ii) parallel: "by the witness in forming ~~them~~ the opinions," etc.]

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: **(A)** the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises; **(B)** the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and **(C)** an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file ~~with the court~~ the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an appropriate identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court directs otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list that states the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served. **(5) Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served[4/].

4. [Subcommittee B approved deletion of present 26(a)(5). The present provision was all of Rule 26(a) before disclosure was added in 1993. It may once have been useful as an index of discovery methods, but the need has vanished and the location has become obscure. The Committee Note should describe the change.]

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows[1]: Parties may obtain discovery regarding any nonprivileged matter that is relevant to the claim or defense of any party — including the existence, description, nature, custody, condition, and location of any books,[2] documents, or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(B)(i), (ii), and (iii).

1. [The new structure seems to change the scope of discovery. In the present rule, paragraphs (1), (2), (3), (4), and (5) define the scope of discovery. In the Style draft, only paragraph (1) defines the scope of discovery. The conclusion has been that the Style draft more accurately reflects present meaning. Paragraph (5), for example, does not affect the scope of discovery. Committee Note explanation is required.]

2. Subcommittee B deferred consideration of whether "books" is an antiquated reference that should be omitted in the restyled rule. But see Rule 45(a) note 1.

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *When Required.* The court must[3] limit the frequency or extent of discovery otherwise permitted by these rules or by local rules if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity by discovery in the action to obtain the information; or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues. **(C)** *On Motion or the Court's Own Initiative.* The court may act on motion or on its own after reasonable notice.

3. Subcommittee B intends to raise with the full Advisory Committee whether "shall" in the current version of this rule is better restyled as "should."

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously	**(3)** ***Trial Preparation: Materials.*** **(A)** *Documents and Tangible Things.* ~~Subject to Rule 26(b)(4)~~ Generally, a party may not discover documents and tangible things otherwise discoverable under Rule 26(b)(1) and prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered ~~only~~ if the party ~~first~~ shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent of the materials by other means. **(B)** *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C~~B~~)** *Previous Statement.* Any party or other person may, on request[4] ~~and~~ without the showing required under Rule 26(b)(3)(A), obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses ~~for the motion~~. A previous statement is either:

4. [The Committee Note should explain the change. Present 26(b)(3) states that a party may obtain the party's statement, but does not say how. It states that a person not a party can obtain that person's statement "upon request." Style (b)(3)(C) allows a party as well as a nonparty to obtain its own statement on request. Specifying the request procedure for a party, whether it is a clarification or an extension, does not change the result. A party could obtain its own statement through Rule 34; request is simpler.]

made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

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

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

(B) *Expert Employed Only for Trial Preparation.* Generally, a ~~A~~ party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But ~~the~~ a party may do so ~~only~~:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) with respect to discovery under Rule 26(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.	(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: **(A)** expressly make the claim; and **(B)** describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(1)** that the disclosure or discovery not be had; **(2)** that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; **(3)** that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; **(4)** that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(5) that discovery be conducted with no one present except persons designated by the court; **(6)** that a deposition, after being sealed, be opened only by order of the court; **(7)** that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and **(8)** that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(E)** designating the persons who may be present while the discovery is conducted; **(F)** directing that a deposition be sealed and ~~then~~ opened only ~~upon~~ court order; **(G)** directing that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and **(H)** directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. **(3)** ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses ~~for the motion~~.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by order, or by agreement of the parties. **(2)** ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and ~~or~~ in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances: **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to	**(e) Supplementing Disclosures and Responses.** **(1)** ~~***Disclosures.***~~ ***In General.*** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response[1]: **(A)** in a timely manner[2] ~~at appropriate intervals~~ if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or correcting information has not otherwise been made known to the other parties during the discovery process or in writing; and **(B)** as ordered by the court.

1. Subcommittee B believes it is within the scope of the style project to omit "to include information thereafter acquired." The Advisory Committee may wish to consider that question and determine how to explain the omission in a Committee Note.

   [It will not be easy to explain this decision in the Committee Note. The background is described in the Rule 26(e) portion of the Subcommittee B meeting notes. From 1970 to 1993, Rule 26(e) applied only to discovery responses [and may have included deposition testimony]. It applied only to a discovery response that was "complete when made." It was not clear whether the Rule 26(e) duty to supplement applied without further conditions when the response was not complete when made, or whether the remedy for an incomplete response lay elsewhere — most directly, in Rule 26(g). However that may have been, the duty to supplement extended only "to information thereafter acquired." The parts of the further provisions that bear on the present question established a duty to supplement a response that was complete when made if the responding party "obtains information upon the basis of which (A) he knows that the response was incorrect [although complete] when made, or (B) he knows that the response though correct [and complete] when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Because the assumption was that the response was "complete" when made, it made sense to apply the duty only to information "acquired" after the initial response. What (A) meant by a response that was "incorrect" when made depended on the meanings of "acquired" and "complete": the response could be both complete and incorrect if it was complete by providing all of the information the party had or was aware of, but incorrect by not accurately describing past or present facts. But other readings were possible. What (B) meant by a response that was correct and complete when made, but that ceased to be true, depended on what (A) meant. (B) might refer only to facts occurring after the discovery response; it might refer to information about earlier facts acquired or appreciated after the response.
   The "complete when made" phrase was deleted in 1993, but "information thereafter acquired" was retained. It is possible to argue that this change was meant to avoid the confusion created by the 1970 drafting. Perhaps Rule 26(e) now means that a discovery response must be supplemented when a party first realizes the relevance of information that it possessed but ignorantly and innocently omitted at the time of the initial response. If that is what it means, then it was a mistake to retain "information thereafter acquired" in 1993 and the deletion is a matter of Style.

   (Note that Style Rule 26(g)(1)(A), carrying forward present (g)(1), says that the signature on a disclosure certifies that "it is complete and correct as of the time it is made." The provisions for discovery responses are expressed differently.)]

2. Professor Marcus was asked to research whether there has been a difference in practice between a party's duty to supplement disclosures "at appropriate intervals" under current Rule 26(e)(1) and its duty under current Rule 26(e)(2) to amend a prior response to an interrogatory, request for production, or request for admission "seasonably." He concluded that the courts appear to treat the question of sanctions under Rule 37(c) the same whether a disclosure or a discovery response is involved, and that there is nothing in the case law that warrants maintaining a distinction between a duty to supplement "at appropriate intervals" and a duty to supplement "seasonably." Accordingly, the restyled rule substitutes "in a timely manner" in both contexts (see STYLE 428A — copy attached).

   [This conclusion makes it possible to combine the duties to supplement disclosures and discovery responses in a single paragraph. The Committee Note might say that although the 1993 amendments that created disclosure and established the duty to supplement disclosures deliberately adopted a different time interval for the duty to supplement disclosures, no distinction appears to have been observed in practice. The Style draft conforms to actual understanding.]

testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due. **(2)** A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.	**(2)** ~~***Discovery Responses.*** A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:~~ ~~**(A)** seasonably if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or correcting information has not otherwise been made known to the other parties during the discovery process or in writing; and~~ ~~**(B)** as ordered by the court.~~ ~~**(3)** ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning: **(1)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; **(2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; **(3)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(4)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to	**(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(D)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).
comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.	**(4)** ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the conference ~~between the parties~~ to occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed fewer than 14 days after the conference ~~between the parties~~, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. **(2)** Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:	**(g) Signing Disclosures, Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented~~:~~ — ~~The paper~~ and must state the signer's address.[1] By signing ~~the paper~~, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: **(A)** with respect to a disclosure, it is complete and correct as of the time it is made; and

1. "[T]he signer's . . . telephone number" is not included in the style draft because it is not found in the present rule, but the Advisory Committee may wish to consider whether to seek the change as a substantive amendment.

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; **(B)** not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and **(C)** not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.	**(B)** with respect to a discovery request, response, or objection, it is: **(i)** not interposed for any improper purpose, such as to harass, ~~or to~~ cause unnecessary delay, or needlessly increase the litigation costs ~~expense~~[2/]; **(ii)** consistent with these rules and warranted by existing law or a good-faith argument for extending, modifying, or reversing existing law[3/]; and **(iii)** neither unreasonable nor unduly burdensome or expensive, ~~based on~~ given the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

2. The style draft of Rule 11(b)(1) uses the phrase " unnecessary . . . expense" in lieu of "needless increase in the cost of litigation" in the current rule. Because the style draft of Rule 26(g)(1)(B)(i) uses "needlessly increase the litigation costs," the Style Subcommittee urges the Advisory Committee to make a corresponding change in the style draft of Rule 11(b)(1).

3. Present Rule 11(b)(2) allows "a nonfrivolous argument for the extension, modification, or reversal or existing law or the establishment of new law." The restyled version of that rule carries that idea forward. The contrast with restyled Rule 26(g)(1)(B)(ii), which allows only a "good-faith argument for extending, modifying, or reversing existing law," will imply strongly that there is a point at which a "good-faith argument for extending, modifying, or reversing existing law" becomes an impermissible (although good-faith) argument for establishing new law. This contrast exists between present Rules 11 and 26(g), but it seems foolish: an "extension" of existing law should include issues the law had not yet addressed. Although the addition of "establishing new law" is beyond the scope of the style project, the Advisory Committee may wish to consider whether to seek the change as a substantive amendment.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.	(2) ***Failure to Sign.*** The court must strike an unsigned disclosure[4], request, response, or objection unless the omission is corrected promptly after being called to the attorney's or party's attention. Until the signature is provided, the other ~~A~~ party has no duty to respond ~~act in response to the paper until it is signed~~.
(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.	(3) ***Sanction for Improper Certification.*** If a certification is made in violation of this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses caused by the violation, including a reasonable attorney's fee.

4. [The Committee Note should explain that although present (g)(1) does not call for striking an unsigned disclosure, the omission "is such an obvious drafting oversight that adding it falls within the scope of the style project." [Possible arguments for distinguishing disclosures from discovery responses seem attenuated. Rule 26(a)(1)(E) provides that a party is not excused from making disclosures because it challenges the sufficiency of another party's disclosures; that might seem inconsistent with adding a provision to (g)(2) that a party has no duty to act in response to an unsigned disclosure, but a disclosure is not a response to another party's disclosures. The signature may seem to play a smaller role with respect to disclosures, particularly since the disclosure obligation was diluted in 2000, and exclusion of witnesses, documents, or expert witnesses actually disclosed because there was no signature may seem extreme.]]

Rule 27. Depositions before Action or Pending Appeal	Rule 27. Depositions to Perpetuate Testimony
(a) Before Action. **(1) Petition.** A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.	**(a) Before an Action Is Filed.** **(1)** ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court[1/] may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons ~~for wanting~~ to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.

1. Subcommittee B asked Professor Marcus to research whether the current rule's use of the phrase "court of the United States" (restyled as "United States court") permits a petition to perpetuate testimony for any action that can be brought only in a state court. After examining the relevant case law and commentary, he concluded that a contemplated action for which testimony is to be perpetuated under this rule must be a matter for which federal jurisdiction exists (see STYLE 428B — copy attached).

(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 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 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.	(2) ***Notice and Service.***[2] At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state under Rule 4. If that service cannot be made with due diligence ~~on an expected adverse party~~, the court may order service by publication or otherwise. The court must appoint an attorney for a person not served under Rule 4; the attorney may cross-examine the deponent if the person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.
(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed. **(4) Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).	(3) ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must enter an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken according to these rules, and the court may make orders like those authorized by Rules 34 and 35. References in these rules to the court in which an action is pending means, for purposes of this rule, the court in which the petition for the deposition was filed. (4) ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under ~~this~~ these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

2. The following substantive revision of Rule 27(a)(2) was published for public comment in August 2003:

> **(2) Notice and Service.** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing on the petition. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent on behalf of persons not served and not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

The published version raises some drafting issues not presented by the style draft. For example, the phrase "on the petition" in the first sentence seems unnecessary, and the omission of "that" between "If" and "service" in the third sentence makes the rule less clear, and "not served" appears to be repeated unnecessarily in the fourth sentence. This also presents the larger issue of how to deal with pending and recent changes. The Style Subcommittee prefers the style-draft version and intends to seek conforming changes to the published draft after public comment has been received.

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.	**(b) Pending Appeal.** **(1)** ***In General.*** The district court in which a judgment has been rendered may, if an appeal has been taken or may be taken[1], allow a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. **(2)** ***Motion.*** The party who wants to perpetuate testimony may move in the district court for leave to take the depositions, upon the same notice and service as if the action were pending in that court. The motion must show: **(A)** the names and addresses of the deponents and the expected substance of each one's testimony; and **(B)** the reasons for perpetuating their testimony. **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may allow the depositions to be taken and may make orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in an action pending in the district court.
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.	**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

1. [The Committee Note should say something like this: Former Rule 28(b) provided for perpetuation of testimony "before the taking of an appeal if the time therfor has not expired." The amended rule, allowing perpetuation if an appeal "may be taken," means the same thing — an appeal may be taken after expiration of the initial appeal period if the district court retains authority to extend appeal time.]

Rule 28. Persons Before Whom Depositions May Be Taken	Rule 28. Persons Before Whom Depositions May Be Taken
(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.	**(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to the jurisdiction of the United States, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by United States law or by the ~~local~~ law in the place of examination; or **(B)** a person appointed by the court in which the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.	**(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by United States law or by the ~~local~~ law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission or, in an appropriate case, both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ~~***Matters of Form***~~ ***Form of Request, Notice, or Commission.*** A deposition notice or a commission may ~~must~~[2] designate — by name or descriptive title — the person before whom the deposition is to be taken. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." **(4)** ***Letter of Request — Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

2. Mr. Hirt of the Department of Justice brought to Subcommittee B's attention a State Department regulation (22 C.F.R. § 92.55) that includes the following language:

> A commission or notice should, if possible, identify the officer who is to take depositions by his official title only in the following manner: "Any notarizing officer of the United States of America at (name of locality)." . . . However, when the officer (or officers) is designated by name as well as by title, only the officer (or officers) so designated may take the depositions.

The wording of this regulation raised concern that it might be inconsistent with State Department policy for Rule 28(b)(3) to mandate that a deposition notice or commission "designate — by name or descriptive title — the person before whom the deposition is to be taken." Subcommittee B therefore decided to substitute "may" for "must" in the restyled rule, and to ask Mr. Hirt to investigate the matter further and provide the Advisory Committee with any pertinent information he might find.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.	**(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations ~~Agreements~~ About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.	Unless the court orders otherwise, the parties may stipulate ~~agree in writing~~ that: **(a)** a deposition may be taken before any person, at any time or place, upon any notice, and in the manner specified — and may then be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified — but ~~an agreement~~ a stipulation extending the time ~~provided in Rules 33, 34, and 36~~ for ~~responses to~~ any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Rule 30. Depositions Upon Oral Examination	Rule 30. Depositions by Oral Examination
(a) When Depositions May Be Taken; When Leave Required. **(1)** A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. **(2)** A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants; **(B)** the person to be examined already has been deposed in the case; or **(C)** a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.	**(a) When a Deposition May Be Taken~~; Without Leave and With Leave of Court~~.** **(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated ~~consented in writing~~ to the deposition and: **(i)** the deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. **(1)** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.	**(b) Notice of the Deposition; ~~Producing Documents and Tangible Things; Method of Recording; Deposition by Remote Means; Officer's Duties; Deposition of an Organization~~ Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. **(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set forth in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request complying with ~~under~~ Rule 34 to produce documents and tangible things at the deposition.
(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. **(3)** With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice.* The party noticing the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The party noticing the deposition bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified by the person noticing the deposition. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may agree in writing — or the court may ~~upon~~ motion order — that a deposition be taken by telephone or other remote electronic means. For the purpose of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters. **(5)** The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.	**(5)** ***Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties agree otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath ~~or affirmation~~[1] to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the ~~recorded tape or other~~ recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through camera or sound-recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and set forth any stipulations ~~agreements~~ made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

1. [Why are we deleting "or affirmation"? The choice to affirm rather than swear is important to some witnesses — important enough that we should resist adoption of a global convention that "oath" includes affirmation. (The same question appears in Rule 32(d)(3)(B)(i).)]

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules. (7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.	(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf; and it may set forth the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The designees must testify about information known or reasonably available to the organization. This paragraph does not preclude depositions by any other procedure authorized in these rules.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1)** ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath ~~or affirmation~~, the officer must record the testimony by the method~~s~~ designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. **(2)** ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted in the record, but ~~does not prevent~~ the examination still ~~from~~ proceed~~s~~~~ing~~; the testimony is taken subject to any objection. An objection must be stated concisely ~~and~~ in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~directed~~ ordered by the court, or to present a motion under Rule 30(d)(3). **(3)** ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the ~~questions of the~~ deponent those questions and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination. **(1)** Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4). **(2)** Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination. **(3)** If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1)** ***Duration.*** Unless otherwise agreed by the parties or authorized by the court, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination. **(2)** ***Sanction.*** The court may impose an appropriate sanction — including reasonable costs and attorney's fees incurred by any party — on any person who ~~has~~ impede~~d~~s, delay~~ed~~s, or frustrate~~d~~s the fair examination of the deponent.
(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(3)** ***Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting party or deponent so demands, the deposition must be suspended for the time necessary to obtain an order ~~make the motion~~. **(B)** *Order.* The court may order ~~the termination of the deposition~~ that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses ~~for the motion~~.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.	**(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and **(B)** if there are changes in form or substance, to sign a statement ~~reciting~~ listing the changes and the reasons for making them. **(2)** ***Changes Indicated in Officer's Certificate.*** The officer must indicate in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must append any changes the deponent makes during the period allowed.

(f) Certification and Delivery by Officer; Exhibits; Copies. **(1)** The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.	**(f) Certification and Delivery ~~by Officer~~; Exhibits; Copies of the Transcript or Recording; Filing.** **(1)** ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition ~~truly~~ accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must securely seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. **(2)** ***Documents and Tangible Things.*** **(A)** *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and ~~annexed~~ attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: **(i)** offer copies to be marked, ~~annexed~~ attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or **(ii)** give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals[1/] may be used as if ~~annexed~~ attached to the deposition. **(B)** *Order Regarding the Originals.* Any party may move for an order that the originals be ~~annexed~~ attached to the deposition pending final disposition of the case.

1. [Do we need a Committee Note, or should we decide there is no ambiguity after all in present (f)(1)(B)? The present rule is: "(B) offer the originals to be marked for identification, * * * in which event *the materials* may then be used in the same manner as if annexed to the deposition." Style (f)(2)(A)(ii) renders this as "the originals may be used as if annexed to the deposition." Clearly the present rule authorizes use of the originals as if annexed. Does it also authorize use of copies as "the materials"? It can be argued that the present rule means only to allow use of the originals. It does not provide an opportunity for other parties to examine a copy made by one party, and creating an incentive that induces the parties to examine each others' copies seems undesirable. Use of a copy that has not been verified by other parties could be dangerous. On the other hand, the originals presumably remain available to protect against inaccurate copies, and it may be convenient to allow use of the copies. If there is to be a Committee Note statement, we should figure out what it will say.]

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent. (3) The party taking the deposition shall give prompt notice of its filing to all other parties.	(3) ***Copies of the Transcript or Recording.*** Unless otherwise agreed by the parties or ordered by the court, the officer must retain stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. (4) ***Notice of Filing.*** A ~~The~~ party who files a deposition must promptly notify all other parties when it is filed.

(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees. **(2)** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may ~~move to~~ recover reasonable expenses for attending, including reasonable attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on ~~the~~ a nonparty deponent, who consequently did not attend.

Rule 31. Depositions Upon Written Questions	Rule 31. Depositions by Written Questions
(a) Serving Questions; Notice. **(1)** A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. **(2)** A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; **(B)** the person to be examined has already been deposed in the case; or **(C)** a party seeks to take a deposition before the time specified in Rule 26(d).	(a) ~~**When Leave of Court Is Required, Serving the Questions.**~~ **When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated ~~consented in writing~~ to the deposition and: **(i)** the deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6). **(4)** Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.	**(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve ~~the questions~~ them on every other party, with a notice stating, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***~~Additional~~ Questions from Other Parties.*** Any ~~additional~~ questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must proceed promptly in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify[1] the deposition; and **(3)** send it to the party, attaching a copy of the questions and of the notice.

1. [The Committee Note should explain at least part of the modification of the present rule's direction that the officer "file or mail the deposition." "File" is deleted because Rule 5(d) was amended in 2000 to direct that discovery materials not be filed until used in the action or ordered by the court.]

   [It seems better to say nothing about the change from "mail" to "send it to the party" in Style (b)(3). Expansion from "mail" to other modes of delivery does not need comment. Specification of "the party" as the addressee seems inevitable. The problems that remain inhere in present language that is carried forward — the "it" that is sent to the party is the deposition. Does the direction to "prepare" it imply that the officer must transcribe a stenographic deposition? The notion of sending stenographic notes without transcription seems strange, and was even more strange when the officer was to file the deposition. The only real question goes beyond style: is it wasteful to require transcription when the purpose of Rule 31, an otherwise most unsatisfactory device, is to save money? But what is the point of the exercise if the answers are not transcribed? The question is interesting, but is not a likely candidate for the Reform Agenda.]

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.	**(c) Notice of Filing.** ~~The party who noticed the deposition must promptly notify all other parties if it is filed.~~ A party who files a deposition must promptly give notice of the filing to all other parties.[1/]

1. Subcommittee B considered whether Rule 31(c) should be adapted to conform to the 2000 amendment to Rule 5(d) and recommended requiring a party to notify other parties when a deposition is "completed." The Style Subcommittee does not understand what "completed" would mean in this context. Instead, the new Style Subcommittee draft seeks to reflect current practice, and more closely tracks the language in the current rule.

   [One question is whether this should track Style 30(f)(4) verbatim: "A party who files a deposition must promptly notify all other parties when it is filed." [It would be awkward to generate a new provision that covers both Rule 30 and Rule 31 depositions. Perhaps each rule should say "the a deposition" to clarify that it speaks only within itself.]

   A separate question arises from elimination of the filing requirement by the 2000 Rule 5(d) amendment. Up to 2000 filing was supposed to occur, ensuring notice to the parties, absent an intruding local rule. Now there is no notice unless the deposition is filed. That explains the suggestion that notice should be given when the deposition is completed. Although this is a change, it may be within the scope of the Style Project to preserve an important function that was inadvertently limited by the 2000 amendment.]

Rule 32. Use of Depositions in Court Proceedings	Rule 32. Using Depositions in Court Proceedings
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:	**(a) Using Depositions.** **(1)** ***In General.*** At any trial or hearing[1], all or part of a deposition may be used against a party on these conditions: ~~to the extent it would be admissible under the rules of evidence if the deponent were present and testifying, and it is used against a~~ **(A)** the party ~~who~~ was present or represented at the taking of the deposition or ~~who~~ had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the rules of evidence if the deponent were present and testifying; and **(C)** the use is permitted by paragraphs (2) through (8).[2]
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence. **(2)** The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.	**(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence[3]. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

1. [The Committee Note should say that "any trial or hearing" includes the "interlocutory proceeding" in present Rule 32(a).]

2. Professor Rowe was asked to research whether the phrase "in accordance with any of the following provisions," which leads in current Rule 32(a) to paragraphs (1)-(4), provides a limitation not found in the restyled version (where the phrase is omitted). He concluded that this concept should remain in the rule in some form, because courts have interpreted it as a limiting factor. For this reason, the Style Subcommittee added subparagraph (C) (see STYLE 433 — copy attached).

3. [The Committee Note should state that the Style Rule carries forward without change the various references in present Rules 32 and 33 to "the rules of evidence" and "the Federal Rules of Evidence." In line with established practice, the Note should not comment further.]

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: **(A)** that the witness is dead; or **(B)** that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or **(C)** that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or **(D)** that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or **(E)** upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.	(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of trial or hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on application and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice.* A deposition may not be used against a party that, having received less than 11 days notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be ~~held~~ taken or be ~~held~~ taken at a different time or place — and this motion was still pending when the deposition was ~~held~~ taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) may not be used against a party who demonstrates that,[4] when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.
(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.	**(6)** ***Using Part of a Deposition.*** If a party offers ~~introduces~~ in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in Earlier Action.*** A deposition lawfully taken and, if required, ~~duly~~ filed[5] in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

4. The Style Subcommittee notes this is not really grammatical because it pairs "it" with "who" ("...a party *who* demonstrates that, when served with the notice, *it* could not..."). An alternative would involve back-to-back "that"s, one a relative pronoun and the other a conjunction: "...a party *that* demonstrates *that* . . . it could not...."

5. When Subcommittee A discussed whether the 2000 amendment to Rule 5(d) obviates the reference to filing, Judge Russell and Professor Marcus agreed to develop, for consideration by the Advisory Committee, an alternative formulation that would substitute the concept of a deposition "properly processed" according to the applicable rules. The phrase "if required" is inserted as an interim solution.

   [Style (a)(8) introduces a subtle shift from present (a)(4). The present rule requires that the deposition have been duly filed in the former action. It does not make exceptions for states that do not require filing, nor for federal districts that barred filing by local rule. Neither was it adjusted when Rule 5(d) was amended in 2000. It seems proper to adjust for the Rule 5(d) amendment by allowing use of a deposition that was not filed in the former action, and to treat state-court and federal-court depositions equally. But allowing use of a deposition that was never filed creates a slight risk of inaccuracy. It is a close call whether the Committee Note should do more than state that the rule is adjusted to reflect the Rule 5(d) amendment.]

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	**(b) Objections to Admissibility.** Subject to Rules 28(b)~~(4)~~ and 32(d)(3), an ~~party may~~ objection may be made at a trial or hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.	**(c) Form of Presentation.** Unless the court ~~directs~~ orders otherwise, a party ~~may offer deposition testimony in stenographic or nonstenographic form, but the party~~ must provide ~~the court with~~ a transcript of any deposition testimony the party offers, but may provide the court with the testimony ~~offered~~ in nontranscript ~~nonstenographic~~ form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript ~~nonstenographic~~ form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions. **(1) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. **(2) As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. **(3) As to Taking of Deposition.** **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.	**(d) Objections.** **(1)** ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2)** ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if it is not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable ~~due~~ diligence, could have been known. **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competency, Relevancy, or Materiality.* An objection to a deponent's competency — or to the competency, relevancy, or materiality of testimony — is not waived by a failure to make the objection ~~if:~~ ~~**(i)** it is not made~~ before or during the deposition, unless ~~; and~~ ~~**(ii)** the ground for it might have been obviated, removed, or cured~~ corrected at that time.
(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.	**(B)** *Objection to an Error or Irregularity ~~at an Oral Deposition~~.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath ~~or affirmation~~[1], a party's conduct, or other matters that might have been ~~obviated, removed, or cured~~ corrected at that time; and **(ii)** it is not timely made during the deposition.

1. [Same question as 30(b)(5)(A)(iv): Why delete "or affirmation"?]

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.	(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if it is not served in writing on the party submitting the question within the time for serving responsive questions or — if the question is a recross-question — within 5 days after being served with the question.
(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.	(4) ***To Completing and Returning the Deposition.*** An objection to how the testimony has been transcribed or how the deposition has been prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress is made promptly after the defect or irregularity becomes known or, with reasonable ~~due~~ diligence, could have been known.

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) In General.** **(1)** ***Number.*** Without leave of court or ~~written agreement of the parties~~ stipulation by the parties, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2[1/]). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b)~~(1)~~. An otherwise proper interrogatory is not[2/] objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

1. [The Committee Notes should explain deletion of the provisions in present 33(a), 34(b), and 36(a) that provide express reminders of the Rule 26(d) discovery "moratorium." The cross-references were redundant when added in 1993, but served a purpose in ensuring rapid observance of the new Rule 26(d) provision. That purpose has been fulfilled. The cross-references have become uselessly redundant.]

2. [Present Rule 33(c) says that an otherwise proper interrogatory "is not *necessarily* objectionable" because it involves an opinion or contention. Although the words imply that an interrogatory *may* be objectionable on this ground, the implication has been rejected in practice. The Style Rule conforms to the accepted use of opinion and contention interrogatories. The Committee Note should provide this explanation.]

(b) Answers and Objections. **(1)** Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. **(2)** The answers are to be signed by the person making them, and the objections signed by the attorney making them. **(3)** The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. **(4)** All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. **(5)** The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	**(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information that is available to the party. **(2)** ***Answering Each Interrogatory.*** Each interrogatory must, ~~except~~ to the extent it is not objected to, be answered separately and fully in writing under oath. **(3)** ~~***Time To Answer***~~ ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be ~~directed~~ ordered by the court or be stipulated ~~agreed to in writing~~ by the parties under Rule 29.[1] **(4)** ***Objections.*** All grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections[2].

1. The Style Subcommittee asks the Advisory Committee to consider whether the reference to Rule 29 is necessary here, and if so whether references to Rule 29 should be added elsewhere in the discovery rules where stipulations are mentioned.

   [The cross-reference may be useful because it negates any inference that a Rule 33(b)(3) stipulation need not observe the Rule 29(b) restrictions — a stipulation requires court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.]

2. [The Committee Note should explain that present (b)(5)'s reminder of Rule 37(a)[(2)(B)] was omitted as redundant.]

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.	**(c) Use.** An answer to an interrogatory may be used to the extent permitted under the rules of evidence.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records[1], and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

1. [It may be better to avoid a Committee Note explanation of the ambiguity resolved by the Style draft. Present (d) refers to deriving an answer "from the business records * * * or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof." The more apparent reading is that this refers to an examination of an existing compilation, abstract, or summary. The alternative reading is adopted by the Style draft, which refers to compiling, abstracting, or summarizing a party's business records. But there is a difference only if an existing compilation, abstract, or summary is not a business record. If it is not, the Style rule might seem to permit production of the business records but not an existing compilation, abstract or summary that would make it easier to "derive or ascertain" the answer. The requirement that the burden be substantially the same for either party, however, may close this potential loophole.]

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	**(a) In General.** ~~Any~~ A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect and copy — and to test or sample — the following items in the responding party's possession, custody, or control: **(A)** any designated documents — including writings, drawings, graphs, charts, photographs, sound recordings, and other data compilations from which information can be obtained or can, if ~~when~~ necessary, be translated by the responding party into a reasonably usable form[1]; or **(B)** any tangible things ~~— and, as appropriate, to test or sample these things —~~ or; **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

1. [Several efforts to translate the present rule have come up with awkward results. The present rule is: "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useful form." The current Style rendition is "data compilations from which information can be obtained or can, if necessary, be translated by the responding party into a reasonably useful form." This form may imply that the responding party can produce and wait for a later request for translation, a matter that touches on issues now being considered by the Discovery Subcommittee. We are told to avoid buried verbs, so we are not permitted to say: "can be obtained after any necessary translation by the responding party." But we might say: "can be obtained after the responding party translates the data into a reasonably usable form."]

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	**(b) Procedure.** **(1)** ***Form of the Request.*** The request must: **(A)** describe with reasonable particularity ~~identify, by~~ each ~~individual~~ item or category~~, the~~ of items to be inspected; and **(B)** ~~describe each item with reasonable particularity; and~~ ~~(C)~~ specify a reasonable time, place, and manner for the inspection and for performing the related acts. **(2)** ***Responses and Objections.*** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be ~~directed~~ ordered by the court or stipulated ~~agreed to in writing~~ by the parties under Rule 29. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, ~~specifying~~ including the reasons. **(C)** *Objections.* An objection to part of a request must specify the part and permit inspection with respect to the rest ~~remainder~~. **(D)** *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request[1].

1. [As with Rules 33 and 36, the Committee Note should state that the cross-reference to Rule 37(a) in the final sentence of the second paragraph in present 34(b) was deleted as redundant.]

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.	**(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection ~~of premises~~.

Rule 35. Physical and Mental Examinations of Persons	Rule 35. Physical and Mental Examinations
(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.	**(a) Order for an Examination.** **(1)** ***In General.*** The court in which the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Report of Examiner. **(1)** If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on	**(b) Examiner's Report.** **(1)** ~~***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.~~ ~~**(2)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was made or by the person examined.~~ **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. **(3)** ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was made[1] like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them from the person examined.

1. [There is no satisfactory solution to a problem posed by present Rule 35(b)(1). Style (b)(1) and (3) finesse the problem without resolving it. Present (b)(1) states that on request the party causing the examination "shall deliver to the requesting party" a copy of the report. "Party" clearly is not used in an exclusive sense; it means either the party against whom the order is made or the person examined. It then states that after delivering the report, the party causing the examination is entitled to receive like reports from the party against whom the order was made. The result seems to be that a nonparty who was examined can request the report, and thereby impose an obligation to deliver like reports on the party against whom the order was made whether or not that party wanted an exchange of reports. Style (b)(1) says only that the party who moved for the examination must deliver a copy of the report, without stating to whom delivery must be made. It does then say that the request may be made by the party against whom the examination order was made or by the person examined, seeming to imply that delivery is to be made to the person who requested the report. Style (b)(3) then carries forward the present provision that after delivering the court-ordered report, the party who obtained the order is entitled to receive like reports from the party against whom the examination order was made. The problem is carried forward intact, apart from the choice in Style (b)(1) to leave to implication the present rule's explicit statement that the court-ordered report is to be delivered to the person who requests it. The only question open to the Style Project is whether to restore to Style (b)(1) an explicit statement parallel to the present rule: "must, on request, deliver to the requester a copy * * *."]

such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial. **(2)** By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition. **(3)** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition. **(5)** ***Failure to Deliver a Report.*** The court on motion may order — on just terms — that a party deliver a report, and if the examiner's report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents[1]. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be ~~directed~~ ordered by the court or stipulated ~~agreed to in writing~~ by the parties under Rule 29. **(4)** ***Answer.*** If a matter is not admitted, t~~T~~he answer must~~, if not admitting the matter,~~ specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party

1. [The Committee Note should explain that the present rule's incorporation of the Rule 26(d) discovery moratorium was deleted as redundant.]

a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of information or knowledge as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. **(5)** ***Objections.*** The grounds for any objection must be stated. **(6)** ***Matter Presenting a Trial Issue.*** A party who believes that a request concerns a matter presenting a genuine issue for trial must not — on that ground alone — object to the request; subject to Rule 37(c), the party may~~, subject to Rule 37(c),~~ deny the matter or state why it cannot admit or deny. **(7)** ***Motion Regarding the Sufficiency of Answers and Objections.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. Upon finding that an answer does not comply with ~~violates~~ this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a designated time before trial. Rule 37(a)(5) applies to the award of expenses~~ related to the motion~~.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.	**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(d) and (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action; and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits~~; and the admission has not been incorporated into a pretrial order~~. An admission under this rule is for purposes of the pending action only,; is not an admission for any other purpose, and ~~it~~ cannot be used against the party in any other proceeding.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: **(1) Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken. **(2) Motion.** **(A)** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.	**(a) Motion For an Order Compelling Disclosure or Discovery.** **(1)** ***In General.*** On notice to other parties and all affected persons, a ~~A~~ party may~~, on notice to other parties and all affected persons,~~ move for an order compelling disclosure or discovery. **(2)** ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken ~~occurs~~. **(3)** ***Specific Motions.*** **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to make the disclosure in an effort to obtain it without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.	**(B)** *To Compel a Discovery Response.* A discovering party may move for an order compelling an answer, designation, production, or inspection. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to obtain the information or material without court action. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30 or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(~~6~~4) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of Rule 37(a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. **(A)** If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust. **(B)** If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. **(C)** If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.	**(5)** ***Payment of Expenses; Protective Orders.*** **(A)** *If the Motion Is Granted (or ~~the~~ Disclosure or Discovery ~~Information~~ Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was ~~has been~~ filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court may not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust. **(B)** *If the Motion Is Denied.* If the motion is denied, the court may make any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court may not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses incurred regarding the motion.

(b) Failure to Comply With Order. **(1) Sanctions by Court in District Where Deposition Is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. **(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If a deponent fails to be sworn or to answer a question after being ordered ~~directed~~ to do so by the court where the discovery is taken ~~occurs~~, the failure may be treated as contempt of court. **(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an ~~discovery~~ order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court in which the action is pending may make further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;	**(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.	**(B)** *For Not Producing a Person for Examination.* If a party does not comply with ~~violates~~ an order under Rule 35(ae) requiring it to produce another person for examination, the court may issue ~~one or more~~ any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient[1] party shows that it cannot produce the other person. **(C)** *Payment of Expenses* Instead of or in addition to the orders above, the court must[2] require the disobedient[2] party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

1. [Subcommittee A voted to delete "disobedient" in (b)(2)(B). The meeting notes are silent with respect to (b)(2)(C), but state that the use of "disobedient" is to be reviewed as a global style issue.]

2. [At the request of Subcommittee A, Professors Rowe and Gensler researched the question whether "shall" in the present rule is better translated as "must" or "may." The reason for "must" is straightforward. The 1970 Committee Note shows a clear intention to establish payment of expenses as a routine discovery sanction. The "unless" clause at the end carries forward all the discretion that was intended in 1970. The argument for "may" is more complex. Resting on the belief that courts have not lived up to the 1970 intent at any time since 1970, it is suggested that in practice "shall" has come to mean "may." This argument is no stronger than the empirical assumption, and may be weaker. Style language that gives new force to the original intent can easily be found appropriate even if it would give the rule new meaning in practice. (The same question recurs later in Rule 37.)]

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. **(1)** A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure. **(2)** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.	**(c) Failure to Disclose, to Amend an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose information as required by Rule 26(a) or 26(e)(1) or (3), or to amend an earlier response to discovery as required by Rule 26(e)(2), the party is not permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may require payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in ~~order authorized under~~ Rule 37(b)(2)(A)(i)-(vi). **(2)** ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party ~~court~~ may~~;~~ ~~on~~ motion[1]~~;~~ ~~order~~ that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.

1. [This appears to be a new style ploy: it is not "move for an order that," nor "move that the party who failed to admit be ordered," but only "move that."]

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** ***In General.*** **(A)** *Motion, Grounds for Sanctions* The court in which the action is pending may, on motion, ~~make any just~~ order sanctions if: **(i)** a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* The motion for sanctions ~~A motion under Rule 37(d)(1)(A)(ii)~~ must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain the answer or response without court action.
The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).	**(2)** ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3)** ***Types of Sanctions.*** Sanctions may include any of the orders listed in ~~order authorized under~~ Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
(e) [Abrogated.]	
(f) [Repealed.]	

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	**(e) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena	Rule 45. Subpoena
(a) Form; Issuance. **(1)** Every subpoena shall **(A)** state the name of the court from which it is issued; and **(B)** state the title of the action, the name of the court in which it is pending, and its civil action number; and **(C)** command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and **(D)** set forth the text of subdivisions (c) and (d) of this rule. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.	**(a) In General.** **(1)** ***Form and Contents.*** **(A)** *Requirements.* Every subpoena must: **(i)** state the court from which it issued; **(ii)** state the title of the action, ~~the name of~~ the court in which it is pending, and its civil action number; **(iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify, or produce and permit the inspection and copying of designated ~~books,~~[1] documents~~;~~ or tangible things in that person's possession, custody, or control, or permit the inspection of premises; and **(iv)** set forth the text of Rule 45(c) and (d). **(B)** *Command to Produce Evidence or Permit Inspection.* A command to produce evidence or to permit inspection may be included in a subpoena commanding appearance at a ~~trial, hearing, or~~ deposition, hearing, or trial, or may be set forth in a separate subpoena.

1. Subcommittee A decided to omit "books" as an archaic reference. Although this change is consistent with the omission of "books" in the corresponding language of Rule 34(c) (which refers to Rule 45), Subcommittee B deferred action on a similar change in Rule 26(b)(1) (see note 2 to that rule).

(2) A subpoena commanding attendance at a trial or hearing 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 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. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.	**(2)**[2/] ***Issued from ~~by~~ Which Court.*** A subpoena must issue as follows: **(A)** for attendance at a trial or hearing, from ~~in the name of~~ the court for the district where the hearing or trial is to be held; **(B)** for attendance at a deposition, from ~~in the name of~~ the court for the district where the deposition is to be taken; and **(C)** for production and inspection, if separate from a subpoena commanding a person's attendance, from ~~in the name of~~ the court for the district where the production or inspection is to be made.
(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of **(A)** a court in which the attorney is authorized to practice; or **(B)** a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.	**(3)** ***Issued by Whom.***[3/] The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney, as an officer of the court, may also issue and sign a subpoena from[4/] ~~in the name of~~: **(A)** a court in which the attorney is authorized to practice; or **(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court in which the action is pending.

2. The following revision of Rule 45(a)(2) was published for public comment in August 2003:
   (2) A subpoena must issue as follows:
   (A) for attendance at a trial or hearing, in the name of the court for the district where the trial or hearing is to be held;
   (B) for attendance at a deposition, in the name of the court for the district where the deposition is to be taken, stating the method for recording the testimony; and
   (C) for production and inspection, if separate from a subpoena commanding a person's attendance, in the name of the court for the district where the production or inspection is to be made.
   A decision on whether to include in restyled Rule 45(a)(2) the substantive part of this revision – that is, the reference in (b) to "stating the method for recording the testimony" – should be made at the time when restyled Rules 26-37 & 45 are to be published.

3. The Style Subcommittee restored the heading "Issued by Whom" to clarify that "request" refers here to an attorney's request for a copy of a signed, blank subpoena, not a request that the clerk complete the form and serve the subpoena.

4. [The present rule enables an attorney to issue a subpoena "on behalf of" a court. The next-most-recent Style draft, "in the name of" the court, seemed similar. "From" in the current Style draft may seem to make the attorney's act too much the court's act. Note that present (a)(2) says a subpoena issues "from" the court, but they changed to "in the name of" in (a)(3). Some may think it odd to contemplate an attorney subpoena as one "from" the court. The uniformity introduced by the Style draft may be appropriate nonetheless. The attorney subpoena is enforceable in the same way as the court subpoena, and the attorney acts "as [an] officer of the court."]

(b) Service. **(1)** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).	**(b) Service.** **(1)** ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~A copy of a subpoena commanding the production of documents and tangible things or the inspection of premises before trial must be served on each party as prescribed in Rule 5(b).~~ If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it issues, a copy must be served on each party as provided in Rule 5(b).[1/]

1. Professor Rowe's research confirms that the "prior notice" requirement in the current rule is applied in practice to require service of a subpoena on other parties before it is served on the person commanded to produce or permit inspection (see STYLE 433 — copy attached).

   [A choice remains between requiring service on the parties before the subpoena "issues" or before it is "served" on the witness. If the court dispenses the subpoena, it may seem odd to contemplate service on the parties before the subpoena "issues." If the attorney generates the subpoena, the mental feat is a bit different — the initial copies that emanate from the attorney are not "issued." Service on everyone involved can be made by mail; would a rule geared to service require no more than earlier deposit in the mailbox? Probably all of this is fuss without meaning — either formulation will give the same advance notice. Additional research may be helpful to determine whether there is a meaningful difference between "issuance" and "service" in this context.

   Those who resist the "If, * * * then" style might be better pleased: "A subpoena that commands * * * must be served on each party as provided in Rule 5(b) before it is served on the witness "]

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.	**(2)** ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: **(A)** within the district of the court from which it ~~is~~ issued; **(B)** outside that district but within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena; **(C)** within the state of the court from which it ~~is~~ issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena; or **(D)** that the court authorizes, if a United States statute[2/] so provides, upon proper application and for good cause.
(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.	**(3)** ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country. **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena ~~was~~ issued a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

2. Current Rule 45(b)(2) uses the term "statute of the United States," which is restyled in this draft as "United States statute" in deference to views previously expressed by the Advisory Committee. Nevertheless, the Style Subcommittee continues to prefer the term "federal statute" when referring to statutes enacted by Congress.

(c) Protection of Persons Subject to Subpoenas. **(1)** A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.	**(c) Protecting a Person Subject to a Subpoena.** **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the ~~that~~ subpoena. The issuing court ~~from which the subpoena is issued~~ must enforce this duty and must impose on a party or attorney who fails to comply with ~~violates this~~ the duty an appropriate sanction, ~~—~~ which may include~~ing~~ lost earnings and reasonable attorney's fees.
(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. **(B)** Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.	**(2)** ***Command to Produce Materials or Permit Inspection.*** **(A)** *Appearance Not Required.* A person commanded to produce and permit the inspection and copying of designated ~~books,~~[1] documents, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial. **(B)** *Objections* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection and copying may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the designated materials or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after ~~being served with~~ the subpoena is served. If an objection is made, the following rules apply: **(i)** At any time, on notice to the commanded person, the serving party may move the court from which the subpoena ~~was~~ issued for an order compelling production, inspection, or copying. **(ii)** Inspection and copying may be done only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

1. See Rule 45(a) note 1.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it **(i)** fails to allow reasonable time for compliance; **(ii)** requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or **(iii)** requires disclosure of privileged or other protected matter and no exception or waiver applies, or **(iv)** subjects a person to undue burden.	**(3)** ***Quashing or Modifying a Subpoena.*** **(A)** *When Required.* On timely motion, the court from which a subpoena ~~was~~ issued must quash or modify a subpoena that: **(i)** fails to allow a reasonable time to comply; **(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held; **(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or **(iv)** subjects a person to undue burden.
(B) If a subpoena **(i)** requires disclosure of a trade secret or other confidential research, development, or commercial information, or **(ii)** requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or **(iii)** requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.	**(B)** *When ~~Grounds for~~ Permitted~~ing~~.* To protect a person subject to or affected by a subpoena, ~~On timely motion,~~ the court from which ~~a subpoena was~~ it issued may, on timely motion, quash or modify it ~~a subpoena that~~ if it requires: **(i)** disclosure of a trade secret or other confidential research, development, or commercial information; **(ii)** disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or **(iii)** travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense. **(C)** *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to Subpoena. **(1)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand. **(2)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.	**(d) Duties in Responding to a Subpoena.** **(1)** ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business, or organize and label them according to the categories in the demand. **(2)** ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: **(A)** expressly assert the claim; and **(B)** describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection.[1]

1. This draft substitutes the language of Rule 26(b)(5) for the current language of 45(d)(2). Subcommittee A believes that identical language makes sense — a Rule 45 subpoena should have the same reach as Rule 34 (which is governed by 26(b)(5)) has on a party. The subcommittee therefore recommends making the change as part of the style project but would also include a Committee Note to explain it.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).	**(e) Contempt.** The court from which ~~in whose name~~ a subpoena ~~is~~ issued may hold in contempt a person who, having been served, ~~inexcusably~~ fails without adequate excuse to obey the subpoena. A nonparty's disobedience must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii).

Draft Notes

Civil Rules Style Subcommittee B

Style Subcommittee B of the Civil Rules Advisory Committee met on August 27, 2003, at the Omni Hotel in Chicago. The meeting was attended by Judge Paul J. Kelly, Jr., Subcommittee Chair; Judge David F. Levi, Advisory Committee Chair; Justice Nathan L. Hecht; Robert C. Heim Esq.; Theodore Hirt, Esq. (for the Department of Justice); Judge Richard H. Kyle; Professor Myles V. Lynk; and Judge Shira Ann Scheindlin. Judge Lee H. Rosenthal also attended. Richard L. Marcus attended as Subcommittee B consultant, and Edward H. Cooper attended as Advisory Committee Reporter. The Standing Committee Style Subcommittee was represented by Judge J. Garvan Murtha, Chair, and Dean Mary Kay Kane. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., were present as Standing Committee style consultants. The Administrative Office was represented by Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, and Steven S. Gensler, Supreme Court Fellow. Observers included Andrea Toy Ohta and Peter Freeman.

Judge Kelly called the meeting to order. The discussion was built around Style 396, the August 8 draft

RULE 26

Rule 26(a)(1)

Discussion began with a "global issue." Style draft 26(a)(1)(A) says "Except * * * as otherwise agreed by the parties." The present rule says except as otherwise "stipulated" by the parties. The change may affect practice. A local rule in the Eastern District of California, for example, directs that every "stipulation" must be in writing. By changing to agreement, the rule may encourage oral agreements. In the Southern District of New York, for another example, every stipulation is "so ordered" and filed; it is something that should be preserved. Several judges observed that it is all too common to find lawyers arguing whether in fact they had agreed on something — "we thought we had an agreement" is a frequent complaint.

A related global issue is illustrated by the same sentence. The present rule is "to the extent otherwise * * * directed by order." The Style draft is "or directed by the court." In recent years the Advisory Committee has followed the convention that a rule that allows an exception "by order" does not permit a local rule that creates an automatic exception. "Directed by the court" may not carry the same implication. Whatever style choice is made, it may prove necessary to be more explicit about the room left for local rules.

The present rules are thought to be "wildly inconsistent" in using such words as "order" and "stipulation."

It was asked whether there will ever be a place — perhaps a Committee Note — where we say that "by order" means "local rules not permitted"? This would come close to adopting

definitions. If definitions are to be adopted at all, a Committee Note does not seem likely to be long remembered or often uncovered.

Style 26(a)(1)(A)(ii) then was noted. The Style draft breaks disclosure of witnesses into two items, (i) for identification and (ii) for the subjects of the information each witness possesses. p. 1 n. 1 suggests that perhaps these two items should be restored to a single item. The Style draft may encourage lawyers to provide two lists — a first list that identifies witnesses, and a second list that describes their subjects of information. In practice, the lists are not separated. It was agreed that the two items should be recombined, substituting em dashes for the commas used in note 1. Item (i) will call for disclosure of "each individual likely to have discoverable information — and the subjects of the information — that the disclosing party may use * * *." Style item (ii) will be deleted, and the subsequent items will be redesignated.

It was suggested that Style item (iii) — to become (ii) — would be clearer if "disclosing party" were repeated: "things that the disclosing party has in its possession, custody, or control and that the disclosing party may use * * *." This was found to be a matter of style, to be resolved by the Style Subcommittee.

So with Style item (iv) — to become (iii) — it was noted that the present rule refers to "any category of damages," while the Style rule refers to "each" category of damages. This too is a style choice.

Turning to p. 2 n. 2, it was agreed that Style item (iv) — to become (iii) — should continue, as the Style draft has it, to call for the disclosing party to "make available for inspection and copying" matters that support the computation of damages. The present rule distinguishes between damages disclosures and insurance disclosure by requiring only that the disclosing party "mak[e] available" the damages documents but requiring that it provide insurance agreements. This distinction should be maintained.

p. 2 n. 3 asks how to style present rule (a)(1)(D)'s reference to "any person carrying on an insurance business." The Style Subcommittee considered and rejected "insurer," because that term might include some things that were intentionally excluded then insurance discovery was first adopted in 1970. The 1970 discovery rule was intended to exclude such things as self-insurance and indemnity agreements made part of business transactions. Is a self-insurer an "insurer"? The current Style draft refers to "an insurance company." It is not clear whether that captures commercial insurance enterprises carried on outside the corporate form; Lloyd's of London is an example. Support was expressed for a return to "person carrying on an insurance business," but others feared that "person" might not cover all entities that should be brought within the rule. The Committee concluded that the rule should say "an insurance business."

p. 2 n. 4 observed that the present rule describes an agreement to satisfy "a judgment which may be entered in the action," while the Style rule refers to "a possible judgment." A suggestion to restore it to "possible judgment in the action" was defeated.

The introduction of Style 26(a)(1)(B) in Style 396 failed to make an intended deletion. It is intended to read: "exempt from initial disclosure ~~under Rule 26(a)(1)(A)~~: * * *."

Style 26(a)(1)(C) refers to a different time set "by party agreement." This is another illustration of the global issue that involves choice between "agreement," "written agreement," "stipulation," and perhaps other words.

p. 4 n. 5 notes that the Style Draft refers to a party objection that disclosure are "not appropriate in the circumstances," although the Style Subcommittee would prefer to delete "in the circumstances." Inclusion of this phrase was defended on the ground that the present rule was deliberately drafted to describe an objection that "disclosures are not appropriate in the circumstances of the action." This stresses what the parties must do. It responds to frequent protests that disclosure is redundant in heavy-discovery cases, and an unnecessary burden in simple cases that do not involve any discovery. Widespread agreement was expressed with this view. The Style draft will remain as it stands.

Rule 26(a)(1)(D) carries forward the present provisions addressing the disclosure obligations of late-added party. It was asked why later-joined parties are not afforded an opportunity to object that there should be no disclosure? The response was that the omission of any reference to late-added parties in the original disclosure rule stimulated increasingly complex drafts during the work that led to the 2000 discovery amendments. It was decided that the complexity was unnecessary and might be counter-productive. It was decided to leave most of these questions to be worked out by the courts. The 2000 Committee Note speaks to some of these questions. The discussion concluded that if there are any problems in practice, they should be addressed through a reform agenda, not in the Style Project.

The catch-line for Style (a)(1)(E) was questioned: "Inadequate Excuses" looks awkward. The Style Subcommittee was asked to consider this further.

Rule 26(a)(2)

Present (a)(2)(A) refers to "the identity of any person who may be used" as an expert at trial. Style (a)(2)(A) refers to "the identity of any witness it may use." The change corrects an opportunity to misread opened by the present rule, which literally could require each party to disclose of any person who may be used by other parties as well as those it may use. The change from "person" to "witness" might create some confusion — a party might argue that it need not disclose anyone, since no one is a "witness" until testifying at trial. All agreed that these changes are appropriate. No one thinks the present rule requires each party to disclose the experts of all parties, and no one thinks it is a nullity. There is no need to note the changes in a Committee Note; the Style draft expresses the meaning of the present rule.

(a)(2)(B) is another example of the global question. The present rule allows an exception when "otherwise stipulated," while the Style Rule says "otherwise agreed." It was suggested that we may not want to adopt a single word for all purposes, and that "written agreement" may be appropriate in some instances.

Style (a)(2)(B)(ii) calls for disclosure of the data or other information "considered by the witness." Deletion of "by the witness" in the Style version threatens a substantive change. There now are cases debating the question whether an expert witness disclosure must include data or information considered by a person on the witness's staff but not considered by the witness, even when the witness relied on discussions with the staff member. All agreed that "by the witness" must be restored.

A different question is presented by the contrast between the second sentence of present (a)(2)(B) and the Style draft. See p. 5, n. 6. The present rule begins: "The report shall contain a complete statement of," introducing a series of several items separated by semicolons. It is not possible to resolve the ambiguity with full confidence: is it intended that there be a complete statement of each item in the series, or only that there be a complete statement of the first item? The Style draft resolves this by calling for a complete statement of each of the first two items, which are grouped together as (i), but not of the other items. Discussion suggested that in practice the rule is read in a reasonable way. The extent of detail required depends on the subject of the disclosure. As to exhibits to be used by the expert, for example, a list of all exhibits is required, but not a complete statement of everything in the exhibits. What lawyers most want is a complete statement of the opinions to be expressed at trial; they hate the presentation of opinions not disclosed, and fight to exclude them. So it may be unnecessary for the Style draft to call for a complete statement of the data and other information considered. It was concluded that the Style draft should limit the "complete statement" requirement to the witness's opinions and the basis and reasons for them. The remainder of Style item (i) will be separated as new item (ii). New item (ii) will be: "(ii) the data or other information considered by the witness in forming them, and any exhibits that will be used to summarize or support the opinions," subject to further possible styling. Style items (ii), (iii), and (iv) will be redesignated.

Style (a)(2)(C) presents another example of a global issue: how many cross-references should be preserved? Present (C) concludes with a reminder of the duty to supplement under Rule 26(e)(1). The discovery rules include many cross-references, particularly to the discovery moratorium in 26(d) and the sanctions provisions in Rule 37. They were added when new rules provisions were adopted to help the bar become familiar with the interrelationships. But that use diminishes with time. Perhaps they can be deleted. Professor Kimble believes that the Civil Rules include too many redundant, often "clunky," cross-references. One measure of Style-Project success will be the reduction of cross-references. At the same time, it is a judgment call in each case; the most important approach is to avoid any default presumption that we will retain each cross-reference unless it is obviously useless. There are a handful of rules that are terribly important, that involve high stakes, and that are constantly reread. So "trial experts are a hot topic." Lawyers constantly reread this rule. This reminder is useful and perhaps necessary. It was agreed that the cross-reference will be restored. The most likely approach, subject to further styling, will be to add as a new subparagraph (D) the version in the July 28 Style Draft, Style 363: "The parties must supplement these disclosures when and as required under Rule 26(e)." (As suggested in note 10 of Style 363, this could be as simple as "must supplement these disclosures under Rule 26(e).")

The Global issue of court "orders" is illustrated by Style (a)(2)(C): "Absent court directions or an agreement by the parties * * *." The present rule is "directed by the court." "[D]irections" is a word that could include local rules, something we do not want. Might this be "direction of the court"? And in most other rules we refer to party agreement before court action, implying a preference for party agreement. The Style Subcommittee tracked the ordering in the present rule; they will consider whether to change the order. It was agreed that the present rule does not require that the court approve the parties' agreement, but noted that if there is a Rule 16(b) order the parties will need court approval for any modification. It also was noted that the present rule refers to a "stipulation" rather than an agreement, and that in some courts a "stipulation" must be "so ordered" by the court. And an "agreement" need not be in writing. Of course practice varies; Texas Rule 11 says that no agreement among lawyers is binding unless it is in writing and filed with the court. The Style Subcommittee wondered whether we can resolve the uses of "agreement," "written agreement," and "stipulation" now; it had thought the question a simple one, but now is not confident. Cultures may be different among different courts. One member observed that in his local culture it would be thought an insult if a lawyer sent a letter to confirm an agreement reached in a telephone conversation. At this point it seemed that all Subcommittee members would prefer to refer to a "stipulation," putting the issue to the Advisory Committee as a global issue. The Style Subcommittee would have the burden of justification to substitute for "stipulation" But it also was recognized that perhaps some other words — "agree," "consent," or the like — might be useful outside the discovery rules. (And later discussions suggested greater flexibility, depending on the specific discovery context.)

26(a)(3)

Only a style question was raised — does "objections" fit well in the tag-line for (a)(3)(B). The Style Subcommittee regards the issue as a "toss-up."

Former 26(a)(5)

The Committee Note to Rule 26 should say that former Rule 26(a)(5) was deleted as surplusage.

Rule 26(b)(1)

It was agreed that the Committee Note should explain the reason for shifting the present introduction to all of Rule 26(b) to become part of Rule 26(b)(1) only. As suggested at p. 8 n. 1, there is no reason to believe that the introduction was intended to qualify (b)(2) through (b)(5).

There was inconclusive discussion of a change from the present rule's "persons having knowledge of" any discoverable matter to the Style Rule's "persons who know of" any discoverable matter. Some members thought that "having knowledge of" is broader, covering people who know of the discoverable matter without regard to whether they know it is discoverable. Other members believed that each phrase means the same thing — there is no reason to suppose that discovery is limited to people who know the information they have is discoverable in this particular lawsuit.

Often enough discovery will extend to the identity of persons who do not even know of the lawsuit, much less know of the issues with sufficient precision to guess at the scope of discoverability.

It was noted that the Style Draft carries forward the reference to "books" in the list of discoverable matter. The word seems antique, and is not used in other discovery rules. Modern data compilations are not described as books. Why not change to "other data compilations"? It was noted that "documents" is the only word in (b)(1) that covers computer-based information. But the computer-based discovery project is engaged in going through the discovery rules to see what changes of this sort should be made. It is better to address them through that project than through the Style Project. "Books" should remain in (b)(1), at least for now.

The redundant cross-reference to (b)(2) at the end of (b)(1), carried forward from the present rule, will be retained in the Style Rule. As suggested at p. 8 n. 2, it was deliberately added as part of the 2000 amendments, recognizing the redundancy but as part of a negotiated package of changes designed to reinforce the effect of the (b)(2) limiting principles.

Rule 26(b)(2)

Style (b)(2)(B) translates "shall" in the present rule to say that the court "must" limit discovery in the circumstances listed in items (i) through (iii). It was suggested that the tone is to dictate to the district court, while the substance of the rule relies on broad district-court discretion. Why not "should"? "Shall" often means "will be done in the ordinary course," not "must" be done. Professor Kimble responded that a change to "may" often is a good translation from an ambiguous "shall" in the present rules. But it is dangerous to add further terms of authority. "Should" would require attention at many points. And it was noted that the tag-line would have to be changed if "should" is substituted — "when required" would not fit. It was further suggested that the choice could affect reliance on cost-bearing: if a court "must" limit discovery, it may become more difficult for a court to say: "I will allow the discovery, but only on condition that the inquiring party pay part or all of the response costs." It was further observed that "should" is used five times in the Style package of Rules 15 through 25. It was concluded that the "should" issue will be raised at the Advisory Committee meeting.

Separately, it was decided that there is no need to add a redundant "proposed" at the end of item (iii): "and the importance of the *proposed* discovery in resolving the issues."

Rule 26(b)(3)

Discussion began with the question identified at p. 10 n. 4. Present (b)(3) begins with a long sentence. Although the Style draft reduces the length of the first sentence, "what it says is different." The Style draft first says that all of these work-product things are discoverable, and only then qualifies the statement of discoverability. The present rule means "is discoverable only * * *." The Style draft "strengthens the sense of discoverability. We are losing a tone, an emphasis." The same question arises with respect to Style (b)(4). Professor Kimble responded that it is a "bugaboo" to believe that an exception or condition must be included in a single sentence with the proposition

subject to the exception or condition. The present rule suffers from a "big divide between 'may discover' and 'only'." Further discussion returned to the point — the difference between present rule and Style draft is the difference between saying you do not ordinarily get these things and suggesting that you ordinarily do. One alternative would be to put the required showing up front: "a party must show substantial need [etc.] to obtain discovery or * * *." A further suggestion was that Style subparagraph (A) should be divided, with a new subparagraph (B) that sets out what now is the last sentence of subparagraph (A). It was agreed that the Style Subcommittee would consider (b)(3)(A) further in light of this discussion.

Separately, p. 10 n. 5 raises the question whether it is wise to delete the reminder in the present rule provision on protecting mental impressions on ordering discovery of work-product materials that discovery is to be ordered only "when the required showing has been made." It was suggested that if Style (b)(3)(A) is revised along the lines of present discussion, the omission will be less troubling.

p. 10 n. 6 observes that present (b)(3) states that a nonparty may obtain its own statement by request, but does not state how a party is to obtain its own statement. One possibility is that it was expected that a party would get its own statement by Rule 34 demand — the request procedure was adopted for a nonparty because a nonparty does not have access to Rule 34. But it seems likely that in practice parties exchange any party statements without further ado. It was concluded that it is desirable to allow a party to obtain its own statement by request, as the Style draft does. The Committee Note should explain that obtaining a statement by request makes general a procedure that works for nonparty statements and reflects common practice.

Separately, it was decided that there is no confusion in the Style draft's: "Any party or other person may * * * obtain the person's own previous statement * * *." Readers will understand this to mean that a party may obtain that party's own statement, not the statement of any other party or person, and so on. There is no need to say "obtain the party's or person's own previous statement."

Present (b)(3) and style (b)(3) refer to a "stenographic" recording of a statement. Is this "too antique"? Why not simplify — "a contemporaneous recording or a transcription that recites substantially verbatim"? Would this be more than a style change? Or is it better to reserve such questions for the project on discovering computer-based information, to become a general sweep that brings the discovery rules into contemporary technology? It was decided that no change would be recommended now.

Rule 26(b)(4)

As with 26(b)(3), there is a change of tone by stating in the first sentence or Style (b)(4)(B) that discovery can be had as to a trial-preparation expert, and then introducing the severe limits in a second sentence. The suggestion that the "fix" is easier here was met by the response that "more radical surgery" is required. The Style Subcommittee will make the attempt. It may be something like this: "Under the following circumstances only, a party may, by interrogatories or deposition, discover * * *."

Rule 26(c)

Should Style (c)(1)(B) restore "and conditions" from the present rule — "specifying terms *and conditions*"? Garner says that "terms" includes "conditions." No change need be made.

Present (c)(5) describes an order "that discovery be conducted with no one present except * * *." Style (c)(1)(E) describes an order "designating the persons who may be present * * *." Does the change lose some of the emphasis on excluding persons? Or does the current rule somehow imply that the persons named must be present? The Style draft seems clearly to imply that the designated persons may be present, but need not be. It was agreed that the present rule means the same thing. The Style draft is appropriate.

Present (c)(6) describes an order "that a deposition, after being sealed, be opened only by order of the court." That seems to contemplate a separate, later order triggered by specific circumstances that may justify opening. Style (c)(1)(F) describes an order "directing that a deposition be sealed and *then* opened only upon court order." That seems to contemplate that the sealing order also state the circumstances that will justify opening. We do not want to force the court to determine at the time of the sealing order what circumstances may justify opening. It was agreed that "then" should be deleted from (F).

Present (c) provides in the final sentence for an award of expenses "incurred in relation to the motion." Style (c)(3) states that Rule 37 "applies to the award of expenses *for the motion.*" It was pointed out that "in relation to" refers to both sides — the party who made the motion and the party who resisted. A party who successfully opposes a motion is entitled to an award under Rule 37. It was agreed to strike "for the motion" from Style (c)(3). "[F]or the motion" also will be deleted from all similar cross-references to Rule 37, including Rule 26(b)(3)(B)[to become (C), 30(d)(3)(C), and 36(a)(7)[a rule initially in Subcommittee A's jurisdiction].

Rule 26(d)

Present 26(d) describes the use of discovery unless the court orders otherwise "for the convenience of parties and witnesses *and* in the interests of justice." Style (d)(2) says "or" in the interests of justice. It was agreed on all sides that "and" should be restored.

Style (d)(2)(B) was described as "clumsy." It says that discovery by one party "does not require any other party to delay its discovery." Why "require"? Why not "does not cause the delay of any other party's discovery"? It was agreed that there need be no change.

Rule 26(e)

Present Rule 26(e) begins with an introduction that addresses both disclosure and discovery. Style 26(e) separates disclosure and discovery from the beginning. There is no need to refer to "or response" in Style (e)(1)(A). It was agreed to delete these words.

Present Rule 26(e) begins by describing a duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." The Style draft omits these words. The omission seems important. The difficulty is compounded by the history of Rule 26(e). The original 1970 version was essentially incoherent. It began by stating that "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows." Tt did not speak at all to a response that was not complete when made. The most plausible readings are that the drafters either could not decide what to say about a discovery response that was not complete when made, or believed that the duty to complete is implicit in the general duty to respond. However that may be, the duty to supplement "to include information thereafter acquired" was described in three paragraphs. The first paragraph established a duty to supplement a response to a question directly addressed to identifying persons having knowledge of discoverable matters or the identity of trial expert witnesses. The second paragraph established a duty to supplement a response if the party "obtains information upon the basis of which (A) he knows that the response was incorrect [although complete] when made, or (B) he knows that the response though correct [and complete] when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." The most readily apparent distinction between (A) and (B) is that (A) refers to facts that were in existence but not known to the responder at the time of response: thus it was a complete statement of available information but not correct. That would mean that (B) refers to facts not in existence at the time of the initial response. (An illustration might be a change in the physical condition of a personal-injury plaintiff.) However that might be parsed, the combination of "complete when made" with "information thereafter acquired" emphasized that 26(e) did not apply when a party failed to make a complete response with all information then available.

The "complete when made" phrase was deleted in 1993, but "information thereafter acquired" was retained. That might seem to underscore the continuing importance of the focus on "information thereafter acquired." But it seems unsatisfactory to leave Rule 26(g) as the only provision that expressly addresses a failure to provide all information that had been "acquired" at the time of the initial response. It might be argued that deleting "complete when made" in 1993 meant that the duty to supplement applies to information that was at hand but not recognized as relevant to the discovery response. It may be argued that deleting "information thereafter acquired" is not substantive for this reason, and because in practice no one acts on the belief that the duty to supplement does not apply when a party deliberately, negligently, or ignorantly fails to include information available — already "acquired" — at the time of the initial response.

It was concluded to leave the Style draft as it is. The Committee Note should explain the deletion, in terms to be worked out in discussion in the full Advisory Committee.

Turning to the separation of Rule 26(e) into two paragraphs, the reason for the separation is that the time of the obligation to supplement is expressed differently. Present 26(e)(1) creates a duty to supplement a disclosure "at appropriate intervals." The 1993 Committee Note states that "[s]upplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches." No change was made to the 1970 requirement, expressed in what became present 26(e)(2), that the obligation to supplement a discovery response is a "duty seasonably to amend" the response. If the timing of the duty were made the same for disclosures and for discovery responses, 26(e) could be drafted in a single paragraph.

It is difficult to know whether there is any practical difference between "at appropriate intervals" and "seasonably." "Seasonable" means "in a timely manner." It might be argued that in 1993 there was a broad and completely new disclosure obligation that might impose untoward burdens on all parties if each disclosure were continually supplemented as case preparation uncovered each new bit of information. The 2000 reduction of initial disclosure obligations may reduce this concern. "Seasonable," moreover, gives great latitude.

It was suggested that perhaps the duty to supplement should be discharged "in a timely manner" as to both disclosures and discovery responses. Continuing supplementation often makes little sense as compared to periodic supplementation "at appropriate intervals." But there are some pieces of information that are obviously important and that should be provided to other parties without delay to facilitate the orderly conduct of further discovery and trial preparation. The 1993 concern focused on only half of the picture.

It was suggested that in practice, there may be no distinction between the differently expressed timing obligations. It would be useful to have further research, although doubt was expressed whether a search of case law is likely to be of much help. And even if a survey of some lawyers should show that they pay no attention to the distinction, or indeed are not aware of it, that would not provide much guidance.

It was concluded that the Style Subcommittee should redraft 26(e) into a single duty to supplement both disclosures and discovery responses, subject to the same timing requirement. This draft will be submitted to the Advisory Committee with an explanation of the question. If the combined draft goes forward, the Committee Note should explain the change. The change will be supported in part by the suggestion that although there is a formal change in the rule, a single expression probably reflects actual practice. Changes of expression that do not change actual practice are accepted within the scope of the Style Project.

Rule 26(f)

Style 26(f)(4)(A) and (B) refer to the conference "between the parties." It was agreed that "between the parties" should be deleted. It was left to the Style Subcommittee whether to undertake further style efforts — one suggestion was "require that the parties confer fewer than * * *."

Style 26(f)(4)(B) authorizes local rules that require that a written report be "filed" within a specified time. It was suggested that this should be "submitted." The portion of present 26(f) that corresponds to Style (4)(B) was drafted to accommodate the Eastern District of Virginia "Rocket Docket" after public comment on the proposed rule. It may be that limiting local rules by authorizing only those that "require" filing is contrary to the purposes of the Rocket Docket to keep things fast and simple. "Submitted" might be better. This distinction was never discussed in framing the 2000 amendments. But the change might seem substantive. It could be put on the reform agenda, but further consideration does not seem necessary unless it should appear that there is an actual problem.

Rule 26(g)

p 18 n. 1 observes that "telephone number" was not included in the required information because the addition might seem substantive. It was suggested that perhaps it will be possible to collect a "small number" of substantive changes to be presented on a separate track parallel to the style track. This might be one of them.

The second sentence of Style (g)(1) refers to the "paper." It was suggested that this is a bad word to use, particularly since it does not appear in the present rule. Although it has been used as a shorthand summary, it might better be avoided. The Style Subcommittee will restyle the rule to avoid the reference to "paper."

Present (g)(2)(B) refers to "needless increase in the cost of litigation." Style (g)(1)(B)(i) refers to "unnecessary delay or expense." "Unnecessary expense" may not capture the full flavor of the present rule. The same issue arose with Rule 11, and the same argument was made — "unnecessary expense" may seem more expansive, and a substantive change. The argument lost then, and we should be consistent between the rules. But we could achieve consistency by adopting the better words in both places. Lawyers have long had these "buzz words" in their heads. These questions are for the Style Subcommittee.

An earlier draft of Style (g)(1)(B)(ii) sought to make Rule 26 parallel to Rule 11 by authorizing a good-faith argument for "establishing new law." This addition was deleted because it seemed a substantive addition. The distinction between the two rules will seem strange to anyone who notes it — the very difference will suggest that in discovery matters the court may not permit a good-faith argument for establishing new law. But there is no sense that Rule 26(g) has yet come to matter very much in practice. And it seems highly unlikely that a court would impose sanctions because a good-faith argument must be characterized as one to establish new law rather than one to extend, modify, or reverse existing law. The question may present the perplexity that the addition would seem substantive, but in fact would not make any difference. Making the rules parallel then would achieve aesthetic symmetry, nothing more. Whether this should be done will be put to the Advisory Committee for decision.

Rule 27(a)

One Style suggestion was quickly rejected: there is no need to repeat "United States" before the second reference to a district court in the first sentence of Style 27(a)(1): "file a verified petition in the district court for the district * * *."

It was asked whether we can safely delete "cognizable in a United States court" from Style (a)(1)(A): "expects to be a party to an action cognizable in a United States court but * * *." The response was to ask whether, without these words, the rule would authorize a petition to perpetuate testimony for an action that could be brought only in a state court or a court in a foreign country. The present rule refers to a matter "cognizable in a court of the United States." "United States court" no more seems to refer to a state court than the former phrase, and it is important to retain the limit that fences out perpetuation to support an action that cannot be brought in a federal court. Whether the Claims Court or other entities might be included in "United States court" seems unaffected by the style change. No change was suggested for the style rule, but it was suggested that research should be done to determine whether the rule now permits a petition to perpetuate testimony for an action that can be brought only in a state court.

Present Rule 27(a)(1)(3) refers to the reasons for "desiring to perpetuate" testimony. Style (a)(1)(C) refers to the reasons for "wanting to perpetuate it." The Subcommittee recommended that the Style Subcommittee delete "wanting to," so the rule would refer to "the reasons for perpetuating it."

Present 27(a)(2) refers to "such order as is just" when an expected adverse party cannot be served. Style (a)(2) simply refers to an order. Deletion of "as is just" adheres to deletion of like phrases in many places, and seems appropriate here.

The third sentence of Style 27(a)(2) addresses the situation in which "service cannot be made with due diligence on an expected adverse party." It was agreed that "on an expected adverse party" should be deleted as redundant.

Present (a)(2) calls for appointment of an attorney to represent a person "not served in the manner provided in Rule 4(d)." The Style rule refers only to a person "not served." Omission of the reference to Rule 4 creates an ambiguity: is a person "served" only by publication a person "not served"? It was agreed to restore the reference to Rule 4, without the long-since superseded reference to subdivision (d). Style 27(a)(2) will read: "The court must appoint an attorney for a person not served under Rule 4; * * *."

Present Rule 27(a)(4) refers to use of a deposition in an action "subsequently brought in a United States district court." Style (a)(4) refers to a "later-filed district-court action." It was suggested that the Style rule does not adequately cover an action that is filed in district court and later transferred to the bankruptcy court. But it was noted that the bankruptcy court is simply part of the district court; it has no independent existence. A proceeding in the bankruptcy court is a "district-court action" for this purpose. No change need be made in the Style draft.

p. 22 n. 4 notes a change from present (a)(4), which invokes admissibility in evidence in the courts of the state "in which it is taken," to Style (a)(4), which refers to the courts of the state "where" it was taken. What happens if a Michigan court authorizes a deposition that is physically taken in Indiana? Note 4 suggests that perhaps the rule should refer to admissibility under the rules of the court "that authorized" the deposition to perpetuate. It was decided that whatever ambiguity inheres in the present rule is adequately carried forward by the Style draft. No change is recommended.

Responding to p. 22, n. 3, it was agreed that the Style draft should be changed to conform to the present rule, referring to a deposition taken under "these rules," not under "this rule."

Rule 27(b)

Present 27(b) refers to the court in which "a" judgment has been rendered, and then the court in which "the" judgment was rendered. Style 27(b) refers only to "a" judgment. This seems appropriate.

p. 23 n. 1 suggests that a Committee Note should explain the Style version of the present rule, which refers to perpetuation "before the taking of an appeal if the time therefor has not expired." The Style version is "if an appeal * * * may be taken." The Note will state that "may be taken" means that if the original appeal period has expired, an appeal still "may be taken" if the district court retains authority to extend appeal time.

In Style 27(b)(3), the Style Subcommittee has restored an omitted word: "If the court finds * * *." The Style version "may prevent a failure or delay of justice" is a suitable translation of the present rule "is proper to avoid a failure or delay of justice."

p. 23 n. 2 asks whether "taken" should be restored from the present rule in the Style draft. It was agreed that the restoration should be made, so the final sentence of Style (a)(3) will read: "The depositions may be taken and used as any other deposition * * *."

Rule 28

Present Rule 28(a) states that a person appointed by the court has power to administer oaths and take testimony. This provision was added in 1948 to expand the categories of persons who could preside at a deposition. The analogue in Style 28(a)(1)(B) is suitable.

Present Rule 28(a) permits a deposition before a person authorized to administer oaths "by the laws of the place where the examination is held." Style 28(a)(1)(A) refers to an officer "authorized * * * by local law in the place of examination." "Local" law is ambiguous — is it, for

example, Arlington County, Virginia law, or Virginia law? It was agreed that "the" would be substituted for "local: "authorized * * * by ~~local~~ the law in the place of examination."

The Style Subcommittee noted that the cross-reference to Rule 29(a)(1) in Style 28(a)(2) should be reduced to refer only to Rule 29(a).

Style 28(b)(1)(C) will be changed in the same manner as (a)(1)(A): "authorized * * * by ~~local~~ the law in the place of examination."

Present 28(b)(4) was added as (2) in 1963. The Committee Note says that it "makes it clear that the appointment of a person by commission in itself confers power * * * to administer any necessary oath." Style b(2)(D) compresses the expression, seeming to say that it is the court rather than the commission that empowers the person appointed to administer the oath. It was asked whether the change means that if the commission does not specifically authorize administration of the oath, there must be someone else to administer the oath? It was concluded that the Style draft does the job and can stand without change.

The tag-line for (b)(3), "Matters of Form," was questioned. It might better be "Form of Request, Notice, or Commission." This is a question for the Style Subcommittee.

p. 25 n. 1 notes that present 28(b) says that a notice "may" designate the person before whom the deposition is to be taken by name or descriptive title, while Style 28(b)(3) says "must." No one present could describe any actual experience with this aspect of procedure. It was noted that State Department regulations, 22 C.F.R. § 99.55, seem to implement this practice, and say that the notice "should if possible" describe the person. It was further noted that an order commissioning a person must name the person. But it was suggested that "may" in the Style draft describes a narrow ambit of discretion — the person must be identified, but identification may be either by name or by descriptive title. It was concluded that "may" can remain in the Style draft unless further consultation with the Department of Justice and State Department reveal problems not yet identified.

Style 28(b)(4) concludes by deleting the final words of present 28(b), "under these rules." The deletion seems appropriate.

Present 28(c) disqualifies as presiding officer a person who is an "attorney or counsel" of any party; Style 28(c) shortens this to "attorney." This question has been raised before — might counsel, for example, refer to a transaction adviser who is not an attorney in the litigation? No change was recommended.

Rule 29

Returning to the "agreement" question, it was agreed that the requirement in Rule 29 should be a "stipulation." The "Agreements" in the Title should be changed to "Stipulations," and "agree in writing" in the introduction should be changed to "stipulation."

p. 27 n. 1. raises the question whether the Rule 29(b) limit on an agreement extending the time for discovery should extend to all forms of discovery, not only Rules 33, 34, and 36. It was pointed out that Rule 16(b) requires the court to set deadlines for completing discovery. The court must assent to any extension. (If there is no Rule 16(b) order, there is no problem with interfering with the time set for completing discovery. The question of interfering with hearing a motion or trial seems fairly caught up in current practice — the court must assent to rescheduling the hearing or trial if the discovery stipulation is to be feasible.) The expansion of Rule 29 would bring it into line with current practice. Because the change simply conforms to practice, it is within the scope of the Style Project. The suggested language in note 1 was adopted, adding three more words. Style Rule 29(b) will read: "other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial." The Committee Note will explain the change.

Rule 30(a)

Present Rule 30(a)(1) refers to taking deposition testimony "upon oral examination." Style 30(a)(1) allows a party to depose "by oral questions." This change was made to achieve a parallel with Rule 31, which provides for deposition "by written questions." Although the Rule 30 Title remains "Oral Examination," it is appropriate to retain "oral questions" in the text. But the caption of subdivision (a) will be abbreviated: "When a Deposition May Be Taken~~; Without Leave and With Leave of Court~~."

A different question is raised by a subtle change of language. Present 30(a)(1) begins by stating that a party may take the testimony "of any person, including a party," and then states in the final sentence that the attendance of "witnesses" may be compelled." Style 30(a)(1) begins in the same way, but concludes that the attendance of the "deponent[]" may be compelled. It was suggested that the present rule implies that the "witness" who may be subpoenaed is a nonparty witness, not a party. A party who does not attend the party's own deposition is subject to sanctions under Rule 37(d). Ordinarily lawyers rely on these sanctions by failing to serve a subpoena when they notice the deposition of another party. But it was pointed out that a subpoena may be used when a party may be recalcitrant; among other advantages, Rule 37(d) expressly lists only some Rule 37(b) sanctions as appropriate, omitting contempt. Rule 45(c)(3)(A)(ii), further, apparently contemplates use of a subpoena for a party deponent by providing special protection when a subpoena requires a person who is not a party to travel beyond specified distances. It was agreed that "deponent" would remain. Consistent references to the deponent throughout the discovery rules are desirable.

It was agreed that in Style 30(a)(2)(A) "consented in writing" would be changed to "stipulated": "if the parties have not ~~consented in writing~~ stipulated to the deposition * * *."

Rule 30(b)

The first sentence of present 30(b)(1) concludes by requiring notice "to every other party to the action." The Style draft deletes "to the action." This seems proper.

It was suggested that the lengthy caption of subdivision (b) could be shortened to something like: "Notice of the Deposition and General Requirements for Taking the Deposition." This is a question for the Style Subcommittee.

p. 29 n. 1 describes the Style Subcommittee's decision to delete from Style 30(b)(2) the sentence at the end of present (b)(5): "The procedure of Rule 34 shall apply to the request" that a party deponent produce documents under Rule 34. The Style Subcommittee believes that in practice not all Rule 34 procedures apply. It was asked whether it would be better to list the Rule 34 procedures that do apply. Style 30(b)(2) refers to a "request under Rule 34." It was suggested that this might better be "made in compliance with"; that expression would solve the question whether the accommodation of present (b)(5) in (b)(2) should specify which Rule 34 procedures apply. These are questions for the Style Subcommittee.

Style 30(b)(2) requires that the deposition notice or an attachment "list[]" the materials designated in a subpoena duces tecum served on the deponent. It was suggested that "specified" or "identified" would be more precise. This is for the Style Subcommittee.

Style 30(b)(3) raises the question whether 21st-Century rules should refer to "stenographic" means of recording. Something depends on what "stenographic" means. If it includes only hand-written notes, it seems irrelevant. If it includes machine or voice shorthand devices, it continues to be relevant. Any of these variations encounters a modest gap in both present and Style rules — each states that any party may arrange to transcribe a deposition taken by nonstenographic means, but neither notes that the person who arranged for stenographic reporting may not arrange for a transcription. It was concluded that these questions should not be addressed in the Style Project.

Present Rule 30(b)(7) states that a deposition taken by telephone or other remote electronic means "is taken in the district and at the place where the deponent is to answer questions." Style 30(b)(4) reduces this to "takes place where the deponent answers the questions." It was suggested that "in the district and at the place" is more precise, but the suggestion was not carried further.

The familiar question returned with the observation that Style 30(b)(4) says that the parties "may agree in writing" to take a deposition by telephone or other remote means. It was decided that

this expression was appropriate; there is no need to require a stipulation for this procedure. Professor Kimble suggested that efforts must be made to achieve consistency.

A few words were removed from Style 30(b)(5)(B): "the officer must repeat * * * at the beginning of each unit of ~~recorded tape or other~~ recording medium."

Preserving the global issue of cross-reference style, Professor Kimble suggested that the cross-reference in (b)(5)(B) should be "(A)(i)-(iii)."

Style 30(b)(6) carries forward present 30(b)(6). It was suggested that the present rule is outdated. It was meant to include all forms of organization, but does not obviously include such modern forms as the LLC and LLP. Perhaps they could be added to the list. One approach might be simply to add "or other organization," but that might sweep more broadly than we know. But it was objected that such additions would be substantive, and in addition might be dangerous — we need to know what we are doing if we start adding additional forms of organization. And Rule 30(b)(6) is frequently used; it has become a "hotbed" after adoption of the 10-deposition limit because it is used to fit several people into the framework of a single deposition. (Even at that, it was noted that "lawyers are not shy about asking for more than 10 depositions.") It was observed that although it may not be appropriate to add "organizations" to the text of the rule, it seems appropriate to retain "organization" in the caption adopted by the Style draft. It was decided that no addition would be made in the Style draft. The question should be researched for the reform agenda.

Rule 30(c)

Present 30(c) states that examination and cross-examination "may proceed" as permitted by the Federal Rules of Evidence. Style 30(c) states that examination and cross-examination "proceed." This change reflects the nature of the statement: it is self-executing, stating a fact.

p. 32 n. 1 points out that present 30(c) has a gap in describing the method of recording. It says only that the testimony shall be recorded by any method authorized by present Rule 30(b)(2). Present 30(b)(2) refers only to the method designated by the party noticing the deposition; an additional method designated by another party comes within present 30(b)(3). Style Rule 30(c)(1) fills the gap by directing the officer to record the testimony "by the methods designated under Rule 30(b)(3)." Because Style 30(b)(3) includes both the method designated by the noticing party and any additional method designated by another party, the cross-reference closes the gap. There may be problem with this solution, however. A party who designates an additional method of recording commonly appears with a person who will perform the recording. Do we want to put all means of recording under the control of a single officer? Suppose the party noticing the deposition designates video recording, while another party designates stenographic recording — the videographer may be hard-put to attempt to make (or even supervise) a stenographic recording as well. Of course if there are two means of recording there may be conflicting versions, but that can happen even if one person supervises both. There is a related question: can more than one officer be responsible for the Style 30(b)(5) duties, including administration of the oath, setting forth agreements about custody, and so

on? And so for the Rule 30(f) duties? It was decided that these questions should not be resolved in the Style Project. The limit of present Rule 30(c) was restored by amending the cross-reference in Style 30(c)(1): "the officer must record the testimony by the methods designated under Rule 30(b)(3)(A)." (A) covers only the method designated by the party noticing the deposition.

Present Rule 30(d)(1) requires that any objection during a deposition be stated "in a non-argumentative and non-suggestive manner." Style (c)(2) replaces "and" with a comma: "a non-argumentative, non-suggestive manner." The Style Subcommittee agreed to delete the comma and restore "and."

It was pointed out that present 30(c) says that when an objection is made "the examination shall proceed." Style 30(c)(2) says that an objection "does not prevent the examination from proceeding." The change reduces the emphasis on the importance of proceeding with the examination. The Style Subcommittee will consider further, looking to something like: "but the examination proceeds."

It was noted that the objection requirements stated in Style 30(c)(2) do not interfere with the common practice of adopting "the usual stipulations" to govern a deposition.

There is an inadvertent omission from Style 30(c)(3). Present 30(c) directs that when a party participates in an oral deposition by written questions, the officer "shall propound them to the witness and record the answers verbatim." This direction was omitted. It will be restored in some form similar to the form adopted in the July 28 draft, or the alternative suggested at p. 43 n. 8 of the alternative draft: "[A] party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the questions of the deponent and record the answers verbatim."

Rule 30(d)

Present Rule 30(d)(2) provides that the presumptive time limit for a deposition may be changed by "stipulation." Style 30(d)(1) changes this to "agreed." Here "agreed" seems to work. The understanding is likely to be reached during the deposition, and is likely to be put on the record.

Style 30(d)(2) omits several words from present (d)(3). It was agreed that there is no need to restore "if the court finds," a phrase commonly omitted in restyling the rules. Nor need we restore "is responsible for." "[A]ny person who" picks that up. The Style language reaches a client who directs an attorney to impede, delay, or frustrate the deposition. "[A]s a result thereof" also is surplusage. But the drafting will be changed from past tense to present tense: "on any person who ~~has~~ impedes~~d~~, delays~~ed~~, or frustrates~~d~~ the fair examination * * *."

It was pointed out that both present Rule 30(b)(4) and draft 30(b)(3)(A) allow a deposition to be suspended for the time necessary to make a motion for protection. Neither addresses directly

the time needed to obtain an order. Surely the intention of the present rule is that the deposition remains suspended until the court makes an order, even if only an order directing that the deposition resume on other topics while the court considers the request to protect specific matters. It was agreed that the Style draft will be amended: "suspended for the time necessary to ~~make the motion~~ obtain an order."

Rule 30(e)

"Signing" appears at the end of the caption to present Rule 30(e). The Style draft appropriately deletes it.

Present Rule 30(e) refers to the witness's statement "reciting such changes and the reasons given by the deponent." Style 30(e)(1)(B) likewise refers to a "statement reciting the changes." It was suggested that "reciting" is an odd word in this setting. "Listing" might be better. But the counter-suggestion was that it is not enough to "list" the changes — the changes themselves must be set out completely. It was suggested that it would better simply to call for "a statement of the changes." The Style Subcommittee will resolve this issue.

Rule 30(f)

The Style Draft title seems cumbersome. It might be improved: "Certification and Delivery ~~by Officer~~; Exhibits; Copies ~~of the Transcript or Recording~~; Filing. So it will be done.

Present Rule 30(f)(1) requires the officer to certify that the deposition "is a true record." Style 30(f)(1) requires the officer to certify that it "truly records." The Style Subcommittee was asked to consider the strong preference of some Subcommittee B members for "accurately records."

Present Rule 30(f)(1) provides that a person offering documents or things for examination during a deposition — then globally described as "materials" — may offer the originals to be marked for identification, etc., "in which event the materials may then be used in the same manner as if annexed to the deposition." It is not clear whether "materials" in its second appearance refers only to the originals or also includes the copies that other parties may make. Style Rule 30(f)(2)(A)(ii) resolves the ambiguity by stating that "the originals may be used as if annexed * * *." It was agreed that this is the better resolution of the ambiguity.

The Style Subcommittee will consider whether Rule 30(f) references to "annexed" should be changed to "attached."

Present 30(f)(1) permits a motion by any party to have the original materials annexed to "and returned with the deposition to the court." Style 30(f)(2)(B) calls for annexing the materials to the deposition, but does not say "and returned * * * to the court." The change conforms to the 2000 Rule

5(d) amendment that prohibits filing depositions until used in the proceeding or ordered by the court. A party who is particularly concerned about safeguarding the originals can move under Rule 5(d) for an order directing filing, joined with the motion to attach the originals to the deposition. And in real practice, a party who has originals of important documents is not going to turn them over to other parties.

Style 30(f)(4) begins: "The party who files a deposition * * *." Since Rule 5(d) was amended, many depositions will never be filed. "The" will be changed to "A" to reflect this development.

Rule 30(g)

Present Rule 30(g)(1) says that the court may order payment of expenses incurred. Style 30(g) begins by saying that a party may move to recover: does this eliminate the court's power to act without motion? It was agreed that "move to" will be deleted: "A party * * * may ~~move to~~ recover reasonable expenses * * *."

Both present and Style 30(g)(2) provide for sanctions when a party noticing a deposition fails to serve a subpoena — on a "witness" in the present rule, on a "deponent" in the Style rule. (There was renewed discussion of the question whether "witness" includes a party, and whether "deponent" does not; it was agreed to adhere to "deponent" in keeping with the general Style practice.) In the present rule a sanction is authorized if "the witness because of such failure does not attend"; in the Style rule, a sanction is authorize if the deponent "consequently did not attend." It was asked whether this should be made more specific — Rule 37(d) authorizes such effective sanctions against a party deponent that there seems little reason to serve a subpoena, and it will be difficult to suppose that a party's failure to attend was caused by the failure to serve a subpoena. More importantly, if a party fails to subpoena a party deponent who does not appear, the sanction should fall on the deponent who failed to appear rather than on the party who relied on the obligation of the party deponent to appear as enforceable through Rule 37(d) sanctions. It was agreed that "nonparty" would be added to Style 30(g)(1): "serve a subpoena on the [a?] <u>nonparty</u> deponent * * *." The Committee Note will explain the addition.

Rule 31(a)

A full redraft of Rule 31 was submitted to the Style Subcommittee for its consideration.

It was agreed that the subdivision (a) caption should parallel the caption of Rule 30(a).

It was further agreed that Style 31(a) should refer to examination "by written questions," to parallel the "oral questions" in Rule 30(a).

And as with Rule 30, it was agreed that it is proper to change "witnesses" to "deponent."

"[C]onsented in writing" in Style 31(a)(2)(A) will be changed to "stipulated," to parallel Style 30(a)(2)(A).

Style 31(a)(4) incorporates the 30(b)(6) provisions for deposition of an organization. This paragraph should be kept consistent with Rule 30(b)(6) if any changes are made in 30(b)(6).

The caption and text of Style 31(a)(5) refer to "additional questions." It was suggested that "additional" "is a word to fight over." It was agreed that both should be changed: "(5) ~~Additional~~ Questions from Other Parties. Any ~~additional~~ questions from other parties to the deponent * * *."

Rule 31(b)

Present 31(b) directs that the written questions be delivered to the officer "designated in the notice." At first it was voted to restore "designated in the notice" to the Style 31(b) introduction, but a second vote rescinded the first. The Style 31(a)(3) requirement that the notice designate the officer suffices. These words will not be added.

p. 40 n 1 notes that present Rule 31(b) directs the officer to "file or mail the deposition"; filing is clear enough, but to whom is the alternative of mailing to be addressed? Style 31(b)(3) deletes "file," in deference to the 2000 amendment of Rule 5(d), and resolves the ambiguity by directing the officer to send the deposition "to the party." What is to be sent? Must the officer transcribe a deposition taken by stenographic means? Both the present rule and Style 31)(b)(2) direct the officer to "prepare and certify" the deposition — perhaps that means transcription? But Rule 31 is used to save expense; in some courts, pro se litigants frequently rely on Rule 31 depositions. At times they show up with a recorder — and if there is no officer, who should administer the oath? Should we leave these questions unresolved? Another use of Rule 31 depositions may be to establish the authenticity of an exhibit. Mr. Heim volunteered to look into these questions further. For the present, no changes were recommended.

Rule 31(c)

There was inconclusive discussion of the question put at p. 41 n. 1. Style 31(c) directs the party who noticed the deposition to promptly notify all other parties "if it is filed." This changes from "when it is filed" in the present rule to reflect the 2000 version of Rule 5(d) — a deposition often will not be filed. But it leaves a gap: if the deposition is not filed, nothing directs that notice be given other parties when it is completed. It might be desirable to add an explicit notice requirement, directing notice "when it is completed" or "when it has been taken." This may fit within the limits of the Style Project as a necessary adaptation that was overlooked when Rule 5(d)

was amended. Or it might be put into a small package of "inevitable" substantive changes that should be made in parallel with the purely style changes. No final determination was made.

Draft Notes

Civil Rules Style Subcommittee A

Style Subcommittee A of the Civil Rules Advisory Committee met on August 28, 2003, at the Omni Hotel in Chicago. The meeting was attended by Judge Thomas B. Russell, Subcommittee Chair; Judge David F. Levi, Advisory Committee Chair; Sheila Birnbaum, Esq.; Theodore Hirt, Esq. (for the Department of Justice); Dean John C. Jeffries, Jr.; Judge Lee H. Rosenthal; and Andrew M. Scherffius, Esq.. Frank Cicero, a new Advisory Committee member, also attended. Professor Thomas D. Rowe, Jr., attended as Subcommittee A consultant. Professor Richard Marcus also attended as Special Reporter. The Standing Committee Style Subcommittee was represented by Judge J. Garvan Murtha, Chair, and Dean Mary Kay Kane. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., were present as Standing Committee style consultants. The Administrative Office was represented by Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, and Steven S. Gensler, Supreme Court Fellow. Irwin Warren, Esq., attended as ABA Litigation Section observer.

The discussion of Rules 32, 33, 34, 36, 37, and 45 was built around Style 397, the August 8 draft. Discussion of Rule 35 was built around Style 414, the August 20 draft.

Rule 19

The meeting began by reopening the discussion of Rule 19. Present Rule 19(a)(2) addresses joinder of a person who "claims an interest relating to the subject of the action." Relying on a First Circuit decision, earlier discussion changed these words to a person who "appears to have" an interest. Those words appeared to be clearer, and to carry forward the same meaning. But further research uncovered a line of cases that seem to say that if a nonparty really is willing to pass by a potential interest, the nonparty does not "claim" an interest and need not be joined. The change earlier approved now seems substantive. All agreed that Style Rule 19 will revert to the language of present Rule 19 — "claims an interest."

Rule 32(a)

Discussion began with the observation that Rule 32 is complicated because it relates to the Federal Rules of Evidence. The complications, however, do not require withdrawal of Rule 32 from the Style Project.

Present Rule 32(a) describes use of a deposition "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." Style 32(a)(1) shortens this to use "[a]t any trial or hearing." The question is whether these words include "an interlocutory proceeding." As an example, what is a pretrial hearing under Rule 44.1 to determine foreign law? It was concluded that the Style draft "works." No change was urged.

p. 1 n. 2 suggests that further style work might improve Style 32(a)(1). One approach would be to "flip" the working provisions: "At any trial or hearing, all or part of a deposition may be used

against * * *." Another approach is sketched at the end of p. 2 n. 3. It was agreed that major redrafting should not be attempted at this subcommittee meeting. The Style Subcommittee will consider these suggestions, and any others that may be made.

It was next noted that the introductory portion of present Rule 32(a) concludes with a restriction — a deposition may be used if admissible "under the rules of evidence" "in accordance with any of the following provisions." Style 32(a) transforms this introductory portion into Rule 32(a)(1), and omits the restriction. Is there a change of meaning? This question ties to the variable expressions in present Rule 32(a), which at times refers to admissibility under "the rules of evidence" and at other times refers to admissibility under "the Federal Rules of Evidence." So p. 2 n. 3 points to the question whether the Federal Rules of Evidence are the sole basis for determining admissibility in federal courts, or whether instead some questions may be addressed by "common-law" rules of evidence. The Style draft resolves this knotty question by carrying forward whichever term is used in the present rule source for each Style rule provision. That is the conservative approach.

Further discussion noted that the *Daubert* opinion seems to state that only the Federal Rules of Evidence apply in federal court, but suggested that the statement may have been a casual generalization that does not focus on all possible uses of principles outside the Federal Rules. Indeed other Supreme Court opinions seem to indicate that concepts developed before the Federal Rules continue to apply. Civil Rule 32, moreover, is basically concerned with hearsay objections to the use of a deposition. Some parts of Rule 32 permit introduction of a deposition in circumstances that do not fit any of the Evidence Rules exceptions to the hearsay rule.

Debate turned to the suggestion that all references to the rules of evidence or the Federal Rules of Evidence might be omitted. That approach, or some alternative that either refers always to the Federal Rules of Evidence or refers always to "the rules of evidence," might be supported if extensive research could show that there is no difference. But this is a big and complex question. The present rule seems to imply that there is a distinction — that there may be evidence rules outside the Federal Rules of Evidence. Redrafting Rule 32 might appear to take sides in an apparent ongoing debate. The course taken in the Style draft is appropriate — in each case, the phrasing of the present rule should be carried forward. This approach is further supported by the lack of any apparent problem in practice arising from the variable expressions in present Rule 32.

The tag line of Style 32(a)(5)(B) refers to an "unavailable deponent," and Style 30(a)(2)(A)(iii) is referred to as "the unavailability provision." It was pointed out that Rule 30 actually deals with a deponent who is available, but is about to become unavailable. The Style Subcommittee will consider alternative words, including the p. 4 n. 4 suggestion of "departing deponent."

Present Rule 32(a)(4) addresses the situation in which only part of a deposition is "offered" in evidence. Style 32(a)(6) recharacterizes this as the situation in which a party "introduces" part of a deposition. It was pointed out that there is a difference between offering evidence and actually

being permitted to introduce evidence. It was agreed that the Style rule will make the change: "If a party ~~introduces~~ offers in evidence * * *."

Another problem arising from the 2000 amendment of Rule 5(d) appears in Style 32(a)(8). Present Rule 32(a)(4) allows use in a later action of a deposition "duly filed" in a former action. This phrase is carried forward in Style 32(a)(8). But under new Rule 5(d) depositions often will not be filed. Carrying forward the filing requirement will continue the situation that has existed since December 1, 2000, limiting the opportunity to use depositions taken in earlier actions. It was noted that in fact the change began before the Rule 5(d) amendment, since many local rules prohibited filing before Rule 5(d) was amended. It also was noted that there are increasing problems in identifying what is a deposition when there is no filing — suppose one party arranges for a stenographic record, while another arranges a video recording? The question is further complicated by asking whether the filing requirement provides an important protection and assurance of accuracy. Evidence Rule 804(b)(1) allows use of deposition testimony in a different proceeding, and in terms that are broader than Civil Rule 32 because it may be enough that the earlier proceeding involved a predecessor in interest to the party against whom the testimony is offered. There is no filing requirement if the law applicable to the earlier proceeding did not require filing.

This question might be addressed by substituting a different requirement for "duly filed." One approach, similar to Evidence Rule 804(b)(1), would require that the deposition have been taken properly under the rules applied in the action in which it was taken. Or Rule 32 could be more pointed: "lawfully taken and filed if required." [An alternative suggestion — "duly completed and filed" — was opposed on the ground that "completed" is a substantive change. But it was protested that no part of a deposition should be admissible if the deposition was not completed.]

The discussion of "duly filed" concluded without making any recommendations.

As suggested at p. 5, n. 7, it was agreed that Style 32(a)(8) would be amended by changing "action" to "court": "lawfully taken and duly filed in any federal or state ~~action~~ court may be used * * *." That conforms to present Rule 32(a)(4), and avoids any possibility that "action" may include proceedings not before a "court."

Rule 32(b)

Present Rule 32(b) preserves the opportunity to object at trial to use of a deposition, "[s]ubject to the provisions of Rule 28(b)." Style 32(b) changes the reference to "Rule 28(b)(4)." It is not clear that (b)(4) includes all of the objections that might be made under Rule 28. The reference to paragraph (4) was struck from the Style draft.

Rule 32(b) says "objection may be made." It was agreed that Style 32(b) effects an improper substantive change by saying "a party may object." There are circumstances in which a person who

is not a party may object. The Style Subcommittee will determine how to incorporate the breadth of the present rule, but if possible will avoid the awkward "objection may be made" phrase.

Rule 32(c)

Style Rule 32(c) carries forward present 32(c)'s reference to offering a deposition "in stenographic or nonstenographic form." As before, these terms seem antiquated. It was suggested that "transcript or nontranscript form" would be better, and would not effect a substantive change. Indeed, a deposition will not be offered in "stenographic" form — only a transcript, not the stenographic symbols, will do. Such is current practice. It was suggested that the Style Subcommittee consider this change, including this form: "must offer transcript and may offer nontranscript."

Rule 32(d)

There is an apparent inconsistency between present Rule 32(d)(2) and (d)(4). (d)(2) requires that an objection to the officer's qualification be made after it becomes known or could be discovered with "reasonable diligence." (d)(4) requires that objections to the transcription or preparation of a deposition be made with reasonable promptness after they are ascertained or after they might with "due diligence" have been ascertained. The difference has endured since the 1938 rules. It seems desirable to use the same term in both places. "Due" diligence has acquired many overtones since 1938, suggesting that it would be better to adopt "reasonable" diligence as the single expression. Professor Rowe will undertake research to determine whether any distinction between "due" and "reasonable" diligence has emerged under Rule 32. If no distinction is found, Style 32(d)(2)(B) and (d)(4) will both be changed to "reasonable" diligence.

Present Rule 32(d)(3)(A) says that objections "are not waived * * * unless." Style 32(a) changes this to a more positive: "are waived if * * *." It was suggested that the change will encourage objections at deposition, an undesirable development. But it was pointed out that present (d)(3)(B) says objections "are waived," and that this is carried forward in Style (d)(3)(B) as "is waived." the rejoinder was that present (A) seeks to discourage objections at deposition to competency, relevancy, or materiality, while (B) seeks to encourage objections to such lesser matters as "irregularities." The distinction is between the substance and the form of the deposition testimony; the Style tag lines in (d)(3)(A) and (B) do not capture this distinction. The Style Subcommittee will work on a means to restore (A) to a form that restores the essence of "is not waived unless," and will work on the tag lines.

Style Rule 32(d)(3)(A)(ii) adds "cured," a word not in the present rule. Discussion sought the differences between "obviating," "removing," and "curing" the ground for an objection. Professor Kimble stated that "dictionaries do not provide answers to questions of this sort." "Obviated" was thought an obscure word; "cured" gives a sense of affirmative action. It was agreed that "obviated" would be deleted. The Style Subcommittee will try to find a single word that

replaces all three — perhaps "cured," or "corrected," recognizing that it may be awkward to speak of "correcting" a "ground" for an objection. The same change will be made in (d)(3)(B)(i).

It was observed that present (d)(3)(B) refers to "errors of any kind," while the Style draft renders this as "matters." No change was suggested.

No response was offered to the question whether there is any difference between present (d)(3)(C), which requires that objections to Rule 31 deposition questions be made at specified times "and" within 5 days after service of the last questions authorized, and style (d)(3)(C), which says "or" within 5 days.

Style Rule 32(d)(4) requires that an objection be made "promptly." Present (d)(4) requires "reasonable promptness." On the face of these words, there appears to be a difference. "Reasonable" is a softening word; it gives comfort to lawyers — a quip was made that "lawyers think 'reasonable' means 30 days." But it is likely that (d)(4) will be amended, in line with the (d)(2) discussion, to refer to "reasonable" diligence. Deletion of "reasonable" promptness was approved because the change does not seem likely to make a difference in practice and in order to avoid repeating "reasonable" in close proximity.

Rule 33(a)

Style Rule 33(a)(1) introduces a question that recurs with Rules 34 and 36. Present Rule 32(a) concludes with a reminder of the Rule 26(d) discovery moratorium. This cross-reference was deliberately added in 1993 when Rule 26(d) was amended. The Rule 26(d) moratorium has been in place for ten years now, and should have become familiar. But the cross-reference may continue to serve a purpose. It makes it clear that the court may grant leave to disregard the moratorium. And in practice some people "jump the gun," ignoring the moratorium; deletion of the cross-reference is likely to increase this practice. The cross-reference can be restored with only a few words: "a party may, at the time permitted by Rule 26(d), serve * * *." This is another of the cross-reference questions. An informal vote, including some participants who are not Subcommittee members, resolved by a 5:4 margin to approve the Style draft omission of the cross-reference. This vote and the question will be reported to the Advisory Committee.

The "stipulation" question reappears with Rule 33(a). The present rule requires a "written stipulation" to serve more than 25 interrogatories. Style 33(a)(1) calls for a "written agreement." It was suggested that "written agreement" may suffice here. We should adopt a consistent usage of "stipulation" when we want a formal written and filed record. "[W]ritten agreement" may suffice here. But we need to find a way to ensure that the intended distinctions are understood and carried into practice.

It was pointed out that present 33(a) says that leave to serve additional interrogatories "shall" be granted, while Style (a)(1) says "may." This translation of "shall" was found acceptable.

It was pointed out that present Rule 33(c) permits interrogatories that relate to any matters within the scope of Rule 26(b)(1); this is carried forward in Style 33(a)(2). But both present Rule 34 and Style Rule 34 refer to all of Rule 26(b). Professor Rowe will look into this.

Present Rule 33(c) states that an interrogatory that involves an opinion or contention "is not necessarily objectionable." That seems to say that the interrogatory may be objectionable, but then again it may not be objectionable. A determination must be made in each case. Style 33(a)(2) deletes "necessarily," stating that the interrogatory "is not objectionable." This phrasing conforms to the original Advisory Committee draft that became the 1970 rule, and to the Committee Note that continued without change. But it may seem a substantive change. The semblance, however, belies the truth. There is no sense that "necessarily" has any effect on present practice. Rule 33(c) is administered as if it said "is not objectionable." The style change simply conforms to general practice and is proper.

It was pointed out that present Rule 33(c) focuses on an answer that involves an opinion or contention, while Style 33(a)(2) focuses on an interrogatory that asks for an opinion or contention. The change is acceptable as a style change.

Rule 33(b)

Style 33(b) omits present 33(b)(5), which is simply a cross-reference to the sanctions provisions in Rule 37. It was agreed that this deletion is proper; cross-reference to Rule 37 does not present the close question that is presented by the cross-references to the Rule 26(d) discovery moratorium.

Present Rule 33(b)(1) and Style 33(b)(2) call for answers "under oath," without adding "or affirmation." No change was suggested.

It was suggested that the Style Subcommittee reconsider the tag-line for 33(b)(3): it might better be "Time To Answer or Object," or "Time to Respond."

Present (b)(1) requires that a party who objects to an interrogatory "shall answer to the extent the interrogatory is not objectionable." Style (b)(2) says every interrogatory "must, except to the extent it is objected to, be answered * * *." The Style draft may mislead some lawyers to believe that there is an exception that excuses giving any answer to an interrogatory if there is an objection to part of it. This is a rule that gets "a lot of pressure." Judges daily encounter discovery disputes that arise from failure to answer parts of interrogatories that have not been objected to. One

alternative might be: "must, unless and to the extent it is objected to, be answered * * *." The Style Subcommittee will consider this question.

As a matter of style, a strong objection was made to splitting the verb structure in (b)(2) and at many other places in the Style draft. Professor Kimble responded that our style guides permit short interruptive adverbial phrases in the middle of the verb phrase.

It was pointed out that Rule 29 has been changed to call for a stipulation rather than an agreement in writing. The cross-reference in Style 33(b)(3) will be changed accordingly: "or be ~~agreed to in writing~~ stipulated [to?] by the parties under Rule 29."

Rule 33(c)

In keeping with the discussion of Rule 32, it was agreed that Style Rule 33(c) properly carries forward the present rule's permission for use as permitted under "the rules of evidence." the possible distinctions between "the rules of evidence" and "the Federal Rules of Evidence" will not be explored.

Rule 33(d)

p. 13 n. 1 asks whether present Rule 33(d) refers to an existing "compilation, abstract, or summary" of business records, or instead refers to a compilation, abstract, or summary that may be made by examining business records. Style 33(d) clearly adopts the latter view. It was agreed that the Style draft accurately captures the meaning of the present rule.

It was observed that Style 33(d) substitutes "determined" for "derived or ascertained" in the first part of present 33(d), but adheres to "derived or ascertained" further into the introductory sentence. It was concluded that there is no need to adhere consistently to "determined"; it means the same thing as "derived or ascertained." No change was recommended.

p. 13 n. 2 observes that some courts read present Rule 33(d) to permit an offer of business records only by representing that an answer to the interrogatory will be found there; the offer cannot be made if all that can be said is that the answer can be found there if it can be found anywhere. Style 33(d)(1) forecloses the possibility of this argument. It was agreed that Style 33(d)(1) is appropriate, and that there is no need to describe the possible change in a Committee Note.

Rule 34(a)

As with Rule 33, present Rule 34(b) includes a cross-reference to the Rule 26(d) discovery moratorium. It might be argued that there is a stronger reason to include the cross-reference in Rule 34, since there is no stated limit on the number of document requests. But the 5:4 rejection of the cross-reference was carried forward from Rule 33.

It was concluded that the Style (a)(1)(A) list of items that constitute documents should not be expanded to include a "video" recording. This is one of the modernization points that should be considered in a separate package. For the same reason, "computerized information" should not be added. The ongoing project on discovery of computer-based information will catch up these details.

The Style Subcommittee will consider further the style of the (a)(1)(A) words: "or, when necessary, be translated by the responding party," whether along the lines suggested at p. 14 n. 4 or along different lines.

Rule 34(a) does not now expressly provide for testing documents; testing and sampling are addressed only to "tangible things," which seem to be distinguished from documents. But courts often direct testing of documents to aid in establishing authenticity. A change to include such testing is not substantive because it conforms to current practice. It was agreed that the introduction of Style 34(a)(1) would be changed: "to inspect, ~~and~~ copy, test, or sample the following items * * *." Style 34(a)(1)(B) will be changed in parallel by striking the reference to testing or sampling: "(B) any tangible things~~ — and, as appropriate, to test or sample these things~~; or" ("[A]s appropriate" is deleted because appropriateness is a matter to be raised by objection and resolved by the court if the parties cannot agree.)

Rule 34(b)

The cross-reference to Rule 37(a) at the end of the second paragraph in present Rule 34(b) is deleted from Style 34(b). As with Rule 33(b), this cross-reference is not necessary.

Present 34(b) directs that a document request "set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity." Style 34(b)(1) separates this into subparagraphs (A) and (B). "(A) identify, by individual item or category, the items to be inspected; (B) describe each item with reasonable particularity." The Style draft seems to require that each item be described with reasonable particularity; the initial identification by category does not suffice. But the present rule seems to permit description of items by a category that is described with reasonable particularity. The initial permission to describe by category becomes a nullity if it must be supplemented with a description of each item. The difference is great. A party framing a document demand often cannot identify individual documents; a categorical description is all that is possible. It was suggested that the Style draft should restore the meaning of the present rule, and may find it desirable to do so by collapsing present subparagraphs (A) and (B) back into a single subparagraph. It also was suggested that "describe" — carried forward from

the present rule — is better than the Style draft attempt to translate "set forth" in the present rule as "identify."

As with Rule 33(b)(3), the cross-reference to Rule 29 in Style 34(b)(1)(A) should be revised to "stipulate": "directed by the court or ~~agreed to in writing~~ stipulated [to?] by the parties under Rule 29."

Rule 34(c)

Present Rule 34(c) refers to compelling a nonparty to produce "documents and things" by a Rule 45 subpoena. Rule 45(a)(1)(C) refers to production of "tangible" things. Style 34(c) properly describes compulsion to produce documents and "tangible things."

Rule 35(a)

Discussion of Rule 35 began with the observation that although close reading of the rule identifies several problems, they do not arise in practice. The examiner always reports in writing. The parties — and a nonparty who is examined — always get the report. But it remains important to style Rule 35 as carefully as can be managed.

Rule 35(b)

The first question addressed to Style Rule 35(b)(1) and (2) is whether the draft of (1) introduces an implied requirement that the examiner always produce a written report. It was agreed that this issue would be resolved by "flipping" paragraphs (1) and (2). The first paragraph will state the duty to deliver a report on request, and the second paragraph will require that the report be in writing.

Discussion then turned to the questions identified in the notes on pages 2 and 3. Present Rule 35(b) shifts between references to the party against whom an examination order is made and references to a nonparty who, being under the legal custody or control of a party, is subjected to a Rule 35 examination. The result is that it is not clear whether the party also gets a copy of the report when an examined nonparty requests a copy; whether a party who requests the report of an examination of a nonparty can waive the nonparty's privileges; and whether an examined nonparty who obtains a copy of the Rule 35 report can be compelled to turn over reports of other examinations of the same condition. Again, it was suggested both that these problems do not seem to arise in practice and that the Style draft generally carries forward the ambiguities of the present rule.

One change was made to bring the Style draft closer to the ambiguities of present Rule 35(b)(2): Style 35(b)(4) will say: "the party examined waives any privilege the party may have * * *." It was noted that (b)(4) raises interesting Enabling Act issues, made more interesting by the fact that the privilege waiver was adopted in the original 1938 rules, long before the 1988 adoption of § 2074(b) relating to rules that affect evidentiary privileges.

It was noted that present Rule 35(b)(1) authorizes exclusion when "an examiner fails or refuses to make a report." Style 35(b)(5) is more open, authorizing exclusion "if the examiner's report is not provided." The Style version reaches the case in which the examiner does make a report, but the party refuses to provide it. The change was found proper. And it was noted that the ordinary reason for an examiner's refusal to make a report is that the party who obtained the examination refuses to pay.

Present Rule 35(b)(3) refers to an examination "made by agreement of the parties," and applies Rule 35(b) "unless the agreement expressly provides otherwise." Style 35(b)(6) refers to an examination made "by the parties' agreement," and applies Rule 35(b) "unless the agreement states otherwise." Should we require that the agreement be in writing, or even a stipulation? It was pointed out that practice probably varies, and that a lot of these agreements are oral. No change was suggested.

p. 3 n. 8 points out that present Rule 35(b)(3) refers to "discovery" of an examiner's report, while Style (b)(6) refers to "obtaining" the report. The choice of words was left to the Style Subcommittee.

Rule 36(a)

The 5:4 vote against restoring the cross-reference to the Rule 26(d) discovery moratorium was carried forward from the discussion of Rules 33 and 34.

As with Rules 33 and 34, the Style 36(a)(3) cross-reference to Rule 29 will be changed to stipulation: "directed by the court or ~~agreed to by the parties~~ stipulated [to?] by the parties under Rule 29."

Style 36(a)(4) introduces a new element not found in present 36(a): the answer must, "if not admitting the matter," specifically deny. It was agreed that this new element was proper. But it was suggested that the Style Subcommittee consider a different expression: "If not admitting the matter, the answer must * * *."

It was agreed that Style 36(a)(4) is awkward in referring to a statement "why the answering party cannot truthfully admit or deny," but concluded that there is no better expression.

The style discussion of split verb structures was renewed by a suggestion that Style 36(a)(6) would be better if phrased: "subject to Rule 37(c), the party may deny * * *."

p. 18 n. 4 points out that the 1970 Committee Note gave excellent reasons why a party who has answered should be able to move to determine the sufficiency of the answers. The 1970 rule, however, provides only for a motion by the party who requested the admissions. This shortcoming is a matter for the reform agenda.

Finally, the initial vote was to accept deletion of "the truth of" from Style 36(a)(1). The later discussion of Rule 37(c)(2), however, led to a direction to reinstate the words: "admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) * * *."

Rule 36(b)

Present Rule 36(b) combines references to Rule 16 with standards for permitting withdrawal or amendment of an admission that are more open than the Rule 16 standards for amending a pretrial order. Style 36(b) seeks to clarify the relationship at the beginning of the second sentence: "Subject to Rule 16(d) and (e) * * *." It is important to be clear that Rule 16 allows amendment of admissions in a pretrial order. The discussion led to agreement to amend the Style draft as follows:

> Subject to Rule 16(d) and (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action; and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits~~; and the admission has not been incorporated into a pretrial order~~. * * *

p. 19 n. 2 points out that the final sentence of present Rule 36(b) includes three safeguards against use of an admission in another proceeding: "Any admission * * * is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding." Style Draft 36(b) omits "and is not an admission for any other purpose," leaving only double protection. It was suggested that all three protections are needed. Use in a grand-jury investigation, for example, may not be reached as use in another "proceeding." It was replied that a grand-jury investigation is not "the pending action," so use is precluded. But it was rejoined that "they had something in mind when they carefully chose this language." As another example, the IRS might say that the admission can be used for tax purposes — that is not a "proceeding." "Any other proceeding" reaches beyond the Rules. It was noted that admissions in personal-injury litigation may be offered for use in later divorce, custody, incompetence, and like proceedings. It was determined to restore "for any other purpose, or" subject to further styling by the Style Subcommittee: "it cannot be used against the party for any other purpose or in any other proceeding."

Rule 37(a)

Style 37(a)(1) calls for "notice" to other parties; present (a) calls for "reasonable notice." The Style project often deletes such words as "reasonable"; it is important to maintain consistent usage.

Present Rule 37(a)(1) refers to the court "where the discovery is being, or is to be, taken." Style 37(a)(2) refers to "the court where discovery occurs." The element of futurity is omitted. The Style Subcommittee will change (a)(2) to say "is, or will be, taken," or something equivalent.

It was pointed out that the cross-reference in Style 37(a)(3)(B)(ii) had not caught up with the restoration of Rule 30(b)(6) to that designation in the Style version. The cross-reference will be changed from (b)(4) to (b)(6).

Most Subcommittee members agreed with the p. 22 n. 1 style suggestion that Style 37(a)(5)(A) would be improved by saying "after the motion ~~has been~~ was filed." And the tag-line for (5)(A) might be improved by changing "Information" to "disclosure or discovery." The Style Subcommittee will decide on both points.

Style (5)(C) omits "in a just manner" from the present rule's directions about apportioning expenses incurred regarding the motion. Omission of such words is common throughout the Style Project.

Rule 37(b)

It was decided that "directed," carried forward by Style Rule 37(b)(1) from present (b)(1), should be changed to "ordered": "after being ~~directed~~ ordered to do so * * *." There is no need for further Style Subcommittee deliberation on this change.

Present Rule 37(b)(2) provides for sanctions when a party "fails to obey an order to provide or permit discovery." Style (b)(2)(A) reduces this to "fails to obey a discovery order." p. 23 n. 2 suggests that the change broadens the meaning of the rule — a party might, for example, breach a confidentiality provision. Confidentiality provisions often are established by stipulated "umbrella" orders that are difficult to characterize as orders to provide or permit discovery. The breach of confidentiality does not seem to be failure to obey an order to provide or permit discovery. The sanctions provided by Rule 37(b)(2) — striking pleadings, directing default, or the like — do not seem appropriate for breach of a confidentiality order. These provisions, moreover, are "high-profile"; lawyers are very sensitive to them. It was agreed to restore the present language, subject to further styling by the Style Subcommittee: "fails to obey ~~a~~ an order to provide or permit discovery ~~order~~, including * * *."

It was asked whether "prevailing party" in Style (b)(2)(A)(i) is the same as "the party obtaining the order." Although "prevailing party" may be used to refer to the party who wins on the merits, here it clearly refers to the party who won on the motion. There is no need to change the Style draft.

Present 37(b)(2)(E) refers to a party who "failed to comply" with a Rule 35 order to produce another person for examination. Style (b)(2)(B) applies if a party violates" a Rule 35 order to produce another. It was decided that the present language should be restored, so that Style (b)(2)(B) will read: "If a party ~~violates~~ fails to comply with an order under Rule 35(c)**[a]** * * *." (In a point not noted, the cross-reference to Rule 35 must be changed to catch up with the most recent Style version: it is now an order under Rule 35(a).) In the same vein, the reference in Style (b)(2)(B) to a "disobedient" party is to be removed: "unless the ~~disobedient~~ party shows * * *." As a global matter, the use of "disobedient" will be reviewed further.

Rule 37(b) now concludes with a paragraph stating that "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order" to pay reasonable expenses. Style 37(b)(2)(C) translates "shall" as "must." The intent of "shall" in 1970 was to encourage courts to award sanctions, tightening up on discovery practice. But all agree that courts are in fact quite reluctant to order payment of motion expenses. In addition, the "in lieu" language seems to establish broad discretion. It can be argued, further, that it is overkill to award expenses if a more powerful sanction is also ordered — if the action is dismissed, for example, an award of expenses to the defendant may provide greater benefits than the defendant would have obtained by litigating further to dismissal on the merits. The subcommittee initially voted to change "must" to "may." But later it decided to ask Professor Rowe to undertake research to help determine whether this "shall" is better translated as "must" or as "may."

It was asked whether an award under Style (b)(2)(C) is appropriate if a party produces a nonparty for a Rule 35 examination but the nonparty refuses to submit. The response was that this uncertainty exists in the present rule and cannot be resolved in the Style project.

Rule 37(c)

Another translation of "shall" arose in Style 37(c)(2). The present rule describes an order to pay the expenses incurred in proving a matter that a party failed to admit under Rule 36, and then says: "The court shall make the order unless * * *." The Style draft says: "The court must so order unless * * *." It was observed that the use of "must" does not really compel the court — one of the escapes is a finding that "there was other good reason for the failure to admit." And "must" seems to demean the court's independent authority under the rule. But it is not clear that "may" does it. And the purpose of "shall" was to "send a strong warning to lawyers." The 1970 theory was that a lawyer "who causes discovery not to work should pay." The suggestion that the rule might say: "the court will so order unless" was met with the reply that we should not further proliferate words of command in the rules. The Subcommittee decided to ask Professor Rowe to research the choice between "may" and "must" as the translation of "shall" throughout Rule 37.

Style Rule 37(c)(2) became the occasion for reconsidering deletion of "the truth of" in Style 36(a)(1). Present 37(c)(2) addresses a party who fails "to admit the genuineness of any document or the truth of any matter as requested under Rule 36" when "the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter." Style (c)(2) addresses a party who "fails to admit what is requested under Rule 36" when the requesting party "proves a document to be genuine of the matter true." Discussion began by asking whether "true" should be retained in light of the initial decision to leave "truth" out of Rule 36. The Rule 36 discussion assumed that a party can admit for purposes of the litigation without conceding truth. So it should be here. It was responded that "genuineness of a document" presents no trouble. So it should be of "truth": what else are you admitting but the truth? People do not now answer by saying "not true, but we admit for purposes of this action." It would be possible to avoid the issue by saying in Style 37(c)(2) something like: if the requesting party later proves the matter requested." After further discussion, it was concluded that the least damage would be done by restoring "the truth of" to Style 36(a)(1) and leaving Style 37(c) as presented.

Rule 37(d)

Literally, present Rule 37(d)(1) seems to say that a party is subject to sanctions for failing to appear for any deposition. Style 37(d)(1)(A)(i) clearly says that sanctions are appropriate when the party fails to appear "for that person's" deposition. The Style draft appropriately corrects a minor drafting lapse in the present rule.

It was noted that (d)(1)(A) retains the "any just order" language. It would not do to say "any order"; absent more drastic style revision, "just" may be required here. One alternative suggested for consideration by the Style Subcommittee was: "may order sanctions if * * *." This approach would tie (d)(1) directly to (d)(3), which begins: "Sanctions may include * * *." (In response to another question it was agreed that "may include" does not impliedly exclude sanctions not described in (d)(3).)

Style 37(d)(3) presents the same question of translating "shall" as presented by Style 37(b)(2)(C). Resolution will depend on the results of Professor Rowe's research.

Rule 45(a)

Three words were deleted from Style 45(a)(1)(A)(ii) to make it parallel with (A)(i): "state the title of the action, the ~~name of the~~ court in which * * *."

The Style Subcommittee was asked to consider new tag-lines for (a)(2) and (3): something like "(2) Issuance From the Court," and "(3) Request for Issuance."

The Style Subcommittee also was asked to consider a change in each of (2)(A), (B), and (C): "~~in the name of the~~ from the court * * *." p. 29 n. 1 points out a change in Style (a)(2)(B) from the present rule provision for a deposition subpoena. The present rule directs that a deposition subpoena issue from the court "for the district designated by the notice of deposition as the district in which the deposition is to be taken." The Style rule reduces this to the court "for the district where the deposition is to be taken." The change was found appropriate.

Rule 45(b)

The Style Committee was asked to consider shortening the tag-line for Style 45(b)(1). Professor Kimble noted that the heading should be as informative as possible.

Present Rule 45(b)(1) requires "prior notice" to the parties of a subpoena that commands production of documents or things. Style (b)(1) deletes this requirement. On its face, the present rule does not answer the question: "Prior to what"? At least some cases and the leading treatises say that notice must be prior to, or at least contemporaneous with, issuance of the subpoena. The purpose is to give an opportunity to object before the subpoena is served. Some version of "prior to" must be restored. It would be easy to draft a rule that says "before [or at the time] the subpoena issues." "When" the issue subpoena issues might do it. Before a drafting choice is made, however, Professor Rowe will undertake research to confirm the interpretation of the present rule.

The Style Subcommittee reminded the Advisory Committee that Style 45(b)(2)(D) illustrates a global issue. The present rule uses the term "statute of the United States." There was a time when some participants believed that this term was used to reflect the statutory definition in 28 U.S.C. § 451. Further research, however, showed that "statute of the United States" was used in the original 1938 rules, and that there was no apparent ancestor for the § 451 definition first adopted in the 1948 codification of the Judicial Code. The Advisory Committee has expressed a preference for "United States statute." The Style Subcommittee would prefer "federal statute."

Rule 45(c)

Several suggestions about Style 45(c)(1) were made for Style Subcommittee consideration. It was noted that "shall" in the present rule is translated as "must" — the court must enforce the duty and must impose sanctions; the Rule 37 research project may suggest further consideration. As a matter of pure style:

> The issuing court ~~from which the subpoena is issued~~ must enforce this duty and must impose on a party or attorney who violates this duty an appropriate sanction, which may — includ~~ing~~ lost earnings and reasonable attorney's fees.

Present Rule 45(c)(2)(A) lists "books, papers, documents * * *." Style (2)(A) omits "papers," but retains "books." As earlier, "books" seems antiquated in this setting. Rule 34(a), the analogue of Rule 45, does not say "books," but simply says "designated documents or tangible things, or to permit * * *." Likewise Rule 34(c) refers only to documents and tangible things. To be sure, "books" is to be retained in Rule 26(b)(1). But the parallel to Rule 34 is important. Deletion of "books" was recommended to the Style Subcommittee, but with the suggestion that the Advisory Committee should review the issue. [The same question arises in present 45(a)(1)(C), Style 45(a)(1)(A)(iii).]

Another suggestion to the Style Subcommittee focused on Style (c)(2)(B): "14 days after ~~being served with~~ the subpoena is served * * *."

Style 45(c)(3)(A)(ii) adds a comma not in the present rule: "where that person resides, is employed, or regularly transacts business in person." For the reasons advanced in p. 33 n. 1, the addition cures a serial comma lapse in the current drafting.

All agreed that it is proper to translate "shall" in the current rule as "must" in (c)(3)(A): the court must quash or modify a subpoena that offends with respect to items (i) through (iv).

There was lengthy discussion of a seemingly modest addition made to Style 45(c)(3)(B). Both present and Style (c)(3)(A) state the circumstances in which a court must quash or modify a subpoena; each begins "on timely motion." Both present and Style (c)(3)(B) state the circumstances in which a court may quash or modify a subpoena. Neither refers to a motion or a timely motion. Adding "On timely motion" to (B) seemed to establish a useful parallel. This view was supported by the argument that the grounds of permissive modification listed in (B)(i), (ii), and (iii) are distinct from the grounds of mandatory modification listed in (A)(i), (ii), (iii), and (iv). When (A)(iii) refers to "privileged or other protected matter," for example, it means to refer to privilege and work-product (including Rule 26(b)(4) expert work-product); it does not mean to refer to the trade-secret ground of permissive protection listed in (B)(i). Privilege and work-product must be protected when appropriately invoked; trade-secret disclosure is a matter of judicial discretion. B(ii)'s reference to an "unretained expert" falls completely outside the range of Rule 26(b)(4) experts that invoked (A)(iii) through "protected matter." And so on. Another comparison was drawn to Rule 45(c)(2)(B). Both present and Style versions set an explicit 14-day period for "objections" to a subpoena. This "objection" procedure is distinct from the relief provisions provided by 45(c)(3). There was a deliberate decision to adopt a more open-ended "timely motion" procedure in (c)(3)(A). There is no apparent reason to leave the question open in (c)(3)(B). Professor Rowe was asked to research these questions to support a final resolution.

Present Rule 45(c)(3)(B), at the conclusion of item (iii), describes the permissive grounds of protection "to protect a person subject to or affected by the subpoena." This statement of purpose is omitted from Style (c)(3)(B). It will be restored. The initial suggestion is to read: "may — to protect a person subject to or affected by it — quash or modify a subpoena * * *." The final form will be determined by the Style Subcommittee.

Rule 45(d)

The Style Subcommittee was asked to consider changing the caption of subdivision (d): "~~Duties in~~ Responding to a Subpoena."

Style 45(d)(2)(B) substitutes the privilege-describing language of Rule 26(b)(5) for the language of present 45(d)(2). The substitution was found desirable.

Rule 45(e)

The Style Subcommittee agreed that it should change "court in whose name a subpoena is issued." The current expression is "the court from which a subpoena was issued." But the Style Subcommittee may consider further refinement of the "issuing" language.

Present Rule 45(e) covers failure to obey a subpoena "without adequate excuse." Style 45(e) says "inexcusably fails to obey." It was agreed that "without adequate excuse" is not the same as "inexcusably fails," which seems to equate to "without excuse." The notion of adequate excuse will be restored, in a form to be crafted by the Style Subcommittee.

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

September 16, 2003

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Proposed Rule "G"*

The Forfeiture Subcommittee has had extensive discussions about a proposed new Rule "G," summarized in Professor Cooper's notes of conference calls that occurred on March 25, July 15, and August 19, 2003. In those calls, the subcommittee considered several possible drafts of Rule "G," which are also attached.

A significant amount of time and effort has focused on the "standing" of potential claimants under proposed new Rule "G" to assert a claim to property subject to forfeiture. The attached materials include a research paper on the issue of "standing" prepared by Ned Diver, former law clerk to Judge Scirica. The Forfeiture Subcommittee is holding a conference call on September 25 that will focus on the "standing" issue. The results of that call, and a copy of a proposed draft of Rule "G," will be circulated to the full committee either shortly before or at the Sacramento meeting.

John K. Rabiej

Attachments

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, 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.

15 July 2003

Participants in the July 15 conference call included Cassella, Cooper, Heim, Jeffries, Marcus, McCabe, McKnight, and Rabiej.

Rule G(4)

Discussion, led by Heim, focused entirely on Rule G(4). Particular concern was expressed as to five topics: How should notice be accomplished for unknown claimants — the questions involve modes of publication, including reliance on the internet; whether e-mail should be permitted as a means of direct notice under (4)(b); whether notice addressed to an inmate at a prison always satisfies "Mullane" requirements; and what point should be used to measure the time to file claims — whether the date when notice is sent or the date when it is received. These topics were woven into discussion of each paragraph of subdivision (4).

(4)(a)(i)(C): As drafted (4)(a)(i)(C) allows newspaper publication in any one of three places — where the action is filed, where the property was seized, or where the property is located. It was pointed out that NACDL believes that notice always should be published where the action is filed. In addition, if the action was filed in a different place, notice should be published either where the property was seized or — in case of real property that was not seized — where the property is located. Is that too much of a burden? In response, it was pointed out that the current rule and statute refer only to publication where the action is filed. That is antiquated — it dates from a time when the action could be filed only where the property is located. But venue has expanded, and the purpose of the draft rule is to provide an opportunity to publish notice in a place that is most likely to reach potential claimants. At the same time, notice is costly: the minimum cost is $1,000 in the least expensive locations, and $2,000 is common. The government as a matter of practice does publish in multiple locations when that seems appropriate. And it may make no sense to publish where the action is filed if the property, seizure, or likely claimants are located elsewhere.

It was suggested that these difficulties could be met by requiring publication both where the action is filed and also — if different — in the place of seizure or the location of non-seized real property, but also by permitting publication in only one place if the court grants relief. But it was responded that publication usually is "immediate"; the need to seek relief from the court would involve thousands of applications in cases and at a time when the judge has no other reason to become involved. And in more than 90% of forfeiture proceedings, there will be direct notice under (4)(b) to at least some one potential claimant. Usually the property was seized from someone, or there is a record owner or lienholder.

A different question addressed the NACDL concern that property may be moved away from the place of seizure to justify publication in an unlikely place as the "location." The purpose of referring to the place where property is located was to address real property that has not been seized — an action may be filed in one district to forfeit real property in another district. This can be made clearer by drafting the rule to refer to the location of property that was not seized.

Further drafting suggestions were made. One was to require publication in whichever of the alternative places is most likely to reach claimants. Another is to say something in more general precatory terms about the need for notice by means best calculated to reach potential claimants. This chore will be addressed.

(4)(a)(iii) provides that publication is not required if the value of the property is less than $1,000 and direct notice is sent under (4)(b). It was asked how the rules should approach the drafting problem that $1,000 may be an appropriate threshold now, but become too low with future inflation. $1,000 is about the minimum cost of notice in the least expensive districts. It seems inappropriate to require costly publication when the value of the property — perhaps a cheap handgun or a "dirty magazine"

— is far less than the cost of notice. One possibility would be to discard any specific dollar figure, relying instead on a provision for court permission to dispense with publication when there is direct (4)(b) notice and the cost is unreasonable in light of the value of the property (or the cost exceeds the value of the property). The alternative of providing a value index did not seem attractive, although the Bankruptcy Rules do use indexing.

As part of this discussion, it was asked whether the provision in (4)(a)(i) describing notice "unless the court orders otherwise" was intended to permit the court to order variations from the requirements of (ii), (iii), and perhaps (iv). That was not the intent.

(4)(a)(iv) addresses publication when the forfeiture property or a potential claimant is in a foreign country. The action may be filed in Miami because that is where the property is, or it may be filed in Miami even though the property is in Spain. It allows publication in the place where the action is filed because that may be where potential claimants are located — the property is in Spain, but the action is filed in Miami. It allows publication where the property is located, because the claimants may be in Spain, not Miami. It provides for notice in a newspaper published outside the country where the property is located, but circulated within it, because some countries forbid publication in domestic newspapers. In one action, notice was published in the International Herald Tribune because the "victims" were located in 72 countries. It was asked whether here too there should be a double notice requirement: always in the place where the action is filed, and also in the country where the property is located or where potential claimants are likely to be found? It was answered that often that would be an unnecessary burden; often there is only one "obvious" place to publish. Here too, precatory language will be added to parallel the language to be added to (iii).

As a separate matter, it was pointed out that (iv) refers to a person "believed to be located in a foreign country." Whose belief counts? It was agreed that this should be shifted to an active voice — if the attorney for the government believes, or something like that. Part of the purpose is to avoid any requirement that a court make a finding on this question.

(4)(a)(v) would permit notice on the Internet to substitute for newspaper publication in the discretion of the Attorney General. The obvious question is whether this should be permitted only as a supplement to newspaper publication, not as a substitute. Again, publication is expensive. And it is seldom effective. Rather than convey notice to plausible claimants who otherwise would not have notice, newspaper publication tends to draw cranks. There is no point in adding Internet posting if newspaper notice has to be published anyway. Indeed, the Department of Justice does not now have the technology for Internet notice. It would have to establish a suitable "window" on the Department or Marshal's web page. The window would reach notices of forfeiture by several alternative methods — the date and place of seizure, description of the property seized, and so on. One compromise approach would be to authorize the court to approve Internet notice as a substitute for newspaper publication; if the device proved effective, it might become necessary to amend the rule.

Further discussion pointed out that Internet notice has the potential to be far more effective than newspaper publication. Much depends on the design of the web site. Accepting that view, it still remains to decide whether Internet notice should be confided to government discretion. What we really want is for the Department to design a web site that works, and then approve its use for all cases. But there may not be sufficient incentive for the Department to construct the site on a trial basis. Among other risks, a trial may show that the nature of internet notice draws many more cranks than newspaper publication, and does little to find real claimants.

This provision will be revised. It may say that Internet notice can be substituted for newspaper notice if in the circumstances it seems more likely to be effective. Some other functional concept may be found. But something will be required to replace simple reliance on the Attorney General's discretion.

4(a) Structure: It was agreed that the structure of 4(a) would be improved by separating provisions dealing with the content of the notice from the provisions dealing with the method of giving notice.

The content provisions are now (a)(i)(A) and (B). The rest is method. As to contents, we should add a provision — similar to the pleading requirement in (2)(a) — requiring a description of the property subject to forfeiture.

4(b) is a first-ever provision for direct notice to any person who, appearing to have an interest in the property, is a potential claimant. There is no provision setting the time when notice must be sent. The forfeiture statutes do not have any such requirement. Although it would be possible to set some time limit from the time the action is filed, the limit would be one more complication. And the limit would serve little purpose. The government cannot move the case along until notice is sent: it is the sending of notice that establishes the time to claim, and, after claiming, to answer.

NACDL raises a broader question. It would prefer that instead of notice, potential claimants be served in the manner of Civil Rule 4. But the "defendant" in an in rem forfeiture action is the property; service is made by executing the arrest warrant or restraining order, or by the distinctive procedures established for real property. The Department of Justice believes that claimants are entitled to due process notice, but not formal service.

It was pointed out that CAFRA refers to filing a claim 30 days from "service" of the complaint. Yet this reference to service appears in conjunction with provisions that invoke the Admiralty Rules. The Department reads this reference to service to mean "receiving" a copy of the complaint, not to imply that technical service is required.

(b)(ii): One of the methods of notice authorized by (b)(ii) is service on counsel representing a potential claimant. The representation need not be with respect to the seizure; it may be representation in a related investigation, administrative forfeiture proceeding, or criminal case. The representation must be in a related proceeding, reducing the concern that counsel in some quite different matter (such as family-law, personal-injury, or other typical human problems) should not be expected to assume responsibility even for notice in a forfeiture proceeding. But real questions remain whether it can be presumed that counsel is authorized to receive notice in a separate proceeding, and whether counsel will believe that one authorization authorizes representation in separate forfeiture proceedings. Counsel may not wish or even be willing to undertake representation in the forfeiture proceeding. The Department, however, relies on case law saying that service can be made on counsel. Service on counsel is in fact more effective because counsel understands the notice and the importance of responding to the notice. The claimant may choose to ignore the notice. At times counsel is the only person who can be located. Generally the Department tries to serve both counsel and claimant, but needs a safe procedure for cases where it has no address — or a wrong address — for the potential claimant. It was asked whether the rule should be amended to require an effort to give notice to both potential claimant and counsel when that is reasonably possible. This question was supported by observing that diligent efforts should be made to send notice to the potential claimant. An effort will be made to draft an amendment that requires appropriate efforts to send notice to the potential claimant, but that accepts service on counsel in a related proceeding as sufficient when that is all that can reasonably be accomplished.

A separate question was asked about the mode of notice. The draft allows electronic mail to substitute for postal mail or private carrier. Why not always require post or private carrier, allowing supplementation by electronic mail? It was observed that when the government has an active e-mail address, that should suffice, particularly when the potential claimant has asked for notice by that means. Electronic mail would be used only when the government is confident that it can generate adequate proof of notice, akin to proof of service. Electronic mail is a convenient back-up when postal mail is returned, or the addressee refuses to sign a return receipt. The rule might require that the government show that notice was sent to a working e-mail address and was reasonably calculated to effect actual notice. But an alternative draft will be prepared that allows e-mail notice only with the consent of the potential claimant. As a starting point, Civil Rule 5(b)(2)(D) will be considered — Rule 5 authorizes service of papers after the summons and complaint by electronic means "consented to in writing by the person served."

The relationship between (b)(ii) and (b)(iii) and (iv) was addressed. The intention was that (i) state the requirement of notice. (ii) describes the general means for giving notice. (iii) describes the particular means for addressing an incarcerated person. (iv) allows — but does not require — notice to be sent to the address given by a person who was arrested in connection with the offense giving rise to the forfeiture but who is not incarcerated. It may be that some revisions should be made to make this relationship clear to all readers.

It was agreed that the final sentence of (b)(ii) stating that notice is sent on the date it is mailed or given to a commercial carrier should be made a separate paragraph. (It might be added that this provision does not state the date of sending notice by electronic means.)

(b)(iii): (b)(iii) provides notice to a potential inmate who is incarcerated by sending to the incarceration facility. It says nothing of a return receipt. Given the uncertainties of internal mail distribution systems, it was suggested that a return receipt should be required. Requiring this proof would relieve the government, courts, and rule drafters of the need to police the reliability of internal distribution systems. And proof of actual receipt also would protect against failures by the unreliable systems. But it was pointed out that the receipt will be signed by the jailer, not the potential claimant. In the Duesenberry case the Supreme Court ruled that due process is satisfied by addressing notice to a person at a prison address; it refused to require proof that the prison distribution system actually got notice to the inmate, but accepted proof that the prison has a generally reliable distribution system. This ruling reflects the problem that potential claimants are incarcerated in every type of facility known in this country, including local lock-ups. The United States cannot assure the reliability of internal delivery systems in all of these facilities. Neither will it work to draft a rule that defines suitable internal distribution facilities. But as a matter of comfort, (b)(iii) can be amended by adding to it the "magic words" the Supreme Court used to describe due-process requirements.

It was observed that if the potential claimant's lawyer is served under (b)(ii), that gives additional protection against possible failures of a prison's internal mail distribution system. This observation led back to the question whether notice should be required both to counsel and to the potential claimant. Again it was noted that the Department believes it wrong to require notice to both; at most, an attempt to send notice to the potential claimant should be required if the Department seeks to rely on notice to counsel.

(b)(iv): It was noted that (b)(i) says the Attorney General "must" send notice. (b)(iii) says that notice to an incarcerated person "must" be sent to the incarceration facility. But (b)(ii) says that notice "may" be sent to the potential claimant or to counsel, and (b)(iv) says that notice "may" be sent to a person arrested but not incarcerated at the address given at the time of arrest or release from custody unless a different address has been given later. Why this alternation of "must" and "may"? The basic notice requirement in (i) is indeed a requirement, a "must." "May" is used in (ii) to express the option — either notice to the potential claimant or notice to counsel. "Must" is used in (iii) to make clear the obligation to address notice to the claimant at the place of incarceration, defeating any attempt to rely on notice to another address such as home, a relative's home, or the like. And "may" is used in (iv) because the government may in fact know of a better address than the address given by the potential claimant at the time of arrest or release.

(b)(v): The first question addressed the relationship between (b)(v), setting the time to file a claim after notice is sent, and Civil Rules 5 and 6, which describe the time of service and the time to respond after service by mail, carrier, or electronic means. Rule 5(b) sets the time of service by mail as mailing; service by carrier occurs at the time of delivery to the agency designated to make delivery; service by electronic means at the time of transmission (but this is undone if the party making service learns that the transmission did not reach the person to be served).

(b)(v) sets the time to claim to run from the time notice is sent by analogy to CAFRA. Section 983(a)(2)(B) describes the notice procedure for administrative forfeiture, setting the time to

respond from the date the letter is mailed. Section 983(a)(4), addressing judicial forfeiture proceedings, sets the time to claim as 30 days from "service" of the complaint. But it does not say what "service" is, nor how it is accomplished. The question is parallel to the fundamental question addressed with (b)(i): should we require formal "service," or only notice?

NACDL objects to the provision that the notice sets the time for filing a claim from the time the notice is sent. It would prefer that the time be set from the time notice is received. But a specific date cannot be set in the notice if the time must be measured from the time of receipt; the government cannot know the time of receipt when it sends the notice.

One possible compromise would be to lengthen the time to claim measured from sending the notice. If the time is set at 35 days, 5 days longer than the statutory period, the result almost always should be more time than would be allowed by 30 days measured from actual receipt. (The most frequent occasions in which 30 days from actual receipt would allow more time are likely to arise from delays in prison mail distribution systems.)

The consequence of filing a claim late is that the claimant lacks "statutory standing." But the failure is not jurisdictional. Courts have authority to grant relief, and will grant relief if there is a good reason. Failure to get timely notice often would be good reason to grant relief.

General: It was suggested that the taglines introducing paragraphs (a) and (b) should be more helpful. Perhaps (a) should be "Notice by Publication," and (b) "Notice to Potential Claimants."

The present draft repeatedly places responsibilities on "the Attorney General." CAFRA repeatedly refers to the "government." The Criminal Rules carefully define "attorney for the government." There is a risk in referring to the Attorney General — acts by an Assistant United States Attorney may be held ineffective if there is not a sufficiently detailed delegation of authority. This is a general issue that must be considered further with respect to all parts of Rule G.

19 August 2003

Participants in the August 19 conference call included Cassella, Cooper, Diver, Heim, Ishida, Jeffries, Kyle, Marcus, McKnight, Rabiej, and Rosenthal.

Ned Diver's August 18 memorandum on standing was distributed on August 18. The standing issues pervade draft Rule G(7), one of the two subdivisions slated for this conference, and also are embodied in Rule G(5). It was decided that the broad standing question should be deferred to permit discussion of the topics that subcommittee members had a better opportunity to prepare.

Judge Kyle led the discussion of G(6) and (7). To help frame the discussion, subcommittee members had a memorandum describing the issues prepared by Cassella.

Rule G(6)

Subdivision (6) deals with preservation and disposition of property subject to a forfeiture proceeding. NACDL objects to some of its provisions, particularly (b)(i)(A) and (C).

Much of (b)(1), including subparagraphs (A) and (B), is drawn from Rule E(9)(b). (A), however, adds a new ground for ordering sale — that the property is subject to diminution in value. (C), allowing sale of property subject to a mortgage or taxes on which the owner is in default, is new. (D), allowing sale for "other good cause," also is new.

The provision for sale of property subject to declining value was explained to involve a variety of circumstances. The property may be a current model automobile, subject not only to storage costs but to inevitably falling value. It may be stock, subject to market fluctuations. A going business loses all value unless it is operated. A home may deteriorate if not occupied. The injury arises because the property is being detained in custody pending resolution of the action.

It was asked what property falls outside the diminution-in-value provision if market risk is treated as diminution in value. The response was that a pile of cash is outside, and so is a bank account.

Interlocutory sales are fairly routine, but do not occur in a large percentage of cases. The Department of Justice believes that current practice allows sale to protect against diminution in value, and seeks sale orders on these grounds, even though present Rule E does not expressly provide for it.

It was asked whether any need to protect against diminution in value is better served by the provision in (D) that allows sale for other good cause. The value of adding an express reference in the rule is that it avoids the need to establish that this is among the grounds that can be good cause for sale. Courts allow sale on this ground now; it is helpful to incorporate the practice in explicit rule text. When we are sure we mean it, it is better to put the provision in the rule than to relegate it to a Committee Note.

Yet almost all property is subject to diminution in value over time, with exceptions for rare items — a 2003 Jaguar is likely to depreciate for the foreseeable future, while a 1953 Jaguar may appreciate.

The concern about fluctuating market values was addressed from a style perspective. There are many commas in the draft. It seems to be intended that the final four categories are all qualified by "being detained in custody pending the action" — it is the court's custody that increases the risk of diminished value, not market fluctuations. But it may be argued that custody causes an inability to take advantage of market fluctuations, and thus causes a diminution in value. And "when there is a market, there is fluctuation."

At times the parties agree to a sale order. But party agreement is not inevitable even when declining value is inevitable. Some owners really want to regain possession of this particular

automobile, Often the inability to agree arises from sheer obstreperousness. Usually courts order sale without difficulty in such circumstances.

This discussion concluded by agreeing that "diminution in value" should be deleted. "It covers too many possibilities." This may be described in the Committee Note as one illustration of good cause for ordering sale.

Turning to (6)(C), it was noted that NACDL protests that sale of property subject to a defaulted mortgage or tax liens could exacerbate erroneous deprivations of property. But the reason for adding this provision — there is no analogue in present E(9)(b) — is that "almost always the owner stops paying on the mortgage." The Department prefers to ask the lender not to foreclose. A foreclosing lender is interested only in realizing the amount of its claim. The Department has an established policy of asking lenders to forgo foreclosure, including a practice of requesting authorization for a judicial sale that may yield a better price than a foreclosure sale. The sale proceeds are held in escrow pending completion of the forfeiture proceeding. If the property is not forfeited, the owner and mortgage lender divide the sale price according to their interests. If the property is forfeited, the lender (if innocent) gets the amount of its security interest. When a lender balks at this arrangement, the Department at times has been able to enjoin a foreclosure sale, or to remove a state-court proceeding and win a stay in federal court, or to invoke some statutes that allow it to force the mortgagee to make its claim in the forfeiture proceeding.

The court sale and escrow arrangement better protects the owner and the government by improving the prospect that the sale will yield an amount greater than the mortgagee's security interest. But courts are divided on the lender's ability to recover penalties, attorney fees, and like amounts when the sale proceeds are distributed. If the government loses its forfeiture claim, there is no federal law addressing the question whether the lender can recover penalties for late payment and the like — but the same questions arise when the property is not sold under federal-court order.

It was noted that the owner may stop making payments on mortgaged property because unable to pay, and that the seizure of property for forfeiture may be the cause. But the Department believes that ordinarily the failure to pay is because the owner concludes that further payments would only be throwing good money after bad. Whatever the reason, the Department believes that state-law obligations to make payments on a mortgage loan are not subject to a defense of impossibility or similar defenses based on the argument that government seizure of the debtor's assets caused the failure to pay. Although these arrangements are easily made when all parties agree, but claimants often oppose everything at every turn. It is helpful to have an express rule provision as support for persuading the lender that its interests can be effectively protected in this way. The Department has a published policy covering this practice.

NACDL has protested that the government often is the cause of mortgage defaults because it seizes all assets. But the court makes a balancing judgment. It may refuse to order sale if the claimant shows good reason for avoiding sale — it is the "family farm" — and good excuse for not continuing payments — the forfeiture proceeding has locked up available assets, and past payment history is good.

As with the diminution-in-value issue, this ground for sale could be covered by the residual "good cause" provision. But there may be an advantage in an explicit provision.

It was suggested that the rule should make clear the court's duty to look at all issues on all sides. This can be accomplished by adding a "good cause" requirement to all grounds for sale in (6)(b)(i): " * * * the court for good cause may order all or part of the property sold * * *." A generic "good cause" provision could be retained as (D), modified to avoid pure redundancy — "(D) other circumstances establish good cause" (or something like that).

The generic good-cause requirement would emphasize the interests of the owner who is not simply avoiding payment. The party moving for a sale order would have the burden in any event;

adding "good cause" would not much change the weight of the burden.

It was pointed out that this introduction of "good cause" as a predicate for all sale orders would add another departure from present E(9)(b), and might raise questions whether sale may be ordered under E(9)(b) without showing good cause. But there are many divergences between draft G(6)(b) and E(9)(b), reducing the risk that any implication would be read back into E(9)(b).

It was pointed out that the provision for delivering property to the claimant, G(6)(b)(ii) is not an answer for all of these problems. Some property is itself a likely tool of crime, even though not unlawful in itself — an airplane specially designed to carry drugs, a drug house, or the like. In other circumstances, however, the government is pleased to release property to the claimant — a load of fish subject to forfeiture for unlawful harvesting, for example, is often better returned to the claimant for prompt disposition.

It was agreed to add "good cause" to preface all grounds for sale described in (6)(b)(i), retaining a modified residual good-cause provision as (D).

Finally, NACDL believes that an express stay provision should be added to draft (6)(d), which provides for disposing of the property or sales proceeds upon completion of the forfeiture proceeding by entry of an order of forfeiture. But it was agreed that stay provisions do not have to be included in every rule provision that addresses what is done after final judgment. There are statutory stay provisions in 28 U.S.C. § 1355, Civil Rule 62, and Appellate Rule 8.

Rule 6(d) should be revised, however, to refer to a "judgment of forfeiture" (or "forfeiture judgment), rather than an "order of forfeiture."

A related style question was noted. Draft 6(a), taken verbatim from present E(10), refers to "any order necessary to preserve the property." Should this be "any order necessary for preservation of the property"?

Rule G(7)

Subdivision (7)(a)

Rule G(7)(a) deals with standing to suppress property as evidence, not standing to claim. Standing to contest the lawfulness of the seizure turns generally on having an expectation of privacy that was invaded by the seizure.

The draft describes a motion "to suppress use of the property as evidence at the forfeiture trial." Suppression would extend to use on a summary-judgment motion, since only evidence admissible at trial can be considered on summary judgment.

Suppression as evidence of the property subject to forfeiture does not automatically defeat forfeiture. If the property is money, for example, the money and the results of drug-residue tests on the money would be excluded, but independently derived evidence might establish forfeitability.

The "at trial" limitation on forfeiture does not appear to address the "fruits of the poisonous tree" issue; the draft addresses only suppression of unlawfully seized property subject to forfeiture, leaving related issues to general practice.

It was pointed out that no one has identified any advantage from including the "at trial" limitation. And there may be disadvantages. It would be necessary to remind the court that suppression at trial entails suppression for summary judgment. And there might be an inference that a ruling granting suppression would be denied the ordinary issue-preclusion effects.

It was agreed to delete the "at the forfeiture trial" phrase.

Subdivision 7(b)

Draft (7)(b)(i) limits a claimant's right to make any Civil Rule 12(b) motion by requiring that the claimant file both claim and answer before moving to dismiss. It is intended to reach all 12(b) motions, particularly lack of subject-matter jurisdiction, lack of property jurisdiction, improper venue, and failure to state a claim.

The claim-and-answer requirement was included "to level the playing field." The government should be able to cross-move to dismiss the claim for lack of standing when the claimant moves to dismiss the forfeiture proceeding. The government "should not risk losing property to someone without standing." But the government cannot make the cross-motion unless it knows who the claimant is. That requires an answer that shows the basis for making the claim and responses to Rule G(5)(c) interrogatories that inquire into the identity of the claimant and the claimant's relationship to the property. The government should not be forced to litigate even Rule 12(b) questions with "just anyone who learns of the forfeiture proceeding and seeks to take advantage."

This provision is intended to "overrule" the Third Circuit decision in U.S. v. $8,221.877.16, 2003, 330 F.3d 141. The Third Circuit ruled that a claimant may move to dismiss for failure to state a claim before filing a claim, relying on the general provisions of Rule 12(a), which are not inconsistent with the Supplemental Rules. It also found a pre-claim, pre-answer motion to be good policy because it holds the government to the heightened pleading standards now set out in Rule E(2) and incorporated in draft Rule G(2). In addition, it expressed concern that it would be a waste of resources to require the claimant to answer extensive interrogatories if a motion to dismiss would succeed. At the same time, it recognized what it characterized as the "efficiency" argument made by the government.

A first observation was that as drafted, (7)(b) provides for a motion to dismiss only by "a party with standing." That seems to imply that a movant has the burden of establishing standing. Why is that not enough? If the motion is made before claim and answer, the movant will be obliged to reveal at least as much information as would appear in claim and answer. This also may be linked to draft 7(d)(ii), which states that standing is a matter to be determined by the court, not a jury. Despite the link, however, there is an independent question — although the court surely would offer opportunities for discovery and argument before deciding the standing question, should the government have the advantages of claim, answer, and "standing interrogatories" to facilitate filing a cross-motion to dismiss the claim at the same time as a motion is made to dismiss the forfeiture?

Although the draft provisions that seek to define standing may be questioned on Enabling Act grounds, and alternatively as a matter better left to Congress, the proposed 7(b) procedure is independent of the standing definition. It would have meaning even if no attempt is made to define standing to claim in Rule G.

The burden of answering G(5)(c) interrogatories addressed only to standing is less than the burden of answering comprehensive interrogatories that concerned the Third Circuit. And the government wants to know when, from whom, and in what circumstances the claimant acquired the property interest that is asserted. A typical claim may be that "the cash you seized belongs to me" — even though the claimant was not present at the seizure and has no apparent connection to the place of seizure.

Draft 7(c) provides that the government may move at any time before trial to strike a claim and answer for failure to comply with Rule G(5) requirements, including the "pleading" requirements for claim and answer. But a motion to dismiss on these grounds, as compared to lack of standing, is likely to fail. "It's easy to plead a claim." The "standing interrogatories" call for better information, requiring the claimant to articulate facts just as the government must plead in detail in the forfeiture complaint. Draft 5(c)(2) requires that the interrogatories be answered before a 7(b) motion can be made to dismiss the complaint.

It was observed that judgment about this proposed procedure is affected by characterization of the claimant. One view is that the claimant is like a plaintiff, and should be subjected to plaintiff-like pleading obligations. The original plaintiff is the government, the original defendant is the property, and the claimant is in effect an intervenor seeking to assert a claim just as a plaintiff does. The other view is that we should not be blinded by the fiction that the "defendant" is the property. The government is a real plaintiff, asserting a real claim to take property. What it wants to do is to cut off all interests of all people in the property. When an interested person appears, that person is a real defendant in every sense. The government remains obliged to carry any plaintiff's burden — including the initial responsibility to pick a proper court and plead a sufficient claim. Failing that, the government is properly put out of court before the claimant is required to do anything more than point out the government's failings.

(As related observations, it was noted that many courts draw a "statutory standing" concept from the claim requirements set out in present C(6). They are established to avoid the abuse that inheres in an in rem proceeding.)

The Department wants to equate "standing" with the CAFRA definition of "ownership" for the "innocent owner" defense. In addressing the rule, it is necessary to separate two questions: (1) what interest suffices to establish standing; and (2) what showing of that interest must be made, and when, by a claimant.

As a brief summary, the sequence contemplated by 7(b) is this: the government files a forfeiture complaint. The claimant appears. The government files standing-only interrogatories. The claimant answers the complaint and also answers the interrogatories. After that point, the government can move to strike the claim and answer, and the claimant can move to dismiss the complaint. The court is free to decide which motion to decide first, but it cannot dismiss the complaint without determining that the claimant has standing.

Supplemental Rule G

Revised July 18, 2003

Rule G. Forfeiture Actions In Rem: Special Provisions

(1) **Application.** This Rule G applies to any forfeiture action *in rem* for violation of a federal statute. With respect to matters on which Rule G is silent, Supplemental Rules C and E and the general Rules of Civil Procedure also apply.

(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;

(iii) the basis for the court's exercise of *in rem* jurisdiction over the property;

(iv) 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, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading~~ **in sufficient detail to support a reasonable belief that the Government will be able to meet its burden of proof at trial**.

(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 court** 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 property is already in Government custody, or 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) Notice by Publication.

(i) **Publication Requirement.** 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~~

Government must publish notice of the forfeiture action. **In choosing the place of publication, the Government should select from the options provided in (a)(iii), (a)(v), and (a)(vi) one that is reasonably calculated, under all the circumstances, to apprise potential claimants of the pendency of the forfeiture and afford them an opportunity to make their claims.**

(ii) **Content of the Notice.** Unless the court orders otherwise, the notice must

> **(A) describe the property that is the subject of the forfeiture action with reasonable particularity,**
>
> **(B)** specify the times under Rule G(5) to file a claim to the property and to answer the complaint, **and**
>
> **(C)** name the attorney for the United States to be served with a claim and answer.

(iii) Frequency and Placement of Publication. The notice of the forfeiture action must appear once a week for three successive weeks in a newspaper of general circulation in a district

> (A) where the action is filed,
>
> (B) where the property was seized, or
>
> (C) **if the property was not seized, where** the property is located.

(iv) Exceptions.

(A) The 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)(iii).**

(B) No publication is required under Rule G(4)(a)(I) if

> **(I)** the value of the property is less than $1000 and direct notice of the forfeiture action is sent under Rule G(4)(b), **or**
>
> **(II) if the court determines that the cost of publication**

exceeds the value of the property and that other means of providing notice to potential claimants would satisfy the requirements of due process, under the circumstances.

(v) Assets or Potential Claimants in Foreign Countries. If the property subject to forfeiture is located in a foreign country, or a person to whom notice must be sent under Rule G(4)(b) ~~is believed to be~~ is 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~~ **a district in the United States described in (a)(iii)**;

(B) a newspaper published outside the foreign country where the property **or the potential claimant** 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 **or the potential claimant** is located.

(vi) Use of the Internet. In lieu of publication in a newspaper, notice that satisfies Rule G(4)(a)(i) 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, **if such posting reasonably appears at least as likely as newspaper publication to inform potential claimants of the forfeiture action**.

(b) **Notice to Known Potential Claimants**.

(I) **Sending Direct Notice.** In addition to the requirements of Rule G(4)(a), the Government must send notice of the forfeiture action, including a copy of the complaint, to any person who, ~~appearing to have an interest in the property~~ **based on the facts and circumstances known to the Government at the time when notice is sent, reasonably appears to have an interest in the property**, **and** is **therefore** a potential claimant.

(ii) Content of the Notice.

(A) The notice must state the date on which the notice is sent, and must either

(I) state that a claim must be filed not more than ~~30~~ **35** days after such date, or

(II) set forth a specific date not less than ~~30~~ **35** days after the date on which the notice is sent by which a claim must be filed.

(B) 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.

(iii) Manner of Sending Notice.

(A) The notice required under Rule G(4)(b)(I) ~~may~~ **must** be sent to 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~~ **a** manner reasonably calculated to ensure that the notice is received, ~~including~~ **such as** first class mail, private carrier, or electronic mail.

(B) Notice to a potential claimant who is incarcerated must be sent **by certified mail** to the facility where the potential claimant is incarcerated**, which facility must have procedures in place for ensuring the delivery of mail to the incarcerated person.**

(C) 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, **or at the time of the seizure of the property,** 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.

(D) No sanction may be imposed against the Government, and no relief from the forfeiture may be granted, based on the Government's alleged failure to comply with the notice provisions of Rule G(4)(b) if the claimant

(I) had actual notice of the forfeiture action, or

(II) the Government sent notice of the forfeiture action 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.

(iv) When Notice is Sent. Notice pursuant to this Rule G(4)(b) is sent on the date when the notice is placed in the mail or in the hands of a commercial carrier.

(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) identify the claimant and 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.

(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.

(1) The Government may serve interrogatories regarding the identity of the claimant and the relationship of the claimant to the property at any time after the claim is filed, without leave of the court.

(2) Answers to interrogatories served under Rule G(5)(c)(1) must be served within 20 days. The court must not consider any motion by the claimant to dismiss the complaint ~~pursuant to Rule 12(b)~~ **pursuant to Rule G(7)(b)** until the claimant has responded to the interrogatories.

(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 **maintained by the Attorney General** 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 Dismiss the Complaint. (i) A party with ~~an ownership~~

~~interest in the property~~ **standing to contest the forfeiture action** may, at any time after filing a claim and answer, move to dismiss the complaint under Rule 12(b).

(ii) A complaint **that satisfies the requirements of Rule G(2)(b)** may not be dismissed on the ground that the ~~United States~~ **Government** did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(c) Motion to Strike Claim **and Answer**. The ~~United States~~ **Government** may move at any time before trial to strike a claim and answer for failure to comply with the ~~filing~~ requirements in Rule G(5).

(d) Standing.

(i) A party has standing to contest a forfeiture action if the party has an ownership or possessory interest in the property as defined by 18 U.S.C. § 983(d)(6). On the motion of the United States made at any time before trial, the court must enter a judgment for the Government if it finds, based on the allegations in the complaint, the responses to interrogatories served under Rule G(5)(c), or other evidence in the record following a hearing, that the claimant does not have ~~an ownership interest, as defined in 18 U.S.C. § 983(d)(6), in the defendant property. The burden is on the claimant to establish such ownership interest~~ **standing to contest the forfeiture.**

(ii) Standing is a matter to be determined by the court, not the jury.

(iii) The claimant has the burden of establishing standing.

(e) Motion for Release of Property. If ~~the~~ property **subject to judicial or non-judicial forfeiture** 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.

(ii) If no judicial forfeiture action has been filed against the property at the time when the motion for the release of the property is filed, the motion must be filed in the district where the property was seized and assigned a miscellaneous docket number. Upon a showing by the Government that a judicial forfeiture action against the property has been filed, or will be filed, in another district, the motion must be transferred to that district.

(iii) 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~~.

(iv) No motion under this Rule G(7)(e) may be made in a case to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)).

(f) 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.

(g) Motions for Summary Judgment. If a motion is made by the Government or any claimant pursuant to Rule 56 regarding the claimant's affirmative defense of innocent ownership, as defined in 18 U.S.C. § 983(d), the entry of summary judgment in favor of either party will be dispositive as to the alleged interest of the claimant in the defendant property, and will require the entry of judgment in favor of the prevailing party in the forfeiture action as to that alleged interest, regardless of whether summary judgment has been entered, or could be entered, with respect to the forfeitability of the property.

(8) Trial.

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

Supplemental Rule G

Revised March 26, 2003

Rule G. Forfeiture Actions In Rem: Special Provisions

(1) **Application.** This Rule G applies to any forfeiture action *in rem* for violation of a federal statute. **With respect to matters on which Rule G is silent, Supplemental Rules C and E and the general Rules of Civil Procedure also apply.**

(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;

(iii) the basis for the court's exercise of *in rem* jurisdiction over the property;

(iv) 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**, without moving for a more definite statement**, 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 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) **identify the claimant and** 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.

(1) The Government may serve interrogatories regarding the identity of the claimant and the relationship of the claimant to the property at any time after the claim is filed, without leave of the court.

(2) Answers to interrogatories served under Rule G(5)(c)(1) must be served ~~with the answer to the complaint~~ **within 20 days. The court must not consider any motion by the claimant to dismiss the complaint pursuant to Rule 12(b) until the claimant has responded to the interrogatories.**

(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)(1) 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 **in Rule G(5).** ~~, or for failure to establish an ownership interest in the property subject to forfeiture~~.

(2) Lack of Standing. On the motion of the United States made at any time before trial, the court must enter a judgment for the Government if it finds, based on the allegations in the complaint, the responses to

interrogatories served under Rule G(5)(c), or other evidence in the record following a hearing, that the claimant does not have an ownership interest, as defined in 18 U.S.C. § 983(d)(6), in the defendant property. The burden is on the claimant to establish such ownership interest.

(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.

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 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.

Supplemental Rule G

Revised June 10, 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.

(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 in any manner reasonably calculated to ensure that the notice is received,

including first class mail, private carrier, or electronic mail. For purposes of this Rule G(4)(b), notice is served on the date that 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.

(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 made under oath, subject to 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.

(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 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 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).

(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.

(8) Trial.

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

MEMORANDUM

To: **Chief Judge David F. Levi**
Chair, Advisory Committee on Civil Rules

From: **Ned Diver**

Date: **August 15, 2003**

Re: **Standing Requirements in Civil Forfeiture Actions Under Proposed Rule G.**

The Advisory Committee on Civil Rules is considering a proposal to create a new Supplemental Rule for civil forfeiture cases.[1] Among the changes Proposed Rule G would make is the creation of a new standing requirement for those wishing to challenge a forfeiture. The Department of Justice has requested this provision to prevent "straw owners" and others with minimal interests in the forfeited property from forcing the government to prove the forfeitability of the property. While the proposal should effectively address the government's legitimate concerns, there may be significant questions about whether the proposal goes beyond what is appropriately accomplished by rulemaking, by eliminating what may now be legitimate claims, and increasing claimants' burden of proof in establishing standing.

I. Overview

Civil forfeiture is adjudicated in an *in rem* proceeding brought by the government against property allegedly connected to criminal activity. Under current law, the government bears the initial burden of establishing the forfeitability of the property—that is, the property's appropriate relationship to criminal activity. If it succeeds, a claimant may defeat forfeiture by establishing an "innocent owner" defense. If the claimant is an owner who was unaware of the criminal connection, for example, she may be able to retrieve the property.

The innocent owners defense requires showing both innocence and ownership (where "ownership" is construed broadly). A claimant may establish standing to challenge a forfeiture, however, with an interest less than "ownership."

Consequently, a person who would not be able to establish innocent ownership may nonetheless be able to challenge the government's attempt to establish forfeitability. The government is concerned that claimants with tenuous connections to the property will be able to

---

[1] Civil forfeitures are subject to the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure. Proposed Supplemental Rule G would be a new rule consolidating requirements for civil forfeiture actions.

stand in for the owner and force the government to put on its forfeitability case. The government may find such a burden onerous for a number of reasons, including that it may have law-enforcement reasons for not wishing to put on such a case. The owner, by contrast, is able to avoid exposing himself through litigation by having a stand-in challenge the forfeiture.

The government's proposal would prevent this result by requiring a claimant to be an owner—for purposes of the innocent-owner defense—to establish standing to challenge a forfeiture. It would also allow the government to move to dismiss a claim for lack of ownership before it establishes forfeitability. A claimant with a minor interest in the property barely sufficient for Article III standing would consequently not be able to force the government to prove forfeitability.

The government contends the need for this legislation has arisen as a result of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). 18 U.S.C. § 983, 985; 28 U.S.C. § 2466-67. Before CAFRA, the government's initial burden on forfeitability was met by showing probable cause. The burden would then be on the claimant to establish the property was not forfeitable by a preponderance of the evidence. CAFRA changed this burden, requiring the government to show forfeitability by a preponderance of the evidence. Before CAFRA, a sham challenge would not likely be effective, since the government's burden was so low, and the claimant would have to present a case establishing a lack of forfeitability. But now, a sham claimant can require the government to put on evidence sufficient to show forfeitability, a burden it believes it should not have to meet for nominal claimants, especially because presenting such evidence might be thought to jeopardize ongoing investigations or prosecutions.

II. Civil Forfeiture

Because of the distinct nature of civil forfeiture actions, standing plays a special role in this area. To understand civil forfeiture, it is helpful to compare it to criminal forfeiture. Criminal forfeiture occurs in the context of a criminal trial. The prosecutor general includes a forfeiture count in the indictment or information. Criminal forfeiture can occur only if the government prevails on the underlying criminal counts. If, say, the government establishes (beyond a reasonable doubt) that a defendant is guilty of drug charges, associated property, such as drug money resulting from the sale of the drugs at issue, can be forfeited. *See generally*, 1 Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice*, ch. 4 (Dec. 2002).

In criminal forfeitures, third-party standing is not an issue at trial. A criminal forfeiture is an *in personam* claim against the defendant only. After the forfeiture, claimants are generally given the opportunity to bring claims against the government in a separate action. If they can establish a sufficient interest in the property (such as one greater than the defendant's), they may be able to get the property from the government. *See* 21 U.S.C. § 853(n).

Civil forfeiture differs in two important ways. First, a civil forfeiture can proceed without a prior conviction. The property's relationship to the criminal activity must be shown, which obviously requires a showing of criminal activity. But that showing is made within the context of the civil forfeiture proceeding, and need be made only under the lower standard-of-proof requirement applicable in such proceedings. Until recently, this often only required establishment

of probable cause as a practical matter. The lower standard of proof required of the government in civil forfeitures has been one of the principle bases for criticisms directed against it. *See* H.R. Rep. No. 105-358(I), at 28 (1997). One concern is that a low standard of proof permits the government to effectively sanction people for criminal offenses without granting them the protections afforded criminal defendants.

The Supreme Court has struggled with the relationship between forfeiture and criminal prosecution, at times describing forfeitures as "quasi criminal" subject to certain constitutional protections applicable to criminal proceedings, but not others. Civil forfeitures are subject to the exclusionary rule under the Fifth Amendment, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *Boyd v. United States*, 116 U.S. 524, 533 (1885), but are not subject to the double jeopardy clause. *United States v. Ursery,* 518 U.S. 267, 303 (1996).

The second—and for present purposes, perhaps most important—difference is that a civil forfeiture action is a proceeding *in rem*. As such, the formal defendant is not the property owner or the alleged criminal, but the property itself. "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931). The property is "guilty"—that is, forfeitable—if it is sufficiently involved with criminal activity.

The property cannot itself commit criminal acts, of course, so it must be related to a person's criminal activity. But the identity of that person is irrelevant to the "guilt" of the property. The criminal actor need not be the owner of—or anyone with a substantial interest in—the charged property. As long as the property was used in the commission of the crime, was a proceed of the criminal activity, or was otherwise related to the crime in an appropriate way, it is forfeitable as an initial matter regardless of whose property it is or was at the time of the crime's commission. Innocent owners may be able to block a forfeiture by way of an affirmative defense, but initial determination of forfeitability does not turn on the distribution of property rights in the "guilty" property.

Another consequence of the *in rem* nature of civil forfeiture proceedings is that, unlike criminal forfeiture, it resolves all claims in the property. "By virtue of its forfeiture judgment and the fact that the time for filing ancillary petitions has run or such proceedings have been concluded, the government succeeds as against the world to the defendant's property. In other words, the government has effectively quieted its title to the defendant's property and owns it outright." *United States v. Gilbert*, 244 F.3d 888, 891 (11th Cir. 2001). Accordingly, while the property is the formal defendant, one might say that everyone is the functional defendant, for all potential claims will be extinguished by a successful forfeiture action.

As a result, a person with an interest in a piece of property the government seeks to forfeit must successfully challenge the forfeiture in order to preserve that interest. In order to do so, such a claimant must establish standing to contest the forfeiture. Legitimate owners have standing without question. But an issue arises with respect to those with lesser property interests. Of special significance are "straw owners"—title holders with no genuine interest in the

property—and those with nothing more than a possessory interest. How far standing to challenge a forfeiture should extend is addressed by the government's proposal.

III. CAFRA

The government's proposal to add a standing requirement to the Rules is a response, in part, to certain changes to civil forfeiture law made by the Civil Asset Forfeiture Reform Act of 2000. 18 U.S.C. § 983, 985; 28 U.S.C. § 2466-67. CAFRA was passed in response to a perception that there was a certain amount of abuse of civil forfeiture, and that the law as it then stood was unfair to property holders in a number of ways.

CAFRA made two changes that are significant here. First, it raised the standard of proof required of the government in proving forfeitability. 18 U.S.C. § 983(c). And second, it created a uniform innocent-owner defense. § 983(d).

Under the previous law, the government ordinarily had to show only that it had probable cause to seize the property. And the government could meet that burden with hearsay evidence. Stefan J. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 108-09 (2001). Following such a showing, the burden shifted to the claimant to show, by a preponderance of the evidence, that the property was not forfeitable. *Id.* Because the government's burden was so easily met, this effectively placed the burden on the claimant in most cases. The claimant could also prevail under some—but not all—forfeiture statutes by establishing an affirmative defense of innocent ownership.

Under CAFRA, the government presents its case first and has the burden of establishing forfeitability by a preponderance of the evidence. § 983(c)(1). The claimant then may respond with evidence to defeat forfeitability, and may present affirmative defenses, including the innocent-owner defense, which is now available in all civil forfeiture actions. § 983(d)(1) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."). Accordingly, after the government presents its case on forfeitability, the claimant can respond by establishing that she is an innocent owner by a preponderance of the evidence. § 983(d). Even if the property is adjudged "guilty," the claimant may defeat a civil forfeiture if she meets the burden of establishing that she is an innocent owner.

To meet this burden, a claimant must establish both innocence and ownership. Innocence is established in a number of ways, depending on the circumstances. For these purposes, it is sufficient to say that innocence is established if the owner did not know of the conduct giving rise to the conduct and took available steps to prevent such conduct and report it to law enforcement.[2]

---

[2] Section 983(d) provides:

(2)(A) With respect to a property interest in existence at the time the illegal

conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who—
(i) did not know of the conduct giving rise to forfeiture; or
(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.
(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—
(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and
(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.
(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.
(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property—
(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and
(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.
(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—
(i) the property is the primary residence of the claimant;
(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and
(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all

"Ownership" is defined fairly broadly in the statute. An "owner" for purposes of the defense is "a person with an 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; and (B) does not include (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." § 983(d)(6). Nor does it include other lesser property interests, such as possessory interests other than the recognized bailment interests.

Thus, the government may obtain ownership of the property if (1) it shows forfeitability; and (2) the claimant fails to establish (a) that he has a sufficient interest in the proper to be an "owner," or (b) that was innocent according to the statute. As a result of this order of required showings, it is possible for a claimant to prevail without reaching the question of innocent ownership. Once a claimant has standing, she is able to put the government to its proof on forfeitability, regardless of whether she is ultimately either innocent or an owner. If the government fails to establish forfeitability, the claimant may prevail without having to establish innocent ownership.

IV. Standing in Civil Forfeiture Actions

Standing determinations, of course, involve statutory, constitutional, and prudential considerations. There are no generally applicable substantive statutory limits on standing to file a claim based on the kind of property interests a person claims to have in property of which the government seeks forfeiture. CAFRA states that "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property." 18 U.S.C. § 983(a)(4)(A). The statute does not elaborate on what a "person claiming an interest" is, suggesting that it is not meant to impose any substantive restrictions on who may make a claim. The lack of substantive statutory limitations on standing means that statutory standing is met by fulfilling the procedural requirements for filing a claim in the forfeiture statutes and Supplemental Rule C(6). *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 527 (2d Cir. 1999); *United States v. $515,060.42*, 152 F.3d 491, 497 (6th Cir. 1998); *United States v. $2,857.00*, 754 F.2d 208, 213 (7th Cir. 1984); David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 9.04[2][a], at 9-68 (Dec. 2002).

---

dependents residing with the claimant.

For Article III standing,[3] the claimant must be able to show an injury that would be redressable by the return of the property. In most cases, injury is established by pleading some property interest in the seized item. For the most part, courts have held that nearly any interest in the property, including possessory and security interests are sufficient. "Such interests in property usually confer standing because they are 'reliable indicators of injury that occurs when property is seized.'" *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *accord United States v. $81,000*, 189 F.3d 28, (1st Cir. 1999); *$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A]n owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the property."); *accord United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974, 985 (3d Cir. 1992); Smith, ¶ 9.04[a], at 9-70; Kessler, § 3:12 ,at 3-96 to 3-99.

---

[3] Courts are nearly unanimous in requiring constitutional standing. Nonetheless, there is a genuine question whether the Constitution has anything to say about standing to challenge a forfeiture, as the Second Circuit has noted. *United States v. $557,933.89*, 287 F.3d 66, 79 n.9 (2d Cir. 2002). Article III standing doctrine is based on the requirement that courts only resolve "cases and controversies." But so long as the government has established its own standing, there is a constitutional case—between the government and the property. "Indeed, because 'the party invoking federal jurisdiction bears the burden of establishing' standing, it might very well be argued that, at least as far as Article III—as opposed to statutory—standing goes, the claimant bears no burden at all, as it is really the government which is invoking the power of the federal courts to effect the forfeiture." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

A challenge to a civil forfeiture action is in the nature of an intervention. *See United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions Lottery Ticket No. M2462333*, 326 F.3d 36, 40 (1st Cir. 2003) ("[D]efenses against the forfeiture can be brought only be third parties, who must intervene."). The Supreme Court has expressly declined to decide whether intervenors under Federal Rule of Civil Procedure 26 must independently meet the requirements of Article III standing, *Diamond v. Charles*, 476 U.S. 54, 68 (1986), and the circuits have split on the issue. *Compare Ruiz v. Estelle*, 865 F.2d 1197 (11th Cir. 1989) (no Article III standing requirements) *and Chiles v. Thornburgh*, 161 F.3d 814 (5th Cir. 1998) (same) *with Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996) (holding that "the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court"); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515 (D.C. Cir. 1994). Article III is always a requirement for intervenors if the original parties do not remain in the suit. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 65 (1997); *Diamond*, 476 U.S. at 62.

Because the courts generally speak of Article III requirements, I will assume Article III does impose requirements on claimants. If this is not true, then the requirements imposed under the Article III rubric may simply be considered prudential limitations on standing.

Two important, and distinct, questions arise. First, what interests in the property suffice for standing? And second, what kind of showing must be made that one actually has those interests, whatever they are determined to be?

A. Property Interests Sufficient For Standing.

The cases are not entirely uniform with respect to what interests will suffice, but in broad outline, nearly all cases agree that possession can be sufficient for standing. *See* U.S. Dep't of Justice, *Asset Forfeiture Law and Practice Manual*, at 4-32 to 4-33 (1998) ("To have standing, one must have an ownership or possessory interest in the *res*, although the courts offer a number of variations on this theme."). *See, e.g.*, *One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003) ("At the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving. In general, any colorable claim on the defendant property suffices."); *Cambio-Exacto*, 166 F.3d at 527 (2d Cir. 1999) ("We have ... recognized that the possession of property may ... confer standing to challenge its forfeiture."); *$81,000*, 189 F.3d at 35 (1st Cir. 1999) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A] claimant must have a colorable ownership, possessory or security interest in at least a portion of the defendant property."); *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 907 (11th Cir. 1985); *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) ("A lesser property interest such as possession creates standing."); *cf. United States v. $94,000.00*, 2 F.3d 778, 790 (7th Cir. 1992) ("[T]here is authority for the proposition that standing may be conferred in forfeiture cases on the basis of possessory interests alone.")

The Fifth Circuit has stated that an "ownership interest" is required. *E.g.*, *United States v. One Parcel of Real Property*, 831 F.2d 566, 567-68 (5th Cir. 1987). It has clarified, however, that for purposes of determining standing, "the term owner should be broadly interpreted to included any person with a recognizable legal or equitable interest in the property." *United States v. $38,570*, 950 F.2d 1108, 1112 n.4 (5th Cir. 1992). The Eighth Circuit has also stated that claimants must show "ownership." But again, the term "owner" seems to be shorthand for a broad set of property interests. "To have standing, a claimant ... need only show a colorable interest in the property, redressable, at least in part, by the return of the property." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003); *see also United States. v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979) ("Broadly speaking, ownership may be defined as having a possessory interest in the *res*, with its attendant characteristics of dominion and control."). The Eighth Circuit did hold, however, that possession of real property by the parents of the owner was not a sufficient interest to satisfy the ownership requirement. *United States v. One Parcel of Property*, 51 F.3d 117, 121 (8th Cir. 1995). As residents, they undoubtedly would be injured by the forfeiture in a way redressable by a successful challenge to the forfeiture, which would likely be enough in other courts. *See United States v. 8402 W. 132nd St.*, 103 F. Supp. 2d 1040, 1043 (N.D. Ill. 2000) (resident who would be made homeless had standing to contest forfeiture).

One consistently recognized limit is that unsecured creditors do not have standing to contest civil forfeitures. "[T]he federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property." *One-Sixth Share*, 326 F.3d at 44 (1st Cir. 2003) (quoting *United States v. $20,193.39,* 16 F.3d 344, 346 (9th Cir. 1994)).

Although all kinds of interests in the property are normally sufficient to establish standing to challenge a forfeiture, most courts have required that there be some substance to interest. Courts have been generally held that standing is not available to those with no more than a "naked claim of possession." *Cambio Exacto*, 166 F.3d at 527 (2d Cir. 1999); *$557,933.89*, 287 F.3d at 79 n.10 (2d Cir. 2002); *$515,060.42*, 152 F.3d at 498 (6th Cir. 1998); *United States v. $191,191.00*, 16 F.3d 1051, 1058 (9th Cir. 1994); *United States v. $321,470.00*, 874 F.2d 298, 303 (5th Cir. 1989). *But cf.*, *Mantilla v. United States*, 302 F.3d 182, 185 (3d Cir. 2002) (assuming, without deciding, that claimant who held the keys to seized car without explanation had standing). In most cases, the courts have not, however, required much. *See, e.g.*, *$191,191.00*, 16 F.3d at 1051 (9th Cir. 1994) ("Mere *unexplained possession* will not be sufficient. However, where a claimant asserts a *possessory interest* and provides some explanation of it (e.g., that he is holding the item for a friend), he will have standing."); *$557,933.89*, 287 F.3d at 79 n.10 (2d Cir. 2002) (where claimant's verified claim that he was owner sufficient to establish standing); *$321,470.00*, 874 F.2d at 304 (5th Cir. 1989) ("[T]he possessory interest [must] be a colorably lawful one."). Some courts have required that bailees name the bailor in order to establish that their possession is colorably lawful. *United States v. Currency, U.S. $42,500.00*, 283 F.3d 977, 983 (9th Cir. 2002); *$321,470*, 874 F.2d at 304 (5th Cir. 1989). But like most issues in this area, exactly how much more than "naked possession" is required is not entirely clear or consistent. *See, e.g., $515,050.42*, 152 F.3d at 498 (6th Cir. 1998) ("The assertion of simple physical possession of property as a basis for standing must be accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property."). At minimum, it appears the possession must be at least "colorably lawful."

In an attempt to prevent challenges by "straw owners," many courts have held that those with formal title to property, but who do not maintain "dominion and control" over the property may be denied standing. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 44 (1st Cir. 2003); *$81,000*, 189 F.3d at 37 (1st Cir. 1999); *Cambio Exacto*, 166 F.3d at 527 (2d Cir. 1999); *Contents of Accounts*, 971 F.2d at 985-86 (3d Cir. 1992);*$38,570*, 950 F.2d at 1113 (5th Cir. 1992); *United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1989); *United States v. 900 Rio Vista Blvd.*, 803 F2d 625, 630 (11th Cir. 1986); *One 1945 Douglas C-54*, 604 F.2d at 28 (8th Cir. 1979). This limits the ability of criminals to protect their property by placing ownership of property in the name of a relative, for instance. In such cases, the titled person is not viewed as the "true owner." *$81,000*, 189 F.3d at 36.

The Second Circuit has tied the straw owner (and "naked possessor") analysis to constitutional injury. Where an "owner" is one in name only, then he will not actually be harmed by the forfeiture, it has said. Where that is the case, it is appropriate to deny standing. *Cambio*

Exacto, 166 F.3d at 527 (2d Cir. 1999) ("It is because of the lack of proven injury that we have, for example, denied standing to 'straw' owners who do indeed 'own' the property, but hold title to it for somebody else.").

Some courts have rejected such attempts to flush out straw owners. *See United States v. 5 S 351 Tuthill Rd.*, 233 F.3d 1017, 1023 (7th Cir. 2001) (possibility of monetary gain on sale of item establishes sufficient interest in forfeited property, despite lack of dominion and control); *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1471 (6th Cir. 1995) ([W]hether or not [claimant] proves to be a straw man at the hearing, as the record title holder, he is entitled to notice and a hearing before being deprived of his interest in the property.") (Martin, J., writing for the court); *but see 16510 Ashton*, 47 F.3d at 1472 (Engel J., concurring) ("If [claimant's] only connection with the forfeited property were that of a naked title holder ... I might agree with the trial judge's determination that he lacked standing ...."). It is not always clear, however, whether the courts are focusing on the interests that suffice, or the showing that must be made. It appears that at least some of the time, courts accept that straw ownership is not sufficient for standing, but that legal title is itself sufficient evidence of genuine ownership for purposes of the standing inquiry. *See One Lincoln Navigator*, 328 F.3d at 1013 (8th Cir. 2003) ("[A]lthough there is evidence that [claimant] has only 'bare legal title,' we conclude that is sufficient to confer Article III standing to contest the forfeiture."); *$191,910.00*, 16 F.3d at 1058 (9th Cir. 1994) ("[A] simple claim of ownership will be sufficient to create standing to challenge a forfeiture."). In any event, most courts would probably reject the claim of a straw owner if that status could be sufficiently established at the time of the standing determination.

In sum, courts have generally held that a broad range of interests in the property at issue—including lawful possession—are sufficient to establish standing. Most courts, attempting to weed out straw owners, require that the interests at issue have a degree of substance to them, or be explained. The scope of the property interests required for standing does not appear to have changed significantly since the passage of CAFRA. It may be that recent cases are somewhat more consistent in permitting more possessory interests, and somewhat more likely to permit what may be cases of straw ownership, but there has not been a significant shift with respect to this issue over the last several decades.

B. Required Showing.

Somewhat less settled is the issue of what showing a claimant must make, and when it must be made. Courts have consistently labeled standing a "threshold" issue. *E.g.*, *$557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *United States v. $9,041,598.68*, 163 F.3d 238, 245 (5th Cir. 1999);*$38,570*, 950 F.2d at 1111 (5th Cir. 1992). A claimant must consequently establish standing in order to get her feet in the door, as it were. Courts have also been fairly consistent that only a "colorable" interest in the property need be shown. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003); *One Lincoln Navigator 1998*, 328 F.3d at 1013 (8th Cir. 2003); *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002); *$81,000*, 189 F.3d at 35 (1st Cir. 1999) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *$515,060.42*, 152

F.2d at 497-98 (6th Cir. 1998); *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992); *$38,570*, 950 F.2d at 1112 (5th Cir. 1992) *$321,470.00*, 874 F.2d at 304 (5th Cir. 1989) ("colorably lawful interest").

Courts and commentators have commonly distinguished this threshold showing of a colorable interest from the merits of the claimants' claim. When standing is at issue, "a claimant need not prove the underlying merits of the claim." *One Lincoln Navigator*, 328 F.3d at 1013 (8th Cir. 2003); *accord*, *One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003); *$557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *$81,000*, 189 F.3d at 35 (1st Cir. 1999); *$515,060.42*, 152 F.2d at 497 (6th Cir. 1998); *$38,570*, 950 F.2d at 1112 (5th Cir. 1992). The burden of proof is on the claimant, *e.g.*, *$38,570*, 950 F.2d at 112, but that burden is generally not especially great. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 41 ("At the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving.").

Establishing the requisite property interest at trial requires a different—and ordinary more substantial—showing. But if a claimant fails to establish ownership at trial (when putting on an innocent owner defense, for instance), that will not undermine the previous finding of standing, which ordinarily will have required only a colorable interest in the property. *See $557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *$9,041,598.68*, 163 F.3d at 245 (5th Cir. 1998) (disagreeing with district court finding of lack of standing based on jury verdict finding no ownership); *United States v. Hooper*, 229 F.3d 818, 820 n.4 (9th Cir. 2000) ("The district court's concluding statement that Claimants lacked 'standing' is simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief."). Stefan Cassella of the Asset Forfeiture and Money Laundering Section of the Department of Justice has endorsed the view that standing should be treated as a threshold issue, and should be kept distinct from the ultimate determination of ownership:

> [T]he better practice would be to refer to the threshold Article III "case-or-controversy" requirement as one that necessitates a showing by the claimant that he has standing to litigate his or her claim, and to refer to the ultimate question of ownership as part of the claimant's affirmative defense. That would make clear what has always been the rule: a person with a "colorable interest" in the defendant property is allowed in the courthouse door to litigate his claim, but once inside, the claimant is required to show that he satisfies all of the indicia of ownership as part of his affirmative defense. As the outcome in *$9,041,598.68* illustrates, there will be claimants who are able to establish standing to contest a forfeiture at the outset of the proceeding by showing that they have a colorable interest in the property (e.g., by showing that their name is on the title to the property, or that they have possession of it) yet they will be unable to establish the requisite ownership interest under § 983(d)(2)(A) at trial.

Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 Ky. L.J. 653, 676-77 (2001).

At the pleading stage, it makes sense to permit the claimant to establish standing on a very limited showing. Thus, cases decided on the pleadings tend to speak only of a requirement that the claimant allege facts establishing standing—in most cases, facts that would establishing a facially colorable interest in the *res*. *E.g.*, *$191,910.00*, 16 F.3d at 1057 (9th Cir. 1994). But language in at least one case appears to create a requirement that the claimant present evidence along with the claim. *$38,570*, 950 F.2d at 113 (5th Cir. 1992) ("Ordinarily, ... a claimant is required to submit some additional evidence of ownership along with his claim in order to establish standing to contest the forfeiture."). *But see* Smith, ¶ 9.04, at 9-70.7 ("There is no justification or authority for requiring a claimant to submit proof of standing along with a claim."). Regardless of whether evidence is required to be submitted along with the claim, if the government challenges the claimant's standing, the claimant will generally be required to come forward with proof establishing a colorable interest in the property.

When the facts related to standing are in dispute, the burden on the claimant can vary from case to case. There seem to be two general tracks that litigation of the issue takes in standing challenges that go beyond the pleadings. Standing can be litigated as an issue in summary judgment motions, or the court can itself resolve the factual issues, often after an evidentiary hearing.[4]

On summary judgment, the burden on the claimant is presumably the familiar one: the claimant must establish that there is at least a genuine issue of material fact as to the requisite property interest. "[A]lthough at the motion to dismiss stage it is enough to allege the elements of standing, at the summary judgment stage the party with the burden of demonstrating standing must demonstrate that there is a genuine issue of material fact as to the standing elements ...." *United States v. $57,790.00*, 263 F. Supp. 2d 1239, 1242 (S.D. Cal. 2003); s*ee also $515,060.42*, 152 F.3d at 499 (6th Cir. 1998) ("Here, the real question is ... whether there was sufficient proof of property interests to establish standing and avoid summary judgment."). In some cases, courts have resolved the issue in the context of a summary judgment motion, but have not discussed the standard applied. *See, e.g.*, *United States v. $122,043.00*, 792 F.2d 1470 (9th Cir. 1986); *$321,470.00*, 874 F.2d 298 (5th Cir. 1989).

Because standing is a legal issue, however, courts may resolve standing issues on their own. *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *Contents of Accounts*, 971 F.2d at 984 (3d Cir. 1992). "If a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them." *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003). Indeed, an evidentiary hearing may be required in certain cases, such as where credibility determinations must be made to resolve the issue. *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397, 400 (8th Cir. 2000). As a general matter, the choice of which approach to take would appear to be a matter of discretion. *See* Smith, ¶ 9.04, at 9-70-9 ("Where the determination of a standing question requires the taking of evidence, it is within the court's discretion to leave the matter unresolved until trial.").

---

[4] This tracks standard practice. *See infra*, at 26.

These approaches may not be as different as they appear, however. For, as discussed, courts consistently state that all that claimant need establish is a "colorable" interest in the property. Courts have not elaborated on what "colorable" means in this context. But it is clearly something less than establishing an ownership interest by a preponderance of the evidence. As noted, the prevailing view would seem to be that sufficient averments in the claim together with some supporting evidence will ordinarily be sufficient. This standard should at least be in the neighborhood of a requirement that claimant produce sufficient evidence to permit a jury to conclude that the claimed property interest is genuine. *See* Smith, ¶ 9.04, at 9-70.9 ("Any disputed issue of fact, such as who owns the property, can then be decided by a jury. All that needs to be shown at the preliminary stage is a 'facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and prudential considerations defining and limiting the role of the court.'") (quoting *$557,933.89*, 287 F.3d at 78-89, and collecting cases). In any event, in both instances, the court resolves the standing question without fully resolving issues going to the merits of the case.

In some decisions, courts appear to have gone further, making ultimate determinations of the property interests of the claimant. In *Contents of Accounts*, for instance, the Third Circuit analyzed the district court's finding of straw ownership for clear error, 971 F.2d at 987, even though it had stated that standing is available to a claimant "who is either the colorable owner of the *res* or who has any colorable interest in it." *Id.* at 985. *See also $81,000*, 189 F.3d at 41-42 (1st Cir. 1999) ("After carefully reviewing the grand jury testimony, we disagree with the district court's conclusion and hold that [claimant] did indeed exercise sufficient dominion and control over the *res* to have standing in this civil forfeiture proceeding."). It may be that these courts were only determining that the claimant had a colorable claim, but the language of the opinions, together with the searching inquiry into the facts, suggests something more. *Cf. United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (reviewing factual findings of ownership in criminal forfeiture).

Over the last few years, courts have become somewhat more insistent on distinguishing the standing issue—a threshold determination of a colorable interest—from the "merits" of the claim—including assessment of the actual interests the claimant has in the *res*. In *One Lincoln Navigator*, the court set aside a district court finding going to ownership. The court noted that "[i]f a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them." 328 F.3d at 1014 (8th Cir. 2003). But the district court's findings with respect to whether claimants had a real ownership interest or merely "bare legal title," was a merits issue that must be resolved by the jury. *Id.* A court could make such a finding before trial, the court held, only "in accordance with Rule 56 standards." *Id.* Because the district court had resolved genuine issues of material fact in reaching its conclusions, summary judgment had been erroneously granted. *Id.*

As noted, the Second and Fifth Circuits have both set aside district court determinations that the claimant lacked standing based on jury determinations. *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002); *$9,041,598.68*, 163 F.3d at 245 (5th Cir. 1999). The Fifth Circuit noted that this required it to review what should be a threshold issue by assessing the merits of the case. "Allowing a district court to revisit the question of standing post-verdict necessarily invites this

Court to chase its tail—we ought to review standing as a threshold matter yet in order to do so we must review the merits." *$9,041,598.68*, 163 F.3d at 245. The Second Circuit followed this reasoning, emphasizing that as a result, district courts should limit the standing inquiry to the threshold determination of whether there is a colorable interest. *$557,933.89*, 287 F.3d at 79. *Cf. United States v. $242,484.00*, 2003 WL 21488882, at *13 n.6 (11th Cir. June 30, 2003) (opinion withdrawn without comment, July 23, 2003). *But see $57,790.00*, 263 F. Supp. 2d at 1245 (S.D. Cal. 2003) (holding that claimants "must prove their standing to contest the forfeiture at trial by a preponderance of the evidence.").

Although this area of the law remains somewhat muddy, there is a fairly well-defined prevailing view. Standing challenges are often made on the pleadings, at which stage it should be enough to properly allege the requisite interest in the property. When evidence is required for a standing determination, standing may be litigated at the summary judgment stage subject to the requirements of Rule 56. Alternatively, the court may make factual findings, but only so far as is necessary to determine that the claimant has a sufficient colorable interest in the *res*. And once this threshold determination of standing is made based on evidence, the issue is treated as resolved. The fact that a claimant is later found to have no genuine interest will not defeat standing, which is settled "at the threshold" on the limited determination of a mere colorable interest.

Because standing requires only a limited showing, a person who in fact lacks the requisite interests for standing may obtain standing if he can make a colorable showing of having those interests. As a result, nominees and straw men with enough evidence to establish a colorable interest, among others, may be able to obtain standing to challenge a forfeiture.

V. The Government's Concern.

Proposed Rule G seeks to address certain consequences that have resulted from the forfeiture standing doctrine in CAFRA-governed cases. CAFRA did not expressly change the rules of standing, and there has been no dramatic shift in the case law on standing. But the combination of these standing rules and CAFRA has resulted in a set of circumstances that permit illegitimate claimants to take advantage of the system in certain cases.

The fundamental concern is that a person with either minimal interests in the property, or no interests at all, will be able to obtain standing and force the government to prove forfeitability, thereby incurring all of the costs associated therewith. To be sure, such claimants could obtain standing before CAFRA. And just as now, a person with no genuine interest in the property may be able to prevail, but the threat such claimants represent has become significantly greater.

Before CAFRA, a claimant who barely met minimal standing requirements could force the government to meet its initial burden, but that burden was easily met. After that, the claimant would need either to prove that the property was not forfeitable by a preponderance of the evidence, or to establish an affirmative defense, such as innocent ownership, if available.

Now, by contrast, once the claimant meets the standing requirement, it is possible for her to prevail without making any further showing. If the government is successful in meeting its burden, then the claimant will prevail only if she can establish an innocent-ownership defense.

But because innocent ownership is an affirmative defense, those issues need be litigated only after the government has put on its case. Obtaining standing is sufficient to put the government to its proof—a showing much more substantial than was previously required. And standing, under the cases, is often very easily obtained. The result is that a person with no real chance of establishing innocent ownership, or who has no actual legal interest in the property at all, may still find it valuable to challenge a forfeiture, because if she can establish standing, that may be enough. She can put the government to its proof.

According to the government, this situation invites abuse. Those with no significant interest in the property can be used by wrongdoers to easily and cheaply challenge forfeitures. The real owners, meanwhile, are protected from exposing themselves through litigating the forfeiture. The government, by contrast, must expose what may be an ongoing investigation to make its case. And after it expends the resources necessary to put on its case, the government may fall short of establishing the forfeitability of the property, requiring it, in certain cases, to turn over the property to a person with no legitimate claim to the *res*.

The government has highlighted the following examples of cases in which it believes undeserving claimants have been granted standing. In one case, the court assumed, without deciding, that a claimant had standing who had held the keys to a car moments before it was seized. *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002). In another, a resident of a seized property obtained standing because he would be rendered homeless by a forfeiture, even though he had no ownership rights in the property. *United States v. 8402 W. 132nd St.*, 103 F. Supp. 2d 1040 (N.D. Ill. 2000). Finally, standing was granted to a person who found money on the highway after it had fallen out of a car in front of him. *United States v. $347,542.00*, 2001 WL 335828 (S.D. Fla 2001). In all of these cases, the claimant could establish a minimal case-or-controversy showing, but would not be able to challenge the forfeiture under proposed Rule G.

VI. Proposed Rule G

Proposed Rule G would make a number of changes to requirements for standing to challenge civil forfeitures. The rule makes changes with respect to the kinds of interests sufficient to challenge a forfeiture and to the procedures for resolving standing disputes.

These provisions are found in sections five and seven of the proposed rule. Section 5(a) governs the filing of a claim. It provides: "A person who asserts an ownership interest in the property that is the subject of the action may contest the action …." It also provides that the claimant must "state the claimant's ownership interest in the property, in terms of 18 U.S.C. § 983(d)(6)." Section 983(d)(6) defines the term "owner" for purposes of the innocent owner defense.[5]

---

[5] Section 983(d)(6) provides, in full:

In this subsection, the term "owner"—(A) means a person with an 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; and (B) does not include (i) a

The connection between the statutory definition of "owner" for purposes of the innocent owner defense and standing is even more explicitly drawn in section seven, which governs motions practice. Section 7(d)[6] includes a definition of standing, as well as procedures for litigating the issue. It expressly provides, "A party has standing to contest a forfeiture action if the party has an ownership or possessory interest in the property as defined by 18 U.S.C. § 983(d)(6)."

The definition of ownership included in the statute tracks many of the elements that courts have focused on in resolving standing disputes. The statute defines ownership interests broadly—including mortgages and liens, among others—but stops short of unsecured credit interests and claims against the property. Straw owners are expressly omitted by the exclusion of "a nominee who exercises no dominion or control over the property." The definition also limits possessory interests, excluding "a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized."

Nevertheless, the definition is narrower than the limits of Article III standing. The family member who would be rendered homeless by the forfeiture of his home and the person finding money on the highway may be excluded by Rule G, for example. And by excluding "nominees," the adoption of the § 983 standard would work a change in those circuits that have held that issue to be a merits question that must be resolved at trial.

Section seven of Rule G also includes important provisions governing the procedure involved in resolving standing disputes. The rule specifies that the government may move at any time before trial for judgment in its favor if the court finds a lack of a sufficient ownership interest. Supp. Rule G(7)(d)(i). It also states that standing is an issue for the court, and that the claimant has the burden of establishing standing.

These procedures do not appear to be greatly different from current practice. The difference is made significant, however, by the fact that the definition of standing is made in terms of the ownership interests stated in § 983. Under this proposal, it appears to be no longer sufficient to establish a *colorable* interest in the property.[7] The claimant must actually establish the interest in the property. And the determination whether the claimant has met his or her burden is to be made by the judge, who is to weigh the evidence and reach an ultimate conclusion with

---

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.

[6] This subsection was part of the July 18th amendments to the government's proposal.

[7] The definition does include one reference to a colorable showing. A bailee, under the statute, is an owner only if she identifies the bailor and has "a colorably legitimate interest" in the *res*. § 983(d)(6)(B)(ii).

respect to ownership. Any disputed issue of fact material to the standing question, it appears, must be resolved by the court.

Proposed Rule G also includes a related provision on summary judgment motions. If either party can prevail on the innocent ownership issue on summary judgment, the court must dismiss the case. This provision does not appear to have a direct effect on standing. Only the ownership part of the innocent ownership defense is relevant to standing, and the court can resolve that issue on the facts without appeal to this section. This provision is consistent with the view that those who cannot establish innocent ownership should not be able to put the government to its proof on forfeitability, but does not appear to actually change anything with respect to standing disputes.

VII. Analysis of the Changes

The primary reason for Rule G's standing requirements appears to be to eliminate challenges by straw owners and nominees. The proposal would effectively achieve that aim. The definition of ownership expressly excludes "a nominee who exercises no dominion or control over the property." 21 U.S.C. § 983(d)(6). And the proposal permits that issue to be fully litigated before trial. Thus, any straw owners can be effectively flushed out without the government having to put on its forfeitability case, along with its associated costs and risks of revealing confidential information.

The prevention of genuine nominees from challenging forfeiture in the place of the real owners seems a worthy goal. In the typical case, the true owner will wish to avoid challenging the forfeiture, because in order to so, she would have to admit ownership and otherwise expose herself through the litigation. She will then designate a nominee in whose name she may place title, in order to permit a "clean" challenge to the forfeiture. Most importantly, the nominee in such a scenario has no genuine interest in the property that needs to be protected by the law. So there is no good reason to recognize the nominee's standing. And there are very good reasons for wanting the real owner to protect her own interests. Since the substantive interests really being protected are the owner's alone, the owner should be the one from whom the government can seek discovery.

Proposed Rule G achieves these ends both by limiting the interests that suffice for ownership and by providing for full resolution of the existence of those interests before trial. Though the effects are often intertwined, it is helpful to look at them independently. The first change—the ownership requirement—is directed at eliminating those with minimal interests in the property. The second—the procedural change—is directed at eliminating those who assert interests that are sufficient, but who cannot prove they really have those interests.

A. Ownership Requirement.

1. Is the Change Substantive?

By instituting an ownership requirement, proposed Rule G narrows the class of people entitled to challenge a forfeiture. Nominees and straw owners are expressly excluded from the definition of "owner" adopted by proposed Rule G, effectively excluding those with only

superficial rights to the *res*. But in tying standing to the definition of ownership in § 983, proposed Rule G goes further than that, excluding the claims of not only nominees, but also others with lesser property rights, including certain possessory rights. It thus appears, on its face, to abridge substantive rights: some of those with a legitimate cause of action under current law would lose the right to pursue their claims under proposed Rule G. And changes to the rules should not, of course, alter substantive rights.

The change to the standing requirement, however, is accomplished by moving a standard applicable elsewhere in the litigation to the standing inquiry. In at least some cases—those in which innocent ownership is claimed—it does not impose a new or increased requirement, it simply changes order of proof. Instead of litigating ownership as part of an innocent-owner affirmative defense, the proposal would move resolution of that question up before the government's presenting of evidence on forfeiture. Currently, litigation of cases involving innocent-owner defenses proceeds as follows: (1) the claimant attempts to establish standing; (2) the government attempts to establish forfeitability; and (3) the claimant attempts to establish (a) innocence and (b) ownership. In such cases, proposed Rule G would move half of the affirmative defense up to the standing stage: (1) the claimant attempts to establish standing by establishing (b) ownership; (2) the government attempts to establish forfeitability; and (3) the claimant attempts to establish (a) innocence.

The effect of the proposal, however, is not limited to simply rearranging the order of proof in all cases. For under current law, the claimant is not required to put on an innocent-owner defense to prevail. So the claimant is not required to prove ownership. The only time it is currently necessary is after the government successfully establishes forfeitability, which it might not do. Under proposed Rule G, however, every claimant would face the requirement of establishing ownership. The proposed rule would thus create a new requirement in certain cases.

This may not be a problem if it were true that only innocent owners were genuinely entitled to prevail in these cases.[8] Were this true, a claimant's possibility of prevailing without

---

[8]The government appears to accept that only innocent owners are genuinely entitled to prevail in a civil forfeiture challenge. The assumption is embodied in recently-added section (7)(g) of proposed Rule G. The proposal contemplates that all grants of summary judgment on the innocent ownership issue will be dispositive, and will obviate any need to litigate forfeitability. With respect to claimants' motions, this is unremarkable. When a claimant prevails on such a motion, the court will have found that the claimant is an innocent owner as a matter of law. If so, then the claimant will win no matter what the government does. That innocent ownership defeats forfeitability is a fundamental feature of the innocent-owner defense.

By contrast, with respect to the government's summary judgment motions, the proposal is very significant. If a conclusion that the claimant is not an innocent owner is dispositive, that implies that the claimant will lose even if the government cannot show the property to be forfeitable. This essentially codifies the assumption that only innocent owners are entitled to prevail in a forfeiture challenge.

ever getting to the innocent-owner portion of the litigation would be simply fortuitous. When the government fails to establish forfeitability, it is established that it does not have a right to the property. But that does not mean that the claimant necessarily has a legitimate entitlement to it. Under the current system, because the government must go first, if neither part has a genuine right to the property, the default is in favor of the claimant. The change would simply mean that undeserving claimants could not prevail over the government, even when it could not establish its entitlement to the property. Accepting this view, the only people hurt by the new change would be those who now win by default, but who do not have a genuine entitlement to prevail in these cases.

Under current law, however, it is not true that one must be an innocent owner to have a genuine claim in this sense. By granting standing to those with an interest in the property less than ownership, it is implicit in the law that people other than innocent owners may rightly prevail in a civil forfeiture challenge. Under the present state of the law, those with lesser interests in the property, or who would otherwise be injured by the forfeiture, have a right to challenge a forfeiture in order to prevent the injury forfeiture would cause. The resident who would be made homeless by a forfeiture, for instance, cannot prevail on an innocent-owner defense, but may be entitled to challenge the government on forfeitability.

Under proposed Rule G, by contrast, those potential claimants would lose the right to contest the forfeiture. Because forfeiture finally resolves the government's outright ownership in the forfeited property, the inability to challenge the forfeiture means they would have no recourse at all. And these claims would be lost because of the *substance* of the claims. There are no procedural steps they could take to challenge the loss of the property through forfeiture, or to receive compensation for their loss.

Non-owners could, of course, rely on owners to bring these challenges. By eliminating the ability of non-owners to challenge a forfeiture, the rule would force the real owners to either challenge the forfeiture themselves or let the property go. For the reasons that make straw ownership troubling, this would be beneficial. And because the actual owner will generally have the greatest to lose, she will generally have plenty of incentive to step in, if there are no other challengers.

Nonetheless, the owner may not want to challenge the forfeiture for any number of reasons. A person with a lesser interest in the property cannot force the owners to file a claim. Such a person will simply lose the ability to protect his interest in the property, or prevent the injury he will suffer by the government's (potentially wrongful) forfeiture. The change defines away such a person's claim based on the rights it seeks to protect.

2. Congressional Intent.

Proposed Rule G appears to represent a substantive change from the current state of the law, as represented in the cases, but does it represent a change from what Congress intended? Did Congress intend to protect only innocent owners? Current law represents a fairly consistent

set of interpretations by a number of federal courts. Is there a compelling reason for thinking these interpretations are wrong?

It should be remembered that, historically, standing was regularly granted to those who could not establish an innocent owner defense, because in most cases, there was no innocent owner defense. The only way to challenge a forfeiture was to challenge the government on the forfeitability issue. Thus, standing necessarily developed independently of innocent ownership. There is thus no reason to presume any particular connection between the two.

a. Does the Current Rule Make Sense?

If the current system was irrational, we might be able to presume that Congress did not intend these results. But while the question whether the current system is a good thing or a bad thing is a legitimate one, it cannot be said to be irrational.

A civil forfeiture action is directed at resolving the government's right to the property, not the claimant's. When a forfeiture judgment is entered, "the government succeeds as against the world to the defendant's property. In other words, the government has effectively quieted its title to the defendant's property and owns it outright." *United States v. Gilbert*, 244 F.3d 888, 891 (11th Cir. 2001).

On the other hand, when the government cannot establish the forfeitability of the property, it has no rights in the property at all. So even a claimant with a minimal interest will have a greater claim to the property than the government. Thus, it is reasonable to think a party with an interest in the property—even a relatively minor one—should be able to protect that interest if the property is not forfeitable, and challenging the forfeiture is generally the only opportunity to do so.

Forfeiture with an innocent owner defense might be seen as establishing a particular ordering of property rights. When property is forfeitable, the government obtains rights in that property inferior to innocent owners, but superior to all others. If the property is not forfeitable, then any genuine interest in the property will be superior to the government's. Viewed this way, it makes sense to permit a person with a lesser interest in the property to challenge the government, because if the property is not, in fact, forfeitable, the claimant will be wrongfully harmed if the forfeiture is permitted to stand.

From this perspective, it is apparent that many of the cases the government has expressed concern about may not represent bad outcomes. In *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002), the Third Circuit assumed claimant had standing where he briefly held the keys to the seized car before handing them over to a government agent. His interest in the property had obviously not been shown to be significant. Nevertheless, if the property turns out not to be forfeitable, there is no obvious reason that the government should not return the keys to him. Similarly, the claimant who would be rendered homeless by a forfeiture, as in *8402 W. 132nd St.*, 103 F. Supp. 2d 1040, would clearly suffer a very significant injury should the property be forfeited. A wrongful forfeiture would wrongfully deprive him of a place to live. And the person who found the money on the highway had a non-trivial interest in the money. Under state law, lost money reported to the appropriate officials becomes the owner's after ninety days if the

previous owner is not identified. *$347,542.00*, 2001 WL 335828, at *4. Thus, the finder has a substantial chance of keeping all the money he collected. If the property was not actually forfeitable, there is no apparent reason he should not be able to pursue this possibility. The government has labeled this case a "travesty," because it found it necessary to settle with the claimant rather than put its case on. But it is only a travesty if the money was rightfully the government's. If not, then the claimant's interest in the money was clearly greater than the government's. So while the case may have been a travesty, because the government did not put on its forfeitability case, it is not clear that the outcome of the case can be assumed to be regrettable.

These cases are troublesome only if we either assume that the claimant should not have prevailed whether or not the government established forfeitability, or if we assume that the property was, in fact, forfeitable. But is not obvious that either assumption can be made. One could reasonably think that those with lesser interests should have the chance to challenge the government on the issue of forfeitability even if they could not prevail on an innocent ownership defense. And only when the government prevails on the merits of its forfeitability case can the law accept that it has a right to the property—that is the burden Congress has placed on it.

b. Legislative History.

The government suggests a different reason for presuming that Congress intended to limit forfeiture challenges to owners within the meaning of § 983(d)(6). The government contends that courts generally used the terms "ownership" and "standing" interchangeably until recently, including the period during which Congress was considering CAFRA. Congress may consequently have though that standing and ownership were treated as essentially the same thing at that time, and would continue to be so treated. Consequently, even if Congress could have chosen the system adopted by the courts, it may have intended to permit only owners to bring challenges.

As discussed, however, most courts have long taken a broader view of the kinds of property rights sufficient to establish standing. *See, e.g.*, *Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d at 907 (11th Cir. 1985) ("[A] claimant must demonstrate an ownership or possessory interest in the property seized."); *1982 Sanger 24' Spectra Boat*, 738 F.2d at 1046 (9th Cir. 1984) ("A lesser property interest such as possession creates standing."). And the appropriateness of the Article III redressable-injury inquiry was recognized by at least one court long before the passage of CAFRA, and by several others before CAFRA. *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992) ("We see little analytic difference between [the injury-in-fact] approach and the owner-possessor approach in forfeiture cases. An owner or possessor of property that has been seized necessarily suffers an injury that can be redressed, at least in part, by return of the seized property."); *$81,000*, 189 F.3d 28 (1st Cir. 1999); *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999);*$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A]n owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the property.").

On the other hand, it is true that in the years before CAFRA's passage, there was a certain amount of confusion about the relationship between ownership and standing, and a few courts

did equate standing with ownership. *See, e.g., United States v. One Parcel of Real Property*, 831 F.2d 566, 567-68 (5th Cir. 1987); *United States v. $9,041,598.68*, 976 F. Supp. 642 (S.D. Tex. 1997). Consequently, it is possible that Congress did understand the requirements to be more or less equivalent.

In support of this possibility is the fact that the individual parts of the definition of owner in § 983(d)(6) are strikingly similar to previous rulings on standing. The definition includes a broad range of interests, including secured creditors' interests, but excludes a unsecured creditors, nominees, and bailees who do not identify the bailor. § 983(d)(6). All of these limitations are found in cases addressing standing issues. And overall, though the definition of ownership is somewhat narrower than the range of property interests sufficient for standing under the cases, it is undoubtedly a plausible view of where the boundaries should be set as a matter of statutory standing.

c. Statutory Structure.

The statute itself does not provide much guidance. As noted, CAFRA states that "*any person claiming an interest* in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims." 18 U.S.C. § 983(a)(4)(A) (emphasis added). There are no express standing requirements. The term "standing" does, however, appear in a few locations.[9] There are also a few places where it or related concepts appeared in earlier bills, but did not make it into the final version.[10] The lessons to be drawn from these examples are not clear, but it does seem that Congress considered various issues related to standing, ownership, and possession over the

---

[9]The statute provides for the appointment of counsel in certain cases, but only for "a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute." § 983(b)(1)(A), (b)(2)(A). CAFRA also permits the court to stay proceedings with respect to a claimant for whom participation in the civil forfeiture action may burden the right against self-incrimination in an ongoing criminal investigation. Such a claimant is entitled to relief only if "the claimant has standing to assert a claim in the civil forfeiture proceeding." 18 U.S.C. § 981(g)(2)(b).

[10]One place standing is not expressly required is in the provision for return of the property before trial to avoid a hardship. The enacted version requires the person to have a "possessory interest" in the property. § 983(f)(1)(A). One version of the bill required that "the claimant has standing to assert a claim in the civil forfeiture proceeding." S. 1701, 106th Cong. (Oct. 6, 1999). To reform civil asset forfeiture, and for other purposes. Another had required that "the claimant has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a nonfrivolous claim on the merits of the forfeiture action." H.R. 1965, 105th Cong. (Oct. 20, 1998). Also, currently, a "person entitled to written notice" in an administrative forfeiture who does not receive may move to set aside the forfeiture. § 983(e)(1). A related provision in an earlier bill allowed a "person with an ownership or possessory interest in the seized article" to move to set aside. H.R. Rep. No. 105-358 (Oct. 30, 1997).

course of its deliberations. Consequently, there is no particular reason to think, from looking at the enacted bill and its predecessors, that it simply overlooked these considerations.[11]

In sum, the requirement that claimants be "owners" as defined in § 983(d)(6) appears, on its face, to be a substantive one. Nevertheless, if it is correct that only innocent owners are genuinely entitled to prevail in a forfeiture action, the change may be seen as procedural. Under this view it would simply change the order of proof, placing part of the claimant's case before the government's. Such a view is not, however, consistent with the case law, and it is not obvious that courts have interpreted CAFRA incorrectly. Regardless of its wisdom, the case law presents a coherent view of the law that does not appear to be inconsistent with the statute. And I have not found anything in the legislative history that is clearly to the contrary.

B. Procedural Changes.

Proposed Rule G also makes significant changes to the procedures for litigating standing disputes. Section seven provides a mechanism for the government to move to challenge the claimant's standing at any time before trial: "On the motion of the United States made at any time before trial, the court must enter a judgment for the Government if it finds, based on the allegations in the complaint, the responses to interrogatories served under Rule G(5)(c), or other evidence in the record following a hearing, that the claimant does not standing to contest the forfeiture." Proposed Supp. Rule G(7)(d)(1) (July 18, 2003).

The important change, however, is not the timing of the motions—the government can currently challenge the claimant's standing through a number of pretrial motions—but the standard to be employed. Currently, a claimant need not prove the merits of his case, he need only show a "colorable" interest in the *res*. Under proposed Rule G as I understand it, the existence of sufficient interests in the property would be fully litigated. The claimant would have to show, by a preponderance of the evidence, that he has the requisite interest in the property.

1. The Nature of the Change.

Proposed Rule G now expressly states that standing is to be resolved as a matter of law by the court, not the jury, and that the burden of proof is on the claimant. These appear consistent with current law. The burden of proof is now on the claimant to show a colorable interest, a

---

[11] Richard Troberman, on behalf of the National Association of Criminal Defense Lawyers, claims DOJ, in a letter to Congress, emphasized the distinction between "ownership" for purposes of the innocent-owner defense and standing. DOJ apparently recommended that the statute include a provision identifying standing requirements that was largely the same as the current "ownership" definition, but permitted standing for those with a "possessory or ownership interest in the specified property." Letter of Richard J. Troberman, at 17 (August 26, 2002) (quoting DOJ's "March 16 Response to 'Comments of the March 9th Bill" at 6-7). This would suggest that Congress did consider these issues directly at least to an extent, and did so with the assistance and input of DOJ.

determination that can be made by the court. But under the new rule, the burden would seem to be different. The claimant has standing only if he *is* an owner under § 983(d)(6)—not if he can show only a *colorable* ownership interest. And the court must enter judgment for the government if it finds the claimant does not have standing—*i.e.*, is not an owner. The court thus appears to be called to make an ultimate determination whether the claimant is an owner, rather than simply whether he can show a colorable ownership (or other) interest in the property.[12]

Note that this change is logically independent of tying the standing inquiry to ownership. Even if the substantive standards are not changed, it would still be a substantial change to current law to require the court to fully resolve all disputes over the actual existence of whatever interests are deemed sufficient for standing. With respect to the substantive changes, the question is whether a person with an assumedly *genuine*, but *minimal* interest has standing. Here, the question is whether a person who has made only a *colorable* showing of a *sufficient* interest has standing, even though he may not actually have that interest.

The advantages of this change to the government are clear. Those with bogus claims would no longer be able to slip past the standing inquiry on a minimal showing. A verified claim of ownership without more would no longer buy an opportunity to challenge the forfeiture. Nor would bare legal title suffice in many cases. The government could thus avoid the costs associated with litigating forfeitability in many cases by challenging the claimant on standing. Only those with real interests in the property (or a real likelihood of injury from the forfeiture)—and thus presumably only those genuinely entitled to relief—would be able to force the government to put on its forfeitability case.

This part of the proposal changes the default outcome. Under the current system, after the minimal standing showing is made, the government can only prevail if it establishes forfeitability, even if the person does not actually have the interest in the property alleged. So if the government cannot show forfeitability (for whatever reason) and the claimant does not "really" have standing, the claimant will win by default. Under the proposed change, the government would prevail under those circumstances, because the issue of forfeitability would never get resolved against the government. The change is, therefore, not substantive in the same way as is the ownership requirement.

2. Threshold v. Merits.

Because of the particular role standing plays in forfeiture actions, there is more focus on its status as a threshold issue than in other cases. "[I]n a civil forfeiture action the *government* is the plaintiff, and it is the government's right to forfeiture that is the sole cause of action adjudicated." *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002). "The function of standing in a forfeiture action is therefore truly threshold only—to insure that the government is put to its proof only where someone with a legitimate interest contests the forfeiture." *Id.* A determination

---

[12] Again, the definition does include a requirement that a bailee show his possession to be "colorably legitimate." § 983(d)(6)(B)(ii). Other than that, the interests, under the proposal, would have to be fully established, it appears.

at trial after the government has put on its proof that the claimant lacked standing should not change the outcome. For once it is shown that the property is not forfeitable, the government has no interest in the property. The claimant's interest or lack thereof does not change that. And it is the government's interest, not the claimant's, that is formally at issue. So the claimant's standing must be settled before the issue of forfeitability is resolved. In that sense, it is necessarily a threshold issue.

But this is different from saying the claimant need only make a "threshold showing" in the sense that the claimant need only show enough to get past the courthouse door. Currently, all that need be assessed is whether the claimant "has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest." *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002). But the logical precedence of the standing inquiry simply requires that it come before, not that it be made on only a minimal showing. There is no logical reason that standing cannot be litigated fully, so long as it is done before the government puts its case on.

The primary reason courts have resisted requiring a greater showing appears to be that it would require the claimant to establish the merits prematurely. *See supra*, at 11. The issue of one's interest in the property is a part of the innocent-owner defense—an issue that is properly resolved at trial. Indeed, because a claimant has a Seventh Amendment right to a jury in a civil forfeiture action, *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943); *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 469 (7th Cir. 1980), the issue of ownership is often resolved by a jury. As is discussed in more detail below, the Eighth Circuit has thus held that resolving the issue of ownership (in a nominee case) interferes with the claimant's right to a jury. *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003).

In order to avoid interfering with the merits, a court should presumably refrain from resolving any genuine issue of fact that could be determinative at trial. The ultimate assessment of a claimant's interest in the property may or may not fall into this category, depending on whether the claimant asserts an innocent-owner defense. If so, then if the court dismisses the claim on standing by resolving a genuine dispute going to ownership, it will decide an issue that would be resolved by a jury, and could be determinative. If the claimant does not assert an innocent-owner defense, then ownership cannot be a determinative issue at trial. Thus, the court could make ultimate findings of fact with respect to property interests other than those that qualify under the innocent-owner defense without resolving anything that may arise in the merits portion of the trial.[13] So resolving factual disputes in standing issues does not always implicate the merits, but in many cases, it may.

---

[13] Under proposed Rule G, however, the standing requirements would be the same as the ownership requirement, and the rule is designed so that only those claiming innocent ownership could prevail. Under that scheme, disputed questions of material fact concerning standing would *always* implicate the merits of the dispute. If the claimant did not assert an innocent-owner defense under proposed Rule G, the government could prevail by filing a summary judgment motion pursuant to G(7)(g).

Courts do not generally make this determination, of course. Instead, they ordinarily apply the "colorable interest" test across the board, limiting the standing inquiry to the perceived minimal Article III requirements. That approach effectively avoids resolving merits issues before trial.

The reasons for avoiding resolving merits issues before trial are obvious. Nevertheless, standing is consistently treated as a matter of law for the court. So it might be argued that courts *can* resolve whatever factual disputes are necessary to establish standing—their declining to do so is simply a matter of discretion. And if this is the case, if a statute makes a merits issue a matter of standing, can a court not resolve that issue as a matter of law? That appears to the approach taken in proposed Rule G.

This approach, however, may not avoid implicating the right to a trial by jury. For this reason, the Eighth Circuit has held that disputed issues of facts going to the merits could not be decided, even when they were part of the standing inquiry. The court stated disputes going to the existence of Article III standing—which requires only a colorable showing of an interest—could be resolved. But in that case, according to the court's recitation, "the *disputed* issue was statutory standing." *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003). Since it implicated the merits, even though it was a standing issue, it needed to be decided in accordance with Rule 56 standards. *Id.* So making a requirement a matter of *statutory standing* did not, in that case, insulate it from the rule that merits issues must be resolved at trial—by a jury, if demanded—or by conventional pretrial standards.

3. In Personam *Cases Compared.*

In conventional standing cases, courts often likewise avoid resolving merits issues, even while acknowledging that standing is a matter of law for the court. It is settled that courts can, in certain cases, resolve disputed issues of fact going to standing at a pretrial hearing. *See Duke Power Co. v. Caroline Env'l Study Group, Inc.*, 438 U.S. 59 (1978) (basing decision on factual findings of court after four-day hearing); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[I]t is within the trial court's power" to resolve standing on the basis of evidence.). Alternatively, standing may be contested at various stages in the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice .... In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for purposes of the summary judgment motion will be taken to be true.").

Determining which approach to take is not always clear. But "[a] clear answer ... can be given for cases in which some element of standing is identical with the claim on the merits." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3531.15 (2d ed. 1984). For example, "[i]t would be folly to attempt to dispose of the injury element of standing by a preliminary hearing" on a merits issue. *Id.* In other words, if "it would be impossible to prove the injuries alleged for the purposes of establishing standing without also addressing the merits, a preliminary hearing of the type available in disposing of a motion to dismiss would not offer an appropriate forum for evaluating the issues." *Barrett Computer*

Services, Inc. v. PDA, Inc., 884 F.2d 214, 220 (5th Cir. 1989). *See also Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (summary judgment appropriate for merits issues); *United States v. SCRAP*, 412 U.S. 669 (1973) (same).

In a standard *in personam* case, where the plaintiff's standing is at issue, even when standing issues are left unresolved initially, they must eventually be established in order for the plaintiff to prevail. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. "[A]t the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial." *Id.* Ordinarily, then, a plaintiff will not prevail unless genuine disputes of material fact relevant to standing are ultimately resolved in the plaintiff's favor.

This is not always the case in civil forfeiture proceedings. Because claimants are not plaintiffs, they are not required to put on any case at all at trial. As we have seen, a claimant's interest in the property may be fully litigated as a part of an innocent-owner defense, but it may not. And even if the claimant is found not to be an owner at trial, he may still prevail based on a lesser interest in the property. Indeed, under most cases, the claimant need not ever establish that he actually has a minimal interest necessary for standing. Because courts have treated the issue as merely a threshold one, once it is established the claimant has a colorable interest in the property, he need not put on any case at all.[14] For a civil forfeiture claimant, standing is not an

[14]Under proposed Rule G, the standing inquiry would be much more closely tied to the claimant's case at trial. The showing required for standing would be identical to the showing required for the innocent-owner defense. Nevertheless, a claimant with a colorable innocent-owner defense may choose, for strategic reasons, not to put on the affirmative defense, but instead rely on the government to fall short on its forfeitability showing. And even if they do put the defense on, they may fail to establish the defense, but prevail nonetheless. There is, in other words, no "indispensable part" of her claim that must be established at trial. A claim may be successful without ever making out the elements of standing beyond making a colorable showing.

"indispensable" part of the claim at trial.[15] A claim may be successful without ever making out the elements of standing beyond making a colorable showing.

This is a fundamental concern for the government. An unwillingness to resolve claimants' standing by delving into the merits means that claimants can successfully challenge a forfeiture even if they do not, in a sense, have a genuine claim. So long as claimants create a genuine issue of fact on standing, or establish a "colorable" interest, they may prevail even if they could not show their interests to be real ones at trial. The fact that they *could* rely on such a showing at trial protects them from every having to make such a showing. So claimants with no real interest are permitted to put the government to its proof without putting on any evidence themselves. And they may be able to gain possession of the *res* despite having no genuine claim to it.[16]

---

[15]In a recent case, the district court responded to this situation by imposing a requirement that the claimant establish standing at trial. *United States v. $57,790.00*, 263 F. Supp. 2d 1239, 1245 (S.D. Cal 2003). The court understood *Defenders of Wildlife*, which recognized that plaintiffs must establish each standing element "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation" to imply a requirement that claimant's establish standing at trial, as they were required in *Defenders of Wildlife*. 263 F. Supp. 2d at 1242 (quoting *Defenders of Wildlife*, 504 U.S. at 561). The problem is, claimants are not plaintiffs, and they do not bear the burden of proof on standing at trial, so this application appears to be an extension of—and not merely an application of—*Defenders of Wildlife*.

[16]There is little discussion in the literature of just what happens to the property following a successful challenge. But it seems clear that the claimant does not, by successfully challenging the forfeiture, automatically receive the property. The forfeiture action resolves only that the government must relinquish the property. When the *res* is real property, the government will presumably simply undo the seizure. When a bank account is frozen, a successful challenge should similarly result in the account's being unfrozen. Where the seized item is an automobile or a quantity of cash, the claimant may get possession of the property after a successful challenge. If the claimant is the person from whom the property was seized, it may make sense to simply return the item whence it came.

Where the claimant has never actually established an interest in the property, it is not clear what should be done. For the result of the adjudication will be that the government does not have the right to the property. But there will be no conclusion that the claimant has any interest in the property either. The claimant may have shown only a colorable interest in the property. If no one else has claimed the property, then that colorable showing may be enough to get possession of the *res*. It should be noted, however, that even with possession, however, the claimant will not have established a right to the property against any other potentially interested property. Only the government's rights are adjudicated at a civil forfeiture proceeding.

The proposed change would undoubtedly have the effect, in at least some cases, of calling on the court to resolve issues that are also merits issues. The questions whether this is (1) permissible, and (2) advisable, must therefore be addressed. Among the relevant considerations may be that these merits issues may never by resolved, even when a claim is successful.

If it is thought that courts should not resolve these merits issues, one option may be to resolve standing issues at trial prior to the government's case on forfeitability. *Cf.* 13A Wright, Miller & Cooper, § 3531.15 ("It may be possible to arrange the trial to present standing issues first, so that undue waste is avoided if the case must be dismissed."). That would avoid any concern with the court resolving merits issues prematurely, and would still leave standing as a threshold issue, in the sense that it would be resolved prior to the government's case.

4. Policy Considerations and Congress.

One difficulty with such an approach is that appears, on its face, to alter the order and burdens of proof Congress crafted in CAFRA. One of CAFRA's primary purposes was to change the burdens of proof to make it more difficult for the government to forfeit property, and easier for potential claimants to challenge such forfeitures.

Current standing requirements were not changed fundamentally by the passage of CAFRA. It has long been true that a claimant could get to trial on no more than a showing of a colorable interest in the property. And the claimant could always potentially prevail without ever fully establishing the existence of that interest. The important differences are elsewhere, primarily that such a claimant would carry the burden with respect to the separate issue of forfeitability. There was less incentive to challenge forfeitures before CAFRA, and the cost to the government was not as high. But the basic rules of standing that the government now seeks to change were fairly clearly settled before CAFRA, including the time during which Congress was considering CAFRA.

Most likely, the ability to easily challenge a forfeiture with only a facially colorable interest in the property was a consequence not foreseen at the time of CAFRA's adoption. It is the result of an intentional change to the burdens of proof together with an essentially unchanged standing doctrine, so it may have been foreseeable, but it not clear that it was actually considered.

Whether it is good or bad depends, in large part, on which kinds of mistakes are viewed as more acceptable. When a nominee prevails, he does so even though he has no legitimate claim to the property. There is no reason to be concerned for his interests, because in such a case, he has no "real" interests. But if he prevails because the government fails to prove forfeitability, then the government has no legitimate claim to the property either. There is no particular reason the claimant should win, but there is no more reason the government should necessarily prevail.

The law-enforcement benefits of proposed Rule G are clear. Litigating forfeitability has costs for the government other than the chance it may lose. Doing so requires putting on evidence of criminal activity—evidence it may have very good reasons for keeping confidential. Straw claimants may be able to extract settlements in such cases. If the government does move forward, wrongdoers may gain valuable information about government investigations. Proposed Rule G avoids these problems by defaulting for the government. If a claimant does not have a genuine

interest in the property, the government will prevail no matter how strong its case on forfeitability.

On the other side, one might think it worse for the government to obtain property by forfeiture to which it does not actually have a right. One may think that it is especially important that the government not mistakenly deprive citizens of their property. The burdens the government faces in establishing its right to the property, in this view, are necessary to ensure that it does not take property without justification. Whether these considerations are more or less forceful than the reasons for enhancing the burden on claimants with respect to standing issues requires a determination of what weight to give competing considerations.

In any event, before deciding whether the new rule better reflects public policy, it must be determined whether requiring judicial resolution of what may be merits issues is permissible and advisable. And one must also consider whether the change would be consistent with the balance of the burdens Congress created in CAFRA.

VIII. Conclusion

The proposed changes to standing requirements in Rule G would effectively address what is, by all appearances, a legitimate concern about the potential for abuse of civil forfeiture challenges. But the proposal raises a number of significant questions. It may exclude what are now treated as legitimate claims. It would also require the resolution by the court of factual issues that may be involved in the merits of the claim. And although the proposal is directed at legitimate concerns, there are competing policy considerations that must be considered. These policy choices may be seen as the province of Congress, which exercised its authority and put its mark on this area of the law in adopting CAFRA.

Sealed Settlement Agreements in Federal District Court

Research Progress as of September 8, 2003

Tim Reagan, Shannon Wheatman, Marie Leary, Natacha Blain,
Steve Gensler, George Cort, Dean Miletich
Federal Judicial Center

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 is common, the question is how often and under what circumstances are such agreements *filed* under seal?

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,[1] but a sealed settlement agreement is filed in only one in approximately 300 civil cases. In 99% of these cases, the complaint is not sealed.

The Appendix includes descriptions of cases with sealed settlement agreements, based on our review of unsealed court files. This is a work in progress.

Method

We are looking for sealed settlement agreements in the 11 districts with local rules requiring good cause to seal a document and a 50% random sample of the other districts.

We originally designed our method so that we might include all districts in the study, but we have studied the districts in a random order, so that if we concluded the research without studying all districts, we would have studied a random sample. Because state court practices influence federal practice, we decided to study districts in the same state together, and we decided the same researcher should study them. So we listed the states (plus the District of Columbia, Guam, Puerto Rico, and the Virgin

[1] 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."

Islands) in random order and began studying the districts in that order.[2] We have now begun our study of the first 47 districts in that list.

At the May 1-2, 2003, meeting of the Civil Rules Advisory Committee, we reported that only two districts have local rules pertaining specifically to sealed settlement agreements. The District of South Carolina proscribes them,[3] and the Eastern District of Michigan limits how long they may remain sealed.[4] Several districts have local rules pertaining to sealed documents generally. Fifteen districts (16%) have rules covering administrative mechanics (e.g., how sealed documents are marked), 29 districts (31%) have rules covering how long a document may remain sealed (after which it is returned to the parties, destroyed, or unsealed), and 11 districts (12%) have good cause rules.[5] Perhaps the most natural candidate for a national rule among these local rules is a good cause rule, so we decided it would be useful to compare sealed settlement agreement rates for districts with good cause rules to sealed settlement agreement rates for other districts. Therefore we are studying the 5 districts with such local rules that were not in the first half of our randomly sorted list of all districts.

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.

---

[2] The Northern Mariana Islands is not included, because its docket sheets are not available electronically.

We departed from random selection a bit in the following ways. We began our research with districts in North Carolina, which is home to the subcommittee's chair (the Honorable Brent McKnight, formerly magistrate judge for the Western District of North Carolina and now district judge there), so that his additional knowledge about cases in his district would serve as a check on our work. We also put at the top of the list states with districts having local rules concerning sealed settlement agreements specifically. 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 District of South Carolina has a brand new rule proscribing the sealing of settlement agreements. D.S.C. L.R. 5.03(C). We also put Florida at the top of the list, because of the state's Sunshine in Litigation law, Fla. Stat. § 69.081.

[3] D.S.C. L.R. 5.03(C).

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

[5] California Northern, N.D. Cal. Civ. L.R. 79-5; Illinois Northern, N.D. Ill. L.R. 26.2; Maryland, D. Md. L.R. 105.11; Michigan Western, W.D. Mich. L. Civ. R. 10.6; Mississippi Northern and Southern, N. & S. D. Miss. L.R. 83.6; Missouri Eastern, E.D. Mo. L.R. 83-13.05(A); Oklahoma Northern, N.D. Okla. L.R. 79.1(D); Tennessee Eastern, E.D. Tenn. L.R. 26.2; Utah, D. Utah L. Civ. R. 5-2; and Washington Western, W.D. Wash. L. Civ. R. 5.

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 rejected the idea of looking only at cases with disposition codes of "settled" or "consent judgment" in data reported to the Administrative Office – that would have eliminated 31% of the cases we ultimately found.[6] Even if we also looked at cases with disposition codes of "voluntarily dismissed" and "other dismissal," we would have eliminated 13% of the cases we ultimately found.[7]

We downloaded all docket sheets for cases terminated in 2001 or 2002 in the study districts and searched each docket sheet for the word "seal." This search found "seal," "sealed," "unseal," etc., including "Seal," "Seale," etc. in a party name. Docket *entries* (and headers) with the word "seal" in them were extracted and assembled into a text file. If a docket *sheet* had the word "seal" in it, then we also searched for the word "settle" (which found "settle," "settled," "settlement," etc.), extracted docket *entries* with the word "settle" in them, and assembled them into the same text file as the docket entries with the word "seal" in them. Naturally, some docket entries had both the word "seal" and the word "settle" in them.

We considered, but rejected, looking only at cases where a docket entry with the word "seal" had a date within two weeks, for example, of either the termination date or a docket entry with the word "settle." Had we done this, we would have missed 7% of the cases we ultimately found.[8]

If "seal" and "settle" docket entries from the same case suggested that the case might or did have a sealed settlement agreement, then we read the entire docket sheet for that case. Sometimes, for example, a docket entry merely says "sealed document," and review of other docket entries is necessary to determine what the sealed document might be.[9]

---

[6] 64% of the cases we found were coded 13 = "dismissed: settled" and 5% were coded 5 = "judgment on consent."

[7] 8% of the cases we found were coded 12 = "dismissed: voluntarily" and 10% were coded 14 = "dismissed: other."

[8] In one consolidated case, the word "seal" was 205 days from termination and the word "settle" did not appear in the docket sheet (*Carr v. Louisiana-Pacific Corp.*, NC-W 5:99-cv-00023 filed 02/24/1999, *consolidated with Carr v. Louisiana-Pacific Corp.*, NC-W 5:99-cv-00024 filed 02/24/1999, *Cardwell v. Louisiana-Pacific Corp.*, NC-W 5:99-cv-00025 filed 02/24/1999, *Phillips v. Louisiana-Pacific Corp.*, NC-W 5:99-cv-00026 filed 02/24/1999, *and Carr v. Louisiana-Pacific Corp.*, NC-W 5:99-cv-00027 filed 02/24/1999).

[9] 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

This review eliminated cases with sealed documents filed only at the beginning of qui tam actions or attached only to discovery motions, motions for summary judgment, and motions in limine.

When we reviewed a complete docket sheet, we determined two things. First, we determined whether the case might or did include a sealed settlement agreement. If so, then we identified which documents in the case file to review to learn what the case is about and to learn as much as possible about the sealed settlement agreement. Generally we reviewed complaints, cross- and counterclaims, court opinions, and documents pertaining, or possibly pertaining, to the settlement.

The Appendix includes summaries of local rules and descriptions of cases that we believe contain sealed settlement agreements. We also interviewed 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.

Results

So far, we have finished examining 128,288 civil cases that were filed in one of 29 districts. We found 379 cases with sealed settlement agreements (0.30%). That is approximately one-third of one percent, or one in approximately 300 cases. Table 1 shows our research progress on the study districts.

The sealed settlement rate for individual districts ranges from considerably less than the national rate to considerably more than that rate. Figure 1 shows sealed settlement rates for individual districts. So far, we have found three districts without any sealed settlement agreements among cases terminated in 2001 and 2002 – Indiana Northern, Iowa Southern, and South Dakota. We have found four districts with sealed settlement rates more than twice the national rate – North Dakota (0.87%), Virginia Western (0.78%), Guam (0.77%), and Florida Southern (0.67%).[10]

---

approximately one year of law school). Tim Reagan reviewed documents from districts in Guam, Iowa, Michigan, Missouri, New Hampshire, North Carolina, Puerto Rico, South Carolina, and Virginia; Shannon Wheatman reviewed documents from districts in Florida, Hawaii, Indiana, Maine, North Dakota, Pennsylvania, Virginia, and Washington; Marie Leary reviewed documents from districts in Alabama, Arizona, Delaware, Idaho, New York, and South Dakota; Natacha Blain reviewed documents from districts in Minnesota, Mississippi, New Mexico, Oklahoma, and Tennessee; Steve Gensler reviewed documents from the District of Columbia.

[10] We have not yet finished studying Puerto Rico, but it appears the sealed settlement rate there is approximately 10 times the national rate.

Figure 1
Rate of Sealed Settlement Agreements in Civil Cases
(With Number of Terminated Cases 2001-2002)

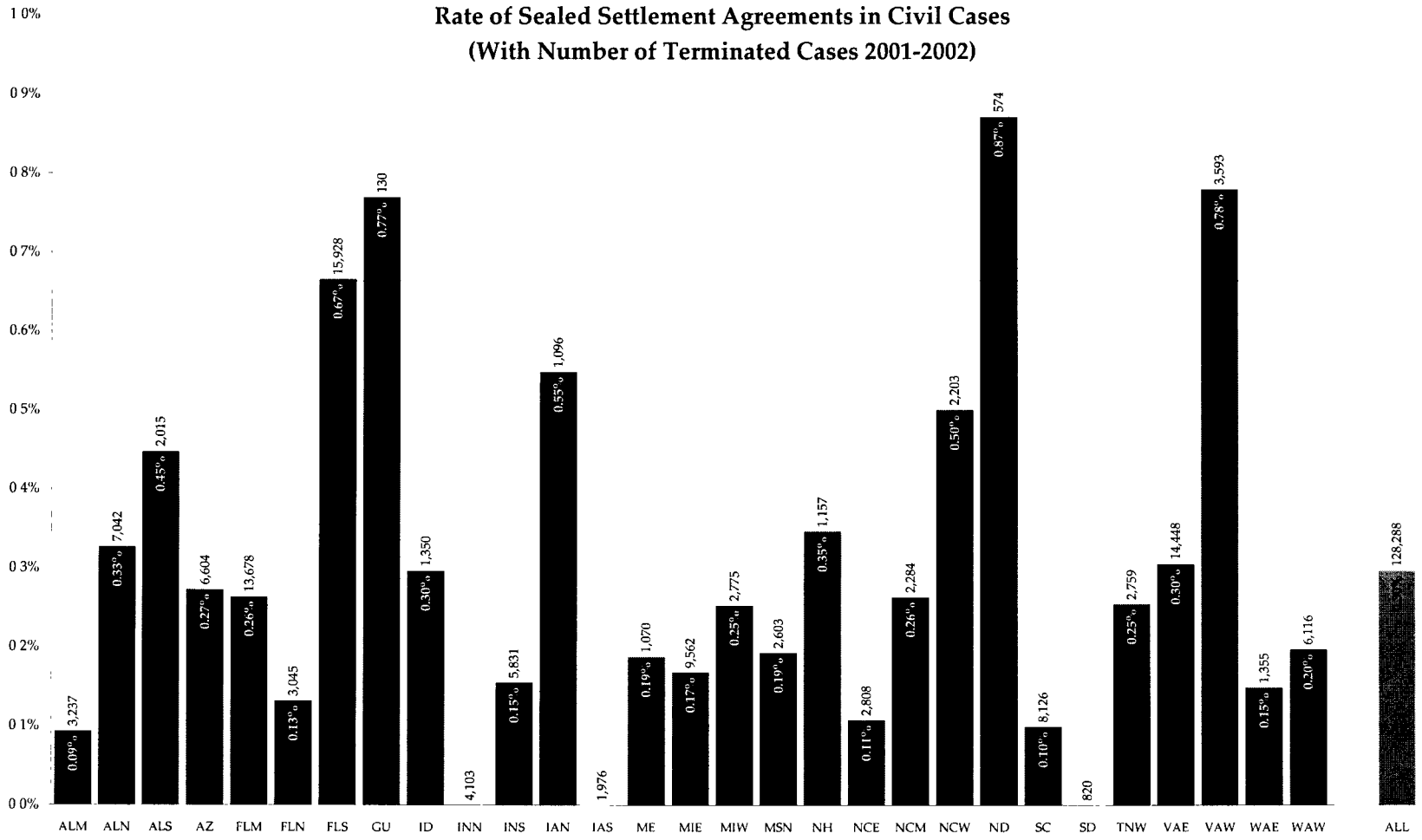


Table 1. Case Counts.

District	Docket Sheets Searched for "Seal"	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Alabama Middle	3,237	80	4	3	3
Alabama Northern	7,042	745	26	24	23
Alabama Southern	2,015	78	22	9	9
Arizona	6,604	347	32	21	18
California Northern**	12,140				
Delaware	2,250	213	13		
District of Columbia	5,368	469	39		
Florida Middle	13,678	513	87	43	36
Florida Northern	3,045	160	11	5	4
Florida Southern	15,928	666	256	120	106
Guam	130	7	3	1	1
Hawaii	1,752	458	42	42	
Idaho	1,350	440	10	5	4
Illinois Northern**	19,378				
Indiana Northern	4,103	216	11	7	0
Indiana Southern	5,831	200	60	13	9
Iowa Northern	1,096	42	15	6	6
Iowa Southern	1,976	69	9	0	0
Maine	1,070	141	10	2	2
Maryland**	7,851	231			
Michigan Eastern	9,562	351	52	19	16
Michigan Western*	2,775	181	13	7	7
Minnesota	4,792	299	30	26	
Mississippi Northern*	2,603	53	21	5	5
Mississippi Southern*	5,775	210	38	18	
Missouri Eastern*	4,798	315	48	22	
Missouri Western	4,857	167	35	27	
New Hampshire	1,157	82	9	4	4
New Mexico	3,084	87	23	19	
New York Eastern	16,001	495			
New York Northern	3,928	192			
New York Southern	20,976	948			
New York Western	3,000	106			
North Carolina Eastern	2,808	143	12	4	3
North Carolina Middle	2,284	63	10	7	6
North Carolina Western	2,203	101	27	14	11
North Dakota	574	126	8	6	5

Table 1. Case Counts.

District	Docket Sheets Searched for "Seal"	Docket Sheets with Entries Examined	Docket Sheets Read	Case Files Examined	Cases with Sealed Settlement Agreements
Oklahoma Northern**	1,954	192			
Pennsylvania Eastern	19,520	654			
Pennsylvania Middle	4,678	520	24	12	
Pennsylvania Western	6,218	306	44	20	
Puerto Rico	3,562	223	159	119	
South Carolina	8,126	311	25	8	8
South Dakota	820	40	6	0	0
Tennessee Eastern*	3,128	249	15	11	
Tennessee Middle	3,162	581	39	7	
Tennessee Western	2,759	222	37	16	7
Utah*	2,387				
Virginia Eastern	14,448	330	57	47	44
Virginia Western	3,593	112	41	31	28
Washington Eastern	1,355	70	3	2	2
Washington Western*	6,116	741	23	16	12
Total Number of Cases	**288,847**	**13,570**	**1,453**	**783**	**379**
Total Number of Districts	**52**	**49**	**42**	**40**	**29**

* District with a local rule requiring good cause for sealing and part of the 50% random sample
** District with a local rule requiring good cause for sealing and *not* part of the 50% random sample

Sealed settlement agreements appear in cases of many different types. Table 2 shows nature of suit frequencies.

Settlement agreements appear to be filed under seal typically to facilitate their enforcement. If they are filed with the court, the same judge who heard the case can enforce the agreement without a new action being filed, and the court can enforce the agreement with contempt powers. Often the agreement is filed so that the court can approve it. Among cases with sealed settlement agreements, approximately one-third (31%) were actions typically requiring court approval of settlement agreements – 12% were cases involving minors or other persons requiring special protection, 18% were actions under the Fair Labor Standards Act, and 11% were class actions (11%).[11]

[11] The three individual percentages add up to more than the overall percentage, because some cases had more than one reason for court approval of settlements.

Table 2. Types of Cases With Sealed Settlement Agreements

Nature of Suit	Cases	
Personal Injury	74	(20%)
Personal Property	5	(1%)
Real Property	3	(1%)
Fair Labor Standards Act	67	(18%)
ERISA	9	(2%)
Other Employment/Labor	73	(19%)
Other Civil Rights	33	(9%)
RICO	3	(1%)
Contract	52	(14%)
Patent	13	(3%)
Copyright	7	(2%)
Trademark	11	(3%)
Other	29	(8%)
Total	**379**	

Sometimes the settlement agreement is not filed until one party believes it has been breached, and then it is filed as a sealed exhibit to a motion to enforce it. In approximately 15% of the cases with sealed settlement agreements, this was how the agreement came to be filed. In a few additional cases, there was a motion to enforce after the agreement was filed.

Occasionally the settlement agreement is not a sealed document filed with the court but a part of a sealed or partially sealed proceeding or transcript. This is true for 11% of the cases we found with sealed settlement agreements.

In approximately 99% of the cases with sealed settlement agreements the *complaint* is *unsealed*. The only time we encountered a sealed complaint was in cases where the entire record was sealed. (The docket sheet, however, was not sealed.)[12]

[12] We encountered four cases with sealed records so far: a product liability action brought by a minor, *Farr v. Newell Rubbermaid* (AL-N 5:00-cv-00997 filed 04/18/2000); an employment action against the University of Michigan where private medical information was an issue, *Baker v. Bollinger* (MI-E 4:00-cv-40239 filed 06/26/2000); and two consolidated foreclosure actions pertaining to gambling boat mortgages, *Credit Suisse First Boston Mortgage Capital v. Doris* (MS-N 4:99-cv-00283 filed 11/22/1999), *consolidated with*

Some of the cases with sealed settlement agreements are likely to be of greater public interest than others. Table 3 lists some types of cases that might be of special public interest and states what proportion of sealed settlements in our study are in cases of each type. Approximately 3 out of 10 cases have at least one of the features in Table 3 that might make them of special public interest.

Table 3. Types of Cases That Might Be Of Special Public Interest

Type of Case	Cases	
Environmental	2	(1%)
Product Liability (includes cases with other Nature of Suit codes)	38	(10%)
Professional Malpractice	8	(2%)
Public Party Defendant	40	(11%)
Very Serious Injury (death or serious permanent disability)	62	(16%)
Sexual Abuse	10	(3%)
Any Reason	**109**	**(29%)**

The Appendix contains case descriptions and 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 preliminary statistics at this time, but we are working to add case descriptions as court files become available.

Credit Suisse First Boston Mortgage Capital v. Bayou Caddy's Jubilee Casino (MS-N 4:99-cv-00284 filed 11/22/1999).

Appendix
Descriptions of Cases with Sealed Settlement Agreements[13]

ALABAMA

No relevant state statute or rule.

Middle District of Alabama

No relevant local rule.

Statistics: 3,237 cases searched; 80 cases (2.5%) had the word "seal" in their docket sheets; 4 complete docket sheets (0.12%) were reviewed; actual documents were examined for 3 cases (0.09%); 3 cases (0.09%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Principal Financial v. Principal Equity (AL-M 2:00-cv-00326 filed 03/16/2000).

Action seeking injunctive and monetary relief for trademark infringement, dilution, unfair competition, and counterfeiting. After the parties agreed to settle and submit a final judgment and permanent injunction by consent to the court, the court ordered the parties to submit a joint stipulation of dismissal. The plaintiffs requested more time to finalize the settlement terms and inadvertently attached exhibits containing draft settlement papers which were filed with the court. Because the draft settlement papers contained confidential information, plaintiffs moved to have them sealed. The court granted the motion and the parties filed under seal the settlement documents and the final judgment and permanent injunction by consent. The court approved the judgment and permanent injunction, ordered the clerk to ensure they remain sealed, and retained jurisdiction over the case as needed to enforce the settlement. The case was closed but remains on the court's administrative docket.

Robson v. Dale County Board of Education (AL-M 1:00-cv-01037 filed 08/02/2000).

Civil rights action by a substitute teacher for retaliation for exercising her First Amendment freedom of speech. The parties settled and the court granted the parties' joint stipulation to dismiss with prejudice the individual defendants (principal and school superintendent). The settlement agreement with the remaining defendant school board apparently was filed under seal, because after the court granted the parties' sealed joint motion to seal, the docket sheet indicates that the case was closed pursuant to a sealed order and a document was filed under seal the same day.

Johnson v. Dothan Coca Cola (AL-M 1:01-cv-00901 filed 07/20/2001).

Employment civil rights action by a black employee against a bottling company for race discrimination and retaliation. The parties settled, the court ordered costs to be taxed against the defendant, and the case was dismissed with prejudice. The defendant contested the bill of cost filed by the plaintiff and moved to file the parties' confidential settlement agreement under seal to show that the parties had an agreement with respect to the payment of costs. The court granted the motion and defendant filed a copy of the confidential settlement agreement for in camera review by the court. Prior to an evidentiary hearing, the parties agreed to split payment of the costs and the court closed the case.

Northern District of Alabama

No relevant local rule.

Statistics: 7,042 cases searched; 745 cases (11%) had the word "seal" in their docket sheets;

[13] Districts are presented in alphabetical order; cases are presented within district in order of filing date.

26 complete docket sheets (0.37%) were reviewed; actual documents were examined for 24 cases (0.34%); 23 cases (0.33%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Woodruff v. City of Birmingham (AL-N 2:96-cv-02196 filed 08/21/1996).

Employment civil rights action for sex discrimination and retaliation by a female buildings inspector employed by the city. Pursuant to a sealed court order, judgment was entered for the plaintiff and the defendant was ordered to comply with the terms contained in the sealed order. Because no motion preceded the order, the sealed order probably incorporated the terms of a settlement agreement reached by the parties. Four years later, the plaintiff brought a motion to enforce the court order still under seal and a motion for contempt against the defendant. The court denied the plaintiff's motions and the case was closed.

Robinson v. Boohaker, Schillaci et al. (AL-N 2:96-cv-03198 filed 12/09/1996).

Contract action by a former shareholder/director/employee for breach of several agreements made with the defendant accounting corporation, including a buy-sell agreement. The defendant counterclaimed that plaintiff's breach of a non-compete provision was the reason for its refusal to honor the terms of its agreement. After a jury trial had commenced, the parties settled. Settlement terms were stated on the record, and the transcript was sealed. The case was dismissed.

Jones v. Samford University (AL-N 2:98-cv-02530 filed 10/06/1998).

Employment civil rights class action by female faculty and staff members alleging sex discrimination by defendant university in compensation, tenure, hiring, and promotion. The court denied certification of the case as a class action. The parties settled and the court dismissed the case with prejudice. The court sealed the transcript of the settlement proceedings.

Faddis v. Roehuf Restaurants (AL-N 2:99-cv-01214 filed 05/13/1999).

Class action under Fair Labor Standards Act alleging defendant restaurant discriminated against female employees regarding wages. In addition, allegations of race and age discrimination, retaliation, and failure to pay overtime wages were brought by named plaintiffs. The court denied class certification. A settlement apparently was reached because two weeks after the court dismissed the case with prejudice, the defendant moved to enforce the settlement and for sanctions. The court denied the defendant's motions and ordered the clerk to place the defendant's motion to enforce the settlement under seal. The case was closed.

Martin v. Davenport AME Zion (AL-N 4:99-cv-01908 filed 07/23/1999).

Personal injury action removed from state court brought by a minor and her mother for molestation of the minor by the defendant pastor. The parties settled and the case was dismissed without prejudice. Less than a month later the parties moved to reopen the case to accept the parties' petition for pro ami settlement to effectuate the settlement that involves the minor. Pro ami proceedings were held. The court filed its order regarding the proposed settlement and final judgment under seal.

Smith v. Cohen (AL-N 5:99-cv-02907 filed 10/29/1999).

Employment civil rights action against the Department of Defense for alleged acts of discrimination against a black female employee on the basis of plaintiff's gender and race, association with African Americans, and retaliation for participation in the EEO process. The parties reached a confidential settlement agreement, which was sealed. The case was dismissed without prejudice.

Hawkins v. Electronic Data (AL-N 2:99-cv-03451 filed 12/30/1999).

Employment civil rights action where black plaintiffs sued their employer for race discrimination and retaliation; plaintiffs also brought claims for unpaid overtime compensation due under the Fair Labor Standards Act. The parties negotiated a settlement agreement at a mediation session. Two weeks later the defendant motioned to enforce the settlement agreement. Attached exhibits which contained the terms of the settlement agreement were filed under seal. The court granted defendant's motion and the parties' stipulation to dismiss the case with prejudice.

IMI Intl. Medical Innovations v. MQS, Inc. (AL-N 2:00-cv-00131 filed 01/14/2000).

Contract action removed from state court where plaintiff terminated defendants' services due to defendants' insufficient and incomplete performance of the terms of their agreement. One of the defendants counterclaimed against the plaintiff and named officers and/or shareholders for breach of contract and unjust enrichment. The case settled between the plaintiff and the counterclaimant/defendant and the court granted the plaintiff's motion to place the confidential settlement agreement under seal. The court also sealed a consent judgment agreed upon by the plaintiff and the counterclaimant/defendant. Plaintiff and the sole remaining defendant stipulated to dismiss the case with prejudice.

Desanto v. Howard (AL-N 2:00-cv-00171 filed 01/20/2000).

Personal injury action brought on behalf of a minor for inappropriate contact by an intoxicated passenger during a flight on defendant airline. In addition, plaintiff alleged the airline failed to provide appropriate supervision during the flight, in breach of the Unaccompanied Minor Program contract. The parties settled. The court granted defendant's motion to allow the filing of all future pleadings under seal until a proposed settlement was approved by the court because the claims were filed on behalf of a minor. In support of its motion, the defendant disclosed that confidentiality of the settlement amount was a material element upon which it relied when agreeing to settle the claims against it. Plaintiff's motion to approve the proposed settlement and the report of the guardian ad litem were filed under seal. The court approved the pro ami settlement and dismissed the case.

McWhorter v. Lawson State College (AL-N 2:00-cv-00401 filed 02/17/2000).

Employment civil rights action brought by a female professor against defendant university for sex discrimination and for retaliation and harassment in response to her complaints of discrimination. The parties settled during court-ordered mediation and the court dismissed the case without prejudice, retaining jurisdiction to enforce the parties' settlement agreement. The court ordered the mediation agreement which was filed with the court to be placed under seal.

Farr v. Newell Rubbermaid (AL-N 5:00-cv-00997 filed 04/18/2000).

Product liability action brought by a minor. The specific allegations of this case are not known because the assigned judge's docket clerk confirmed that the entire case file remains under seal. The docket sheet does indicate that the parties settled and the settlement agreement was sealed. In addition, following a pro ami hearing the court filed a confidential order and approval of the minor settlement under seal. The court ordered that the contents of the file were to remain under seal for purposes of confidentiality. The case was closed.

Shrader v. Mallard (AL-N 4:00-cv-01050 filed 04/21/2000).

Civil rights action removed from state court for sexual abuse injuries allegedly inflicted by employees of defendant city jail while plaintiff was imprisoned upon arrest.

The parties settled and the case was dismissed without prejudice. Four months later the parties filed a joint motion to seal the settlement agreement to maintain its confidentiality to maintain the parties' reputations. The court granted the joint motion and filed the settlement agreement under seal except as to production to plaintiff's counsel in a separate suit against the same named defendant.

Livingston v. City of Attalla (AL-N 4:00-cv-01989 filed 07/18/2000).

Personal injury action for violation of civil rights resulting from sexual abuse injuries allegedly inflicted by employees of defendant city jail while plaintiff was imprisoned. The parties settled and the case was dismissed without prejudice. Four months later the parties filed a joint motion to seal the settlement agreement to maintain its confidentiality to protect the parties' reputations. The court granted the joint motion and filed the settlement agreement under seal.

Bell v. Jacksonville Board of Education (AL-N 1:00-cv-02035 filed 07/21/2000).

Employment civil rights action brought by a female teacher against defendant board of education for discrimination on the basis of gender and age by repeatedly denying the plaintiff promotions. Prior to opening statements at a jury trial, the parties announced settlement of all pending claims and issues. The agreed terms of settlement were read into the record and the settlement portion of the transcript was sealed. The case was dismissed, and the court reserved jurisdiction for 30 days for the filing of motions to enforce the settlement.

Jordan v. API Outdoors, Inc. (AL-N 2:00-cv-02059 filed 07/24/2000).

Product liability action for serious injuries sustained in a fall when the climbing belt plaintiff was using, which was designed and manufactured by the defendant, suddenly and without warning failed. The parties settled and the court ordered the case dismissed without prejudice, retaining jurisdiction over the parties to enforce their settlement agreement. The court ordered the parties' stipulation regarding the settlement agreement to be filed under seal. The court granted the parties' stipulation to dismiss the case with prejudice.

EEOC v. Employers Mutual Casualty Co. (AL-N 2:00-cv-02605 filed 09/15/2000).

Employment civil rights action brought on behalf of a female employee of the defendant insurance company for failure to promote her because of her sex. The parties settled and the defendant moved to allow the parties to file under seal the settlement agreement and general release which was referenced in the proposed consent decree filed with the court. The court granted the defendant's motion. The court ordered the clerk to close the file but the court would retain jurisdiction either for the next four months to resolve any dispute arising out of administration of the consent decree, or until the defendant certifies that the payment and training required under the consent decree was completed, whichever was sooner.

Brockway v. DaimlerChrysler Corp. (AL-N 5:00-cv-02970 filed 10/19/2000).

Employment civil rights action removed from state court brought by a female employee of defendant manufacturing corporation for sex discrimination and sexual harassment plaintiff alleges to have suffered as a condition of employment. The parties apparently reached a settlement because the defendant filed a motion to enforce the settlement agreement with attached exhibits and a brief in support of the motion—both of which were filed under seal. Plaintiff's response to defendant's motion also was filed under seal. Following an evidentiary hearing, the court denied the defendant's motion to enforce the settlement agreement. After all claims against the defendant were dismissed by summary judgment, the case was dismissed.

Reifenentsforgumsgesell-Schaft MBH v. Oxy Tire, Inc. (AL-N 2:00-cv-02977 filed 10/20/2000).

Contract action for breach of an agreement made with plaintiff to make timely payments for tires received and accepted as well as not to sell tires to countries specifically prohibited by the contract. The parties settled and the court granted their request to enter judgment against the defendant under seal and for the judgment to remain under seal until the defendant defaulted in payment of this judgment. The case was dismissed with prejudice. Seven months later the court granted the plaintiff's motion to remove the judgment against the defendant from under seal because the defendant failed to make the second installment payment on the judgment.

Hill v. CVS RX Services Inc. (AL-N 2:00-cv-03355 filed 11/21/2000).

Class action under the Fair Labor Standards Act by CVS pharmacists for failure to pay overtime wages. The parties settled and filed their confidential settlement and release agreement under seal with the court. The court also sealed the transcript of the fairness hearing/settlement conference, including the conditions of settlement agreement with two exhibits. The court approved the settlement of class claims and dismissed the case with prejudice.

Wilson v. Saks Inc. (AL-N 2:01-cv-00237 filed 01/24/2001).

Employment civil rights action by black plaintiff who sued his employer for race discrimination and retaliatory discharge. The parties agreed on a confidential settlement agreement; six days later the defendant brought a motion to enforce the settlement agreement with sealed exhibits attached (letters confirming the settlement). The court granted the defendant's motion to enforce the settlement agreement and dismissed the case.

Cole v. PGT Trucking Inc. (AL-N 5:01-cv-00498 filed 02/23/2001).

Motor vehicle action removed from state court against a truck driver and truck's owner for wrongful killing of the driver (father) and passenger (daughter) and for severe injuries sustained by another minor passenger (daughter) when the tractor-trailer collided head on with the vehicle occupied by the plaintiffs. The parties settled and the plaintiffs filed under seal a motion for an order approving the pro ami settlement pertaining to the minor plaintiff. The court approved the terms of the pro ami settlement and granted the parties stipulation and order of dismissal with prejudice.

Holcombe v. Therapeutic Programs (AL-N 2:01-cv-00918 filed 04/13/2001).

Employment civil rights action by a black employee of a corporation providing foster care services to the state of Alabama for alleged racial discrimination and wrongful termination. The parties apparently settled because the defendant brought a motion to enforce the settlement. The court placed the transcript of the hearing on the motion to enforce the settlement agreement under seal. The court's order dismissing the case with prejudice also was filed under seal.

EMCO Building Products, Inc. v. ARES Corp. (AL-N 5:01-cv-01226 filed 05/14/2001).

Contract action for failure to pay the balance of the contract price after plaintiff sold and delivered the goods to the defendants. After a jury trial had commenced, the case settled and the settlement agreement was sealed as dictated into the court record. The court filed under seal a judgment by agreement of the parties terminating the case. The court granted the plaintiff's request to unseal the agreed order and judgment for the limited purpose of allowing it to be registered/recorded in another judicial district.

Southern District of Alabama

No relevant local rule.

Statistics: 2,015 cases searched; 78 cases (3.9%) had the word "seal" in their docket sheets; 22 complete docket sheets (1.1%) were reviewed; actual documents were examined for 9 cases (0.45%); 9 cases (0.45%) appear to have sealed settlement agreements. [14]

Cases with Sealed Settlement Agreements

In re Amtrak "Sunset Limited" Train Crash (AL-S 1:94-cv-05000, MDL 1003 filed 03/02/1994), multidistrict litigation including *Schmidt v. CSX Transp.* (AL-S 1:94-cv-05015 filed 03/02/1994) *and Procaccini v. CSX Transp.* (AL-S 1:94-cv-05017 filed 03/03/1994).

Personal injury and wrongful death actions arising out of the "Sunset Limited" passenger train derailment and crash into Bayou Canot, Alabama, on September 22, 1993. The train struck a bridge girder displaced by the collision of a towboat and barges with the railroad bridge over Big Bayou Canot. Cases filed by or on behalf of injured or deceased passengers or crew members were transferred by the MDL panel to the Southern District of Alabama and consolidated for pretrial purposes. A master file was created for all pretrial proceedings and assigned docket numbers MDL 1003 and AL-S 94-5000.

Defendants were ordered to submit under seal lists of all settlements, with each settlement agreement to be disclosed only if all parties to it agreed. In December 1998, a global settlement was reached in the remaining 42 wrongful death actions, but it was contingent upon all of the wrongful death plaintiffs' approving the settlement. Each plaintiff's attorney previously settling a wrongful death case with one of the defendants was ordered to complete a "confidential case settlement questionnaire" and file it under seal with the court after which the plaintiff's attorney would receive the terms of the proposed confidential global settlement and other necessary settlement documents. After all plaintiffs executed the appropriate releases, and defendants filed a notice of their receipt, the plaintiff steering committee filed under seal a request for disbursement of the settlement funds. All 42 remaining wrongful death actions were dismissed in March 1999.

Case 94-0515 was by a minor and case 94-0517 was by the minor's mother. One of the defendants filed a motion to enforce a settlement in these two cases which was later placed under seal by the court; the court denied the motion and a jury trial was held in these two cases. In both cases final judgment was entered for plaintiffs against one defendant and in favor of another defendant who had been granted summary judgment. The court dismissed the remaining claims in both cases pursuant to a sealed settlement agreement.

Strong v. City of Selma (AL-S 2:98-cv-00191 filed 02/27/1998).

Civil rights class action for police brutality against black males. The court dismissed the case as settled. Three days later the case was reopened and the court gave the parties 20 days to file under seal a jointly proposed consent order embodying the terms of the confidential settlement agreement. The case was closed upon entry of the sealed consent order.

O'Gwynn v. Foley Police Dept. (AL-S 1:00-cv-00273 filed 03/31/2000).

Action by a mentally ill plaintiff for civil rights violations during her detention at the city jail. After summary judgment for the city, the plaintiff and the police officer entered into a confidential settlement agreement. Because plaintiff was committed and found to be incompetent, a pro ami hearing was required under state law to determine the fairness of the settlement. The court granted the guardian ad litem's request to seal the motion to approve the settlement

[14] These include three cases consolidated as part of a multidistrict litigation case, described together.

agreement. The court approved the settlement agreement and dismissed the case.

Huber v. Tillman (AL-S 1:01-cv-00019 filed 01/05/2001).

Employment civil rights action brought by a female police officer for sex discrimination and retaliation for a religious discrimination charge filed in the past and for filing this action. After summary judgment for the defendant on plaintiff's retaliation claim, the parties reached a confidential settlement agreement. Plaintiff filed a motion to enforce it. Because the terms of the settlement were confidential, the court ordered the plaintiff to file under seal a supplemental motion setting forth the terms of the settlement agreement and the basis for her claim. Before the court ruled on the motion to enforce the settlement agreement, a notice of voluntary dismissal was filed.

Curry v. Kimberly Clark Paper (AL-S 1:01-cv-00445 filed 06/20/2001).

Action removed from state court brought under the National Labor Relations Act and the Labor Management Relations Act arising out of an alleged theft of property from plaintiff's place of employment. The court dismissed the case as settled and gave the parties 30 days to perfect their agreement. The plaintiff moved to enforce the settlement after refusing to sign the general release. The defendants moved to enforce the settlement agreement and the general release. The motions were filed under seal pursuant to a confidentiality provision of the proposed settlement agreement. The parties agreed that the court's resolution of the settlement dispute would end the case. The court denied both motions, but pursuant to its inherent authority to enforce agreements entered into in settlement of litigation pending before it, the court ordered the plaintiff to sign a release according to the terms set forth in the court's order and the defendants to pay plaintiff the undisputed confidential amount set out in the settlement agreement.

EEOC v. Wal-Mart Stores (AL-S 1:01-cv-00522 filed 07/19/2001).

Employment civil rights action brought on behalf of female Wal-Mart employees for sexual harassment and retaliation for reporting the harassment to supervisory employees. In July 2002 the parties notified the court that the action had settled and the court dismissed the case with prejudice. The settlement agreement included a confidential release. The transcript of the settlement agreement apparently was sealed, because in January 2003 the court granted the defendant's motion to unseal the transcript of the settlement agreement.

Williams v. Davis & Feder (AL-S 1:02-cv-00188 filed 03/21/2002).

Legal malpractice case removed from state court concerning plaintiff's claim for medical complications arising from use of a diet drug. Plaintiff alleged that defendants' false representations induced her to accept an inadequate settlement that did not compensate her for a serious heart condition defendant failed to discover. Following settlement and a voluntary dismissal, the defendants moved for relief from judgment and to submit evidence under seal. The court ordered all documents related to defendant's motion sealed. The court granted the defendants' motion for relief from judgment and ordered the parties to conform to the terms of the settlement agreement and release. The parties agreed that the court should have continuing jurisdiction over any alleged breach of the settlement agreement or violation of its terms. The case was dismissed with prejudice.

ARIZONA

"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." Ariz. Sup. Ct. R. 123(c).

District of Arizona

No relevant local rule.

Statistics: 6,604 cases searched; 347 cases (5.3%) had the word "seal" in their docket sheets; 32 complete docket sheets (0.48%) were reviewed; actual documents were examined for 21 cases (0.32%); 18 cases (0.27%) appear to have sealed settlement agreements.[15]

Cases with Sealed Settlement Agreements

Grimes v. Golden Eagle Distributors (AZ 4:96-cv-00689 filed 11/26/1996).

> Employment discrimination action removed from state court by current and former employees for age discrimination, wrongful termination and retaliation in violation of the Age Discrimination in Employment Act. Three plaintiffs agreed to dismiss their claims with prejudice in consideration of a confidential settlement agreement reached by each plaintiff with the defendant. One of the three plaintiffs filed a motion to enforce the settlement agreement. The court granted the defendant's unopposed request to file the plaintiff's motion under seal as well as any future pleadings or papers containing confidential data regarding the settlement agreement and/or negotiations. The parties stipulated to withdraw all pending motions, except for motions for attorney fees filed on behalf of two of the plaintiffs.

Morton v. United Parcel Service (AZ 2:96-cv-02813 filed 12/23/1996).

> Employment discrimination action under the Americans with Disabilities Act for refusal to consider the plaintiff for a driver position based upon a hearing disability and failing to accommodate her disability resulting in the plaintiff's constructive discharge. The parties settled eight months after the case was reopened following the Ninth Circuit's reversal of the district court's decision to grant the defendant's summary judgment motion. The court ordered the record of the telephonic settlement agreement sealed. The parties stipulated to a court order providing for the continuing confidentiality of the substance and terms of the settlement agreement and dismissal of the case with prejudice.

Unisys Corp. v. Varilease Technology Group (AZ 2:98-cv-02251 filed 12/17/1998).

> Copyright infringement and trade secret action concerning maintenance and product support materials and diagnostic software. All parties to the case reached a confidential settlement agreement. As a result of delay in signing the stipulation for dismissal by one of the defendants, the plaintiff filed under seal a motion to enforce the settlement agreement. Before the motion was considered, the necessary signatures were obtained and the case was dismissed upon filing the stipulation to enter a permanent injunction and dismiss the claims with prejudice.

Greenlee Textron Inc. v. Aines Manufacturing Corp. (AZ 2:99-cv-01184 filed 06/30/1999).

> Patent infringement action concerning an inductive amplifier used in the telephone service industries. The parties settled and filed a proposed consent judgment under seal. The court approved the sealed consent judgment.

Ransom v. Arizona Dept. Public Safety (AZ 2:99-cv-01962 filed 11/02/1999).

> Employment action involving an African-American security officer alleging that his employer discriminated against him based upon race and retaliated against him for filing an internal complaint alleging the defendant was conducting a racially biased internal affairs investigation of him. The case settled and the court ordered the record of the terms of the settlement to be sealed.

[15] Two of these cases were consolidated and are described together.

Southwest Gas Corp. v. Oneok Inc. (AZ 2:00-cv-00119 filed 01/24/2000), *consolidated with Southwest Gas Corp. v. Southern Union Co.* (AZ 2:00-cv-00452 filed 03/13/2000).

This case is a consolidation of three cases, two of which were identified by our search. The lead case was not included because litigation continues and the case has not been terminated. The two cases listed above are contract actions also alleging fraud regarding a merger agreement and a confidentiality/standstill agreement. These two cases settled. The court sealed the transcript of the settlement hearing. The settlement agreement subsequently was unsealed by stipulation, except for attachments to an exhibit.

Borenstein v. Finova Group Inc. (AZ 2:00-cv-00619 filed 04/06/2000).

Securities class action alleging false financial statements. A court-approved settlement agreement was filed unsealed, but a "supplemental agreement" was filed under seal and the court sealed the portion of the transcript of a telephonic settlement hearing pertaining to the supplemental agreement.

M&I Heat Transfer v. VAW Systems Ltd. (AZ 2:00-cv-00908 filed 05/15/2000).

Patent infringement action. The plaintiff accepted defendant's offer of judgment, which the court ordered to be filed under seal.

Gregory v. Assisted Living Concepts Inc. (AZ 2:00-cv-01339 filed 07/13/2000).

Personal injury action removed from state court by a nursing home resident for physical and mental injuries including a stroke because of negligent care. The court permitted the parties to file their "Joint Motion for Expedited Approval of Settlement and Stipulation to Dismiss with Prejudice" and all exhibits under seal; on the same day the court approved the parties' settlement agreement and dismissed the action with prejudice.

Ritchie v. Yanchunis (AZ 2:00-cv-01533 filed 08/09/2000).

Personal injury action removed from state court for legal malpractice in allowing the statutory limitation on an action for wrongful termination to lapse. The parties agreed to a confidential settlement agreement and the court ordered the transcript of the settlement agreement to be filed under seal.

Noriega v. City of Scottsdale (AZ 2:00-cv-01646 filed 08/28/2000).

Employment discrimination action by ten current or former Hispanic employees alleging retaliation for filing complaints with the EEOC. The court sealed a joint notice regarding the status of settlement discussions reached by the parties; the parties requested more time to finalize their settlement. The court granted the parties' stipulation to dismiss the case with prejudice.

FTC v. RBJ Telcom Inc. (AZ 2:00-cv-02017 filed 10/25/2000).

Statutory action under the Federal Trade Commission Act for an injunction to halt defendants' unauthorized billing for access to sexually explicit web pages and websites. The court filed two appendices to the stipulated final injunction under seal and further ordered that they shall remain under seal. These appendices apparently "contain details on the efforts that will be made to eliminate or at least minimize potential for fraud and would be damaging if made available to those wishing to perpetrate a fraud."

Cieslinski v. Taurus International Mfg. (AZ 4:00-cv-00712 filed 12/18/2000).

Personal injury action against manufacturer of an allegedly defective firearm for serious physical injury suffered when the firearm misfired, striking the plaintiff in the abdomen. The court ordered the record of the settlement conference to be sealed and not revealed without court order. The court retained jurisdiction to enforce any settlement.

Biesiada v. American Financial Resources, Inc. (AZ 2:01-cv-00511 filed 03/19/2001).

> Action removed from state court under the Fair Labor Standards Act brought by two former bank employees for unpaid wages. The case was dismissed pursuant to a sealed settlement agreement.

Hannan v. Pacific Indemnity Insurance Co. (AZ 4:01-cv-00471 filed 09/14/2001).

> Insurance contract action removed from state court for bad faith in handling plaintiff's claim for a fire that partially destroyed her home. Apparently the parties settled their claims, because five months after the case was filed the court found good cause to file under seal the defendant's motion to enforce the settlement agreement. The case was dismissed with prejudice shortly thereafter.

Stephens v. Community Health Centers (AZ 2:01-cv-01936 filed 10/10/2001).

> Action under the Fair Labor Standards Act by a former employee of the Arizona Association of Community Health Centers for unpaid overtime wages. The case settled and the court ordered the terms of the settlement to be sealed.

Ishmail v. Honeywell Inc. (AZ 2:01-cv-02355 filed 12/03/2001).

> Employment action removed from state court involving a machinist of Macedonian descent suing his former employer for race and age discrimination and wrongful termination. The case settled and the court ordered the settlement agreement to be sealed.

DELAWARE

In state court, a document may be filed under seal only by court order upon a showing of good cause. Del Super. Ct. R. Civ. Proc. 5(g)(2); Del. Ch. Ct. R. 5(g)(2); Del. Ct. Com. Pl. Civ. R. 5(g)(2). "[U]nless the court orders 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." *Id.* Thirty days after the case is over, sealed documents must be unsealed, returned, or destroyed, unless the court orders otherwise upon a showing of good cause. *Id.* R. 5(g)(5).

District of Delaware

The court's local rule on sealing pertains only to administrative details. *See* D. Del. L.R. 5.3.

Statistics: 2,250 cases searched; 213 cases (9.5%) had the word "seal" in their docket sheets; 13 complete docket sheets (0.58%) were reviewed.

DISTRICT OF COLUMBIA

"Absent statutory authority, no case or document may be sealed without an order from the Court." D.C. Super. Ct. R. Civ. 5-III(a).

District of the District of Columbia

"Absent statutory authority, no cases or documents may be sealed without an order from the Court." D.D.C. L. Civ. R. 5.1(j)(1).

Statistics: 5,368 cases searched; 469 cases (8.7%) had the word "seal" in their docket sheets; 39 complete docket sheets (0.73%) were reviewed.

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: 13,678 cases searched; 513 cases (3.8%) had the word "seal" in their docket sheets; 87 complete docket sheets (0.64%) were reviewed; actual documents were examined for 43 cases (0.31%); 36 cases (0.26%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Scarborough v. Bristol-Myers Squibb Co. (FL-M 8:97-cv-02266 filed 09/18/1997).

Personal injury case involving aluminum poisoning by breast implants. A settlement agreement was reached during mediation. The court denied plaintiff's motion to set aside the mediation agreement due to mediator bias. A sealed settlement agreement was filed with defendants' motion to enforce a prior order requiring plaintiff to sign a release. The case was dismissed with prejudice conditioned on immediate payment of settlement and signing of release by plaintiff.

United States ex rel. Carroll v. Living Centers (FL-M 8:97-cv-02600 filed 10/23/1997).

Qui tam action under the False Claims Act for fraudulent Medicare billing against a provider of nursing homes. The government's notice to intervene reported a settlement agreement had been reached. The court ordered that all contents of the court's file remain under seal (except the complaint and the notice to intervene). A sealed settlement agreement apparently was filed.

Burnette v. Cooker Restaurant (FL-M 8:99-cv-00734 filed 03/29/1999).

Class action under the Fair Labor Standards Act by restaurant employees for failure to pay minimum wage and overtime wages. The case was dismissed pursuant to a sealed settlement agreement. Five weeks later the court granted plaintiff's motion to enforce the settlement agreement. The final document in the case reports that the defendant filed bankruptcy.

Williams v. NCS Healthcare (FL-M 8:99-cv-01556 filed 07/06/1999).

Qui tam action under the False Claims Act against a provider of pharmaceutical services for fraudulent Medicare billing. A sealed document was filed the same day that the case was dismissed. In the final order of dismissal the court ordered all documents remain under seal (except the complaint and the notice of election to decline intervention). A sealed settlement agreement apparently was filed.

Lambert v. Water Bonnet (FL-M 6:00-cv-00010 filed 01/04/2000).

Action seeking declaratory judgment under CERCLA for causing pollution on plaintiff's property. On the third day of a bench trial a stipulated settlement agreement was made between the plaintiff and one of the defendants. A sealed settlement agreement was filed. The court also issued orders pertaining to final arguments regarding the remaining defendant and the case was dismissed in defendant's favor nearly eight months later.

Hemphill v. Helmtech (FL-M 5:00-cv-00045 filed 01/18/2000).

Personal injury action removed from state court in which the plaintiff suffered severe head injuries in a motorcycle accident while wearing a helmet manufactured by the defendant. A sealed settlement agreement was filed. The court denied plaintiff's motion to enforce the settlement agreement and for sanctions since payment of $2,320,542 had been received. The court retained jurisdiction for 60 days to enforce the terms of the settlement agreement.

Gambrill v. Laboratory Corp. (FL-M 8:00-cv-00397 filed 02/25/2000).

Qui tam action under the False Claims Act against a provider of laboratory services for fraudulent Medicare billing. All documents in the case file (except the complaint) were filed under seal.

Jabs v. Manatee Memorial Hosp. (FL-M 8:00-cv-00420 filed 03/01/2000).

Medical malpractice case involving negligent care of a newborn with hypotension and respiratory problems causing permanent brain damage. The court placed under seal the plaintiff's motion for approval of minor settlement, the order granting the motion, the guardian ad litem report, and the release.

The supplemental report of guardian ad litem reports a settlement amount of $1,736,716.

Wheeler v. First Colony Life Ins. Co. (FL-M 8:00-cv-00695 filed 04/12/2000).

Contract class action alleging fraud and breach of common law duties in the sale and subsequent servicing of life insurance policies. The plaintiff never filed a motion to certify the class. The order dismissing the case approved a confidential settlement agreement. The same day the case was dismissed two sealed documents were filed under seal. A sealed settlement agreement apparently was filed.

Florida Conference v. Royal Venture (FL-M 6:00-cv-00895 filed 07/13/2000).

Admiralty action involving a deposit of $120,000 for a cruise, where the cruise company went out of business and failed to repay the deposit. A sealed settlement agreement was filed. The settlement amount of $300,000 was noted in the amended agreed stipulated final judgment. The court retained jurisdiction to enforce the terms of the settlement agreement.

Russell v. Baxter Healthcare (FL-M 6:00-cv-01134 filed 08/28/2000).

Product liability action involving a minor who contracted Hepatitis C from defendant's intravenous immunoglobulin product, which had not been treated or manufactured to inactivate viruses, such as Hepatitis B and Hepatitis C. The court granted the motion to approve the settlement and ordered the transcript and record of the settlement sealed.

TV/COM International v. Mediaone (FL-M 3:00-cv-01045 filed 09/19/2000).

Patent infringement action concerning a "multi-layer encryption system for broadcast of encrypted information." Two sealed settlement agreements were filed. The court retained jurisdiction to enforce the terms of the settlement agreements.

Woolbright v. Capris Furniture (FL-M 5:00-cv-00315 filed 10/02/2000).

Employment action where a furniture store employee sued her former employer for sexual harassment and retaliation. A sealed settlement agreement was filed by the defendant. The court retained jurisdiction to enforce the terms of the settlement agreement.

Brackett v. United Healthcare (FL-M 8:00-cv-02112 filed 10/13/2000).

ERISA action for wrongful denial of coverage for speech therapy for plaintiff's brain-injured child. A sealed settlement agreement was filed.

Artcraft of Montreal v. Classic Lighting (FL-M 3:00-cv-01166 filed 10/18/2000).

Copyright action involving the production, distribution, and sale of glassware products that are direct copies of plaintiff's glassware. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Anthony v. Community Hospice (FL-M 3:00-cv-01239 filed 11/08/2000).

Class action under the Fair Labor Standards Act by kitchen and nursing employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction for 30 days to enforce the terms of the settlement agreement.

Morrow v. Town of Oakland (FL-M 6:00-cv-01514 filed 11/13/2000).

Employment action involving a chief of police suing his former employer for age discrimination and wrongful termination. A sealed document was filed the day of the settlement conference. A sealed settlement agreement apparently was filed.

Thiruchelvam v. Human Medical Plan (FL-M 6:00-cv-01542 filed 11/16/2000).

Employment action brought by eight medical doctors against a health insurance company alleging that they were terminated

from their primary care agreements because of their race. Plaintiffs' filed a motion to enforce the oral settlement agreement reached during mediation. One week after the motion was filed two sealed documents were filed. Two days later a settlement conference was held. The case was dismissed as settled and the court retained jurisdiction to enforce the settlement agreement.

Palermo v. United Parcel Service (FL-M 8:00-cv-02395 filed 11/22/2000).

Action filed under the Americans with Disabilities Act, Family Medical Leave Act, and Fair Labor Standards Act by a supervisor against his former employer for failure to pay overtime wages, discrimination, retaliation, and wrongful termination due to his stress disorder. A sealed settlement agreement was filed as an attachment to a joint motion for a protective order. The case was dismissed as settled.

Wallendy v. Kanji (FL-M 8:01-cv-00323 filed 02/13/2001).

Action filed under the Americans with Disabilities Act for an injunction requiring defendant to remove from its commercial property architectural barriers to the physically disabled. A portion of the settlement agreement containing attorney's fees and costs was filed under seal.

Delgado v. Hillsbrough (FL-M 8:01-cv-00514 filed 03/09/2001).

Employment action where an Hispanic security officer alleged that his former employer discriminated against him based on race and retaliated against him for filing a complaint with the EEOC. A sealed settlement agreement was filed. Two months after the case was dismissed the plaintiff filed a notice of defendant's non-compliance. One month later the plaintiff reported defendant had complied with the settlement agreement.

Hanshaw v. Princess U.S. (FL-M 8:01-cv-01045 filed 06/01/2001).

Personal injury action involving an injury sustained when plaintiff's wheelchair was thrown backwards when entering the gangway of defendant's passenger ship. After the court ordered mediation, the case was dismissed without prejudice and "subject to the right of the parties within 60 days to submit a stipulated form of final order or judgment." Six days after the case was dismissed a sealed document was filed. Two months later a final order granted the joint stipulation for dismissal with prejudice. A sealed settlement agreement apparently was filed.

Erway v. Mayport Wholesale Seafood (FL-M 3:01-cv-00733 filed 06/27/2001).

Employment action where a supervisor sued her former employer for sexual harassment and retaliation. The case was dismissed as settled. A sealed settlement agreement was filed as an attachment to plaintiff's motion to enforce the settlement agreement. The court denied plaintiff's motion to enforce.

Mishoe v. City of Bartow (FL-M 8:01-cv-01303 filed 07/10/2001).

Employment action removed from state court where a man sued a former employer for wrongful termination in retaliation for his supporting a co-worker's sexual harassment claim. A sealed document was filed about a month after the case was dismissed without prejudice and the parties were given 60 days to submit a stipulated form of final order or judgment.

Shuey v. Information Display (FL-M 3:01-cv-00797 filed 07/13/2001).

Action under the Fair Labor Standards Act by inventory logistics coordinator for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the terms of the settlement agreement.

Hunter v. Albertson's (FL-M 6:01-cv-00866 filed 07/20/2001).

Class action under the Fair Labor Standards Act by grocery store employees for failure to pay overtime wages. A sealed settlement agreement was filed.

Konecranes v. Leach (FL-M 3:01-cv-00917 filed 08/09/2001).

Contract action involving breach of an employee noncompetition and confidentiality agreement. A sealed settlement agreement was filed. The court granted the plaintiff's motion for a permanent injunction against the use of client lists and trade secrets. The court retained jurisdiction to enforce the terms of the settlement agreement.

Access for America v. Hall (FL-M 8:01-cv-01734 filed 09/07/2001).

Action under the Americans with Disabilities Act for an injunction requiring defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed document was filed ten days after the motion to approve a consent decree. The court retained jurisdiction to enforce the consent decree.

Access for America v. World Continents (FL-M 8:01-cv-01736 filed 09/07/2001).

Action under the Americans with Disabilities Act for an injunction requiring defendant to remove from its commercial property architectural barriers to the physically disabled. A sealed settlement agreement was filed. In the order of dismissal the court awarded plaintiff $2,500 to cover legal fees, expert fees, costs, and reinspection costs.

Hernandez v. Central Beef (FL-M 5:01-cv-00323 filed 09/27/2001).

Wrongful termination action under the Family Medical Leave Act seeking reinstatement and repayment of employment benefits. A sealed settlement agreement was filed by the defendant. The court retained jurisdiction to enforce the terms of the settlement agreement.

DirectTV v. Lamothe (FL-M 8:01-cv-01923 filed 10/09/2001).

Action under the Federal Communication Act seeking injunctive relief and compensation for unlawful sale of signal theft devices. Eighteen days before the case was dismissed a sealed document was filed. The case was dismissed without prejudice and the parties could "re-open the action within sixty (60) days upon good cause." The court also ordered a permanent injunction enjoining the defendant from manufacturing or selling signal theft devices.

Harwell v. Groover (FL-M 3:01-cv-01179 filed 10/12/2001).

Shareholder derivative action involving breach of fiduciary duty and usurpation of corporate opportunity. A sealed settlement agreement was filed.

Access for America v. G&G Properties (FL-M 8:02-cv-00212 filed 02/05/2002).

Action under the Americans with Disabilities Act for an injunction requiring defendant to remove from its shopping plaza architectural barriers to the physically disabled. In the consent decree the defendant agreed to modify its facilities to make them readily accessible to the disabled. In a stipulated agreement the fees and costs were approved by the court in camera under seal.

Tremaroli v. Information Display (FL-M 3:02-cv-00315 filed 04/01/2002).

Action under the Fair Labor Standards Act by electronics technician for failure to pay overtime wages. A sealed settlement agreement was filed.

Violet v. Designers' Press (FL-M 6:02-cv-00658 filed 06/06/2002).

Employment action where a woman sued her former employer for sexual harassment and retaliation. Settlement was reached during the settlement conference. The portion of the record containing the terms of the settlement was sealed.

Cummings v. Timberland Security (FL-M 8:02-cv-01227 filed 07/10/2002).

Class action under the Fair Labor Standards Act by a security officer for failure to pay overtime wages. A sealed settlement agreement was filed.

Northern District of Florida

No relevant local rule.

Statistics: 3,045 cases searched; 160 cases (5.3%) had the word "seal" in their docket sheets; 11 complete docket sheets (0.36%) were reviewed; actual documents were examined for 5 cases (0.16%); 4 cases (0.13%) 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 Stores Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982).

Statistics: 15,928 cases searched; 666 cases (4.2%) had the word "seal" in their docket sheets; 256 complete docket sheets (1.6%) were reviewed; actual documents were examined for 120 cases (0.75%); 106 cases (0.67%) appear to have sealed settlement agreements.[16]

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

[16] Two of these cases are companion cases, described together.

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 ex rel. Airon 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.

United Parcel Service v. Lynn Strickland Tires (FL-S 1:98-cv-00992 filed 05/10/1998).

Contract action involving tire related services. A sealed settlement agreement was filed. The court approved the settlement, retained jurisdiction to enforce the settlement agreement, and closed the case. One of the defendants filed a motion to reopen the case and unseal the settlement agreement because they were not a party to the agreement and never received a copy of the settlement agreement. The court reopened the case, vacated the order approving the settlement, and unsealed the settlement agreement, but ordered that "the parties shall maintain the confidentiality of the document and use it only to promote further settlement." The defendant who had settled with the plaintiff was dismissed. The final judgment against the remaining defendant was in the amount of $18,712.

Rando v. Slingsby Aviation (FL-S 1:98-cv-02224 filed 09/22/1998).

Wrongful death action alleging a faulty fuel system caused the crash of a Firefly Aircraft, which killed an Air Force Academy cadet. The case was dismissed as to the distributor of the airplane. Plaintiffs alleged the aircraft had a faulty fuel system. A joint stipulation 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. Two years later a settlement agreement was reached with the manufacturer of the airplane, but this agreement was not filed. In the order of dismissal the court retained jurisdiction to enforce the terms of the settlement agreement.

Casey v. Windmere-Durable Holdings (FL-S 1:98-cv-02273 filed 09/29/1998).

Securities class action for fraudulently misrepresentation of financial condition, causing artificial inflation of the company's stock price. The settlement agreement provided $10,500,000 to the class. A supplemental agreement was filed under seal.

United States ex rel. Christensen v. Preferred Healthcare Consultants (FL-S 1:98-cv-03021 filed 12/10/1998).

Qui tam action under the False Claims Act for fraudulent Medicare billing by healthcare providers. Two days before the case was dismissed a sealed document was filed. A sealed settlement agreement apparently was filed.

Martin v. Underwood Karcher & 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 Design and Management v. All That Style Interiors (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 of Florida (FL-S 1:99-cv-02391 filed 08/31/1999).

Action, removed from state court, under the Fair Labor Standards Act by a crystal art assembler for failure to pay overtime wages. A sealed settlement agreement was filed.

Martin v. Thermo Electron Corp. (FL-S 1:99-cv-02547 filed 09/22/1999).

Contract action for breach of master distributor agreement. A sealed document was filed two weeks after the settlement conference and two weeks before the joint stipulation to dismiss. A sealed settlement agreement apparently was filed.

United States ex rel. Alford v. Bon-Bone Medical Imaging (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 and Cedar Co. (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-07580 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 that allegedly caused the aircraft to crash, killing the pilot. The court appointed a guardian ad litem to approve the settlement agreement with decedents' minor child. 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.

Hofstein v. Coastal Leasing (FL-S 0:99-cv-07620 filed 12/10/1999).

Employment action brought by a portfolio manager against her former employer for wrongful termination based on her pregnancy. Plaintiff's motion to enforce the settlement agreement was filed under seal. The court denied the motion and entered a final judgment in favor of the defendant.

Gornescu v. United Cable Communications Group (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 Technicians (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 Ins. 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 Preparatory School (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 Equipment (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 of Florida (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 emer-

gency 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. One month after the case was dismissed a sealed document was filed. A sealed settlement agreement apparently was filed.

Runnels v. 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 Inc. (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 Corp. (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 Beach LLC (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 University (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.

Ballantini v. Royal Carribean Cruises (FL-S 1:00-cv-04755 filed 12/14/2000).

Admiralty action for personal injury that occurred when plaintiff fell down the stairs while a passenger on defendant's cruise ship. A settlement for $110,000 was noted in the minutes of the settlement conference. The transcript of the settlement conference was sealed. The court retained jurisdiction for 30 days to enforce 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).

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 a 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. Russell J. Ferraro, Jr. & Assocs. (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 Inc. (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 Inc. (FL-S 1:01-cv-00351 filed 01/29/2001).

RICO action involving a management buy-out 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 Inc. v. Biosamplex Inc. (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.

Stortini v. LDC General Contracting (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.

Flores v. Albertson's Inc. (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.

Doe v. Metropolitan Dade County Public Health Trust (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 Inc. v. Winn-Dixie Stores (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 order 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 Management (FL-S 1:01-cv-00794 filed 02/22/2001).

Employment 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 Inc. (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-Owners' Ass'n (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 and granted a motion to file it under seal.

Thomas v. Johnny Rockets Group (FL-S 1:01-cv-01067 filed 03/19/2001).

Class action filed under the Fair Labor Standards Act by restaurant employees for failure to pay minimum wage. The case was dismissed as settled and the court retained jurisdiction to enforce the settlement agreement. Six months after the case was dismissed the plaintiff filed a motion to enforce the settlement agreement. A sealed document, presumably the settlement agreement, was filed the same day.

Planet Solutions v. European Cosmetics & Research Lab (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 so the court could rule upon the motion to vacate the permanent injunction on grounds that the plaintiff breached the

terms of the confidential settlement agreement. A sealed settlement agreement was filed along with the motion to vacate. No other documents were filed in the case.

Vigo v. American Sales & Management Org (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 Inc. (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 Corp. (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.

Carlucci v. Thermo Electron Corp. Inc. (FL-S 1:01-cv-01680 filed 04/24/2001).

Personal injury action against manufacturer and owner of an X-ray unit the plaintiff serviced. The plaintiff's wrist was broken when the scissor arm casting broke, causing the arm and tubhead to fall. A sealed settlement agreement was attached to the defendants' motion to enforce the settlement agreement. The case was dismissed as settled before the court ruled on the motion to enforce.

Signal Communications v. Motorola Inc. (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.

Seiko Kabushkiki Kaisha v. Swiss Watch Int'l Inc. (FL-S 0:01-cv-06732 filed 05/02/2001).

Infringement action for use of the trademarks "Seiko" and "Pulsar." A sealed settlement agreement was filed.

Taylor v. Arrowpac Inc. (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.

Harrington v. Twin City Fire Ins. Co. (FL-S 9:01-cv-08442 filed 05/16/2001).

Insurance action for bad faith in not offering policy limits to resolve an automobile negligence claim. The court approved a settlement and sealed the settlement agreement. The court retained jurisdiction to enforce the settlement agreement.

Velazquez v. Softnetgaming Inc. (FL-S 1:01-cv-02011 filed 05/17/2001).

Action filed under the Fair Labor Standards Act for failure to pay overtime wages. The case was dismissed as settled and the court retained jurisdiction to enforce the settlement agreement. Two months after the case was dismissed, the plaintiff filed a motion to enforce the settlement agreement under seal. Another sealed document, presumably the settlement agreement, was filed the same day.

Medley Industria Farmaceutica 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.

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.

Dede v. City Furniture Inc. (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.

Vargas v. Shoma Development Corp. (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 Inc. v. Harris (FL-S 1:01-cv-02964 filed 07/06/2001).

Action for declaratory judgment 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 Inc. (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.

Eugene v. Pep Boys (FL-S 1:01-cv-03171 filed 07/19/2001).

Civil rights employment action brought by a black assistant store manager against his former employer for race discrimination. The parties settled the case during mediation. The plaintiff filed a motion to enforce the settlement agreement. Defendants filed under seal a response to plaintiff's motion since it contained information on the confidential terms of the settlement. The court dismissed the case pursuant to a joint stipulation and retained jurisdiction to enforce the settlement agreement.

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 Inc. (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.

Washington v. School Board of Miami-Dade County (FL-S 1:01-cv-03343 filed 07/30/2001).

Employment action brought by a substitute teacher against the school district and high school principal for sexual harassment. Two sealed documents were filed eight days before the parties filed a joint notice of status of settlement documents stating that they have agreed about the terms of the settlement and are in the process of executing the agreements. The case was dismissed as settled and the court retained jurisdiction for 60 days to enforce the settlement agreement.

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 Condo Hotel (FL-S 1:01-cv-03572 filed 08/20/2001).

Wrongful termination action under 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 on 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 Int'l Inc. v. T&T Sports Marketing Ltd. (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 30 Minute Custom Framing Inc. (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 Inc. (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 stated it considered the settlement agreement before dismissing the case. A sealed settlement agreement apparently was filed.

Yeung v. Far & Wide Travel Corp. (FL-S 1:01-cv-04373 filed 10/24/2001).

Contract action for breach of a restrictive covenants that included a non-competition clause. The parties filed a joint motion to seal the settlement agreement. A sealed settlement agreement was filed. The court denied the motion to seal and returned the settlement agreement to the parties. The court approved the settlement to the plaintiff in the amount of $2,936,550.

Alvarez v. Professional Aviation Management (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.

Siegel v. Office Depot Inc. (FL-S 1:01-cv-04566 filed 11/06/2001).

Civil rights employment action by a copy center manager who alleged he was demoted because of his age. A settlement was reached during mediation. The case was dismissed as settled. A sealed document was filed the same day the case was dismissed. A sealed settlement agreement apparently was filed.

Sarabia v. Peoplease Corp. (FL-S 1:01-cv-04870 filed 11/30/2001).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court retained jurisdiction to enforce the settlement agreement.

Baumgarten v. Children's Psychiatric 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.

Fishman v. American Media Inc. (FL-S 9:02-cv-80042 filed 01/16/2002).

Class action filed under the Fair Labor Standards Act by newspaper employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court ordered the settlement agreement remain sealed for five years at which time it will be returned to the defendant.

Marinaro v. Miller & Bechert PA (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, the 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.

White v. Cowcat Enterprises (FL-S 9:02-cv-80075 filed 01/31/2002).

Class action filed under the Fair Labor Standards Act by employees of an addiction treatment program for failure to pay overtime wages. Two sealed documents were filed one day before the court approved the settlement and retained jurisdiction to enforce the settlement agreement. A sealed settlement agreement apparently was filed.

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.

Wilson v. Senor Frogs (FL-S 1:02-cv-20516 filed 02/15/2002).

Class action filed under the Fair Labor Standards Act by a restaurant workers for failure to pay minimum and overtime wages. A sealed settlement agreement was filed along with the motion to approve the settlement agreement. The court approved the settlement but denied the motion to seal the settlement agreement.

Puig v. Florida Sol Systems (FL-S 1:02-cv-20663 filed 03/04/2002).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and said it would destroy the settlement agreement.

Webster v. Urbieta (FL-S 1:02-cv-20838 filed 03/18/2002).

Civil rights action against the owner of a gas station where the black plaintiff and his two minor children were denied service because of their race. Three sealed documents were filed within two weeks of the close of the case. A sealed settlement agreement apparently was filed.

Navigators Insurance Co. v. Seaboard Marine Ltd. (FL-S 1:02-cv-20867 filed 03/20/2002).

Admiralty action for loss from defendant's alleged failure to properly load and stow cargo. Five months after the case was dismissed as settled a sealed document was filed.

Varig v. Nijankin (FL-S 1:02-cv-20960 filed 03/28/2002).

RICO action for breach of fiduciary duty where plaintiff seeks to recover damages

arising from defendant's receipt of commissions, bribes, and kickbacks from plaintiff's contractors. A sealed document was filed one day before the case was dismissed. The court retained jurisdiction to enforce the settlement agreement.

Hernandez v. Children's Psychiatric Center (FL-S 1:02-cv-20961 filed 03/28/2002).

Action filed under the Fair Labor Standards Act for failure to pay minimum and overtime wages. A sealed settlement was filed as an attachment to defendant's motion to approve the settlement agreement and seal the settlement agreement. Six days later the court denied the motion to seal the settlement agreement. The settlement agreement was returned to the defendant. The defendant filed a motion for reconsideration of their motion to seal or in the alternative to review the settlement in camera. The court granted an in camera review. The court approved the settlement and dismissed the case.

Reyes Cigars v. Adworks of Boca Raton (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.

Fernandez v. GFB Enterprises (FL-S 1:02-cv-21563 filed 05/24/2002).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and dismissed the case.

Steinberg v. Michaud Buschman Mittlemark Millian Blitz & Warren (FL-S 9:02-cv-80523 filed 06/06/2002).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. The case settled during mediation. The case was dismissed without prejudice and the court retained jurisdiction for 60 days to enter judgment or final order of dismissal. One month later a sealed document was filed. The court has yet to enter an order of dismissal.

Plasencia v. Hanjin Shipping Co. (FL-S 1:02-cv-21968 filed 07/03/2002).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed as an attachment to defendant's motion to file the settlement agreement under seal. The case was dismissed as settled.

Abascal v. Univision Network Ltd. (FL-S 1:02-cv-22092 filed 07/17/2002).

Class action filed under the Fair Labor Standards Act by sales employees for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and ordered that the settlement agreement be unsealed December 5, 2007.

Charmant v. L & M Fisheries Inc. (FL-S 0:02-cv-61141 filed 08/15/2002).

Class action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The parties filed a joint stipulation of dismissal and asked the court to retain jurisdiction to enforce the settlement agreement. The case was closed but no order of dismissal was filed. Five sealed documents were filed the same day the case was closed. A sealed settlement agreement apparently was filed.

Wool v. Tokyo Bowl (FL-S 1:02-cv-22442 filed 08/19/2002).

Class action filed under the Fair Labor Standards Act by restaurant employees for failure to pay overtime wages. A sealed set-

tlement agreement was filed as an attachment to a joint motion to seal the settlement agreement. Eight days later the court denied the motion to seal and returned the settlement agreement to counsel. The case has not been closed and no order of dismissal has been filed.

Shred-it USA Inc. v. Tejo (FL-S 1:02-cv-22494 filed 08/22/2002).

Contract action for breach of confidentiality and non-competition agreement. A sealed settlement agreement was attached to defendant's motion to enforce. The court granted the motion to enforce.

Chong v. D & E Building Maintenance Inc. (FL-S 1:02-cv-22534 filed 08/27/2002).

Action filed under the Fair Labor Standards Act by a maintenance worker for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement and dismissed the case.

Pizza Hut Inc. v. Grossman (FL-S 1:02-cv-23192 filed 10/29/2002).

Trademark infringement action involving use of "Pizza Hut" in the domain name "Pizahut.com." A sealed settlement agreement was filed. A consent judgment ordered a permanent injunction against defendant's use of the domain name. The court retained jurisdiction for 60 days to enforce the settlement agreement.

GUAM

No relevant state statute or rule.

District of Guam

No relevant local rule.

Statistics: 130 cases searched; 7 cases (5.4%) had the word "seal" in their docket sheets; 3 complete docket sheets (2.3%) were reviewed; actual documents were examined for 1 case (0.77%); 1 case (0.77%) appears to have a sealed settlement agreement.

Cases with Sealed Settlement Agreements

Blaz v. van der Pyl (GU 1:00-cv-00014 filed 03/31/2000).

ERISA action by former dental employee for failure to provide pension documents, for wrongful termination in retaliation for request to examine pension documents, and for wrongfully attempting to withhold pension funds in satisfaction of plaintiff's personal debt to her employer. Defendants counterclaimed for conversion of patients' bill payments to plaintiff's personal use. The case settled at a court-mediated settlement conference and a sealed document was filed that day. Two days later, the court dismissed the action pursuant to the settlement agreement, which was incorporated by reference into the notice of dismissal.

HAWAII

No relevant state statute or rule.

District of Hawaii

No relevant local rule.

Statistics: 1,752 cases searched; 458 cases (26%) had the word "seal" in their docket sheets; 42 complete docket sheets (2.4%) were reviewed; actual documents were examined for 42 cases (2.4%).

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). Court staff members have observed that after they started making electronic images of court files available in 1998, parties have more often requested that settlement agreements be filed under seal.

Statistics: 1,350 cases searched; 440 cases (33%) had the word "seal" in their docket sheets; 10 complete docket sheets (0.74%) were reviewed;

actual documents were examined for 5 cases (0.37%); 4 cases (0.30%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Bursch v. Residential Funding Corp. (ID 3:99-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 1:99-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 1:00-cv-00280 filed 05/23/2000).

> Product liability action against manufacturer of a helicopter for wrongful death in a crash resulting from the engine's failing suddenly. The court approved and sealed the settlement agreement.

McKee v. Young (ID 1:00-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.

INDIANA

The sealing of court documents in Indiana state courts requires the showing of stringent criteria at a public hearing. Ind. Code § 5-14-3-5.5. The sealing proponent must show by a preponderance of the evidence that the public interest in sealing outweighs the public interest in public records, *id.* § 5-14-3-5.5(d)(1), sealing will prevent a "serious and imminent danger" to the public interest, *id.* § 5-14-3-5.5(d)(2), and there is no reasonable alternative to sealing, *id.* § 5-14-3-5.5(d)(3). "Sealed records shall be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records no longer exist." *Id.* § 5-14-3-5.5(d)(5).

Northern District of Indiana

No relevant local rule. According the the clerk, the court considered adopting a rule like the District of South Carolina's, proscribing sealed settlement agreements, but decided such a rule was unnecessary, because the district does not have sealed settlement agreements.

Statistics: 4,103 cases searched; 216 cases (5.3%) had the word "seal" in their docket sheets; 11 complete docket sheets (0.27%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

Southern District of Indiana

"No document will be maintained under seal in the absence of an authorizing statute, Court rule, or Court order." S.D. Ind. L.R. 5.3(a).

Statistics: 5,831 cases searched; 200 cases (3.4%) had the word "seal" in their docket sheets; 60 complete docket sheets (1.0%) were reviewed; actual documents were examined for 13 cases (0.22%); 9 cases (0.15%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

United States ex rel. Elrefai v. Charter Medical Corp. (IN-S 1:96-cv-01759 filed 12/04/1996).

Qui tam action filed under the False Claims Act for fraudulent Medicare billing by psychiatric hospitals. The case was dismissed as settled and the complaint, the notice of intervention, stipulation of dismissal, and dismissal were unsealed. A sealed settlement agreement apparently was filed.

Stanback v. DaimlerChrysler Corp. (IN-S 1:99-cv-00043 filed 01/15/1999).

Civil right employment action for wrongful termination after plaintiff complained he was sexually harassed. A jury awarded plaintiff $2,800,000. To prevent an appeal the plaintiff reached an agreement with the defendant. A sealed settlement agreement was filed along with the motion to enforce the settlement agreement.

Indianapolis Motor Speedway Corp. v. Transworld Diversified Services Inc. (IN-S 1:99-cv-01073 filed 07/12/1999).

Contract action involving breach of a sponsorship agreement. A sealed settlement agreement was filed as an attachment to the joint notification of settlement.

Bokelman v. Allied Telecomm. Inc. (IN-S 1:99-cv-01452 filed 09/16/1999).

Contract action for breach of an employment agreement involving failure to pay plaintiff a sales commission. The defendant filed a sealed settlement agreement. The court dismissed the case and returned the settlement agreement to the defendant.

Cook Vascular Inc. v. Reiser (IN-S 1:99-cv-01598 filed 10/15/1999).

Patent infringement action involving a specialized catheter used to remove problem pacemakers. A sealed settlement agreement was filed pursuant to a protective order. The court retained jurisdiction to enforce the settlement agreement.

Glendale Centre LLC v. Houlihan's Restaurants Inc. (IN-S 1:00-cv-00671 filed 04/21/2000).

Real property action involving breach of a lease agreement. A consent judgment was reached and a sealed settlement agreement was filed. The order of dismissal discloses the amount of judgment was $800,000.

Locke v. Lawrence Township Fire Dept. (IN-S 1:00-cv-00942 filed 06/07/2000).

Civil rights employment action brought by a firefighter against her employer for sexual discrimination and retaliation. Plaintiff filed a motion to enforce the settlement agreement. The court sealed the motion because it contained terms of the settlement agreement.

FFI Corp. v. Powers Fastening Inc. (IN-S 1:00-cv-00968 filed 06/13/2000).

Contract product liability action where plaintiff installed grain dryers using defendant's allegedly faulty anchoring system which caused one grain dryer to collapse and caused plaintiff to test all of the anchors they installed. The plaintiff filed a motion to enforce the settlement agreement. Two months after the motion was filed the court ordered the motion sealed because it contained terms of the settlement agreement.

Bailey v. United Nat'l Bank (IN-S 1:00-cv-01175 filed 12/04/1996).

ERISA action brought by retired employees for breach of fiduciary and contractual duty by not properly monitoring and protecting assets. At the pretrial conference the record of settlement was sealed. The case was dismissed and referred to the bankruptcy court because the ERISA claims relate to matters which were contested in the debtor's bankruptcy case.

IOWA

In Iowa state courts, settlements with public parties must be public. Iowa Code § 22.13.

Northern District of Iowa

A document may be filed under seal only by court order. N. & S. D. Iowa L.R. 5.1(e). Thirty days after the case is over (60 days if the United States is a party), the clerk may notify parties that documents will be unsealed unless there is a timely objection. *Id.* (Note that the Northern and Southern Districts of Iowa have the same local rules.)

Statistics: 1,096 cases searched; 42 cases (3.8%) had the word "seal" in their docket sheets; 15 complete docket sheets (1.4%) were reviewed; actual documents were examined for 6 cases (0.55%); 6 cases (0.55%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Mineral Area Osteopathic Hosp. Inc. v. Keane Inc. (IA-N 1:99-cv-00050 filed 03/31/1999).

Contract action by three hospitals against a provider of healthcare information software for damages arising from the Y2K bug. Defendant sought a protective order. Papers and proceedings pertaining to plaintiffs' motion to certify a class were sealed and the motion was denied. The parties settled (as did three additional hospital plaintiffs in independent actions) at a settlement conference before a magistrate judge and asked the court to approve a confidential settlement agreement, which was filed under seal. One term of the agreement was plaintiffs' not appealing the denial of class certification. The court approved the settlement agreement.

Javeed v. Covenant Med. Ctr. Inc. v. Defendant (IA-N 6:00-cv-02007 filed 01/13/2000).

Employment sex discrimination action by a surgeon who complained of a hostile work environment for women, more favorable treatment of male surgeons, and termination of her employment contract for complaining about the discrimination. The court scheduled a settlement conference before the chief magistrate judge and nearly two months later plaintiff filed a sealed motion to enforce a settlement agreement. Defendants filed a sealed opposition. Four months later the case was dismissed as settled.

Weems v. Federated Mut. Ins. Co. (IA-N 6:00-cv-02013 filed 02/08/2000).

Designated a civil rights action, this is really an employment race discrimination action by an African-American employee for wrongful termination. The complaint included state-law counts for assault and intentional infliction of emotional distress. Defendant counterclaimed for $549.32 in excess salary paid and retained property belonging to defendant. In advance of a settlement conference before a magistrate judge, defendants filed a "confidential settlement statement" under seal. Subsequently the case was dismissed as settled.

EEOC v. American Home Products Corp. (IA-N 3:00-cv-03079 filed 09/29/2000).

Employment discrimination action on behalf of female employees for a hostile work environment created by a management employee. The complaint alleged that the manager was promoted rather than disciplined and that employees who investigated the harassment were fired. A consent decree mandated payment of $478,500 to employees, with the list of employees and their shares filed under seal.

Liu v. Life Investors Ins. Co. of America (IA-N 1:01-cv-00141 filed 09/28/2001).

Action for employment discrimination on the basis of race and national origin in failing to promote plaintiff. The action was dismissed as settled, with plaintiff filing a sealed "motion to extend time to finalize settlement" three weeks later. Over a month later defendant filed a sealed motion to enforce a settlement agreement. An unsealed brief in support of this motion stated that the agreement has not been executed because (1) plaintiff sought to amend his agreement not to seek employment with defendant or related companies with a limitation to companies within the United States, (2) plaintiff objected to terms concerning his return of de-

fendant's property and defendant's not admitting liability, and (3) plaintiff's wife had not signed the agreement. Ruling on the motion, the court ordered specific terms and that a signed settlement agreement be filed by a specific date. The agreement was filed under seal.

EEOC v. DeCoster (IA-N 3:02-cv-03077 filed 09/26/2002).

Employment sex discrimination action on behalf of female employees complaining of sexual harassment and assault. The case was terminated by consent decree with defendant's denial of the allegations, but agreement to promulgation of an anti-harassment policy, training, recordkeeping, and payment of $1,525,000 in monetary relief. The list of who received how much was sealed, but each of approximately a dozen individuals received approximately $125,000.

Southern District of Iowa

A document may be filed under seal only by court order. N. & S. D. Iowa L.R. 5.1(e). Thirty days after the case is over (60 days if the United States is a party), the clerk may notify parties that documents will be unsealed unless there is a timely objection. *Id.* (Note that the Northern and Southern Districts of Iowa have the same local rules.)

Statistics: 1,976 cases searched; 69 cases (3.5%) had the word "seal" in their docket sheets; 9 complete docket sheets (0.46%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

MAINE

The state of Maine's civil procedure rule on sealed documents pertains to administrative details only. *See* Me. R. Ct. Civ. Proc. 79(b).

District of Maine

No relevant local rule.

Statistics: 1,070 cases searched; 141 cases (13%) had the word "seal" in their docket sheets; 10 complete docket sheets (0.93%) were reviewed; actual documents were examined for 2 cases (0.19%); 2 cases (0.19%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Strout v. Paisley (ME 1:00-cv-00107 filed 05/24/2000).

Wrongful death and personal injury action in which plaintiff sued a truck driver and his employer for causing a motor vehicle accident that killed his wife and caused him bodily injury. Plaintiff's motion for approval of the couple's minor son's settlement was sealed. An unsealed order approving the minor's settlement reported the minor received $125,341 of the $450,000 settlement.

Carrier v. JPB Enterprises (ME 2:01-cv-00187 filed 07/20/2001).

ERISA class action against plaintiffs' former employer for failure to provide advance notice of mass layoffs, pay severance and vacation pay, and contribute to a 401(k) plan. The parties filed a sealed joint motion to approve the settlement. An unsealed order approving the settlement reported the class representatives received $10,000. The order approving plaintiffs' motion for attorney fees reported the attorneys were awarded $150,000.

MARYLAND

No relevant statute or rule.

District of Maryland

"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." D. Md. L.R. 105.11. At the

end of the case, sealed documents are returned to the parties or destroyed. *Id.* R. 113.2.

Statistics: 7,851 cases searched; 231 cases (2.9%) had the word "seal" in their docket sheets.

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: 9,562 cases searched; 351 cases (3.7%) had the word "seal" in their docket sheets (but 155 of these merely had "seal" in a party name, including 141 cases where Crown Cork and Seal Company was a party); 52 complete docket sheets (0.54%) were reviewed; actual documents were examined for 19 cases (0.20%); 16 cases (0.17%) 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 action by a paralegal for retaliation against her for complaining of the general counsel's pursuing a sexual relationship with another paralegal through unwelcome sexual advances. The action was partially dismissed pursuant to a sealed settlement agreement, with an award of attorney fees to be determined. In addition, plaintiff was ordered to keep confidential the terms of the settlement agreement with the other paralegal in her separate action. Attorney fees of $184,371.25 and costs of $13,240.98 were awarded by sealed order, which both plaintiff and defendants appealed. The case settled on appeal.

Relume Corp. v. Dialight Corp. (MI-E 2:98-cv-72360 filed 06/09/1998).

> Patent infringement case concerning LED displays in traffic signals. The court granted summary judgment to defendants. Documents filed in the case indicate that plaintiff tried to negotiate a settlement with defendants that would relieve it of the preclusive effect of the summary judgment in future actions against other LED traffic signal manufacturers. Apparently some defendants were amenable to this and some were not. The amenable defendants agreed to a settlement agreement filed under seal. Plaintiff thereafter lost an appeal of the summary judgment. The case was finally dismissed as settled pursuant to an apparently unfiled settlement agreement.

Solomon v. City of Sterling Heights (MI-E 2:98-cv-73900 filed 09/04/1998).

> Civil rights case against a newspaper, a city, and its police department for injuries resulting from the police using tear gas, pepper spray, and physical violence to disrupt a picket line. Plaintiff further alleged denial of medical treatment while in confinement and permanent disability. Judgment on a jury verdict awarded plaintiff $500,000 in compensatory damages against all defendants

and $1 million in punitive damages against the newspaper. Litigation over prejudgment interest and attorney fees continued, and a sealed settlement agreement with the city defendants was filed. The newspaper appealed the judgment against it, and the matter is still on appeal.

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.

Madison/OHI Liquidity Investors v. Omega Healthcare Investors (MI-E 2:00-cv-72793 filed 06/21/2000).

Contract case for failure to provide security investment firm with agreed-upon line of credit. A settlement agreement was reached during a bench trial and a transcript of the agreement was filed under seal.

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.

Saleh v. U.S. Health and Life Ins. Co. (MI-E 2:01-cv-74981 filed 12/21/2001).

> Designated an insurance action, the complaint alleged ERISA violations in wrongfully denying an employee's wife $21,256.80 in health insurance benefits because the employer wrongfully ceased paying the premium. The record of a settlement conference was sealed, the case was referred to mediation, and the case was dismissed as settled.

Moses v. MSP Industries Corp. (MI-E 5:02-cv-60076 filed 04/12/2002).

> Action under the Fair Labor Standards Act by a student engineer for failure to pay for overtime hours. The case was dismissed pursuant to a sealed settlement agreement.

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: 2,775 cases searched; 181 cases (6.5%) had the word "seal" in their docket sheets (but 79 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); 13 complete docket sheets (0.47%) were reviewed; actual documents were examined for 7 cases (0.25%); 7 cases (0.25%) 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 settlement 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.

Fewless v. Wayland Union Schools Board of Educ. (MI-W 1:01-cv-00271 filed 05/01/2001).

Civil rights action for a warrantless strip search of a disabled fourteen-year-old boy on a false tip from another student that the boy was concealing contraband drugs in his buttocks. The parties filed a "confidentiality agreement and stipulated protective order" to keep confidential "the name or other personally identifying information about a minor witness or minor party." A magistrate judge presided over a settlement conference, which was sealed "in furtherance of justice and the protection of a minor child." Subsequent to a stipulated dismissal, plaintiff filed a motion to recover $53,034.10 in fees and costs. Defendants argued against this figure by noting the settlement amount was "significantly lower than [the] initial demand" of $750,000 stated in plaintiffs' Rule 26(a)(1) disclosures. The court's resolution of this motion was sealed.

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.

Mikulak v. Choiceone Financial Services (MI-W 1:01-cv-00721 filed 11/07/2001).

Pro se employment action for wrongful termination by an insurance agent who was a recovering alcoholic and alleged disability discrimination. The court sealed a tape recording of a settlement conference where the case settled.

Rapid Design Service v. Cambridge Integrated Service Group (MI-W 1:02-cv-00179 filed 03/18/2002).

Contract action by a self-insured employer against a company hired by the employer to provide administrative services on insurance claims. An employee was severely burned mixing explosives in his home and defendant authorized an insurance payment of $236,983.32 to the employee. But employer's "excess insurance" provider refused to cover the payment beause the injury arose from criminal activity, so the employer sued defendant for wrongful authorization. The case settled pursuant to a confidential settlement agreement, which was inadvertently filed with the court and subsequently sealed.

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: 4,792 cases searched; 299 cases (6.2%) had the word "seal" in their docket sheets; 30 complete docket sheets (0.63%) were reviewed; actual documents were examined for 26 cases (0.54%).

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; 53 cases (2.0%) had the word "seal" in their docket sheets; 21 complete docket sheets (0.81%) were reviewed; actual documents were examined for 5 cases (0.19%); 5 cases (0.19%) appear to have sealed settlement agreements.[17]

Cases with Sealed Settlement Agreements

Smith v. The Salvation Army (MS-N 1:99-cv-00148 filed 04/03/1999).

> Contract action brought by a bookkeeper for wrongful termination. The case was dismissed as settled with parties agreeing to keep terms of the settlement confidential. Two months later plaintiff filed a sealed motion to enforce the settlement agreement. The court denied the motion to enforce.

Credit Suisse First Boston Mortgage Capital v. Doris (MS-N 4:99-cv-00283 filed 11/22/1999), *consolidated with Credit Suisse First Boston Mortgage Capital v. Bayou Caddy's Jubilee Casino* (MS-N 4:99-cv-00284 filed 11/22/1999).

> Foreclosure actions concerning preferred ship mortgages pertaining to riverboat gambling. The parties filed a stipulation of dismissal. Over three months later the court granted a joint motion to seal the record.

Banks v. CCA of Tennessee Inc. (MS-N 4:01-cv-00150 filed 06/20/2001); *Hale v. CCA of Tennessee Inc.* (MS-N 2:01-cv-00145 filed 06/21/2001).

> Action under the Fair Labor Standards Act for failure to pay employees overtime for meetings plaintiffs attended as part of their employment but beyond their scheduled shift. Plaintiffs filed under seal a motion to enforce a settlement agreement. The court ordered defendants to pay approximately $2.075 million to 346 plaintiffs, contingent upon notice to a handful of named plaintiffs who were determined not to have valid claims.

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.)

Statistics: 5,775 cases searched; 210 cases (3.6^%) had the word "seal" in their docket sheets; 38 complete docket sheets (0.66%) were reviewed; actual documents were examined for 18 cases (0.31%).

MISSOURI

No relevant state statute or rule. One of Missouri's 45 judicial circuits has a rule covering administrative details for sealed court documents. *See* Mo. Circ. Ct. Jackson Cty. R. 100.4.14.

Eastern District of Missouri

A document may be filed under seal only by court order upon a showing of good cause. E.D. Mo. L.R. 83-13.05(A)(1). Absent an order to the contrary, sealed documents may be unsealed and placed in the public file 30 days after the case is over. *Id.* R. 83-13.05(A)(2).

Statistics: 4,798 cases searched; 341 cases (7.1%) had the word "seal" in their docket sheets

[17] These include a pair of consolidated cases and a pair of companion cases.

(but 98 of these merely had the word "seal" in place of docket entry clerk initials); 52 complete docket sheets (1.1%) were reviewed; actual documents were examined for 22 cases (0.46%).

Western District of Missouri

No relevant local rule.

Statistics: 4,857 cases searched; 167 cases (3.4%) had the word "seal" in their docket sheets; 35 complete docket sheets (0.72%) were reviewed; actual documents were examined for 27 cases (0.56%).

NEW HAMPSHIRE

"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." N.H. R. Ct Guideline for Public Access to Court Records II.

District of New Hampshire

The District of New Hampshire recognizes two levels of sealing. Documents sealed at Level I may be reviewed without court order by any attorney appearing in the action. D.N.H. L.R. 83.11(b)(1). Documents sealed at Level II may be reviewed without court order only by the filer (or the person to whom an order is directed if the sealed document is an order). *Id.* R. 83.11(b)(2). Documents may be sealed only by court order, and motions to seal must explain the basis for sealing and specify which level of sealing is desired. *Id.* R. 83.11(c).

Statistics: 1,157 cases searched; 82 cases (7.1%) had the word "seal" in their docket sheets; 9 complete docket sheets (0.78%) were reviewed; actual documents were examined for 4 cases (0.35%); 4 cases (0.35%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

A.S.I. Worldwide Communications Corp. v. WorldCom Inc. (NH 1:98-cv-00154 filed 03/17/1998).

Contract action between providers of telephone service. Plaintiff filed under seal a motion to enforce a settlement agreement, but before the case closed, defendant filed for bankruptcy protection and the action was stayed.

Polyclad Laminates Inc. v. MacDermid Inc. (NH 1:99-cv-00162 filed 04/19/1999).

Patent action alleging that defendant's product MultiBond, a chemical solution used in the manufacture of printed circuit boards, infringed plaintiffs' patent. Defendant alleged that its product did not infringe, because it did not use a cationic surfactant, and counterclaimed for tortious business interference. The court granted defendant a summary judgment on the patent claim and plaintiffs appealed. With plaintiffs' appeal and defendant's counterclaim still pending, the parties settled and filed a sealed settlement agreement.

Griffin v. Odyssey House Inc. (NH 1:99-cv-00561 filed 12/03/1999).

Personal injury action against a residential facility for emotionally troubled adolescents for negligently permitting a 15-year-old resident to attempt suicide by hanging herself with her belt, which left her in a persistent vegetative state. The case settled pursuant to a confidential settlement agreement. The settlement agreement was filed under seal and then returned to the parties. The amount of settlement was kept confidential, but unsealed documents disclose that settlement funds were used to satisfy Medicaid liens and establish a special needs irrevocable trust.

Armstrong v. Correctional Medical Services (NH 1:00-cv-00532 filed 11/14/2000).

Civil rights action for wrongful death resulting from inadequate medical treatment

for a head injury inflicted by a correctional officer while decedent was held at the Hillsborough County House of Corrections under arrest for failure to pay child support. Plaintiff filed a sealed motion to approve a settlement agreement on behalf of decedent's minor heir. The court approved the agreement, but denied the motion to seal the approval motion, ordering the confidential agreement returned to the parties.

NEW MEXICO

Three of New Mexico's 13 judicial districts have rules on sealed documents, which specify that documents may be sealed only by court order upon a showing of good cause N.M. R. Ct. 1-208, 2-111, 8-207. Two of these districts specify further that the court must determine "that significant and irreparable harm will result unless the file is sealed." *Id.* R. 1-208.B(3); 8-207.A(3). One district specifies that documents may be sealed for only six months, absent an order to the contrary upon a showing of good cause. *Id.* 1-208.C.

District of New Mexico

No relevant local rule.

Statistics: 3,084 cases searched; 86 cases (2.8%) had the word "seal" in their docket sheets; 23 complete docket sheets (0.75%) were reviewed; actual documents were examined for 19 cases (0.62%).

NEW YORK

Court documents may be sealed only "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." Uniform R. N.Y. Tr. Cts. § 216.1(a).

Eastern District of New York

To clear out its vault, the District Court for the Eastern District of New York ordered that sealed documents be archived at the records center and disposed of after 20 years there. E.D.N.Y. Admin. Order 2001-02 (Feb. 21, 2001).

Statistics: 16,001 cases searched; 495 cases (3.1%) had the word "seal" in their docket sheets.

Northern District of New York

Court documents are sealed upon motion, which itself is filed under seal. N.D.N.Y. L.R. 83.13. Sealed documents remain sealed until ordered unsealed. *Id.*

Statistics: 3,928 cases searched; 192 cases (4.9%) had the word "seal" in their docket sheets.

Southern District of New York

No relevant local rule.

Statistics: 20,976 cases searched; 948 cases (4.5%) had the word "seal" in their docket sheets.

Western District of New York

No relevant local rule.

Statistics: 3,000 cases searched; 106 cases (3.5%) had the word "seal" in their docket sheets.

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, the court may order the documents to be unsealed and they will thereafter be available for public inspection." *Id.* 79.2(d).

Statistics: 2,808 cases searched; 143 cases (5.1%) had the word "seal" in their docket sheets (but 57 of these merely had Crown Cork and Seal Company as a party); 12 complete docket sheets (0.43%) were reviewed; actual documents were examined for 4 cases (0.14%); 3 cases (0.11%) 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: 2,284 cases searched; 63 cases (2.8%) had the word "seal" in their docket sheets; 10 complete docket sheets (0.44%) were reviewed; actual documents were examined for 7 cases (0.31%); 6 cases (0.26%) 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 pre-empted 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.

Kurth v. BioSignia Inc. (NC-M 1:00-cv-00534 filed 06/01/2000).

Stockholders' suit for wrongful cancellation of a stock certificate allegedly worth $3.3 million. Plaintiff received the certificate in exchange for legal services to a CEO of a subsidiary of defendant. Defendant alleged that the CEO's interest in the certificate never vested because he was forced to resign, with a suggestion of wrongdoing. The case settled on the eve of trial and the court sealed the transcript of the settlement conference. Plaintiff thereafter refused to sign the settlement papers because of a term impairing his ability to sell his stock, so defendant filed a sealed motion to enforce the agreement. Plaintiff's unsealed response included the agreement as an exhibit. The disagreement was resolved and a copy of the settlement agreement was attached to an unsealed stipulation of 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.

Estate of Mayo v. Kindred Nursing Ctrs. East (NC-M 1:02-cv-00260 filed 04/05/2002).

Medical malpractice action against a nursing home for wrongful death resulting from the insertion of a feeding tube into decedent's trachea instead of her esophagus, resulting in her lungs receiving feeding solution. The case was dismissed pursuant to a sealed consent order.

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: 2,203 cases searched; 101 cases (4.6%) had the word "seal" in their docket sheets; 27 complete docket sheets (1.2%) were reviewed; actual documents were examined for 14 cases (0.64%); 11 cases (0.50%) appear to have sealed settlement agreements.[18]

Cases with Sealed Settlement Agreements

Carr v. Louisiana-Pacific Corp. (NC-W 5:99-cv-00023 filed 02/24/1999), *consolidated with Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00024 filed 02/24/1999), *Cardwell v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00025 filed 02/24/1999), *Phillips v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00026 filed 02/24/1999), *and Carr v. Louisiana-Pacific Corp.* (NC-W 5:99-cv-00027 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 the 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.

Delaney v. Stephens (NC-W 3:00-cv-00138 filed 03/24/2000).

Medical malpractice action by a three-year-old boy for "cardiac arrest and cephalad hematoma" allegedly resulting from his mother's physician's using a "vacuum assisted delivery device" during delivery. More than two years later the court denied a motion to continue the trial date, and one week in advance of the scheduled trial date a document was filed under seal. A week later another document was filed under seal and the case was closed the following day, with the disposition of the case coded as a consent judgment. A sealed settlement agreement apparently was filed.

McKinney v. CVS Pharmacy Inc. (NC-W 1:01-cv-00124 filed 06/08/2001).

Housing/accommodations action for refusal to permit a customer with a service dog to bring her dog into the store. Plaintiff alleged she brought in the dog while filling a prescription and was rudely shooed away. A district manager told plaintiff, "we don't have to let handicapped people in . . . if we don't want to." Subsequently the dog needed a prescription filled and when plaintiff visited the store to fill it she was humiliated, injured, and prosecuted for violating the store's no-dog rule. Defendants claimed that plaintiff was not disabled, the dog was not a service dog, and the dog was not sufficiently well-behaved. The case was dismissed pursuant to a sealed settlement agreement. Nearly two months later another document was filed under seal – apparently a motion by defendants to enforce the agreement. Plaintiff's counsel notified the court that plaintiff had not yet signed the agreement or received the settlement check and that plaintiff was no longer permitted to visit counsel at his office. Thereafter plaintiff represented herself. Two additional documents were filed under seal, at least one of which was an order.

McGinnis v. Eli Lilly & Co. (NC-W 5:02-cv-00010 filed 01/22/2002).

Product liability action by a surviving husband and three children claiming that Prozac caused suicide. Prior to a mediation conference the parties settled and four documents were filed under seal.

[18] Five of these cases were consolidated and are described together.

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 . . . ."

Estate of Neville v. United States (NC-W 1:02-cv-00029 filed 02/04/2002).

> Medical malpractice action alleging wrongful death at a Veterans' Administration hospital following surgery to correct bile peritonitis resulting from an earlier negligent Veterans' Administration hospital surgery. A mediator's report was filed under seal and the case was dismissed as settled.

Rasavong v. Fortis Benefits Ins. Co. (NC-W 3:02-cv-00132 filed 03/29/2002).

> ERISA action challenging defendant's refusal to pay life insurance benefits on the grounds that plaintiff was a suspect in her husband's murder. The parties moved for approval of a confidential settlement agreement, which the court ordered filed under seal. The docket sheet, however, does not show such a filing, but the court did approve the agreement. Unsealed documents disclose that defendant paid the $370,000 insurance claim in full to plaintiff and that this was deemed in the best interest of her minor children, who would receive the payment themselves if she were ineligible. It is not clear what term of the settlement agreement remains confidential.

NORTH DAKOTA

"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." N.D. Sup. Ct. Admin. R. 41 § 5.

District of North Dakota

Unless the court orders otherwise, sealed documents are returned to the parties filing them when the case is over. D.N.D. L.R. 5.1(F)(1). If an entire file is permanently sealed, then the court retains custody of it. *Id.* R. 5.1(F)(3).

Statistics: 574 cases searched; 126 cases (22%) had the word "seal" in their docket sheets; 8 complete docket sheets (1.4%) were reviewed; actual documents were examined for 6 cases (1.0%); 5 cases (0.87%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Jones-Van Tassel v. Richland County (ND 3:99-cv-00060 filed 04/16/1999).

> Civil rights employment action brought by an emergency manager against her former employer for wrongful termination based on gender. The transcript of the settlement conference was sealed. The court retained jurisdiction to enforce the terms of the settlement agreement.

USA v. BM&H Partnership (ND 3:99-cv-00163 filed 11/17/1999).

> Action filed under the Fair Housing Act for wrongful termination and eviction by husband and wife caretakers for an apartment complex. The complaint alleged retaliation for aiding tenants in asserting their right to fair housing. The transcript of the settlement conference was sealed. The court approved the settlement on behalf of plaintiffs' three minor children.

Steen v. USA (ND 4:00-cv-00040 filed 03/21/2000).

> Personal injury action filed under the Federal Tort Claims Act by a civilian contract air force base maintenance worker for sexual harassment and assault by a civilian employee who inspects the work of contractors. During the settlement conference the court agreed to keep the settlement

amount under seal. About a month after the settlement conference, the defendant filed a motion to unseal the settlement amount of $30,000 because confidentiality provisions in settlement agreements are contrary to the policy of the Department of Justice

Johnson v. Pharmacia & Upjohn (ND 1:00-cv-00047 filed 04/10/2000).

Personal injury action brought by a pharmaceutical sales representative for wrongful termination based on his felony conviction which had been divulged to defendant prior to employment. The parties settled at a pretrial conference. The court ordered that transcripts and any settlement documents that contain monetary amounts be sealed.

Binstock v. The Finder (ND 1:00-cv-00087 filed 07/14/2000).

Personal injury action filed under the Family Medical Leave Act and state law by a woman, unaware she was entitled to twelve weeks of maternity leave, who returned to work after five weeks so she would not lose her benefits. The court granted summary judgment on the state law claim of negligence. The transcript of the settlement conference was sealed.

OKLAHOMA

"Judgments, orders, and settlements of claims [against public parties] shall be open public records unless sealed by the court for good cause shown." 51 Okla. Stat. § 158.A.

Northern District of Oklahoma

"No pleading, document, or record shall be placed under seal without a prior, specific order of the court finding good cause to do so." N.D. Okla. L.R. 79.1(D).

Statistics: 1,954 cases searched; 192 cases (9.8%) had the word "seal" in their docket sheets.

PENNSYLVANIA

No relevant state statute or rule.

Eastern District of Pennsylvania

No relevant local rule.

Statistics: 19,520 cases searched; 654 cases (3.4%) had the word "seal" in their docket sheets.

Middle District of Pennsylvania

Court documents are unsealed two years after the case is over, unless good cause is shown. M.D. Penn. L.R. 79.5.

Statistics: 4,678 cases searched; 520 cases (11%) had the word "seal" in their docket sheets; 24 complete docket sheets (0.51%) were reviewed; actual documents were examined for 12 cases (0.26%).

Western District of Pennsylvania

No relevant local rule.

Statistics: 6,218 cases searched; 306 cases (4.9%) had the word "seal" in their docket sheets; 44 complete docket sheets (0.34%) were reviewed; actual documents were examined for 20 cases (0.22%).

PUERTO RICO

No relevant state statute or rule.

District of Puerto Rico

No relevant local rule.

Statistics: 3,562 cases searched; 223 cases (6.3%) had the word "seal" in their docket sheets; 159 complete docket sheets (4.5%) were reviewed; actual documents were examined for 119 cases (3.3%).

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: 8,126 cases searched; 311 cases (3.8%) had the word "seal" in their docket sheets (but 136 of these merely have "seal" as the docket entry clerk identifier and another 13 merely have "seal" in the party name); 25 complete docket

sheets (0.31%) were reviewed; actual documents were examined for 8 cases (0.10%); 8 cases (0.10%) 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 injuries 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.

Davis & Small Decor Inc. v. Desperate Enterprises Inc. (SC 2:01-cv-00914 filed 03/27/2001).

Copyright action concerning novelty signs, "Mom's Bed & Breakfast," "Dad's Fix-It Shop," and "Grandma's Babysitting Service." Plaintiff filed a sealed "motion . . . to file under seal, and for sanctions, or to enforce settlement agreement." The case was dismissed pursuant to an agreed order of injunction and dismissal permanently enjoining defendant from selling signs similar to plaintiff's.

SOUTH DAKOTA

No relevant state statute or rule.

District of South Dakota

No relevant local rule.

Statistics: 820 cases searched; 40 cases (4.9%) had the word "seal" in their docket sheets; 6 complete docket sheets (0.73%) were reviewed; actual documents were examined for 0 cases; no case appears to have a sealed settlement agreement.

TENNESSEE

State court documents in Tennessee may be sealed only upon a motion "contain[ing] sufficient facts to overcome the presumption in favor of disclosure." Tenn. R. Ct. 7.02.

Eastern District of Tennessee

Court records may be sealed only upon a showing of good cause. E.D. Tenn. L.R. 26.2(b). Absent a court order to the contrary, court records are unsealed 30 days after the conclusion of the case. *Id.* R. 26.2(d). "All such orders shall set a date for the unsealing of the Court Records." *Id.*

Statistics: 3,128 cases searched; 249 cases (8.0%) had the word "seal" in their docket sheets (but 52 of these merely had the word "seal" in a party name); 15 complete docket sheets (0.48%) were reviewed; actual documents were examined for 11 cases (0.35%).

Middle District of Tennessee

No relevant local rule.

Statistics: 3,162 cases searched; 581 cases (18%) had the word "seal" in their docket sheets; 39 complete docket sheets (1.2%) were reviewed; actual documents were examined for 24 cases (0.76%).

Western District of Tennessee

No relevant local rule.

Statistics: 2,759 cases searched; 222 cases (8.0%) had the word "seal" in their docket sheets; 37 complete docket sheets (1.3%) were reviewed; actual documents were examined for 16 cases (0.58%); 7 cases (0.25%) appear to have sealed settlement agreements.[19]

[19] These include a pair of consolidated cases and a pair of companion cases.

Cases with Sealed Settlement Agreements

Lammey v. Ford Motor Company (TN-W 2:99-cv-02156 filed 02/19/1999).

> Product liability action for the negligent manufacture of a car resulting in the car rolling out of the plaintiff's driveway and rolling over the three year-old plaintiff's head. The case was dismissed as settled. The court order approving the minor settlement and settlement payment was sealed.

Doe v. City of Memphis Board of Education (TN-W 2:99-cv-03075 filed 12/09/1999) *consolidated with C.W. v. City of Memphis Board of Education* (TN-W 2:99-cv-03076 filed 12/09/1999).

> Civil rights actions for failure of the principal and school board to intervene on behalf of children to prevent emotional, physical, and sexual abuse by their special education teachers. The court appointed a guardian ad litem for the minors. The cases were dismissed as settled. The court orders approving the minor settlements and detailing the payments to the plaintiffs were sealed.

Reed v. Corrections Corporations of America (TN-W 2:00-cv-02473 filed 05/26/2000).

> Section 1983 civil rights action for failure of a juvenile detention center to prevent the plaintiff's suicide attempt resulting in severe and permanent brain injury. The case settled. The transcript of the settlement hearing and the order approving of the cash settlement were sealed.

Warner v. Owens (TN-W 2:01-cv-02250 filed 03/28/2001).

> Personal injury action by a child arising from a car accident in which the uninsured defendant negligently drove her car over the median and into on-coming traffic. The plaintiff suffered severe permanent injuries to her head, face, mouth, teeth and entire nervous system requiring extensive medical treatment. The case settled. The order approving the minor settlement and detailing payment was sealed.

Harper v. Gordon (TN-W 2:02-cv-02347 filed 05/07/2002); *Northfield Insurance v. Gordon* (TN-W 2:02-cv-02503 filed 06/21/2002).

> *Harper* is a wrongful death action by a father for the negligent driving of a day care center's bus driver that resulted in an accident and the death of his son and several other children. Plaintiff alleged that the bus driver, who had a hisory of drug use, allowed the van to leave the road and strike highway structures and that the defendants failed to provide proper safety restraints and procedures in and for the van.
>
> *Northfield Insurance* is an insurance contract action against the owner of the day care center that hired the bus driver. The insurance company claimed that the accident was not covered under the policy.
>
> The cases were dismissed as settled. Settlement agreements were sealed and filed in a related case, *Robinson v. The Tennessee Department of Human Services* (TN-W 2:02-cv-2370 filed 5/13/02) (still pending).

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: 14,448 cases searched; 330 cases (2.3%) had the word "seal" in their docket sheets; 57 complete docket sheets (0.39%) were reviewed; actual documents were examined for 47 cases (0.33%); 44 cases (0.30%) appear to have sealed settlement agreements.[20]

[20] Two of these cases were consolidated and are described together; another twelve are part of multi-district asbestos litigation assigned to the Eastern District of Pennsylvania, also described together.

Cases with Sealed Settlement Agreements

United States ex rel. Groshans v. Unisys Corp. (VA-E 1:02-cv-01589 filed 02/29/1996).

Qui tam action under the False Claims Act for false billing in contracting for the Trident Missile Program. The docket shows only the four documents that the United States asked to be unsealed, including an amended complaint. The case was dismissed pursuant to a settlement agreement, although it cannot be determined with certainty that the agreement was filed, because of sealed docket entries.

America Online Inc. v. CN Productions Inc. (VA-E 1:98-cv-00552 filed 04/16/1998).

Statutory action filed under the Lanham Act alleging defendants e-mailed plaintiff's subscribers unsolicited electronic mail containing plaintiff's trademark along with information on pornographic websites, products, and services. Defendants were held in contempt for violating a permanent injunction. An additional 16 individuals and 13 entities were held in civil contempt for conspiring with defendants to violate the injunction. Plaintiff was awarded $6,904,712 in damages. The court sealed the memorandum opinion and judgment because it contained details of the settlement amount. The plaintiff filed a motion to partially unseal the judgment and memorandum opinion to show that this type of public violation will be punished and substantial damages awarded. One month later a redacted version of the order was unsealed.

United States ex rel. Doe v. University of Virginia Health System (VA-E 1:01-cv-01691 filed 07/16/1998).

Qui tam action under the False Claims Act for fraudulent Medicare billing. A settlement agreement initially was filed under seal, but it, the complaint, and other documents were unsealed when the case was dismissed. The defendant paid the United States $3,000,000 and the relator $600,000.

Price v. Foster (VA-E 1:99-cv-00549 filed 04/19/1999).

Personal injury action for wrongful death resulting when defendants severed a hospital oxygen line. A sealed settlement agreement was filed. The guardian ad litem rejected the settlement of $1,000 for the decedent's minor grandchild. One month after the case was dismissed the plaintiff filed a motion to reconfirm approval of the settlement. The court reconfirmed approval of the settlement agreement and gave the minor grandchild $5,000 solely for education and support.

Franklin v. First Union Corp. (VA-E 3:99-cv-00344 filed 04/05/1999), *consolidated with Franklin v. First Union Corp.* (VA-E 3:99-cv-00610 filed 09/07/1999).

ERISA action including RICO allegations concerning 401(k) plans of current and former bank employees. Defendants denied liability, but agreed to pay $26 million to named plaintiffs and a class of approximately 150,000. The list of potential class members was filed under seal.

MCI Communications v. Essential Voice Computing Inc.(VA-E 3:00-cv-00105 filed 02/25/2000).

Patent infringement action involving a telephone-based personnel tracking system. Three months after a settlement agreement, the defendants refused to execute the final documents. The plaintiff filed a motion to enforce the settlement agreement and the court granted a motion to seal the motion since it contained settlement terms. The court ordered a consent judgment with a permanent injunction. The court retained jurisdiction to enforce the consent judgment and permanent injunction.

Advamtel LLC v. Sprint (VA-E 1:00-cv-01074 filed 04/17/2000).

Statutory action concerning telecommunications collection of charges alleging that Sprint used 90 plaintiffs' telephone lines without paying applicable tariffs. Sprint counterclaimed for overbilling. A few plain-

tiffs dismissed their actions pursuant to confidential settlement agreements as the litigation proceeded. After Sprint reached settlement agreements with all plaintiffs but one, it filed under seal a motion to enforce the settlement agreement. Disagreements with the remaining plaintiff ultimately were resolved and the case was dismissed as settled.

Fordham v. OneSoft Corp.(VA-E 1:00-cv-01078 filed 06/29/2000).

Computer software copyright infringement action. An order concerning settlement proceeds stated that the defendant deposited $644,285. The plaintiff filed a motion and memorandum under seal for disbursement of the settlement proceeds. One week later the plaintiff filed a suggestion of bankruptcy. The court granted plaintiff's motion for disbursement of settlement proceeds eleven weeks later. The attorney in the case was granted a lien against the settlement funds and the court ordered that the attorney fees and expenses be paid out of the settlement funds.

Garcia v. Gloucester Seafood (VA-E 4:00-cv-00069 filed 06/30/2000).

Fair Labor Standards Act class action for unpaid minimum wages and overtime by Mexican citizens recruited to work at defendants' seafood processing plant. The court dismissed the action as settled, retaining jurisdiction to enforce the settlement agreement. Approximately three months later the court issued an agreed order to reopen the case for entry of judgment pursuant to a sealed settlement agreement. Approximately three months later the case was closed upon the court's satisfaction that settlement payments had been made.

Alegre v. United States (VA-E 4:00-cv-00074 filed 07/19/2000).

Medical malpractice action for severe brain injury arising from improper treatment after routine surgery at a Veterans hospital. The United States admitted liability and agreed to pay $950,000. The attorney for the United States filed under seal a motion to approve the settlement agreement, but unsealed documents disclose the settlement agreement's terms.

Doe v. Holcomb (VA-E 2:00-cv-00597 filed 08/15/2000).

Personal injury action for sexual molestation of a head start student by a school bus driver. An agreed protective order held confidential: (1) medical and psychological information about plaintiff, (2) information concerning the criminal investigation of the bus driver, and (3) the identity of the plaintiff. The court approved a sealed settlement agreement.

*Opsahl v. E*Trade Group* (VA-E 1:00-cv-01501 filed 09/06/2000).

Contract action for breach of corporate acquisition agreement where defendants, after acquiring a company in which plaintiff was a corporate officer with significant stock options, failed to timely file a registration statement with the SEC, causing plaintiff significant delay in his ability to exercise his stock options. A sealed settlement agreement was attached as an exhibit to plaintiff's motion to enforce it that involved disputed escrow arrangements. Six days later the plaintiff withdrew the motion to enforce and asked the court to destroy the sealed settlement agreement or return it to plaintiff's counsel. In the final order of dismissal the court ordered that the settlement agreement remain permanently sealed.

Bryant v. Southside Gin Inc. (VA-E 3:00-cv-00616 filed 09/22/2000).

RICO action brought by farmers alleging defendants stole their cotton while it was being processed at defendants' gins. A sealed settlement agreement was filed. A confessed judgment was granted in favor of the plaintiffs for $184,106. In the order of dismissal the court ordered the plaintiffs "shall not pursue enforcement of the confessed judgment."

Zeller v. America Online (VA-E 1:00-cv-01603 filed 09/27/2000).

Employment discrimination action brought by manager who sued his former employer for wrongful termination resulting from his report of sexual harassment against co-workers. The case was dismissed as settled. One month after the case was dismissed the defendant filed a motion to enforce the settlement agreement and attached a sealed settlement agreement as an exhibit. The plaintiff also filed a motion to enforce the settlement agreement. A report and recommendation was filed under seal and the court granted defendant's motion to enforce the settlement agreement.

Asbestos Multidistrict Litigation: Estate of Lott v. American Standard Inc. (VA-E 2:00-cv-03931 filed 10/10/2000); *Blackburn v. American Standard Inc.* (VA-E 2:00-cv-03981 filed 10/19/2000); *Estate of Chapman v. American Standard Inc.* (VA-E 2:01-cv-04223 filed 02/01/2001); *Estate of Smith v. American Standard Inc.* (VA-E 2:01-cv-04291 filed 02/09/2001); *Estate of Johnson v. American Standard Inc.* (VA-E 2:01-cv-04343 filed 02/22/2001); *Estate of Carpenter v. American Standard Inc.* (VA-E 2:01-cv-04451 filed 03/26/2001); *Dreyer v. American Standard Inc.* (VA-E 2:01-cv-04787 filed 04/17/2001); *Estate of Russell v. American Standard Inc.* (VA-E 2:01-cv-04977 filed 04/23/2001); *Estate of Howell v. American Standard Inc.* (VA-E 2:01-cv-05007 filed 04/23/2001); *Estate of Dickey v. American Standard Inc.* (VA-E 2:01-cv-05427 filed 05/14/2001); *Estate of Holland v. American Standard Inc.* (VA-E 2:01-cv-05431 filed 05/14/2001); *Estate of Boyette v. American Standard Inc.* (VA-E 2:01-cv-05511 filed 06/01/2001).

Asbestos product liability litigation for wrongful death of workers who were exposed to the inhalation of asbestos and industrial dust and fibers. These cases were transferred by the MDL Panel to the Eastern District of Pennsylvania as MDL 875. All of the plaintiffs were represented by the same law firm in Norfolk, VA. Claims were dismissed against two of the defendants. A settlement was reached with one of the defendants and the petition for approval of the compromised settlement was sealed. The order approving the compromised settlement also was sealed.

Wyatt v. S. C. Jones Service Inc. (VA-E 3:00-cv-00720 filed 11/01/2000).

Employment discrimination action removed from state court by black plaintiff who sued former employer for wrongful termination. The defendant sought sanctions against the plaintiff for filing a frivolous lawsuit because plaintiff had filed similar claims in the past. The court ordered sanctions prohibiting plaintiff from filing a civil action or filing pro se without prior approval of the court for five years. The plaintiff also was ordered to pay the defendants' attorney fees and expenses. The court granted the defendants' motion to dismiss and motion for summary judgment. A sealed settlement agreement was filed eight days after the sanctions were imposed.

Cousino v. Sunbeam Corp. (VA-E 2:00-cv-00876 filed 11/22/2000).

Product liability action by two parents and their five-year-old daughter alleging that an electric blanket caught fire. The court conducted a sealed settlement conference and approved a sealed settlement agreement.

Haider v. American Honda Motor Co. (VA-E 1:00-cv-02079 filed 12/14/2000).

Motor vehicle product liability action for wrongful death in a traffic accident where the driver of a Honda Accord survived, but two passengers were killed. A mediation report was filed under seal. Defendants' response to plaintiff's petition for approval of the settlement stated that confidentiality of the agreement was an essential term.

SY Technology Inc. v. System Studies and Simulation Inc. (VA-E 1:00-cv-02129 filed 12/22/2000).

Contract action for breach of proprietary data agreement by defendant who alleged former employee used sensitive financial and trade secrets to benefit his new company. Af-

ter a jury trial had commenced the parties reached a settlement. The case was dismissed and the final order was placed under seal presumably because it contained terms of the settlement agreement.

Alley v. Core Inc. (VA-E 2:01-cv-00065 filed 01/29/2001).

Designated a contract product liability case, this is an ERISA action for wrongful denial of disability benefits concerning a work injury to a knee and subsequently unsuccessful arthroscopic surgery. The case was consolidated with *Alley v. Sickness and Accident Disability Plan for Bell Atlantic Employees* (VA-E 2:01-00123 filed 02/26/2002). The court awarded plaintiff summary judgment and plaintiff moved for $53,432.50 in attorney fees and $2,770.97 in costs. Defendant appealed the summary judgment. While the case was on appeal, it settled pursuant to a settlement agreement filed under seal in district court.

Jappell v. American Association of Blood Banks (VA-E 1:01-cv-002228 filed 02/09/2001).

Personal injury action removed from state court involving wrongful death of a woman who contracted HIV from defendant's blood products. The complaint alleged that defendant failed to properly screen blood donors. A sealed settlement agreement was filed and the case was dismissed as settled. Eight days after the case was dismissed the plaintiff filed a motion to enforce the settlement agreement. The hearing on the motion to enforce settlement agreement has not occurred.

Verizon Online Services Inc. v. McDonald (VA-E 1:01-cv-00432 filed 03/19/2001).

Statutory action under the Computer Fraud and Abuse Act alleging that the defendants sent unsolicited electronic mail advertising goods and services to plaintiff's subscribers. A sealed settlement agreement was filed as an attachment to the motion for stipulated judgment.

Breeden v. PYA/Monarch Inc. (VA-E 2:01-cv-00194 filed 03/20/2001).

Employment action for disability discrimination by a warehouse worker who was not relieved of lifting duty while he recovered from an off-work wrist injury. The action was dismissed as settled, but nearly four months later plaintiff filed a sealed motion to enforce the settlement agreement, which was subsequently sealed by agreed order. The motion to enforce was denied by a sealed order.

Vance v. Everly Funeral Homes (VA-E 1:01-cv-01048 filed 07/05/2001).

Employment action where an assistant manager sued a former employer for sexual harassment and constructive termination. The plaintiff filed a sealed motion to enforce the settlement agreement. The defendant's memorandum in opposition to the settlement agreement also was sealed. The case was dismissed as settled.

Canon USA Inc. v. Lease Group Resources Inc. (VA-E 1:01-cv-01086 filed 07/10/2001).

Contract action for nearly $5 million concerning the provision of several hundred photocopiers to the federal government. The parties moved for dismissal pursuant to a settlement agreement and asked the court to appoint a magistrate judge as special master to supervise the settlement, "[g]iven the complex nature of the settlement obligations, the period of time over which they will be performed, and the possibility that the resolution of disputes will require factual determinations and legal analysis." The memorandum in support of the motion, presumably containing a copy of the agreement, was sealed. But the 23-page agreement was filed unsealed as an exhibit to two enforcement motions subsequently filed by the defendant. The court continues to oversee the agreement.

Estate of Bui v. DaimlerChrysler Corp. (VA-E 2:01-cv-00612 filed 08/13/2001).

Motor vehicle product liability action for wrongful death resulting from a wheel coming off a Dodge van carrying church group youths. Decedent's estate sued manufacturers of the van, the wheel, and the tire. The estate filed a sealed petition for approval of a settlement agreement, which initially was approved by sealed order and subsequently approved by unsealed order after decedent's sisters in Vietnam had been given notice of the agreement. An unsealed Vietnamese translation of the settlement agreement translated into Vietnamese suggests the settlement was for $282,500, with $82,500 from the van manufacturer, $140,000 from the wheel manufacturer, and $60,000 from the tire manufacturer.

Fredley v. Huthwaite Inc. (VA-E 1:01-cv-01337 filed 08/29/2001).

Employment action alleging that defendant paid plaintiff less than her male counterparts for equal work. The plaintiff filed a motion to enforce a settlement agreement two weeks after the case was settled with the sealed settlement agreement filed as an exhibit. In the defendants/ response to plaintiff's motion, defendants reported their attempt to pay plaintiff $14,500 by check, but she wanted cash. The court ordered the case dismissed as settled because the parties had reached an agreement.

Hoffstaetter v. Gwaltney of Smithfield Ltd. (VA-E 2:01-cv-00665 filed 08/31/2001).

Class action under the Fair Labor Standards Act by employees of a pork processing and hog slaughtering facility for failure to pay overtime wages. A sealed settlement agreement was filed.

Automall Online Inc. v. American Express Travel Related Services Co. (VA-E 1:01-cv-01705 filed 11/08/2001).

Contract action for breach of a rewards participation agreement. After a jury trial had commenced, the parties settled. The settlement was placed on the record under seal pursuant to a confidentiality order.

Leavitt-Imblum v. McNeil (VA-E 2:01-cv-00942 filed 12/18/2001).

Copyright infringement action alleging defendants incorporated plaintiffs' cross-stitch patterns into a computer program allowing users to stitch uncountable copies of plaintiffs' designs without payment of royalties. The settlement agreement was filed under seal.

Drexler v. Aeon Knowledge Inc. (VA-E 1:02-cv-00174 filed 02/01/2002).

Statutory action under wiretapping law for misappropriation of the internet domain name, "wonderful.com," which was registered by an individual for his personal use. The case was dismissed pursuant to a sealed settlement agreement.

Fenelus v. Dav-El Capital City Inc. (VA-E 1:02-cv-00417 filed 03/21/2002).

Civil rights employment discrimination action brought by a black chauffeur for discrimination, assault and battery, and constructive termination. The plaintiff filed a motion and memorandum under seal to enforce the settlement agreement. The case was dismissed before the court ruled on the motion.

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: 3,593 cases searched; 112 cases (3.1%) had the word "seal" in their docket sheets; 41 complete docket sheets (1.1%) were reviewed; actual documents were examined for 31 cases

(0.86%); 28 cases (0.78%) appear to have sealed settlement agreements.[21]

Cases with Sealed Settlement Agreements

Sales v. Grant (VA-W 6:96-cv-00027 filed 04/01/1996).

Civil rights action by assistant election registrars for the City of Lynchburg who alleged they were not reappointed to their positions because they are Democrats. The court awarded defendants judgment as a matter of law at the close of evidence in a jury trial, but the court of appeals reversed. After a second trip to the court of appeals, a second jury awarded one plaintiff $55,000 in compensatory damages and $40,000 in punitive damages and the other plaintiff $57,000 in compensatory damages and $35,000 in punitive damages. Following the trial the parties settled the action pursuant to a sealed settlement agreement incorporated by reference into an unsealed consent decree. Although defendants denied liability, they agreed to pay each plaintiff $26,000 plus ten years of periodic payments in accordance with the agreement, with total payments summing close to $400,000. Thereafter the court awarded plaintiffs $814,893 in attorney fees and $28,893.19 in expenses for the five-and-a-half years of litigation in this case. The court destroyed the sealed settlement agreement eight months later.

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 against African Americans by the Director of Public Works and another supervisor. Parties agreed to a settlement at a settlement conference before a magistrate judge, who filed the terms of settlement under seal for review by the district judge, who in turn dismissed the action as settled.

Weber v. Rivanna Solid Waste Auth. (VA-W 3:98-cv-00109 filed 11/17/1998).

Environmental action by 26 plaintiffs against operators of a landfill dump. Defendant filed a motion for a protective order against discovery of material defendant claimed was protected by attorney-client privilege and as attorney work product. A few months later sealed documents were filed, including reports and recommendations and orders. One sealed document was labeled "order and settlement agreement." But the case by most of the plaintiffs was dismissed pursuant to a lengthy settlement agreement that was filed unsealed. Two separate orders each dismissed the action as settled as to a pair of plaintiffs. Documents pertaining to an interpleader action by a third party refer to settlement with the remaining pair of plaintiffs.

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.

[21] These include a pair of companion cases, a pair of consolidated cases, and a trio of consolidated cases.

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.

Bryant v. Delta Star Inc. (VA-W 6:00-cv-00113 filed 12/11/2000).

Employment action, originally filed pro se, for discrimination on the basis of age and disability. Plaintiff ultimately obtained representation and her case was consolidated with two others against the same defendant. The court dismissed the disability discrimination claims as not first presented to the EEOC and the cases went to trial on the age discrimination claims. A memorandum of settlement pertaining to all three cases was filed under seal (but docketed only for the lead case), and the case was dismissed.

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.

Palmer v. Shire Richwoods Inc. (VA-W 7:01-cv-00739 filed 09/26/2001).

Employment action by a 47-year-old recovering alcoholic man with a brain tumor alleging discrimination on the basis of age, disability, and sex, and violation of the Family and Medical Leave Act in his employer's replacing him with a younger, healthier woman. The case was dismissed pursuant to a sealed memorandum of settlement.

Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Hook Up Inc. (VA-W 7:02-cv-00035 filed 01/10/2002).

Labor action alleging that the closing of a truck distribution terminal violated the Worker Adjustment and Retraining Notification Act by not giving employees 60 days notice. The case was dismissed pursuant to a sealed memorandum of settlement, subsequently destroyed.

Phi Delta Theta Int'l Fraternity v. Phi Delta Alpha (VA-W 3:02-cv-00028 filed 03/05/2002).

> Designated a trademark infringement action, this is an action by the the international Phi Delta Theta fraternity against an expelled University of Virginia chapter, which changed its name to Phi Delta Alpha, but continued to suggest association with Phi Delta Theta, such as by referring to its members as Phi Delts. The chapter was expelled for serving alcohol, which resulted in the hospitalization of an underage student. The case was dismissed pursuant to a sealed "sketch settlement agreement." Unsealed documents disclose that the settlement did not include an award of damages.

Reyes-Ibarra v. Miller (VA-W 7:02-cv-00681 filed 05/23/2002).

> Action by migrant agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act and the Fair Labor Standards Act for improper wages, working conditions, and notice in the processing of Christmas evergreens. The action was dismissed pursuant to a sealed memorandum of settlement.

Younger v. FWC Inc. (VA-W 6:02-cv-00038 filed 06/19/2002).

> Employment discrimination action for sexual harassment and retaliatory discharge. The case was dismissed pursuant to a sealed memorandum of settlement.

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: 1,355 cases searched; 70 cases (5.2%) had the word "seal" in their docket sheets; 3 complete docket sheets (0.22%) were reviewed; actual documents were examined for 2 cases (0.15%); 2 cases have sealed settlement agreements (0.15%).

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

"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." W.D. Wash. L. Civ. R. 5(g)(1). In civil actions, after the case is over, if the entire record is sealed, the file is destroyed, *id.* R. 5(g)(5)(D); if part of the record is sealed, then sealed documents are returned to submitting parties, *id.* R. 5(g)(5)(C).

Statistics: 6,116 cases searched; 741 cases (12%) had the word "seal" in their docket sheets;

23 complete docket sheets (0.38%) were reviewed; actual documents were examined for 16 cases (0.26%); 12 cases (0.20%) appear to have sealed settlement agreements.

Cases with Sealed Settlement Agreements

Costco Wholesale v. Commonwealth Insurance Co. (WA-W 2:98-cv-01454 filed 10/14/1998).

Contract action involving an insurance coverage dispute for losses suffered by plaintiff for excessive soil settlement at plaintiff's warehouse. A crossclaim was filed against the architect and engineer who were responsible for the design, planning, and construction of the warehouse. A settlement was reached with the engineer. The motion for setoff of amount paid by the settlement was filed under seal. A stipulated protective order noted that the settlement agreement was confidential. The plaintiff was awarded $10,845,740 from the insurance company. The decision was affirmed on appeal.

MetroNet v. U.S. West Communications (WA-W 2:00-cv-00013 filed 01/05/2000).

Antitrust case challenging defendant's monopoly over local and long distance telecommunication services. The plaintiff filed a motion under seal to enforce the settlement agreement. The court denied the plaintiff's motion. The court granted the defendant's motion for summary judgment. The case currently is under appeal.

Kim v. Toyohara-Katagiri (WA-W 2:00-cv-00071 filed 01/14/2000).

Employment action brought by a Korean cook against his former employer and two former co-workers for race discrimination and retaliation. A guardian ad litem was appointed to oversee the interests of the plaintiff who was hospitalized for psychiatric care. The court granted a partial summary judgment for one of the co-worker defendants. A joint stipulated agreement provides that the terms of the settlement remain confidential. The court approved and sealed the guardian ad litem report.

Supnick v. Amazon.com (WA-W 2:00-cv-00221 filed 02/11/2000).

Class action involving web navigation software that gave defendant access to user's name, password, and other confidential information. A sealed settlement agreement was filed. One week after the settlement agreement was filed it was unsealed. Defendants agreed to modify its software so it does not collect confidential information. Defendants agreed to pay $1.9 million to named plaintiffs and a class of approximately 47,500 and $100,000 to a fund that will provide grants to university-based programs with internet public policy issues.

Lambert v. Henderson (WA-W 3:00-cv-05165 filed 03/21/2000).

Employment discrimination action brought by a black mailman against his former employer for refusing to provide light duty work for him after his surgery. Minutes of the settlement were placed on the record under seal during the settlement conference.

Savage v. Combined Insurance (WA-W 3:00-cv-05319 filed 06/01/2000).

Labor litigation case involving failure to pay commissions on sale of Medicare supplemental policies. The settlement agreement was placed on the record under seal during the settlement conference.

White v. Johnston & Culberson (WA-W 2:00-cv-00982 filed 06/07/2000).

Action filed under the Fair Labor Standards Act for failure to pay overtime wages. A sealed settlement agreement was filed. The court approved the settlement.

Gorchoff v. North Shore Agency (WA-W 2:00-cv-01329 filed 08/07/2000).

Class action filed under the Fair Debt Collection Act for failing to provide name of original creditor in collection letter and for threatening to take action not legally allowed by defendant. The case was dismissed as settled and the order of dismissal was filed un-

der seal. A sealed settlement agreement apparently was filed.

Precor v. Brunswick Corp. (WA-W 2:00-cv-01392 filed 08/17/2000).

Trademark infringement case involving a patent for a treadmill. Six weeks after the case was dismissed the defendant filed a motion under seal to enforce the settlement agreement. The court granted the defendant's motion.

Chance v. Avenue A (WA-W 2:00-cv-01964 filed 11/20/2000).

Class action brought by persons who were secretly tracked by the defendant as they surfed the internet. Defendant's motion for summary judgment was granted. Plaintiffs filed an appeal but later the appeal was voluntarily dismissed. The court granted a joint motion for preliminary approval of the class action settlement that was filed under seal.

Chilbeck v. Deere & Company (WA-W 3:01-cv-05287 filed 05/29/2001).

Product liability wrongful death case involving a man who suffocated when his tractor tipped over, pinning him between the tractor's rollover protective structure and the ground. The decedent's minor child was represented by a guardian ad litem, whose report on the settlement was sealed. A joint stipulation was filed that the settlement documents be filed under seal.

In re Artic Rose (WA-W 2:01-cv-01360 filed 08/31/2001).

Admiralty action by owners of a fishing vessel for exoneration from or limitation of liability arising from an accident which resulted in the deaths of 13 people. Seven guardian ad litem reports were filed under seal and approved by the court for decedents' minor children. The order authorizing settlement was filed under seal.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

October 3, 2002

Honorable Herb Kohl
United States Senate
380 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl:

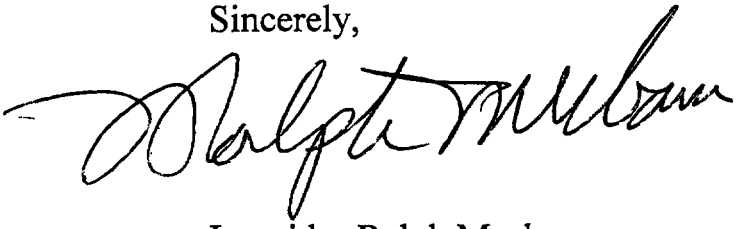
Thank you for your September 18, 2002, letter urging the Judicial Conference to "consider appropriate changes to Rule 26 of the Federal Rules of Civil Procedure." I have sent your letter to Judge David F. Levi, chair of the Advisory Committee on Civil Rules, who has informed me that he has placed the matter on the committee's agenda.

As you may recall, the Advisory Committee opposed only that part of proposed legislation that would have required a judge to make particularized findings of fact before approving any protective order concerning discovery materials. The Advisory Committee's opposition was based on a comprehensive study of protective orders and represented a concern that the proposed legislation would unnecessarily complicate discovery practices, increase cost, and prove counterproductive. Most protective orders in the course of discovery are issued to protect valid privacy interests in employment and civil rights cases or trade secrets in intellectual property litigation. The Advisory Committee drew a sharp distinction between protective orders concerning discovery materials and sealing orders related to filed settlement agreements, carefully limiting its comments to the former.

The sealing of filed settlement agreements presents different issues from protective orders concerning private, usually unfiled, discovery materials. Moreover, unlike Rule 26 protective orders, there is no Federal Rule of Civil Procedure governing the sealing of filed settlement agreements. This has been left to case law and local court rules.

Several weeks ago the Advisory Committee began considering whether the sealing of filed settlement agreements should be placed on the agenda. The Committee is now planning a thorough investigation of the matter. It will begin its work with a review of the pertinent local district court rules and state court rules as well as the case law to determine whether a national rule governing sealing settlements is feasible and appropriate.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Anthony J. Scirica
Honorable David F. Levi

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-3653
T.T.Y. (202) 224-4484
http://kohl.senate.gov/
senator_kohl@kohl.senate.gov

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:
APPROPRIATIONS
JUDICIARY
SPECIAL COMMITTEE ON AGING

September 18, 2002

L. Ralph Mecham
Secretary, Judicial Conference of the United States
Administrative Office of the U.S. Courts
One Columbus Circle, NW
Washington, D.C. 20544

Dear Secretary Mecham,

Approximately four years ago, the Judicial Conference Advisory Committee on Civil Rules closed its examination of the factors to be considered regarding a motion to modify or dissolve a protective order under Rule 26. Specifically, the Committee explored what circumstances, if any, should be considered by judges signing secrecy orders in civil litigation. At that time, the Committee determined that no need had been shown to amend Rule 26.

During the past four years, however, our nation has been shaken by the revelation of a number of sealed settlements containing information which could have saved or changed lives. For example, we learned that Bridgestone/Firestone had shielded the danger inherent in a defective tire by secretly settling with victims and their families. In addition, this year's flurry of suits alleging abuse by members of the clergy has revealed a long history of secret settlements. If the names of the offenders had been made public, countless children and their families could have been spared the trauma of sexual abuse.

As a result, last month the district of South Carolina's ten active federal judges voted unanimously to ban secret settlements entirely. While leaving judges the discretion to seal some information involving trade secrets and other information found to be proprietary, the new local rule, if approved, would create a presumption of openness and hinder efforts to suppress vital information about real health hazards.

During each of the last three Congresses, I have introduced legislation which would require federal judges to perform a balancing test before restricting discovery, sealing information or restricting access to court records. Specifically, judges would be required to determine that the interest in secrecy outweighs concerns over public health and safety. This reasonable provision would ensure public access to life-saving information in the most critical cases without adding an undue responsibility to the already overburdened federal judiciary.

Given the changes we have witnessed over the last four years, I request that you revisit this issue as soon as possible. The American people are outraged that our judicial system is complicit in these secret settlements. I urge the Judicial Conference to review this issue and consider appropriate changes to Rule 26 of the Federal Rules of Civil Procedure.

Sincerely,

Herb Kohl

Herb Kohl, U.S.S.

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 960
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y (414) 297-4485

MADISON OFFICE
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 235
APPLETON, WI 54914
(920) 738-1640

LACROSSE OFFICE
425 STATE STREET
SUITE 202
LACROSSE, WI 54601
(608) 796-0045

NO. 423

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Contents Display	

Bill 1 of 7

GPO's PDF version of this bill	References to this bill in the Congressional Record	Link to the Bill Summary & Status file.	*Printer Friendly Display* - 5,342 bytes.[Help]

Sunshine in Litigation Act of 2003 (Introduced in Senate)

S 817 IS

108th CONGRESS

1st Session

S. 817

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

April 8, 2003

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the `Sunshine in Litigation Act of 2003'.

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL- Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

`Sec. 1660. Restrictions on protective orders and sealing of cases and settlements

`(a)(1) A court shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records in a civil case unless the court has made findings of fact that--

`(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

`(B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

`(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

`(2) No order entered in accordance with paragraph (1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) have been met.

`(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

`(4) This section shall apply even if an order under paragraph (1) is requested--

`(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

`(B) by application pursuant to the stipulation of the parties.

`(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

`(B) No party shall request, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

`(b)(1) A court shall not approve or enforce any provision of an agreement between or among parties to a civil action, or approve or enforce an order subject to subsection (a)(1), that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

`(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

`(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement between or among parties that prohibits 1 or more parties from--

`(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

`(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

`(2) Paragraph (1) does not apply if the court has made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information.'.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

`1660. Restrictions on protective orders and sealing of cases and settlements.'.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall--

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

THIS SEARCH	*THIS DOCUMENT*	*GO TO*
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Contents Display	

MEMORANDUM

To: Advisory Committee on Civil Rules
From: Rick Marcus
Date: Sept. 15, 2003
Re: E-discovery rule discussion proposals

During the May, 2003, meeting, the Committee authorized the Discovery Subcommittee to attempt to draft proposed amendments to address seven concerns. Thereafter, the initial drafting tasks were parceled out among Subcommittee members, working either in tandem or alone. That effort produced a set of initial drafts that I combined into a memorandum attempting to integrate them into one package. In a number of instances, the memorandum (like the initial drafts) had multiple options to deal with specific issues.

On Sept. 5, 2003, the Subcommittee met for a full-day consideration in detail of the various proposals. During the meeting, the Subcommittee selected various proposals for submission for discussion purposes to the full Committee, and modified or refined the language of several of them. It also decided not to present a proposal on one of the topics identified in May -- expanding initial disclosure under Rule 26(a)(1) to include information about computer systems. This memorandum was prepared on the basis of the Sept. 5 discussion. Owing to time constraints, the Subcommittee has not had a chance to review this memorandum, and undoubtedly some mistakes of understanding have crept into it. The presentation proceeds as follows:

It bears emphasis at the outset that these are merely discussion proposals. Whether any actual amendments should be proposed, and what they should be if they are proposed, are questions which the Subcommittee has yet to answer. Indeed, the full Committee is planning to host an important conference on these topics on Feb. 20-21, 2004, at Fordham Law School. That conference will provide an opportunity to examine the proposals set out in this memorandum, modified as needed in light of the Committee discussion on Oct. 2-3, but also to consider the larger question whether any changes are needed. The Subcommittee could conclude after that consideration that the current rules are adequate to deal with the challenges of this form of discovery, and that no rule changes are needed.

One further introductory matter should be kept in mind: Although these proposals are presented and should be discussed individually, it is important to think of the way in which the aggregation of several of them would fit together as a balanced package. If there are important problems with discovery of electronically-stored materials, it is likely that they affect a number of litigation constituencies, not just one. Thus, one goal would be to develop a balanced set of proposals that would address the concerns of various elements in the litigation system.

Restyled format for proposals: After the preparation of the initial drafts of possible amendment proposals had been completed, the question whether they should be worked into the present rules or the restyled rules arose. As you know, the restyling process for Rule 26-37 and 45 has proceeded apace, and may result in initial publication of preliminary drafts next Summer. In addition, it has been true for some time that when rule subdivisions were amended to accomplish substantive change they were also restyled. Thus, the pending amendment proposals for Rules 27 and 45, which the Committee forwarded to the Standing Committee earlier this year, are in restyled form. Against this background, it seemed wise to try to develop rule change proposals that fit into the restyled format. Otherwise there might be a need to make changes to move into that format later. Accordingly, the discussion proposals included in this memorandum adhere to the current version of the restyled rules, which are the subject of separate discussion during the Oct. 2-3 meeting. Changes to the pending style proposals are indicated by strikeover and underscoring. Further changes to these rules in the restyling project should be reflected in the e-discovery amendment process as well.

(1) Definition of the subject

This is not one of the seven areas on which the Subcommittee said it would focus, but it emerged from the drafting process as an important one. Working somewhat independently, Subcommittee members developed a variety of sets of words to describe the topic on which we were working: Three years ago, I called it "computer-based or electronically stored information." During the drafting process this year, various Subcommittee members favored various phrases: "information stored on a computer or in electronic form," "documents created or stored electronically," "data from electronic media, including computers," and "electronic documents."

All of these phrases have some appeal, but using different ones in different places seemed undesirable unless it was necessary. Accordingly, at the Sept. 5 meeting the Subcommittee tried to settle on a single phrase to cover the subject. It is not clear that it did so, but for purposes of simplicity the first topic is a rule provision that would attempt to adopt and define a single phrase that could then be invoked throughout the discovery rules:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronically-stored data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. [This provision will be added later in the memorandum under item (5), and the heading is included here as a placeholder.]

Comments

This is a first effort. It is intended to be broad. As indicated, the catch-phrase "electronically-stored data" could be replaced by other phrases similarly defined. And the definition certainly should be examined with great care. That might be an important focus of the Fordham conference.

A basic question is whether we can devise a definition that will stand the test of time.[1] In this area, change moves fast, and technological evolution can be breathtaking. There is legitimate concern that any definition we fix upon presently could be rendered meaningless by changes in five or ten years. The goal of this effort is to try to use terms that anticipate technological developments and would be sufficiently flexible to be of use once those occur. Thus, it is hoped that, if current consideration of chemical or biological computing actually leads to innovative techniques, those new techniques would be encompassed within the terms used here. The hallmarks seem to be that information will be in digital format and that the manner of access will in some sense depend on electronic technology.

Another point to be kept in mind is that, particularly under the Style Project, definitions in the rules are not favored. If it is desirable to have this one, it may also be important to emphasize the need for it throughout the rule amendment process.

---

[1] One possible statutory reference would be 15 U.S.C. § 7006, which contains definitions for the Electronic Signatures in Global and National Commerce Act. It includes the following:

> **(2) Electronic**
>
> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> **(4) Electronic record**
>
> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(2) Including discussion of these issues in the early discovery planning -- Rule 26(f), Rule 16(b), and Form 35

The initial draft presented to the Subcommittee on Sept. 5 contained considerable detail about topics to be discussed regarding discovery of electronically-stored data.[2] The consensus of the Sept. 5 meeting was that a more general description of the topic would be more suitable for the rule, and that the details included in the initial draft should be addressed in the Note.

---

[2] The proposal for a new (C) was as follows:

> **(C)** whether any party expects to [provide initial disclosure of or] seek discovery of data from electronic media, including computers and, if so, indicate the parties' agreements or proposals concerning:
>
> **(i)** the steps needed to segregate and preserve from alteration or destruction any such data;
>
> **(ii)** the anticipated scope of discovery of [e-mail messages] {data from electronic media}, and the search protocol for such data, including treatment of inadvertent production of privileged materials;
>
> **(iii)** the format, media, and procedures for the production of such data;
>
> **(iv)** whether restoration of deleted data or examination of back-up media may be sought, and [which party should bear] {the appropriate allocation of} the resulting cost;
>
> **(v)** any other issue concerning the [disclosure or] discovery of such data that a party reasonably believes should be addressed in this case;

There was also a proposal to invite counsel to consider the need for a confidentiality order during the conference as a method of raising the possible need for protective provisions regarding proprietary software and the like.

Rule 26

* * *

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must hold a conference as soon as practicable -- and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a)(1), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) whether any party anticipates disclosure or discovery of electronically-stored data, and if so what arrangements should be made to facilitate management of such disclosure or discovery; and

(D) whether provision should be made to facilitate discovery by protecting the right to assert privilege after the [inadvertent] disclosure or production of a privileged document; and

(E~~C~~) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F~~D~~) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Comment

This sort of amendment to Rule 26(f) to promote early consideration of e-discovery issues seems likely to be widely acceptable. Such activity already is required by local rule in three districts, and another appears to be adding such a requirement. A number of commentators enthuse about this sort of planning activity. It might be a substitute for trying to adopt specific rules to deal with the myriad things that could be covered by such a discussion. In any event, such specific rules would presumably serve as default settings in the absence of party agreement. On the other hand, having specific rule provisions as well might be a useful addition to the generalized directive in Rule 26(f), as specific rules could give parties and courts a starting point on how to react to various proposals the parties make in with regard to these topics.

The addition of proposed consideration of arrangements regarding privilege waiver also seems a worthwhile thing to raise, and it might tie in directly with one of the possible measures regarding waiver considered below, known as the stipulated order approach.

Form 35. Report of Parties' Planning Meeting

* * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____ (brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically-stored data is anticipated, and it should be handled as follows: _____(brief description of parties' proposals)_____

A privilege preservation order is needed, as follows: _____(brief description of provisions of proposed order)_____

All discovery commenced in time to be competed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

* * *

Comment

This expansion of the form may be useful to call lawyers' (and perhaps judges') attention to the need to attend to these matters as imposed by proposed Rule 26(f)(1)(C). Note that the Rule 26(f) proposal above mandates discussion of these matters. Indeed, it may be that adding something to Rule 16 is not necessary if parties can be expected to include this material in their discovery plans, and thereby call these topics to the judge's attention.

Rule 16. Pretrial Conferences; Scheduling; Management

* * *

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge -- or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail , or other suitable means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically-stored data;[3]

(iv) provide for protection against [inadvertent] waiver of privilege; and

(viii) set dates for other conferences and for trial; and

(viiv) include other appropriate matters.

(4) ***Modifying Schedule.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

[3] Note that one could include this as a mandatory provision in 16(b)(3)(A). But that would probably be unduly aggressive, even though proposed 26(a)(1)(C) is limited to situations in which discovery of this data is expected.

(3) Definition of document -- Rule 34

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect and copy -- or to test or sample -- the following items in the responding party's possession, custody, or control:

(A) any designated documents -- including writings, drawings, graphs, charts, photographs, sound recordings, and other data or data compilations in any [magnetic or other][4] media from which information can be obtained or, when necessary, be translated by the responding party into a reasonably usable form, [and including, for electronically-stored data, all data stored or maintained on that document {if the court so orders for good cause},][5] or

(B) any tangible things or;

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, text, or sample the property or any designated object or operation on it.

---

[4] Is the bracketed phrase a useful addition?

[5] This phrase raises a question on which the Subcommittee did not reach consensus regarding initial production including metadata and embedded data. The stronger argument for routine production is made for metadata, so that the material may be electronically accessed and searched, than for embedded data. The further phrase making this form of production dependent on court order based on good cause would make this a "second tier" discovery matter available only under the supervision of the court. It probably needs refinement if it is retained to make clear what data the court-order requirement applies to.

Comment

The proposed addition to Rule 34(a)(1)(A) was accompanied by a proposed Committee Note:

> The inclusive description of "documents" is revised to accord with changing technology. For documents created or stored electronically, all data about the creation of the file, such as header information, file size and location, date of creation and author -- commonly known as metadata -- is to be considered part of the document and thus discoverable. Similarly, substantive information hidden within the file itself -- commonly known as embedded data -- is also discoverable. Such data includes, for example, the substance of previous edits, formatting commands, links to other files, hidden rows or columns in spreadsheets, or "electronic stickies," which are notes or reminders that authors and reviewers leave for each other.
>
> When documents are produced as they are ordinarily stored or maintained, meaning the form in which they are created and stored on the computer, rather than in a special format (e.g., .tiff images or .pdf format), both the metadata and the embedded data will be produced with the electronic file. Accessible data is that which is in an immediately usable format, and does not need to be restored or otherwise manipulated. It does not include data that has been deleted and is now available only on backups or through restoration of deleted files by means of retrieving residual data or file fragments. Those documents, which are retrievable but not ordinarily accessible, may be produced only if a court determines that such production is required and addresses the question of the cost of that production.[6]

There was extended debate during the Sept. 5 meeting on whether inclusion of metadata and embedded data should be routinely required in initial production of documents. Opposition to a routine requirement was based on the low likelihood that this material -- particularly embedded data -- will be used, and on the added cost resulting from mandating that it be included. Support for a broader production requirement emphasized that metadata, at least, may be necessary for the recipient to manipulate the documents using its own computer system. Certain types of electronic production -- .tiff images, for example -- were said to be "no better

---

[6] Note that the question of access to such inaccessible material is addressed under heading (5) below.

than paper," requiring time-consuming and costly computer inputting before they could be used effectively. The draft thus has this provision in brackets, with a further possibility of making required production depend on court order. As noted above, it will probably be important to refine this provision, if it is to be retained, to clarify what it applies to.

Note also the overlap between this topic and the next one -- form of production. To the extent the proposed Rule 34(b) provisions there give the requesting party a right to seek production in a specified format (e.g., with metadata), and permit the responding party to object to the requested format only if it produces the electronically-stored data in the form it usually stores the data (presumably with metadata also).

(4) Form of production

(a) Documents

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

(1) ***Form of the Request.*** The request must:

(A) describe with reasonable particularity each individual item or category, the items to be inspected; and

(B) specify a reasonable time, place, and manner for the inspection and for performing the related acts. The request may specify the form in which electronically-stored data are to be produced.

[Alternative][7]

(D) specify the form in which documents electronically-stored data are to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or stipulated by the parties under Rule 29.

[7] This alternative makes it mandatory to specify the form of production. That is more in keeping with the form of the rule, but the question whether this specification should be mandatory or permissive prompted substantial disagreement in the Subcommittee.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, specifying the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the remainder. A party may object to the requested form for producing electronically-stored data [and to production of electronically-stored data that are not {reasonably} accessible [without undue burden or expense] {reasonably available} in the usual course of the producing party's business {activities}].[8]

(D) *Producing the documents.*

(i) *In general.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(ii) ***Electronically stored materials.*** A party producing electronically-stored data may produce them in the form in which they are ordinarily [created and][9] stored.[10] Unless the court orders

---

[8] In the next section, we will see that a Rule 26(h)(2) proposal has emerged as the method for dealing with the inaccessible data problem. Assuming (as is the intent) that this provision can do duty for all forms of discovery, it would seem unnecessary to add a parallel provision here in Rule 34. But the Committee Note should call attention to the application here of the inaccessible-data proposal.

[9] Is this phrase useful here? Unless creation in a certain format makes it easy to put data stored in another format back into the format in which it was created, the phrase might be taken out. If the phrase is retained, should it be "created or"?

[10] This might seem inconsistent with the earlier provision that the party seeking production may request production in a certain format. Perhaps the reconciliation, which could be explored in a Committee Note, is that the right to request production in a certain form gives way if that is not a form in which the producing party ordinarily creates or stores the material. That would seem to mean that the grounds of objection are generally limited to those based on what the producing party ordinarily does to create or store the documents. One complication that might warrant consideration is a situation in which the producing party creates and stores the

otherwise for good cause, a party producing electronically-stored data need only produce it in one form.[11]

Comment

A key question is whether it should be mandatory that the party requesting production specify the form of production it desires. Arguments for required specification include facilitating discovery generally and forestalling demands that material produced in one form be re-produced in another form. An effort has been made to add a provision addressing the latter problem. Arguments in favor of making the request optional include the assertion that the requesting party may often not know what format it wants, or which ones the other parties use. Moreover, technological developments may make this issue less important in the future.

As noted the first footnote accompanying proposed Rule 34(b)(2)(D)(ii), it may be necessary to be more focused, either in the rule or the Note, on how a conflict between the parties about the form of production should be resolved. In general, it would seem that the sensible way is to balance burden on the producing party against utility to the party seeking production. The first major case involving discovery of computer-readable material[12] involved what might partly have been an effort to defeat the other side from using the material to build its case. More recently, there have been repeated suggestions that parties producing materials stored

---

documents in more than one format, which I would guess can occur. If that is true, should the party requesting production have a right to insist on production in the format most useful to it, or can the responding party choose the format (possibly to frustrate the other side's use of the material)?

[11] This sentence was added after the Sept. 5 meeting to include something that seemed important to some of the participants at that meeting -- that a party should not be able to demand one form of production, perhaps hard copy, and then demand a duplicate production in another form, perhaps electronic. The Subcommittee has not seen or commented on this proposal. It may be important to address the question whether the producing party or the requesting party gets to choose the form of production where the producing party creates or stores the data in multiple forms.

[12] In *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980), Judge Becker required production of a computer-readable version of lengthy interrogatory answers initially provided in hard copy form to save the discovering party the burden of inputting the material (in order to analyze it) dealt with a situation of this sort. There the court was confronted with work product objections based on the fact that the computerized version had been created by counsel, and emphasized that the production ordered had the same content, but in a different form.

electronically sometimes select a form of production that minimizes their utility to the other side. There probably is often a wide range of reasonably possible forms of production, and we could be more or less directive about the way in which the court is to oversee the parties' debates about choosing the proper version.

A separate problem initially raised in Shira's article in the Boston College Law Review is that there may be proprietary aspects to the form in which the data are kept. In the Brooklyn memorandum, another provision was added to address that question:

> and the party making the request may not release such information in that form to anyone other than its expert witnesses unless the producing party agrees to such release or the court so orders.

One way of addressing this issue would be to say in the Note that the court should be free with such protection when a proprietary data problem is raised.

In any event, this format problem is one of the topics we want the parties to discuss in their Rule 26(f) conference, and we may want to highlight it somehow in connection with that activity, or with Rule 16(b). As suggested in connection with item (2) above, this confidentiality consideration should probably be mentioned in the Committee Note accompanying an amendment to Rule 26(f) if that is pursued.

If Rule 26(f) is thus amended, is it important also to add these changes to Rule 34(b)? Doing so may be justified on the ground that it is worthwhile to list these specifics about Rule 34 requests in Rule 34. In addition, assuming no agreement between the parties, putting the provision here allows us to have a Note outlining general attitudes toward how to handle these problems if the parties have a dispute about them. That might not so easily fit in a Note to amended Rule 26(f), assuming we were to go forward with that amendment.

(b) Interrogatories

Rule 33. Interrogatories to Parties

* * *

(e) **Option to Produce Electronically Stored Information.** If the answer to an interrogatory may be determined [by examining, auditing, abstracting, or summarizing] {from}[13] the responding party's electronically-stored data, and if the burden of determining the answer will be substantially the same for either party, the responding party may answer by:

(1) producing the electronically-stored data from which the answer may be determined; and

(2) giving the interrogating party sufficient information [and computer software][14] to enable it to derive or ascertain the desired information.

Comment

It may be that this option should supplant, and not only be added to, current Rule 33(d). Nowadays, it is hard to believe that parties seeking to employ the option offered by 33(d) would do so with regard to hard copy information. Indeed, it might be important to find out how parties currently deal with Rule 33(d) for computerized records. Maybe that rule only needs to be tweaked a bit, or the current proposal can be integrated into it.

---

[13] The bracketed phrase borrows from current Rule 33(d), but "from" may be sufficient here.

[14] This bracketed phrase recognizes the possibility that the responding party stores and accesses the information using software that the other side does not have. Almost certainly another phrase would be better, and "computer software" is used to describe what I'm getting at in words that probably are not sufficient for the purpose. If it is added, there might be reason to say either in the rule or in the Committee Note that any proprietary software must only be used for this case.

(5) Addressing the producing party's burden of retrieving, reviewing, and producing inaccessible data.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronic data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. In responding to discovery requests,[15] a party need not include electronically-stored data [from

---

[15] Another phrase could be added before "responding to discovery requests" -- "making disclosures under Rule 26(a) and in" -- to exempt parties from including inaccessible materials (within the meaning of this provision) in Rule 26(a) disclosure. The consensus of the Sept. 5 meeting appeared to be that this provision should not be included.

Initially, it would seem that disclosure of inaccessible material should also be excused, since a requirement that a party restore and search out all this stuff to make its initial disclosures would be onerous indeed, and would overwhelm any protection afforded by a provision that the discovery responses need not involve mining such data unless the court so orders. But that disregards the "may use to support its claims or defenses" limitation now included in Rule 26(a)(1)(A) and (B). If a party decides to mine ordinarily inaccessible stuff to get good evidence, should we override the duty to disclose that material under Rule 26(a)(1)(B) (along with the duty to supplement under Rule 26(e))?

There are reasons to be wary about limiting disclosure to exclude items retrieved from "inaccessible" sources. For example, in employment discrimination actions an employer may make considerable efforts to locate "inaccessible" information that will support an adverse employment decision in order to use that information in the case. Should it be relieved of the duty to disclose what it finds (even though it plans to use the evidence) because it found the seemingly damning information by searching the residual data on the hard disc of the employee's office computer? How about an employer who installs a device on the employee's computer that makes a record of each keystroke or otherwise engages in some form of surveillance to keep track of employee behavior? This computer forensic activity may be increasingly important in a

systems] created only for disaster-recovery purposes,[16] [providing that the party preserves a single day's full set of such backup data,][17] or electronically-stored data that are {not [reasonably] accessible without undue burden or expense} [accessible only if restored or migrated to accessible media and format] {not accessible [reasonably available] in the usual course of the responding party's {business} [activities]}. For good cause, the court may order a party to produce inaccessible electronically-stored data subject to the limitations of Rule 26(b)(2)(B), [and may require the requesting party to bear some or all of the reasonable costs of {any extraordinary efforts necessary in} obtaining such information].

Comment

There are a number of choices to be made if the above general approach seems desirable.

Probably the first issue to address is the method of describing the information being excluded from discovery response absent court order. The above draft includes a first-cut attempt to excuse efforts to search backup tapes and the like unless the court so orders. The Sept. 5 meeting produced substantial consensus that such review of backup materials should be

---

number of areas of litigation, and removing a disclosure obligation regarding this information seems contrary to the objectives of disclosure and unnecessary to relieve the party of an inappropriate burden. It comes into play only when the party chooses to do what we want to say is not required.

A permutation raised during the Sept. 5 Subcommittee meeting was a situation in which a party dredges up material from inaccessible sources and finds ten pertinent items, one of which it intends to use. Should it still be relieved of the obligation to make the other nine items available through discovery because they are inaccessible? By the time they have been dredged up, they are no longer inaccessible, so it would seem that the exemption specified in the text would not apply.

[16] This is a first-cut effort to exclude backup tapes and the like from the duty to respond to discovery absent a court order. The Subcommittee's resolution of the drafting approach was (1) to put backup tapes and the like off limits absent a court order, and (2) similarly to exclude inaccessible materials from the duty to search absent direction from the court.

[17] This proviso was suggested during the Sept. 5 meeting on the ground that good practice calls for such preservation of a "snapshot" of the material that was backed up. Other places to include such a provision are mentioned later. Whether it should be in a rule is not clear, assuming it would at least be a desirable admonition.

categorically exempted from discovery-response efforts absent court order. Care should be taken to refine this rule description, however. In addition, there is a provision to condition this excuse on retaining one day's full set of backup materials for future reference. Whether this sort of thing should be in a rule can be debated.

During the Sept. 5 meeting, there was considerable discussion about whether it is desirable to focus on what is accessed during the usual course of the responding party's business or activities. That seems, at first blush, a sensible way of determining what is easy or difficult to access. At a minimum, it would seem odd for electronically-stored data that a party accesses routinely to be considered inaccessible when the other side wants it through discovery. The draft suggests that if this approach is taken, the focus should be on the producing party's "activities" rather than "business." If business is defined broadly, as in Fed. R. Evid. 803(6), it covers a lot of things. But there are others that are outside it; most natural persons as litigants would not be able to use it with regard to the hard disks on their home computers. So "activities" is meant to cover a similar focus on everyday activities for non-business litigants.

During the Sept. 5 meeting it was objected, however, that the real question was whether there would be undue burden or expense in accessing the data, without regard to whether the producing party does so for its own purposes. If the data would be easy to access, is there a reason to prevent discovery of it absent court order just because it is not normally accessed? The phrase "not [reasonably] accessible without undue burden or expense" is designed to respond to this point. Whether it is useful to add "reasonably" to this formulation could be debated.

The third phrase -- "accessible only if restored or migrated to accessible media and format" -- may be a more precise way of capturing the idea behind "not accessible without undue burden or expense." Although it may be more precise, that could be a drawback if there are obstacles to access that are not encompassed within "restored or migrated to accessible media and format."

Another issue has to do with providing explicit authority to shift costs in the rule. As we learned in 1999 with the Rule 26(b)(2) amendment that was rejected by the Judicial Conference, more explicit coverage of cost-bearing can be a very controversial subject. That is, of course, not a reason to shrink from a useful proposal. But the upshot of the 1998-99 experience is that the power to require cost-bearing rather than entirely forbidding discovery that would be impermissible under the proportionality principles is implicit in the rule, as the proposed

Committee Note to the preliminary draft said. To add explicit cost-bearing authority in a different subdivision of Rule 26 might lend some textual support to arguments that the authority to do shift costs is limited to Rule 26(h)(2), and not available under Rule 26(b)(2) as well, but because this is in a different subdivision that argument seems weak.

A related issue is whether to tie cost-bearing (if included) to "extraordinary efforts." In Texas Rule 196.4, cost-shifting is tied to "extraordinary steps." Lee Rosenthal and Nathan Hecht offer the following explanation for the introduction of that term there:

> The practitioners thought the words "reasonable" and "extraordinary" were crucial parameters of this cost-shifting mechanism. "Reasonable" focuses not only on amounts but also on the efforts necessarily undertaken to produce the data. "Reasonable" -- a familiar concept in determining attorney fees, medical expenses, and other such issues -- is better understood than "extraordinary," and the practitioners realized that. They thought it was important to state that the producing party must incur ordinary expenses of producing electronic data, the same as in producing documents, and that cost-shifting would be permitted, and required, only for extraordinary measures. What is extraordinary might vary from party to party, for reasons unrelated to the net worth of the party. For example, a business or agency might have the technical ability readily to access categories of information that another entity might only be able to access with great effort and expense.

Perhaps including "extraordinary efforts" curtails occasions in which cost-bearing can be granted. Thus, if the "ordinary course of business" standard for defining accessibility is used, there could be instances in which electronically-stored data is considered inaccessible but retrieving it would not require extraordinary efforts. Then inclusion of the term might reassure those uneasy about cost-bearing. But if the term does not curtail cost-bearing, it may be daunting to have a term that is not well known doing such important work.

Finally, it should be noted that the invocation of Rule 26(b)(2) seems to address the concerns that should influence the court in deciding whether to require production of this information, and whether order cost-bearing. The proportionality principles seem to provide pertinent guidance on the question whether -- and to what extent -- the court should impose cost-bearing in this context. One of them looks to whether the information can be obtained more readily by another method, and another to whether the effort involved in obtaining it is justified

586 in terms of the importance of the information in this case. Those seem the sorts of things that the
587 court should look to in deciding what to do when trying to assess whether there is good cause
588 within proposed Rule 26(h)(2).

(6) Addressing privilege waiver

(a) The "Quick Peek" Approach

The privilege waiver problem has been on the Subcommittee's agenda for a long time; it may be that the time has come to confront it. The last full Committee discussion occurred during the Fall, 1999, meeting in Kennebunkport. Because many of the issues remain the same, and to provide important background, the agenda materials for that meeting are included as an Appendix to this memorandum. The outcome of the discussion of the topic in Kennebunkport was that the Subcommittee should keep the issue on its agenda, particularly because it appeared likely to be important in the anticipated examination of problems of discovery of electronically-stored data. But the treatment proposed below is not limited to electronically-stored data.

One important consideration in connection with rules about privilege waiver is 28 U.S.C. § 2072(b), which says that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." It appears that there is virtually no caselaw about this limitation, which is not surprising since it could arise only if such a rule were adopted. The questions raised by § 2074(b) are covered in the Appendix. Suffice it to say for current purposes that one could argue that Civil Rules 26(a)(2)(B) and (26(b)(5) might be challenged on this ground if dealing with waiver is forbidden. Both of them affect issues of waiver, and nobody seems to have raised a serious question about that. So there may be some latitude to adopt rules dealing with privilege waiver as a function of discovery.

Nonetheless, there is reason for caution in this area. At the time of the Kennebunkport meeting, therefore, the pending proposals (quoted in the Appendix) were premised on consent and a court order based on that consent. Something of that sort might be sufficient to do most of the job, in conjunction with addition of the topic to the Rule 26(f) conference. Accordingly, we begin with the "quick peek" approach discussed by the full Committee in 1999.

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

(1) ***Form of the Request.*** The request must:

(A) identify, by individual item or category, the items to be inspected;

(B) describe each item with reasonable particularity; and

(C) specify a reasonable time, place, and manner for the inspection and for performing the related acts.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or agreed to in writing by the parties under Rule 29.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, specifying the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the remainder.

(D) *Producing the documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(E) ***[Order Regarding] Privilege Waiver.*** [On stipulation {of the parties},[18] a court may order that][19] A party may respond to a request to produce

[18] It is not clear to me whether, as a matter of restyling, these words should appear after "stipulation."

[19] Deleting this phrase would make the "quick peek" applicable without a stipulated order.

documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege or protection.[20] The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under Rule 34(b)(1).

Comment

The purpose of this provision is to facilitate discovery by enabling parties permit adversaries to inspect the their materials without thereby waiving any privileges. For many years, the bar has complained about the practical consequences of the waiver doctrines (1) that any disclosure to anyone waives as to the world, and (2) that any waiver applies not only to the disclosed material but also to any other material on the same subject matter. Because document requests are often very broad, and the responsive material is therefore often of no real interest to the party seeking production, undertaking the laborious task of reviewing all this material before the other side gets to look at it is highly wasteful if the other side then says it is really interested in only 10% of the material. Wouldn't it be more sensible to postpone the privilege review until the 10% had been identified? That could save the producing party money, and save the party seeking discovery time.

We have been informed that parties often agree to such an arrangement and the original proposal therefore was predicated on such a stipulation and the subsequent entry of a court order. The addition of discussion of privilege waiver during the Rule 26(f) conference may facilitate the negotiation of such agreements. In addition, it was thought that relying on a stipulation and court order would fortify arguments that this sort of order could be entered without exceeding the limits of 28 U.S.C. § 2074(b). But one could certainly argue that the parties' agreement cannot expand the Committee's authority or foreclose arguments by third parties about whether a waiver has occurred whatever the parties intended.

As the brackets indicate, however, the approach could be rewritten as a rule that has the specified effect without an agreement and court order. Deleting the agreement/order requirement could have adverse consequences besides possibly magnifying problems of power. If a party

---

[20] The phrase "or protection" is designed to cover work product.

receiving production does not know that the producing party believes it is only doing an initial examination, it might well take the position that the privilege was waived whatever the producing party had in mind. The stipulation approach avoids that contretemps.

Either with or without the stipulation, the objective of the above provision is to foreclose the arguments of third parties that the privilege has been waived in the situation described.

Whether the quick peek will be of much assistance in relation to electronically-stored data is debatable. Unlike the situation in which hard copy materials are made available in a warehouse and the party who asked for them then designates the items it wants copied, thereby focusing the privilege review, with electronically-stored materials the producing party is likely to give the other side a CD containing all the materials. Thus, there seems no obvious occasion for further copying or a further request that would fit the model above.

But it has been suggested that in some instances this model might be of considerable assistance in relation to discovery of electronically-stored data. Discovery regarding electronically-stored materials may involve having one party query its computer system according to directions from the other side. At the time the query is used, the parties don't know what it will elicit, much less whether that might be privileged. So a quick look might be quite helpful in that situation. Presently, courts that order such querying often appoint a neutral (perhaps as a master) to do the query and then deliver the material to the producing party for privilege review. The master is needed so that the court can say this person is an agent of the court and that any revelation to him or her is not a waiver. With a provision like the one above, it might be possible to "eliminate the middleman."

This quick peek approach may nonetheless be insufficient because it cuts off any privilege objection at the point the copies (or the query results) are delivered to the party seeking production. During the Sept. 5 meeting the Subcommittee considered, but found too difficult, a more aggressive approach to this problem. A version of that approach is provided by footnote, along with some commentary.[21]

---

[21] This approach would add a new Rule 34((b)(2)(E) along the following lines:

> **(E)** ***Privileged material.*** If a party produces documents without intending to waive a claim of privilege, that production does not waive the privilege [under these rules or the Rules of Evidence] if, within 10 days of discovering that

(b) Inadvertent Production

This approach would rely on a different new Rule 34(b)(2)(E):

(E) ***Inadvertent production of privileged material.*** When a party inadvertently produces documents that are privileged, that production does not waive any applicable privilege or protection if waiver would be unfair in light of

---

privileged documents have been produced, the producing party identifies the documents that it asserts are privileged and the grounds for such assertion. The requesting party must promptly return the specified documents [and any copies (electronic or paper)] to the producing party, who must preserve those documents pending a ruling by the court.

There are a number of issues that could be troublesome with this approach:

(1) If it turns on "intending to waive" the privilege (rather than inadvertent disclosure, discussed below), it could apply in a situation that would be quite difficult to justify -- where the producing party acknowledges that it knew that the item was being produced and that it was privileged, but wanted to have the other side see it without waiving the privilege;

(2) The focus on privileges "under these rules or the Rules of Evidence" might leave out privileges under state law, or limit the protection if waiver were later asserted in relation to an action in state court;

(3) The timing problem is quite great. The proposal ties the producing party's obligation to make the objection to discovery that privileged documents have been produced. Would there be a requirement to make a post-production review of documents within a certain time? Does the other side have to give notice of the mistake? (It may be that ethical rules require something like this.) If there is no time cutoff, could the objection be raised for the first time at trial, by which time the other side might have built its case around the document? During the Sept. 5 meeting, all agreed that ordinarily it should not be too late to raise the objection if the document were used in a deposition, but that deferring until the pretrial order (or perhaps a motion for summary judgment) would be too late. Perhaps invoking the "used in the proceeding" phrase from Rule 5(d) could be helpful here, as that excludes use in discovery but seems to include use in court filings.

(4) Should the duty to return the documents include any other documents that refer to them (even work product)?

(5) Should the preservation requirement turn on when the court makes a ruling. If there is no dispute about whether the documents are privileged, there may never be a motion for such a ruling. Perhaps this would best be left to the preservation requirements considered in item (7) below rather than including it in this rule.

(i) the volume of documents called for by the request [given the time available for review of the materials produced]; and

(ii) the efforts the party made to avoid disclosure of the privileged materials; and

(iii) whether the party identified the privileged materials within a reasonable time after production and promptly sought return of the materials; and

(iv) the extent of the disclosure; and

(v) the prejudice to any party that would result from finding -- or failing to find -- a waiver;[22] and

(vi) any other matter that bears on the fairness of waiver.]

Comment

The stimulus behind this approach is existing caselaw on inadvertent waiver. That caselaw is not uniform. There are cases saying that only the client can waive the privilege, and that therefore the lawyer's delivery of the material does not waive it. But that is a minority view, and there is another minority view that any disclosure is a waiver, no matter what precautions were taken to avoid it. For examples of recent cases adopting these minority views, see 8 Fed. Prac. & Pro. § 2016.2 ftn. 17 and 18 (2003 Pkt. Pt. at 61-62).

If we are going to be aggressive, it might be preferable to pursue the majority position. That position has been summarized as follows:

[22] This factor is not on the usual list of factors mentioned by courts although it presumably is important in making the overall fairness inquiry. It is included due to discussion during the Sept. 5 meeting. The idea is that either or both parties might urge prejudice that bears on whether to find a waiver. The producing party could point out how its understandable mistake would have unfairly broad ramifications if treated as a waiver. The party that obtained the document could emphasize the importance of the document to its case.

> Many courts have taken a third position that recognizes the burdens of discovery and the reality that lawyer errors can in some instances waive client privileges. These courts commonly look to a series of factors in deciding whether to hold that a given disclosure should be regarded as waiving the privilege that would otherwise attach to the materials produced. First, they look to the reasonableness of the efforts to avoid disclosure. Second, they look to the delay in rectifying the error. Third, they consider the scope of discovery, particularly as it relates to the burden of preparing for that discovery. Fourth, the examine the extent of the disclosure. There is a relationship among these factors; as the volume of discovery mounts so should the efforts to avoid waiver but so also should the court's understanding that, particularly given the pressures of time, mistakes can happen. Finally, the courts using this middle test consider the "overriding issue of fairness."

8 Fed. Prac. & Proc. § 2016.2 at 242-45.

Given the problem of authority, it might be prudent to adopt the majority view as a rule for the federal courts. We might also adapt that rule to include only certain of the factors that the courts have developed, and could (in a Committee Note) articulate the desired approach to application of those factors. And if the Committee thought it worthwhile to adopt such principles but beyond the rulemaking authority, it could urge the Standing Committee to seek Judicial Conference approval for endorsing this action by Congress. As the above treatise passage suggests, there is some variation among the expression of these criteria by the courts, and if a rule proposal were to be presented as based on the caselaw considerably more attention should be paid to that caselaw. But it might be a stronger case before Congress if based on the consensus of the majority of the courts.

The above draft largely tracks the majority caselaw. It adds explicit reliance on the prejudice issue, but it may be that some such concern was implicit in the decisions.

(7) Preservation, "Safe Harbor," and Sanctions

(a) Preservation and Safe Harbor

The Sept. 5 discussion of these issues resulted in a combination of two contributions by different Subcommittee members. One was a proposal for a new Rule 34.1 that would specify

the affirmative obligation of parties to preserve documents and tangible things. Another began as a Rule 27 proposal that included a "safe harbor" regarding continuing normal operations of computer systems. The consensus of the Sept. 5 meeting was that these two features should be combined in a single rule, initially designated Rule 34.1.

Rule 34.1. Duty to Preserve

Upon commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule [26(a)(1) and][23] (b)(1), except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court for good cause.[24] Nothing in these rules[25] requires a party to suspend or alter the operation in good faith of disaster recovery or other [computer] systems {for electronically-stored data} unless the court so orders for good cause, [providing that the party preserves a single day's full set of such backup data].[26]

Comment

The following Committee Note was proposed:

---

[23] Whether to include disclosure as well as discovery here might be debated. As discussed in connection with proposed Rule 26(h)(2) under heading (5) above, it seems useful to require parties to provide disclosure of any inaccessible materials they access even though we propose to exempt parties from searching such materials in compiling discovery materials. But requiring preservation of such materials would contradict the objective of 26(h)(1) and run counter to the second sentence of proposed 34.1. So it might be best to leave out disclosure here -- the range of things that might be required to be produced pursuant to Rule 26(a)(1) is vast.

[24] This cross-reference is to the proposal (covered in item (5) above) to exempt from the duty of search any inaccessible electronically-stored data. As noted below, if the preservation obligation is limited to electronically-stored data, this provision might better be inserted as a new 26(h)(3).

[25] This may generally not be a favored form of saying things in the Civil Rules, but because there are lots of other legal regimes dealing with preservation, particularly of electronically-stored data, it seems a valuable way of putting the point.

[26] This sort of directive to preserve one day's worth of backup data is proposed in item (5) above. Would it be better included in this provision, which is directly addressed to preservation?

806 This rule does not address preservation obligations that may arise prior to the
807 commencement of a civil action. The preservation obligation does not require a party to
808 preserve multiple copies of the same data -- for example, successive backups when a
809 single backup captures the same data. However, because backup data may be required to
810 be produced pursuant to Rule 26(b)(1), as explained in Rule 34, one copy of such data
811 must be preserved.[27]
812
813 A prime topic for consideration is whether this proposal strikes the right balance. One
814 starting point is to observe that the preservation proposal reaches all material, not just
815 electronically-stored materials. Whether it is wise to do that could be debated. There is presently
816 no rule provision explicitly addressing preservation of hard-copy materials, and the Committee
817 has not received comments indicating that there is need for rulemaking to deal with this topic.
818 Since the general focus of this amendment package is on electronically-stored data,[28] it may be
819 jarring to introduce a potentially-important rule provision that deals with hard copy materials in
820 this package.
821
822 In the same vein, addressing hard copy materials may require considerable inquiry into
823 the exact current treatment of preservation of these materials. The rule presumably is not
824 intended to displace any other legal regimes that address preservation, but that point should be
825 made clear in the Note if this method is pursued. Preservation obligations often arise under those
826 regimes before a suit is filed, and it is presumably not the intention of this provision to alter that.
827
828 A similar question is whether this provision should be located near Rule 34.
829 Understandably, it addresses a concern that is likely to be important in regard to document
830 production. But this consideration can also matter in relation to other topics -- interrogatories
831 and depositions (particularly Rule 30(b)(6) depositions of IT people) come to mind. So it might
832 be desirable to locate the provision instead in Rule 26, which deals with discovery generally.

---

[27] During the Sept. 5 meeting, it was mentioned that prudent counsel will direct the client to make a "snapshot" backup tape (or tapes) of all that's on its system on the day it becomes aware of the suit. This snapshot backup can then be stored for possible use if needed, and ordinary operation of the computer system can continue until the court directs otherwise.

[28] The one exception is the treatment of privilege waiver, covered in item (6). On that subject, the Committee received numerous reports of problems with hard-copy documents before attention focused on electronically-stored data, so it is understandable that the discussion proposal reaches hard copy materials.

Putting together the idea that it might be safer to limit the new provision to electronically-stored data and the idea that it would be better to locate it in Rule 26, one could proceed with a new Rule 26(h)(3), to go along with other discussion proposals presented earlier in this memorandum:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronic data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. In responding to discovery requests, a party need not include electronically-stored data created only for disaster-recovery purposes, or that is {not [reasonably] accessible without undue burden or expense} [accessible only if restored or migrated to accessible media and format] {not accessible [reasonably available] in the usual course of the responding party's {business} [activities]}. For good cause, the court may order a party to produce inaccessible electronically-stored data subject to the limitations of Rule 26(b)(2)(B), [and may require the requesting party to bear some or all of the reasonable costs of {any extraordinary efforts necessary in} obtaining such information].

(3) Preserving electronically-stored data. Upon commencement of an action, all parties must preserve electronically-stored data that may be required to be produced pursuant to Rule [26(a)(1) and] (b)(1), except that materials described by Rule 26(h)(2) need not be preserved unless so

ordered by the court for good cause. Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other [computer] systems {for electronically-stored data} unless the court so orders for good cause, [providing that the party preserves a single day's full set of such backup data].

(b) Sanctions

(f) **Failure to Produce Electronically-stored Data.** A court may not impose sanctions on a party [under Rule 37(b)][29] for failure to produce[30] electronic documents unless [the court finds that][31]

(1) the party deleted, destroyed, or otherwise made unavailable electronically-stored data that were described with reasonable particularity in a discovery request, or

(2) the party willfully or recklessly deleted, destroyed, or otherwise made unavailable electronically-stored data in violation of [Rule 34.1] {Rule 26(h)(3)}.

---

[29] This bracketed phrase may be undesirable. Is it important that this provision apply to other sanctions? Perhaps the sanctions of Rule 37(c)(1) would come to mind, but does this mean that a party that fails to disclose electronic evidence in violation of its obligations under Rule 26(a) may not be sanctioned by exclusion of the evidence? More generally, Rule 37(b) sanctions usually apply only to failure to obey a discovery order under Rule 37(a). Would courts enter 37(a) orders in situations that would be exempted by this rule from imposition of sanctions?

[30] Would this cover failure to provide information sought by interrogatory about electronically-stored data?

[31] It was proposed that this provision include this finding requirement. Is this necessary? There are no other finding requirements in Rule 37.

Comment

This provision is a narrowed version of the proposal that was before the Subcommittee.[32] The eventual reasoning of the Subcommittee on Sept. 5 was that these constraints on sanctions, coupled with the articulation and limitation of a preservation duty described in item (7)(a), would adequately protect against inappropriate imposition of serious sanctions. It was expected, however, that the Committee Note would emphasize the notion that serious sanctions should ordinarily be warranted only where there is serious prejudice as a result of the failure to preserve.

---

[32] The original proposal was as follows:

(f) Failure to Produce Electronic Documents.

(1) ***In General.*** A court may not impose sanctions [under Rule 37(b)] for failure to produce electronic documents unless [the court finds that]

(A) the documents were accessible to the party, or that party declined an offer by the party seeking production to bear or share the expense of making the documents accessible; and

(B) the party deleted, destroyed, or otherwise made unavailable electronic documents that were described with [reasonable] particularity in a discovery request, or electronic documents that were relevant to pending, threatened, or reasonably anticipated litigation; and [or]

(C) the responding party willfully or recklessly failed to preserve the electronic documents; and [or]

(D) the requesting party is materially prejudiced by the loss of the electronic documents.

(2) ***Continued Normal [Ordinary] {Customary} Operation of Computer Systems.*** Nothing in this rule [these rules] requires the responding party to suspend or alter the good faith operation of the responding party's electronic or computer systems absent a court order.

Proposed (2) was moved to the new preservation rule, now styled 34.1 or 26(h)(3). Proposed (1)(A) was deemed unnecessary due to proposals to deal elsewhere with the problem of inaccessible data. Proposed (D) was deleted due to the view that the sanctions decision itself involves consideration of prejudice, and that stating it as a requirement in the rule would involve double counting. The Note, however, should mention the importance of focusing on this issue in determining whether to impose sanctions.

APPENDIX

Agenda Materials on Privilege Waiver
Fall 1999 meeting

(2) Privilege Waiver

This is an issue the Committee has touched on several times before. Accordingly, it seems that some background on this discussion is in order at the outset. The purpose of raising the question again is to determine whether (a) it is time to proceed to draft a proposal for a rule amendment, (b) the Committee feels that the idea of such an amendment should be dropped, or (c) the question should be deferred (perhaps until other discovery proposals emerge).

The problem of wasting time reviewing large quantities of documents to remove all material that could be withheld on grounds of privilege was first raised by some at the conference the Subcommittee held in San Francisco in January, 1997. In June, 1997, David Levi and I attended the mid-year meeting of the ABA Section of Litigation in Aspen, Colorado, and a session of that meeting was devoted to discovery issues, with an open mike for comments and suggestions from the floor. A number of those who used the mikes during that session urged that something be done to reduce the burden of document review to avoid privilege waiver.

Under date of June 2, 1997, I developed a list of possible ideas for rule amendments, and this list was circulated to the various bar groups that were invited to comment on the question of revising the discovery rules during the Boston conference in Sept., 1997. The list included the question whether a rule change should be made to deal with the waiver problem. There was nevertheless not much attention to this question in the written submissions from bar groups about the Boston Conference [in September, 1997]. Just to provide a context, herewith a recap of the views expressed (and not expressed):

ABA: Despite the interest of some during the Aspen meeting (noted above), the ABA Section of Litigation did not mention the subject in its submission (which was prepared by the Section's Task Force on Discovery)[33]

[33] The question whether such a rule amendment would be desirable is reportedly being discussed at a meeting of a committee of the ABA Section of Litigation in late September

APPENDIX

Agenda Materials on Privilege Waiver
Fall 1999 meeting

(2) Privilege Waiver

This is an issue the Committee has touched on several times before. Accordingly, it seems that some background on this discussion is in order at the outset. The purpose of raising the question again is to determine whether (a) it is time to proceed to draft a proposal for a rule amendment, (b) the Committee feels that the idea of such an amendment should be dropped, or (c) the question should be deferred (perhaps until other discovery proposals emerge).

The problem of wasting time reviewing large quantities of documents to remove all material that could be withheld on grounds of privilege was first raised by some at the conference the Subcommittee held in San Francisco in January, 1997. In June, 1997, David Levi and I attended the mid-year meeting of the ABA Section of Litigation in Aspen, Colorado, and a session of that meeting was devoted to discovery issues, with an open mike for comments and suggestions from the floor. A number of those who used the mikes during that session urged that something be done to reduce the burden of document review to avoid privilege waiver.

Under date of June 2, 1997, I developed a list of possible ideas for rule amendments, and this list was circulated to the various bar groups that were invited to comment on the question of revising the discovery rules during the Boston conference in Sept., 1997. The list included the question whether a rule change should be made to deal with the waiver problem. There was nevertheless not much attention to this question in the written submissions from bar groups about the Boston Conference [in September, 1997]. Just to provide a context, herewith a recap of the views expressed (and not expressed):

ABA: Despite the interest of some during the Aspen meeting (noted above), the ABA Section of Litigation did not mention the subject in its submission (which was prepared by the Section's Task Force on Discovery)[33]

[33] The question whether such a rule amendment would be desirable is reportedly being discussed at a meeting of a committee of the ABA Section of Litigation in late September

925 5

926 ACTL: The American College of Trial Lawyers limited its submission to scope of discovery.

927

928 ATLA: ATLA reported on the reactions of lawyers who participated at a session during
929 its 1997 annual convention, saying that it "see[s] nothing prejudicial in a rule that might
930 insulate the producing party from an inadvertent waiver of privileges." (ATLA
931 submission at 4)

932

933 DRI: The Defense Research Institute submitted a number of proposals, including a 17-
934 page discussion of document production under Rule 34, but this did not mention privilege
935 waiver. (DRI tab IV) It also submitted an 8-page discussion of problems with privilege
936 logs, but this paper did not focus on waiver either. (DRI tab VI)

937

938 TLPJ: The Trial Lawyers for Public Justice urged that a rule change to deal with the
939 problem of privilege waiver was unnecessary because there is already caselaw on the
940 problem that adequately handles it. TLPJ suspected, however, that a change would
941 "protect more information than is currently protected," and would also produce litigation
942 about what is "inadvertent" production of privileged material. (TLPJ submission at 21-
943 22.)

944

945 PLAC: The Product Liability Advisory Council submitted results of a survey of its
946 members, but there was no substantial attention to privilege waiver problems, although
947 there were some expressed concerns about privilege logs.

948

949 During the panel on documents at the Boston Conference [in September, 1997], there was
950 little attention to privilege waiver. Magistrate Judge Zachary Karol said that the fear of
951 inadvertent waiver holds up the discovery process, and he suggested that it would be desirable to
952 devise a method to permit initial review without waiving privilege, leaving the question of
953 assertion of privilege until copying is requested. This would, he said, solve the delay problems
954 and reduce the burden of privilege logs for materials that nobody wants anyway. Chilton Varner
955 questioned whether some anti-waiver provision could be applied in diversity cases. Most of the
956 discussion was about other topics.

[1999], and the insights from that discussion should be available to the Committee at its October meeting.

Although there was not much interest expressed in Boston in addressing this problem, the possibility of reducing the risk of privilege waiver was included in the array of possible reforms brought to the Committee at its Oct. 1997 meeting. (Agenda materials at 25-26) At that meeting, there was some discussion of the problem and the Discovery Subcommittee was asked to consider these questions. (Minutes of Oct., 1997, meeting at 16-17) The agenda materials for the Santa Barbara Subcommittee meeting in January, 1998, included considerable discussion of privilege waiver issues (Santa Barbara agenda materials at 57-65), and yielded some alternative proposals that were submitted to the full Committee during its March, 1998, meeting. (March 1998 agenda materials at 37-39) The subject was again discussed at the Durham meeting, and the conclusion was that the Subcommittee should study these issues further. (Minutes of March, 1998, meeting at 36-37)

Since the Durham meeting, much energy has been invested in considering the amendment proposals that were approved there and (in June, 1998) approved for publication by the Standing Committee. Besides the public hearings and full Committee consideration of these proposals, the Discovery Subcommittee has conferred about them. The Subcommittee has not had further discussion of privilege waiver during this time. Nonetheless, because there appears to be a significant question about whether a rule amendment to deal with this problem is desirable, it seems useful to raise the matter again with the full Committee.

The purpose of this discussion, then, is to introduce the issue. In large measure, this introduction includes points and suggestions already addressed by the Committee, but unlike those earlier occasions the 1997-99 discovery package is no longer before the Committee. Accordingly, this memorandum introduces the subject by addressing three topics: (a) the specific rule proposal previously discussed; (b) the question whether such a change would be helpful; and (c) the question whether such a change can be made through the rules process without affirmative action by Congress.

(a) The specific rule proposal: Actually two different versions of a rule proposal, both focused on Rule 34(b), were presented to the Committee during the March, 1998, meeting at Durham. They both appear below as alternative final paragraphs to Rule 34(b):

> **(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The

request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

On agreement of the parties, a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination is not a waiver of any privilege.

On agreement of the parties, a court may order that a party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege. The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under this paragraph (b).

These two alternatives emerged from the Subcommittee's Santa Barbara meeting. Discussion in Kennebunkport could focus on these specifics of these proposals, and the differences between them, but it is probably more fruitful first to consider whether such a change would be desirable.

To introduce that general question, it seems helpful to mention some additional points about what this proposal includes, and what it does not include. *First*, it does not focus on the protective order provisions of Rule 26(c). Because documents are the area where the problem reportedly exists (as opposed to depositions, etc.), Rule 34 seems the proper place to deal with it. It is also true that the Committee voted in Durham not to pursue amendments of a different sort to Rule 26(c), so it might be preferable not to propose different changes to that same rule.

Second, this proposal does not deal with a lot of privilege waiver issues that have been addressed in the caselaw. For a general discussion of those issues, see Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605 (1986). Thus, there is no effort here to deal with privilege waiver that results from putting privileged material "in issue," from sharing of privileged materials with other litigants, or from witness preparation using privileged materials.

Most significantly, this proposal does not attempt in any general way to deal with the problem of "inadvertent production." This occurs when a party turns over privileged material without intending to. "The inadvertent production of a privileged document is a specter that haunts every document intensive case." F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 479-80 (E.D. Va. 1991). By reducing the document review burden, this sort of proposal might limit this risk, but it does not otherwise alter the way in which actual inadvertent production is handled by the courts. And the federal courts have not spoken with entire clarity on this question, for there seem to be three lines of cases. See 8 Federal Practice & Procedure § 2016.2 at 241-46.

During the [January, 1998] Santa Barbara meeting [of the Discovery Subcommittee to draft rule proposals on the topics that the full Committee determined were worth pursuing during its October, 1997 meeting based in part on the September, 1997, Boston Conference], the Subcommittee did not think that trying to deal generally with inadvertent production would be a fruitful subject of rule amendment. For one thing, it might heighten the problems of authority discussed below under heading (c). For another, it seemed likely to immerse the Committee in a thicket of refining the caselaw. The three lines of cases include two that the Committee would probably not embrace. One makes almost all disclosures a waiver, no matter what, so that adopting such a rule would heighten the risk of waiver. Another makes inadvertent disclosure almost never a waiver, which heightens the sense that the rule change alters privilege law. The third (and majority) view of the courts is to make the question of waiver turn on a variety of

circumstances. To "codify" this in a rule would involve addressing many of the questions addressed by the courts:

(1) How much effort must the party seeking to "take back" the waiver show that it made to cull privileged documents?

(2) How quickly must the producing party act to undo the mistake, and what it should do?

(3) How should the court deal with further disclosure of the materials in question to others in the interim between the inadvertent disclosure and its discovery?

(4) How, if at all, should the courts apply the "overriding issue of fairness" that courts using this middle view espouse?

Alternatively, the rule could devise a different set of considerations, but undoubtedly this would be something of a challenge. Rather than undertake that challenge, then, the proposal the Subcommittee brought forward in March, 1998, simply affords the parties a chance to get the court's assurance that permitting the other side a "quick look" to determine what it is really interested in copying will not itself work a waiver.

Third, this proposal depends on agreement of the parties. The Subcommittee discussed the alternative of permitting the same thing on motion (i.e., where one party opposes the arrangement). But the situation where there is an agreement between the parties is the most vexing one that has been raised in such comments as the Committee has received about this problem. So far as the party seeking discovery is concerned, to impose such an order might deprive the party of a right to obtain discovery without this concession. More significantly, to impose such an order on the party permitting inspection might imply the court could deny that party the time needed to screen the documents. Some years ago, a panel of the Ninth Circuit suggested that ordering production on a "Herculean" schedule without insulation against waiver might be an abuse of discretion. See Transamerica Computer Co. v. International Bus. Mach. Corp., 573 F.2d 646 (9th Cir. 1978). But it would seem odd for the court to be able to tell an unwilling party that it could not do as thorough a review as it wanted to do because the court was in a hurry. So the consent of both is required under the proposal.

(b) The question whether such a rule change would be useful: The Committee has had some discussion of this question in the past. To begin with, the reality is that this sort of thing is already being done, seemingly without the court's imprimatur. For a recent published example, consider Walsh v. Seaboard Sur. Co., 184 F.R.D. 494, 495 (D. Conn. 1999):

> On October 29, 1998, Seaboard's counsel reviewed thousands of pages of documents from Garcia's files and identified certain documents that it wished to have copied by Garcia's copying service. On November 9, 1998, plaintiffs' counsel directed Garcia's office not to release the copied documents to Seaboard because he first wanted to inspect them to make sure that they did not contain any additional protected materials. Plaintiffs' counsel subsequently took possession of the copies and removed a number of the documents under claim of attorney-client privilege and work-product doctrine. [The court then addressed and resolved the privilege objections raised in this manner, finding that some privilege objections had been waived due to injection of certain issues into the case, but not inadvertent disclosure.]

Given that such arrangements occur already, one might say that a rule change to make them possible is not necessary. But there is considerable uncertainty about whether such arrangements are currently sufficient to guard against waiver, even when embodied in an order. Assuming that the agreement of the party seeking discovery would estop that party from arguing waiver, there remains the question of waiver with regard to others. Ordinarily waiver is "as to the world," and if privileged materials are once turned over to anyone, all others can claim this disclosure waives privileges as to them. So the basic problem is to insulate the parties against having others use inspection done pursuant to such an agreement as an argument for waiver.

The law is presently rather murky on whether such agreements do the job, and whether a court order makes a difference in effectuating such arrangements. Although the Manual for Complex Litigation (Second) seemed to endorse agreements to contain any waiver that might otherwise result, the Manual (Third) cautions that courts have refused to enforce such agreements, albeit in situations in which there was no court order. See Manual (Third) § 21.431 n.137. Courts have entered orders purporting to insulate such disclosures from waiver consequences. But there is a question about whether those orders will be effective. The Ninth Circuit, in the Transamerica case mentioned above, ruled that an order preserving privilege does insulate disclosure against this effect, at least where it is in the course of very expedited production of large amounts of material under court order. But more recently that decision has

been described as the approach of "a small number of courts." Genetech, Inc. v. U.S. International Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997). So the addition of a provision to Rule 34(b) could either make explicit authority that is already thought to exist by some courts, or supply a procedure that has been thought ineffective by some courts. This might also encourage more litigants to use this time-saving method.

The question, then, is whether the proposed procedure would save time. When these issues have been discussed in prior Committee meetings, it has not been clear that much time would be saved. Some feel that no careful lawyer would allow the other side to inspect documents, even subject to such provisions, before reviewing them all to remove privileged materials. To this it may be responded that where a document request sweeps over wide ranges of materials, and the producing party is confident that the other side will quickly see that most of the material is irrelevant, there is no reason to await and pay for such a careful review of the documents. In addition, by focusing the parties on what is actually of interest to the party seeking discovery, this procedure may reduce the burden of preparing a privilege log. Even this modest change may work a significant savings in big document cases. But to date it has been unclear whether these prospects warrant making a change in the rules.

(c) The question of authority: This rule change would be useful only if it effectively insulated the "quick look" procedure proposed against being urged as a waiver. The problem is that in 1988 Congress amended the Rules Enabling Act to include the following in 28 U.S.C. § 2074(b):

> Any such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress.

At least some (including one member of the Advisory Committee on Evidence Rules who attended the Boston conference) have argued that the statute prevents this Committee from doing anything about waiver by rule. There is presently no certain answer to this assertion, but there are reasons to think the statute does not create an insuperable block.

To begin with, even if it applies the statute does not prohibit rule-making but only requires that such a provision be enacted by Congress. Accordingly, the rules process could simply generate the proposal in the hopes that Congress would enact it. That would be consistent

with the longstanding view that it is undesirable for Congress to change rules by passing legislation except as a feature of the rulemaking process. Of course, the prospect that affirmative legislation would be required (as opposed to the "pocket approval" that usually attends rule amendments) re-raises the question whether this change is so important as to call for such an undertaking.

The more pertinent point is that there are reasons to believe that a provision like the one proposed above would not require affirmative enactment. Of course, even if the problem were highlighted throughout the rule amendment process and called to the attention of Congress, that would not prevent a party from later arguing that the new provision was ineffective because not adopted by Congress. But there are arguments that this proposal does not do what the statute is requiring a statute to accomplish.

The background is the adoption of the Federal Rules of Evidence, which included detailed privilege provisions when they came before Congress for its review in 1972. That was an extremely contentious time regarding certain privileges, particularly the Executive privilege, and the orientation of some of the proposed rules seemed to curtail personal protections and broaden governmental ones. "As the Watergate scandal began to unravel, the notion of expanded privileges of secrecy for government and elimination of privileges for citizens seemed less attractive." 21 Federal Practice & Procedure § 5006 at 104. But those seemed the likely consequences of replacing caselaw on privilege with the provisions of the proposed 500 series of the Federal Rules of Evidence, and Congress eventually replaced all those proposed rules with Fed. R. Evid. 501, which makes privilege a matter of state law as to issues governed by state law, and calls otherwise for the development of a federal common law of privilege. Thus when the provision in the 1988 legislation forbids "creating, abolishing or modifying an evidentiary privilege," it seems directed to something different from the proposal above.

A quick look at the legislative history of the 1988 legislation shows that the source is indeed the 1972-75 dispute over the Rules of Evidence. Thus, the pertinent House Report says that "[s]ubsection (b) of proposed section 2074 carries forward current law." H.R. Rep. 99-422 (99th Cong. 1st Sess.) at 27. (When this legislation was adopted in the next Congress, the legislative history explicitly adopted this provision. See H.R. Rep. 100-889 at 26.) The derivation was 28 U.S.C. § 2076, adopted as part of the legislation by which Congress eventually passed the Rules of Evidence, which authorized the Supreme Court to prescribe amendments to those rules. Thus, the basic thrust was to give effect the limitation on Rules of Evidence that

alter privileges Congress had embraced in substituting Fed. R. Evid. 501 for the proposed 500 series.

The rejected 500 series included a proposed Rule 511 regarding waiver,[34] so there is at least some basis for worrying that waiver rules were included in the prohibition now embodied in § 2074(b). But the objections to this rule (as opposed to the proposed rules creating privileges) don't seem addressed to civil cases, and were about overbroad application of waiver under the proposed rule, not unduly narrow application of waiver.[35] In relation to civil litigation, the proposed rule seems to have been taken as uncontroversial. For that reason, a change like the one above -- allowing the judge to regulate the operation of discovery in a civil case -- seems to present quite different problems from the general regulation of the waiver of privileges in a wide variety of circumstances under rejected Rule 511, although counterarguments can be made.

The view that regulation of pretrial litigation can include some provisions that might affect waiver is confirmed by other rulemaking that has occurred. The Rules of Evidence themselves include Evidence Rule 612, regarding materials shown to witnesses, and this rule has been read to abrogate privilege protection when privileged materials are shown to prospective witnesses. Even while it was refusing to adopt Fed. R. Evid. 511, Congress enacted Rule 612.

---

[34] This rejected rule would have provided:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

[35] As explained in Federal Practice & Procedure § 5721 at 505-06:

> The proposed rule was noncontroversial, but the Justice Department wanted to amend the rule by adding "under such circumstances that it would be unfair to allow the claims of privilege." It was apparently worried that the proposed rule would make it a waiver for the government to share information from an informer with another government. The Advisory Committee left Rule 511 undisturbed in the Revised Draft, but it amended the proposed rule on the informer privilege to resolve the Justice Department complaint. This failed to mollify the Department, which renewed its proposal to amend the rule, this time with the support of a group of Senators who threatened to revoke the Supreme Court's rulemaking powers if the Advisory Committee did not alter the rules to please the Justice Department. The Advisory Committee held fast . . . . The proposed rule was promulgated by the Supreme Court and sent to Congress, but Congress refused to adopt the proposed privilege rules and left the matter to the courts under Evidence Rule 501.

This Committee addressed itself to similar issues in proposing the expert disclosure provisions of Rule 26(a)(2)(B), which calls for disclosure of "the data or other information considered by the witness in forming the opinions," a point made clearer in the Committee Note.[36] So at least some kinds of privilege waiver issues have been addressed by rule.

More pertinent yet is the 1993 addition of Rule 26(b)(5), which requires that a party withholding materials under claim of privilege provide specifics about the basis for the claim. This is the source of the privilege log requirement that was raised by some in 1997. The Committee Note says that "[t]o withhold materials without such notice . . . may be viewed as a waiver of the privilege," and at least some courts have so treated failure to satisfy this requirement. See 8 Federal Practice & Procedure § 2016.1. But if a rule could not modify privilege protection by treating failure to comply as a waiver, this provision would seem invalid under § 2074(b). Nobody has ever so suggested.

To the contrary, all of these provisions seem to be proper subjects for regulation by rule because they relate to the smooth functioning of the civil litigation process. The Supreme Court has recognized the need for the court to have significant latitude in regulating discovery in particular, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), and the focus of the proposal above is therefore on the authority of the court to accomplish just such a result by avoiding needless delay and expenditure in document production. Whether a more ambitious treatment of inadvertent production (mentioned in sub-section (a) above) would similarly be proper by rule is not clear. Indeed, it cannot be said that even the proposed approach would be immune to challenge, but it does seem that a good case can be made for this change being within the scope of rulemaking for civil cases.

---

[36] The Committee Note stated: "Given this obligation of disclosure, litigants should not longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

DISCOVERY SUBCOMMITTEE
Sept. 5, 2003
Washington, D.C.

NOTES ON MEETING

The Discovery Subcommittee met in Washington, D.C., on Sept. 5, 2003. Present were Prof. Myles Lynk (Chair of the Subcommittee), Sheila Birnbaum, Esq., Robert Heim, Esq., Justice Nathan Hecht, Judge Lee Rosenthal, Judge Shira Scheindlin, and Andrew Scherffius, Esq. Also present were Prof. Edward Cooper (Reporter of the Advisory Committee), Prof. Richard Marcus (Special Reporter of the Discovery Subcommittee), Kenneth Withers of the Research Division of the Federal Judicial Center, Andrea Toy Ohta, Esq., Prof. Steven Gensler, Judicial Fellow, and Peter McCabe, John Rabiej, Robert Deyling, Peter Kelly, and Erica Livingston of the Administrative Office.

Prof. Lynk began the meeting by setting out the goal for the day -- to determine which possible rule language to present to the full Committee during the October meeting. During the May meeting, the Subcommittee had been deputized by the Committee to attempt to develop possible rule language on addressing seven areas important to discovery of electronically stored materials. Committee members -- generally working in pairs -- had then been asked to develop initial possible language, and the Special Reporter had collated these proposals in the memorandum for this meeting. In addition, the proposals had been fit into the restyled version of the rules, which was considered by Subcommittees A and B of the Advisory Committee during the Aug. 27-28 meeting in Chicago.

Since the May meeting of the Committee had received a generous offer from Fordham Law School and Prof. Daniel Capra, Reporter of the Evidence Rules Committee, to host a conference on electronic discovery issues. This conference is now scheduled to occur at Fordham on Feb. 20-21, 2004.

In light of this welcome development, the immediate task is to attempt to specify and detail the possibilities for rulemaking of which the Subcommittee is presently aware. These topics can then be discussed with the full Committee during the October meeting, and after that a further and more refined version of them could be provided to those who attend the conference.

Throughout, however, it was important to keep in mind that there was no commitment to recommend any change in the rules. Strong arguments have been made that the present rules are adequate to the job, and the question whether specific amendments would work improvements was one that could only be addressed effectively at a later date. That question, indeed, would be an important concern of the Fordham conference in Feb., 2004.

Judge Rosenthal added that it would be desirable to begin identifying judges and lawyers who might be invited to the conference.

Definition of document -- Rule 34

The drafting on describing a document in Rule 34 in a way that is suitable for electronically-stored materials yielded two basic issues: (1) how to provide a description that would encompass all presently known and future forms of storage of information, and (2) whether the definition of a document should include what has become known as "metadata" and "embedded data." The second issue is presented by proposed rule language that would include, "for documents stored electronically, all data stored or maintained on that document." This approach in Rule 34(a) would make these data a first tier discovery matter.

At the outset, it was pointed out that the definition of a document may be closely tied to the question of requiring a party to accomplish access to inaccessible data. That topic would be considered later, but the handling of the definition of a document was connected to the question of inaccessible data and to the question of a duty to preserve. The idea when that issue is presented is to make production of inaccessible material a "second tier" topic dependent on a showing of good cause. That same sort of "second tier" treatment could be used for the question of production of metadata and embedded data.

For purposes of discussion, "metadata" was described as systems information that enables the sort of information that would be on a hard copy to be subjected to computer operations. One way of thinking about this material is that it is like a library card; it enables the user to find the information he or she wants. "Embedded data," on the other hand, do not have operational utility. Rather, these consist of prior drafts and other information about modification of the document.

A proponent of including both metadata and embedded data as "first tier" discovery argued that embedded data are like a watermark, fold, or tear on a hard copy. They may not be things that the person who prepared the document intended to include or create, but they can have considerable evidentiary importance. Although production of this information could be deferred until the second tier, and made dependent on a showing, that would deprive the discovering party of important information and needlessly delay access.

This led to a discussion of the customary methods of preparing electronic documents for production. The customary method of preparing documents for production involves converting them to .tiff or .pdf files, which are then produced and do not have any metadata or embedded data. In the process of creating these versions of documents for production, however, producing parties often create their own litigation databases including metadata so that party's attorneys can employ these data in a litigation support system. "Lawyers want this for their own use, but they don't want to produce it." It is not a problem if access; metadata and embedded data are accessible.

A defense attorney explained "[w]e've never produced anything but the image, and usually the other side does not want more." If a reason for getting additional data emerges the parties negotiate about whether it should be produced, and if they cannot agree they take the issue to the judge.

Discussion indicated that it could be cheaper for both sides to produce in "native format" -- with metadata and embedded data -- because no further operations would be necessary to ready the materials for production. Nonetheless, the practice is still to convert to .tiff images.

A further explanation was that when both sides have substantial amounts of this data they do exchange it, but that with one-sided discovery (for example, where the defendant has large quantities of electronically-stored information and the plaintiff does not), the defense does not want to give this material to the plaintiff.

A plaintiffs' lawyer said that he had never had a corporate defendant produce this material without a fight. Owing to lack of it, he added, thousands of hours are wasted making .tiff and .pdf images usable in a computer system due to the removal of this information. Exchanging in native format is the cheapest way, but corporations fight about it. He opposed the second tier treatment for metadata because it is the key issue. Embedded data are not so important, and it would be acceptable to make those a "second tier" topic, dependent on a showing.

It was asked whether native format would be the normal format for such materials for corporate purposes. The response was that "for any big corporation, there are 10,000 different ways in which these things are kept." Generally, documents actively used are kept in native format. People can then access them. Some corporations kept everything in that format for ever. Others migrate documents no longer actively used to another format. That shift can be automatically scheduled, as things can be scheduled for deletion. Then the IT department is supposed to overwrite where this material was formerly stored.

When litigation occurs between sophisticated parties, the explanation continued, often the parties adhere to the "mutual destruction rule" that both sides want to avoid the complications of producing electronic documents with considerable additional material. Including the metadata will make the documents larger, and thus in some ways increase the burdens of discovery.

Regarding the use of metadata, the question was raised whether one would want an operating system to be programmed so that it would not create metadata, and the response was that then the user could not find anything. Metadata is structured in a way so that most software can use it to locate specific things. It is like "a fingerprint for the document." "Metadata is the method by which our systems run. No business in its right mind is going to restrict metadata due to litigation concerns."

It was asserted that there is no cost to the producing party to include the metadata, but that removing it imposes a huge effort on the party seeking to utilize the documents. In response to the question why it would be so hard to use an electronic version without metadata, the answer was that using the documents depends on the form of production. "If it is in .tiff or .pdf, that's no better than paper." If it is another electronic form, that may make utilizing the documents a reasonable thing.

Prof. Lynk suggested that the group should try to determine whether there was consensus on any of these issues. One on which there was consensus was that inaccessible materials should be subject to production only a good cause showing. Another was that metadata seemed more important than embedded data. But there was not consensus on the question of whether metadata and embedded data, which are accessible, should only be produced on the basis of a showing justifying such production.

It was asked whether technological developments will soon render this concern unimportant. Can we be certain whether it will become possible to implant new metadata on materials produced in the manner currently popular, say a .tiff image? Although the response was that "everything is possible," it was noted that metadata includes information that no new technology could replicate -- when and where the document was maintained, blind carbon copies, etc.

A defense lawyer reported that the electronic versions usually were searchable, but that metadata makes the documents longer. Since cases can involved millions of documents, that is an important consideration. It was asked whether, if embedded data were not produced, it was reviewed for privilege during the production process.

It appearing that no consensus was likely to emerge on the metadata and embedded data question, attention focused on the other issue -- how most broadly and helpfully to describe the materials that are included. Based on the discussion, it was agreed that the description would be modified for later discussion purposes as follows:

> any designated documents -- including writings, drawings, graphs, charts, photographs, sound recordings and other data or data compilations [stored or maintained] in any [magnetic or other] media from which information can[be obtained . . . "

A question should be noted about whether "stored or maintained" was necessary. And if something of that sort were necessary, were both words needed? "Stored" might be sufficient of itself, and "maintained" might be less desirable because it implies some active maintenance of the data. But another member said that "maintained" would be better. In addition, there is a question whether "magnetic or other" was a useful addition. These topics might be discussed during the Fordham conference as well as during the October Committee meeting.

Regarding the problem of metadata and embedded data, at the October Committee meeting the continuing disagreement of the Subcommittee on this subject should be reported.

Privilege Waiver

The materials for the Sept. 5 meeting presented the proposal drafted by Shirley Birnbaum and Shira Scheindlin as a variant of an inadvertent waiver rule, but at the outset it became clear that the proposal was not meant to be of that sort. Rather, it was intended to be a "quick peek" proposal similar to the stipulated order quick peek proposal that the Committee had discussed last in 1999 when the question of trying to deal with privilege waive by rule was retained on the agenda for consideration in connection with future discovery issues including electronic discovery. It was noted that stipulated order might be encouraged by the Rule 26(f) and 16(b) proposals also on the agenda for the meeting, because they would provide a vehicle for such a stipulation to be reached. The problem with the stipulated order approach, it was suggested, was that a stipulation would not bind third parties.

The starting point, it was emphasized, was that making rule changes to deal with the problem of undue review burdens occasioned by worries about privilege waiver would be "one of the most important changes we could make." This is a problem with electronic discovery, but not only with electronic discovery. The paradigm situation for the "quick peek" derives from discovery of hard copy materials. When one party makes a very broad document request, the other side may make large amounts of material available for initial inspection, and the party that made the request can, on the basis of that examination, designate the materials it is really interested in having copied. That would be the "quick peek." At that point, the producing party could make a careful review of only those documents and assert privilege objections (where applicable) to producing them. In this way, the producing party could avoid the expense of doing a full-scale privilege review of the materials that turn out not to be of interest to the other side, and the other side could accelerate access to the materials really of value because there would not be the delay needed for that inspection.

The full-scale review effort in a huge documents case can be remarkable. One committee member recounted a recent experience in which that activity involved 27 people working full time for six weeks, and not just 9 to 5 on weekdays. It would be wonderful to find a way to avoid this wasteful activity. "I would love to find a way around this problem. It would be wonderful to be able to say 'Here's the stuff; see what you can find.'" It was reported that in Texas this sort of treatment is customary, and that it has been embodied in a provision in Texas law. "There was some reservation at first, but now plaintiffs and defendants think it's a great rule."

The starting point is probably calling the parties' attention to this topic during the Rule 26(f) conference. For the quick peek to work as a revision in Rule 34, it may be important to

avoid the use of the word "production" to describe the initial examination that occurs. It was agreed that "inspection" is better than "production" to describe this activity.

One constraint on aggressive action in this area is the question of the scope of the Committee's authority to alter the handling of privilege in light of 28 U.S.C. § 2074(b). The possible need to predicate a solution on a stipulation and court order might address these concerns.

Whether the proposal from 1999 could be helpful in regard to electronic materials was doubtful. With those materials, often the producing party simply delivers a CD with the documents to the party seeking them, so there is no occasion for designating those for copying as may be true with hard copy materials.

One pending proposal was for a more open-ended opportunity to raise privilege objections than had been true of the proposal discussed by the full Committee in 1999. The concept was that the producing party need only raise an objection within ten days of discovering that privileged documents have been produced. This would seem to deal with the problem created by the absence of an occasion to request copying of specified documents in relation to electronic materials.

But a key question was when the time to raise the objection would expire. If the right to raise the objection persists until "discovery" by the producing party that privileged materials have been included, could that permit an objection when the materials are used at trial? There was consensus that this would not be acceptable. A party may build a case around such a document, and may for tactical reasons not choose to trumpet its existence to the other side. One might even refrain from using the document during depositions, choosing instead to lay a trap for later confrontation with the document at trial. The document might not be included in the listing required by Rule 26(a)(3) because it is considered an impeachment matter. To permit a privilege objection at trial when the witness is confronted with the document during trial would be very disruptive.

Similarly, deferring the time by which privilege objections must be stated until after the close of discovery could result in significant difficulties. A party might have oriented much pretrial preparation and witness interviewing around the contents of such a document. It may have framed questions with the document in mind. To have that document ruled unavailable at a time when much has been rested on it would unduly disrupt a case.

On the other hand, it was generally agreed that it would usually be soon enough to raise the objection if the document were used during a deposition. If the objection were sustained at that time, there would not be such potential disruption of the trial preparation process. But a summary judgment motion based on the contents of the document would present a different question.

The Subcommittee also had before it a pair of drafts of inadvertent disclosure rules that would go beyond the stipulated order approach discussed in 1999 and go beyond the quick peek approach. It was observed that the quick peek approach is not inconsistent with the inadvertent production approach. The former does not require substantial review before the "quick look" occurs, while the latter depends (among other things) on making substantial efforts to screen materials before producing them. Indeed, this approach may correspond with professional responsibility obligations to alert opposing counsel to the fact that seemingly privileged materials have mistakenly been delivered to an adversary. But the quick peek approach does not solve all problems. It was observed that plaintiffs will often say "we want everything," and therefore

decline to take a quick peek. Having a discussion of these topics at the Rule 26(f) conference would also reduce problems, but would also not do the full job.

The question whether one could do anything about the subject-matter scope of waivers was raised. The problem is that making a waiver effective as to all documents that relate to the subject of the mistakenly produced document raises the stakes on overlooking a privileged document a great deal. Could a rule narrow this effect? The current proposals do not attempt to do that, but only modify the handling of the question whether a waiver has occurred. It may be the courts are less prone to push the concept of subject-matter waiver to its maximum limits when the production has been inadvertent and no unfairness would result from limiting the waiver to the materials actually produced. But that sort of limitation can prove difficult in practice.

The draft inadvertent waiver provisions before the Subcommittee sought to embody the position adopted by many courts that the question whether to find a waiver depended on an assessment of a number of factors under the general mantle of deciding whether a waiver would be unfair.

One version attempted to state the courts' approach as a rule, providing the overall guideline that the question is whether waiver is unfair and whether four criteria are satisfied: (1) that the request sought voluminous material, (2) that the party producing the document made reasonable efforts to avoid disclosure and (3) identified the privileged materials within a reasonable time after production, and (4) that the materials "had not been used in the proceeding." The last criterion was an effort to address a somewhat different factor mentioned in the cases -- the extent of the production. That factor could not easily be stated as a yes/no criterion in rule format.

As an alternative to the multicriterion "rule" format, there was also a proposal that would introduce a multifactor approach listing the same four factors and adding a catch all permitting consideration of "any other matter that bears on the issue of waiver."

One view was that the first alternative was preferable because it would be more definite than the open-ended multifactor approach. This was countered with the point that the second alternative -- adopting a multifactor approach -- more closely corresponds to decided cases and "tracks better." To this, the response was that the second alternative was "too squishy." Lawyers need to know with greater certainty whether a waiver will be found. It was observed as well that neither alternative addresses the subject matter scope of a waiver.

But the "used in the proceeding" limitation prompted concern. The phrase is borrowed from Rule 5(d), where it is the trigger for filing discovery materials in court. According to the Committee Note to that provision, use in discovery is not sufficient to be "use in the proceeding." This issue corresponded with the timing problem that arises in connection with the "quick peek" if that is not limited to situations in which initial inspection occurs before any copying is done. All agreed that assertion of a privilege at a deposition regarding inadvertently produced materials should not be too late. On the other hand, delay until the time for the pretrial order would be too late.

Concern was also raised about the lack of emphasis on prejudice resulting from the decision on the waiver question. On the one hand, the party who received the materials might be prejudiced because its trial strategy could be disrupted if it was premised on privileged materials. On the other hand, it would be important to prompt the court to consider the possible prejudice to the producing party, particularly given the customary subject-matter scope of waiver.

One member raised a "Devil's advocate" question: Should negligent attorney action be erased merely because it causes really costly consequences for the client? To this it was responded that producing parties often put in three or four levels of review. This consideration is, indeed, included in the factors -- one is about whether reasonable efforts were made to avoid disclosure.

It was also noted that, even without a provision in the rule about notifying the other side of a mistaken production, judges will often ask "Did you tell the other side." If not, judges are less likely to find a waiver. If so, the are likely to find a waiver if the producing party did not promptly seek return of the materials (as provided in another factor).

Attention focused on the third factor -- whether the party producing the documents identified the inadvertently produced ones and sought their return. Should this mean that counsel must do yet another review of the documents after production or risk waiver due to failure to do that post-production re-review? One possibility would be to delete the third factor and rely only on the second -- reasonable efforts to screen out privileged materials.

The history of this sort of approach was the warehouse review of hard copy documents. After initial inspection at the warehouse you got a second chance to focus on the specific things the other side wanted. If you missed the privileged document then, it was too late. But this is more the "quick peek" approach than the inadvertent production idea.

These comments prompted the observation that "this is rewriting caselaw." There may be a reason to rewrite, but that should probably be approached delicately.

It was also noted that any use in the proceeding was probably too confining a factor, and that the "extent of the disclosure" factor mentioned in the cases could be substituted in the multifactor alternative.

As the conclusion of the discussion approached, the consensus was to preserve both the "quick peek" and the inadvertent production approaches. They are not inconsistent.

The "quick peek" option does not work very well when a CD is provided the other side with images of all the documents, for there is no occasion for review then. So it may not be useful in a number of situations involving electronic discovery. But it could be important in connection with discovery involving large data compilations when neither party is aware what a search will yield. The current solution in some cases is to have a third party neutral appointed (and well paid) to search the database or hard disk, and then to permit assertion of privilege by the producing party before materials are turned over to the discovering party. This is a very cumbersome process that could be improved with a quick peek method.

Ultimately, it was decided to present the full Committee with a version of the stipulated order quick peek approach -- probably tracking the second alternative that was considered in 1999 and avoiding use of the word "production" to describe the initial examination. In addition, the second version of the inadvertent waiver proposal, modified in light of the discussion, should be presented to the full Committee. Although it may be that arrangements between the parties during the Rule 26(f) conference would often be the best way of avoiding these problems, it would be desirable to keep these alternatives available for further discussion.

It was also noted that the drafts should probably include work product protection as another type of "privilege" that is not waived. The use of the word "privilege" alone is not sufficient for that purpose, and adding "or protection" would improve the coverage.

Safe Harbor

The problem of clarifying the obligation to preserve electronic materials is distinctive due to a number of factors. First, the volume is very great, but arguably the storage capacity is enormous. And in some senses preservation is a pervasive and capacious endeavor. Back-up measures, designed to provide a method for reconstructing lost data in the event of a disaster, are routinely used, and they therefore contain everything from a system on a given day. But keeping all these backups for ever can be extremely expensive, and the task of finding things on them is currently very great. They are not used for archival purposes, and the tapes used for them are often routinely recycled for further back-up purposes.

Besides the variety of back-up measures and media, computer operations tend to deposit electronic detritus in many places. The delete command does not really delete, but it does free up space on a hard drive for overwriting by later use of the computer. Although one does not usually access this material, it is impossible to be certain when it will be overwritten. Indeed, turning on the computer can in some instances have results that change such data. Thus, if there is a requirement that no such material be altered, an organization would be unable to use its computers.

Against this background, the Subcommittee had before it two sorts of proposals. The first was a proposal to add a new subdivision to Rule 37 that would protect against serious sanctions due to the disappearance of electronic material and affirmatively assert that continued operation of computer systems in good faith would be permitted unless a court ordered otherwise. The second was a proposal for a new rule -- tentatively designated 34.1 -- that would set forth preservation obligations after an action is commenced. This rule was crafted to invoke the proposed exclusion (considered under a different heading) from discovery of inaccessible materials.

Previously, the Subcommittee has grappled with the problem of whether to include any affirmative statement in the rules about preservation of materials. The current rules do not address the topic, and directives about preservation exist in a number of other places. The Sarbanes/Oxley legislation, for example, contains some such provisions, and the SEC has adopted others. Trying to capture all of these, and possibly raising supersession questions about their applicability in proceedings in district court, loomed as difficulties. The Rule 37 proposal may sidestep many of those problems by avoiding a regime of prescriptions and limiting the safe harbor to a restraint on sanctions.

The Rule 37 sanctions draft was introduced with the observation that there were several issues that affected the initial drafting of the proposal: (1) determining when the obligation to preserve starts; (2) what is required short of "heroic efforts"; and (3) putting in some concept of recklessness or wilfulness. The proposal sought to accomplish these purposes by conditioning sanctions on (1) accessibility of the documents; (2) a discovery request that was reasonably particular or relevancy to pending litigation; (3) willful or reckless failure to preserve; and (4) material prejudice to the requesting party.

It was noted that the first factor might be addressed in other provisions designed to regulate access to inaccessible materials as a "second tier" matter subject to court regulation, and that the final issue might be adequately addressed by the caselaw on Rule 37(b), which usually makes serious sanctions depend upon an indication of prejudice.

"Philosophical objections" to the proposal were expressed on the ground that it shifts the burden to the party seeking sanctions for violation of discovery obligations too vigorously. The

ABA standards seem to require a showing from the party seeking safe harbor protection of why it should receive this protection. Under the proposal, however, the party seeking the material has to do all the work once the other side makes a mere assertion of entitlement to safe harbor protection.

It was suggested that focusing on sanctions risked letting the tail wag the dog. The real goal should be to define the duty to preserve. For example, absent a court order it should be limited to "active data" and not include backup materials. The proposal on that subject regarding continuing "normal operations" is troubling. It was agreed that the key issue is whether normal computer operations can be continued -- this is the dog, not the tail. But the preservation proposal before the Subcommittee did not answer the question because it did not speak to normal business operations.

Regarding continuing operations, support was offered for the language in ABA Civil Discovery Standard 29(a)(iii): "Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or other electronic or computer systems absent court order issued upon good cause shown." In addition, it was noted that ABA Standard 10 articulates a preservation requirement. In response, it was pointed out that Standard 10 articulates an ethical duty to notify a client about preservation, not a rule about client behavior. The language about backup materials from ABA standard 29, on the other hand, is a good effort to address the problem of backup materials. It was agreed by another member that treating backup materials differently from active data is sensible.

Discussion turned to specifics of the sanctions and preservation proposals. Should the preservation obligation begin from the date of suit, or only when a document request is made? It was pointed out that in the mini-conference in San Francisco in March, 2000, general counsel of a large company supplied an exemplar of a preservation letter sent to staff from the date it becomes aware of a suit. It would not seem desirable to have a rule that would make such efforts unnecessary. Whether that starting point is early enough could be debated. "A lot of companies have known for a long time about the existence of a problem with a product before the first suit is filed."

One member explained that a good way to deal with these concerns is to direct the company to make a back-up tape of the entire system for the date on which notice of the suit comes in, and preserve that as a snap-shot of the contents of the system, while allowing normal backup and deletion features continue. This prompted the response that it was a good practice, but questions about whether it should be in the rule. It was also noted that the proposed preservation rule did not attempt to limit when other preservation obligations attach.

It was also emphasized that the proposed preservation rule was designed to exclude inaccessible materials by saying that it was limited to documents "as defined by Rule 34(a)" in tandem with a definition in a proposed amendment to 34(a) that would exclude inaccessible materials from the scope of discovery. Some provision would have to be made to prevent the rule from requiring preservation of inaccessible materials absent a court order requiring such preservation.

Based on the discussion, all agreed that any provision about the duty to preserve should be put outside Rule 37. It was also suggested that the ABA Standard 29 sentence quoted above be inserted into the preservation rule, currently designated Rule 34.1.

The need to carve out protection for continued operation of standard backup practices was emphasized; perhaps the rule should say that there is no obligation to preserve regarding backup

materials absent a court order, and also provide directions for other materials. This brought a counter that a party should preserve a backup for the day the company becomes aware of the suit. But another comment was that in a patent suit, perhaps one needed a snapshot for every day. That prompted the reaction "That's what a court order is for."

If a carve-out of backup materials were contemplated, it was noted, it would be important to be careful to distinguish among various sorts of data. Backup is a systems operation function, and most proposals about preservation "try to take systems stuff out of the equation." That is because this material is not intended to be used as a source of information. Moreover, individual computers inevitably wipe out deleted data as a part of ordinary operations. Some materials are held purely for disaster recovery. But material that is not "active" may well be intended for possible use. This is known as "archival data," and conventional records management often involves storage of information off the operating system but still with an eye to possible future use. This sort of material should be regarded differently from disaster recovery systems.

It was observed that "we all seem to agree on what to do; now we need to write it." In the process, it would be important to be careful about altering the present rule structure, so the problem where such a requirement should be put presents difficulties. In addition, it would be important to avoid prescribing affirmatively something that is in essence an ethical duty. This prompted the response that there is presently a gap in the rules that needs an affirmative statement. "You can't state the negative without the positive."

[After discussion of other matters, attention returned to the safe harbor issues at the end of the meeting]

Attention focused on the four criteria regarding sanctions listed in the proposed addition to Rule 37. One approach would be to remove the first and last criteria as unnecessary and, perhaps, put an "or" rather than an and between the remaining two criteria -- that the materials were the subject of a specific discovery request or that the party acted willfully or recklessly in failing to preserve them.

It was pointed out that the strong sanctions of Rule 37(b) are available only when a party fails to obey a court order. If there is a court order, why should there be such limits on sanctions? The reaction was that the Second Circuit's Residential Funding case had created the possibility of serious sanctions for negligent deletion.

It was suggested that the objective should be to draft a simple preservation rule that would include a provision like the ABA language quoted above on continued computer operations absent court order to the contrary.

Attention shifted to the last consideration in the proposed sanctions rule -- that sanctions not be imposed absent material prejudice. The reality today is that in a modern corporation the employees may have thousands of blackberries, each of which has data of some sort on it that may be overwritten or deleted at any time. To open the company to sanctions because one of them was not preserved would be unduly draconian. In particular, it would be inappropriate in the absence of an indication that the material that was missing was important to the case. It was asked whether the caselaw on Rule 37 provided sufficient assurance that there would be a proportionality analysis before sanctions were imposed.

There seem to be two sorts of situations: (1) There is a court order, whether ex parte or otherwise. Then an innocent violation of the order is the predicate for a sanctions request. (2) Even without a preservation order, something falls through the cracks. As suggested by one

member, a deposition witness says "I deleted everything on my blackberry because nobody told me to preserve it."

The real issue, it was urged, was whether only willful and reckless behavior should justify sanctions, or if negligent behavior would be sufficient. At the same time, it was emphasized, the assurance that normal computer operations can continue is very important to many. If that prompts routine application for case-specific orders, that is not necessarily entirely a bad thing.

Based on the discussion, a consensus emerged to modify the proposal. The first factor -- accessibility -- would be removed from the sanctions rule and handled elsewhere. The last factor -- prejudice to the party seeking sanctions -- would be addressed in the Note and rely on general Rule 37(b) discretion. It was suggested that the remaining factors be rewritten as follows:

(A) the party deleted, destroyed, or otherwise made unavailable electronic documents that were described with [reasonable] particularity in a discovery request, [and] {or}

(B) the party willfully or recklessly failed to preserve electronic documents that were relevant to pending, threatened, or reasonably anticipated litigation.

Then the provision about continuing normal computer operations could be moved to proposed Rule 34.1 and combined with it.

Further discussion focused on the need to be careful about the provisions of (A) above. As presently written, if "or" is used the rule verges on strict liability. Even with a specific discovery request, it is often difficult for a large organization to avoid any destruction of data. The problems presented by thousands of blackberries should be addressed. But to say "and" may mean that only bad faith destruction would suffice for sanctions, which would be peculiar particularly in cases in which there was already a court order directing production. It would be desirable to craft some sort of assurance under (A) that diligence and good faith will protect a party against sanctions.

Form of Production

Documents

The Rule 34(a) proposal was introduced as a way to permit parties requesting document production to specify the form in which electronically-stored materials should be produced. The initial choice to specify would belong to the requesting party. Sometimes the responding party does not care about whether to use that form. The proposal also allows the responding party to object to the form proposed, and permits the responding party to produce the data in the form in which they are stored. It may be that the harder issue arises when the producing party wants to provide the documents in the form it ordinarily uses them. In that case, the producing party's form may be usable only with a considerable dose of software.

The draft includes alternative formulations -- one saying that the requesting party may request a specific form, and another saying that it must specify the form. The use of the "must" command form was urged on the ground that otherwise the requesting party will come back later and ask for the same thing in a different form. It would be important to make the requesting party commit. This argument was supported with an example of a case in which defense counsel "begged" plaintiffs' counsel to say which form of production they preferred. Eventually

defendant produced in paper form, and then plaintiffs' counsel asked for the same thing to be duplicated in electronic form.

One response was that it is often hard to know what form you want, and often true that the requesting party has limited information about the formats used by the producing party. Another response to the argument for a "must" command in the rule was that in many cases it may be a hindrance to specify. And technological change may alter the dynamics of form of production in ways that are difficult to foresee now. Moreover, it might seem odd to command the requesting party to demand a certain form while permitting the responding party to object and choose another form despite the mandated demand.

The discussion shifted to another aspect of the Rule 34 proposal -- accessing inaccessible data. It was urged that the Rule 34(b) form of production provision must be parallel to a document definition in Rule 34(a) that excludes inaccessible materials from production absent court order. The general distinction seems to be between data used in the normal course of business and data technically within the party's possession but not normally accessed. This definition may not be sufficient, however; archived data may not often be accessed, but it is archived so that the party may access it. It was suggested that the focus should be on whether the material "can be accessed without undue burden or expense."

To this it was responded that a backup tape can be accessed without undue burden or expense. One member asked why there should not be a requirement to produce if there was not too much burden in doing so. Indeed, would it comply with the rules for a party to provide access to backup tapes to one who wanted data that might be on them, and invite the party seeking the data to "find it yourself"?

It was suggested that further discussion of the handling of inaccessible material could profitably be postponed until the next heading, which focused directly on that question. Regarding the Rule 34 treatment of form of production, it was decided to preserve the "may" v. "must" question for discussion at the October meeting of the full Committee, and to include the proposal that the responding party may produce in the form it ordinarily uses to store the documents to raise the issues presented by that question.

Interrogatories

The draft Rule 33 proposals included a slightly inaccurate slant because they paralleled the Rule 34 proposal in permitting the discovering party to demand electronic answers. The idea of making a rule change to permit such a demand was made by some commentators during the 1997-99 amendment cycle, and there have been cases ruling that a party may be required to provide information in a computer-readable format. But the current Rule 33 proposals are not designed to take that step.

It was suggested that these issues focus on a problem midway between Rule 33 and Rule 34. Rule 34 only allows a party to demand production of something that exists. Rule 33 requires a party to create something that did not exist before -- an interrogatory answer -- according to the requesting party's specifications of content. The rule proposals are designed to give the responding party flexibility as to the form of that responsive material. It thus builds on the present Rule 33(d) option to produce business records in lieu of answering an interrogatory.

The proposed approach is a new Rule 33(e) that would to some extent supplant current Rule 33(d) by permitting a responding party to produce electronically-stored material rather than working up the answer itself. Indeed, it may be that owing to the prevalent storage of

information in electronic form most invocations of Rule 33(d) currently involve something of this sort.

Burden of accessing inaccessible data

In light of the importance of this issue, there were several variants of proposals that had common themes -- ensuring that there was no obligation to access inaccessible material unless the court so ordered for good cause. A number of questions were presented for discussion:

(1) Should this material be put beyond the scope of disclosure and/or discovery? One proposal said that inaccessible material was beyond the scope of discovery.

(2) Is it important to put provisions about an objection on this ground in Rules 33 and 34, or better to put the only provision in Rule 26, which applies to all discovery? One issue was whether discovery in other forms -- for example, a Rule 30(b)(6) deposition of an IT person, might involve the question of accessing inaccessible material.

(3) Should the rule protect materials that the responding party does not ordinarily access, or only those materials that are not reasonably accessible?

(4) Should we put provisions about cost-bearing with regard to this material directly into Rule 26?

(5) Should cost-bearing turn on whether "extraordinary efforts" are required to obtain this material?

(6) If the focus of this limitation on response burdens goes beyond saying that a party need not access that which is inaccessible, should it focus on a party's "business" or "activities," which would seem a broader notion and to provide protections for consumers and other individual parties who are not engaged in "business."

The discussion began with consideration whether there should be a limitation on production of inaccessible information in regard to Rule 26(a)(1) disclosure. At first blush, that might seem worthwhile since it would be undesirable to press parties to dredge up such material without at least having received a discovery request for it. But given the limitation of the current disclosure rules to materials the disclosing party may use to support its claim or defense, this argument did not seem important. There would only be an occasion to include materials obtained from normally inaccessible sources if the party itself decided to try to mine them for helpful evidence. To permit the party to withhold the material from the other side then would be contrary to the goals of disclosure, and would not protect it against any burden of locating otherwise inaccessible materials.

A related problem was raised: what if the disclosing party did dredge through otherwise inaccessible materials, and found one very helpful item and nine other pertinent items that were not helpful, perhaps even harmful, to its position. Could it fail to produce the other nine on the ground that (before it dug them up) they were inaccessible. One answer to this question would be that by the time they were unearthed the nine additional items would no longer be inaccessible. But the outcome might depend on the phrasing of a rule provision dealing with these problems. If the rule limited the duty to respond to discovery to materials that the party ordinarily accessed only in its normal course of business, these materials that were actually

unearthed in an effort to dredge through normally-inaccessible materials might be considered still off limits for discovery.

The discussion turned to the proper standard for limiting the duty to respond with regard to inaccessible materials. The proposal to the Subcommittee spoke of materials not accessible in "the usual course of the responding party's business." This might often be too restrictive, it was urged, because important items not accessed in the usual course of the responding party's business might nonetheless not require significant efforts to obtain. The focus should instead be on whether extraordinary measures would be required to unearth these items.

To this it was responded that there is currently nothing in the rules that protects against the burden of dredging up everything. Rule 34 directs a party to produce any documents in its "possession, custody, or control," and it is difficult to say that this is not true of ordinarily inaccessible electronic materials, or those that can only be accessed with considerable expense.

It was pointed out that Rule 26(b)(2) already has a proportionality provision; isn't that sufficient to deal with the sort of problem mentioned? To this, one of those who was uneasy with the "usual course" approach responded that it would be important to carve out a protected area, but that it should go to unvarnished inaccessibility. Another member agreed that the "usual course" limitation on the duty to search should not be included in the rule.

As an alternative, it was suggested that the guiding phrase should be "accessible without undue burden or expense." It was suggested that "readily" should be added at the beginning of this phrase.

Others pointed out that it would be important to carve out backup tapes altogether; whatever the hypothetical reasonableness of accessing them in some cases, they should be simply off limits absent a court order. It was agreed that what was really were needed were two screens: (1) backup tapes, and (2) items that could be accessed only with undue burden and expense.

To this, it was countered that it may be very difficult to define each tier. Actually, there is a continuum and there may often not be any clear stopping points in the continuum. One suggested that "If your IT person can restore it, its reasonably accessible." Another suggested that management purposes should be a controlling criterion. "Archived" materials would be available within the meaning of this limitation. "That's like putting it in the warehouse. This is available."

But it was cautioned that many businesses use backup tapes as an archival system. It is their warehouse. Similarly, one could argue that the delete file is kept for a purpose, which is accessing the deletions for possible use. Yet another complication is that in the last few months three companies have come out with software that searches backup tapes, which may mean that the "undue burden and expense" standard would no longer exempt them from review. Of course, that standard might have the advantage of providing an application that evolves with changing technology.

The most desirable wording proved elusive, although the concept that there should be protection against a duty to search backup tapes and to dredge up fragmentary material and deleted was widely shared. It was urged that a bright-line rule would be important. One concern was coming up with a description that would be sufficiently inclusive. The consensus was to have the Special Reporter try to devise wording based on the discussion and continue considering the best way of wording a rule during the October Committee meeting and (probably) the February conference.

There was discussion of where to put the provision once drafted and whether to include explicit reference to cost-bearing. On the question of location, the argument was made that Rule 26 would be the preferable place (to Rule 33 and/or 34) because it covered all discovery. At least the Rule 30(b)(6) deposition might be one additional area in which the limitation should apply, and others might emerge. This was generally accepted. The cost-bearing provision would remain, but in brackets.

Within Rule 26, two possible locations had been suggested for the inaccessible data provision -- as an additional provision in Rule 26(b) or as a new 26(h) dealing with computer-based information. If cost-bearing were retained, that might create problems of negative inference about the authority to use cost-bearing in connection with other issues raised in Rule 26(b). In 1997-99, the Committee recommended including explicit cost-bearing in Rule 26(b)(2) even though it acknowledged that the power had always been implicit. Eventually, the Judicial Conference decided not to make this change, partly in the face of arguments that it was unnecessary. To have some parts of Rule 26(b)(2) that explicitly authorize cost-bearing regarding electronic materials and others that contain no such authorization might fortify arguments that courts may not use this technique except with electronic materials. That would be an undesirable development. The conclusion was to go forward with a proposed new Rule 26(h).

Initial disclosure

The proposal added a requirement to provide disclosure about a party's computer systems, with additional bracketed language directing counsel to make a reasonable inquiry of the client to learn about its computer systems before making disclosure. The objective was to deal with the recurrent problem that counsel don't find out about the client's computer systems until well into the litigation, and by then important things have ceased to exist even though the did exist at the beginning of the case. In addition, requiring this sort of disclosure could provide support for the right to ask for production in certain formats by acquainting the opposing party with sufficient knowledge to enable it to formulate a request.

The initial comment was that it was not clear that this sort of provision would be needed. In a run of the mill case this sort of discovery is not important. It only matters in a certain type of case, and requiring it in all cases would be wasteful and distracting. This prompted a responsive question "When is it irrelevant? What sort of case?" The answer was that in an auto collision case or many other types of suits there is no occasion for this sort of discovery. In most cases, there is very little discovery, as the FJC survey in 1997 demonstrated.

It was suggested that putting a directive in Rule 26(f) to discuss this topic would be sufficient. A counterargument was that there would be a big advantage in having this sort of disclosure requirement because the sanctions cases were exactly the kinds of cases in which people don't investigate and find out about these sorts of things until later in the litigation. But the consensus was the it would be an unnecessary burden to require disclosure regarding computer systems in all cases, and that a Rule 26(f) provision would suffice. Accordingly, no initial disclosure proposal would be presented to the full Committee.

Rule 26(f) conference

This topic was introduced with the observation that there seem to be many advantages to adding e-discovery explicitly to the list of topics to be discussed during the Rule 26(f) conference. Many of the difficulties that have plagued cases in which e-discovery has gone awry seem to have involved the sort of thing that could have been avoided with advance planning. Including consideration of these issues in the report to the judge and the Rule 16 order may often

be well calculated to nip a problem in the bud. Already three districts have local rules requiring discussion of a number of these issues and a third (D.N.J) is finishing work on a similar (and more demanding) new local rule.

The proposal tracked the local rules, and included directives that a number of specific topics be discussed, such as the steps needed to avoid destruction of electronic material, a protocol for production, discussion of inadvertent production of privileged material, and the possibility of restoring deleted data and allocation of cost of that effort.

A question was raised, however, about why the proposed amendment to Rule 26(f) was so specific and detailed. It would seem better to be more open-ended, as are the descriptions of the other topics. Another member agreed. "This should be more generalized -- 'Talk about electronic discovery issues.' Some of these things may be impossible to talk about. Be more general. Put specifics in the Note." Another mentioned that this rule could become too limiting, and that the invitation to raise cost-bearing sent an inappropriate message. The fact that local rules are more detailed should not be troubling.

There were also proposals to add two additional topics to the Rule 26(f) list -- the need for a confidentiality order and privilege waiver. On confidentiality, the thought was that this could deal with the problem of proprietary software, and it was thought best to leave that issue in the Note along with the other specifics about topics that might be discussed. Regarding privilege waiver, the general view was that leaving the topic on the Rule 26(f) list would be valuable. In particular, if the stipulated agreement "quick peek" rule were proposed, this discussion could be a method of prompting the parties to think about whether there should be such an agreement.

The discussion returned to the phrasing of the directive regarding e-discovery. One question is how to phrase the trigger for this discussion. Discussion is not required in all cases, but only those in which it might be useful. On this topic, it was generally assumed that including initial disclosure of electronic material as a trigger seemed worthwhile even if discovery regarding electronic material was not otherwise contemplated, because such disclosure might itself prompt discovery of such material. In addition, it was suggested that the trigger be phrased as "whether any party expects disclosure or discovery involving electronic data."

Definition of e-discovery

In the various drafting efforts that produced the draft proposals on which the discussion focused, various terms were used to describe the subject of this rules. These included "computer-based or electronically stored information," "information stored on a computer or in electronic form," "documents created or stored electronically," "data from electronic media, including computers," and "electronic documents." The discussion turned to whether and how a single term could be used for this purpose.

It was noted that the style project frowns on definition sections in court rules. Thus the removal (at least as a matter of form) of the definition of document in Rule 34(a). But the need to be clear on this topic may justify an exception to that general proscription.

That possibility being open, the following global definition was suggested: "Electronic data" could be described as

> information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology, such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

It was immediately asked with this might prove too time-bound, and the response was that "anything could be dead in 18 months." With that in mind, the best definition might be "computer-based discovery," but the term "computer-based" may soon be viewed as archaic. "Electronic information," for example, is basically meaningless. Information is information, whatever the manner of storage or production. We are talking about information in electronic form. Moreover, the range of situations in which computer-based items exist in society is quite large at present and likely to expand further. Even car keys, for example, have a chip and need to be programmed before they can be used. Perhaps the definition should be "chip-based."

Various innovative techniques were raised. For example, there is talk of chemical and biological computing, and interest in the potential of optics. Would all these developments, if they take off, be included in the definition? The answer was that people might not say it was "electronic" when done using those means, but it would certainly be digital.

In reaction to these issues, it was suggested that the definition start with "data stored in any medium, including . . ." It was also observed that we still find ourselves speaking of a "document" even though much information never is embodied in hard copy form. One member again expressed a preference for "digital," while another said that "electronic" or "computer-based" were the only choices that made sense.

It was suggested that any proposed definition should be vetted with specialists in the field and futurists.

It was noted that 15 U.S.C. § 7006, part of legislation regarding electronic signatures in international commerce, has a number of definitions that seem worth considering, such as "electronic" (§ 7706(2)), "electronic record" (§ 7006(4)), and "electronic signature" (§ 7006(5)).

Eventually, no clear preference could be resolved on the spot, and the conclusion instead was summed up by the comment "Let's put it out there and see what reactions we get."

Feb. 2004 Conference

The meeting ended with brief discussion of the Feb. 20-21 e-discovery conference at Fordham Law School Already efforts are being made to identify possible speakers. On this subject, it is worth noting that the FJC has a database with information on a large number of CLE programs on e-discovery topics, including information on the speakers. This resource is available to all Committee members, who should contact Ken Withers for access information.

In terms of format, a number of issues were discussed. One was whether there would be papers presented during the conference. At the Sept. 1997 Boston conference, each day began with a paper, which set the scene and provided background for the discussion that followed. For this conference, it is less clear that academic presentations would be illuminating. Although there is a long history of hard copy discovery (the topic of the Boston conference), there is very limited experience with e-discovery. There is accordingly little need to "remind" those in attendance about what occurred before they became involved in this activity, which was a function of the papers at the Boston conference.

Introductory presentations might nevertheless serve a valuable purpose in setting the scene for the event. To do this, it might be useful to sum up the Committee's general experience with discovery and its specific focus on e-discovery to explain how things had reached a point that would make consideration of possible actual rulemaking and a conference of this sort

worthwhile. Rick Marcus might do that. It might also be desirable to have an overview on more "technical" issues, and Ken Withers might do that. Throughout, the goal of the conference should be understood -- it would be designed to educate the members of the Committee and the Standing Committee who attend.

In terms of types of panels, etc., one suggestion was to try to arrange an "alumni" panel including those involved in past rulemaking efforts. At the Boston conference this was the nature of the last panel, and it provided a useful summation of the matters covered during the event. Possible participants in that panel would include Judge Anthony Scirica, Dean John Carroll, Paul Niemeyer, and others who have recent experience in rule amendment activity.

In addition, it was emphasized that there should be an effort to involve lawyers or judges from Texas who could explain how the state courts there have fared under the Texas statutory scheme for e-discovery. Similarly, there should be an effort to locate judges from districts that have local rules directed to these problems.

Another possibility would be to ask bar groups to comment (ideally in writing) on the pending ideas for amendment and send representatives to a bar groups panel. There was such a panel at the Brooklyn conference and at the Boston conference.

In terms of topics for panels, the basic thrust was toward focusing on the areas in which the Subcommittee was considering amendments. Thus, the following possibilities exist:

Safe harbor/spoliation/sanctions

The definition of a document and the need for access to metadata and embedded data

Accessibility to backup materials, deleted materials, etc.

Privilege waiver

It will be necessary to begin making arrangements for this conference rather soon. It is likely that after the October meeting of the full Committee a successor treatment of the pending amendment ideas can be generated that can be the focus of discussion during the conference. Beyond that, if we wish to ask bar groups to give use written statements of their ideas and positions, it will be important to give them as much lead time as possible.

Report of Federal Judicial Center
to be Distributed at a Later Date

"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.]

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:

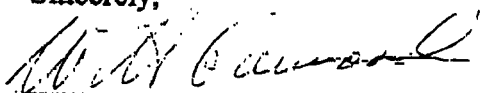
Last year, the Department of Justice asked the Advisory Committee on Appellate Rules to amend the Federal Rules of Appellate Procedure ("FRAP") to explicitly authorize the use of a procedure known as an "indicative ruling." A copy of Solicitor General Waxman's March 14, 2000 letter to me is enclosed. 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.)

00-01

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.

---

[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.

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.[8] 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.

---

[8] This flat assertion seems safe in all reason. But the weight of Seventh Amendment tradition cannot be shrugged off without some effort. An illustration is provided by *Duro-Last, Inc. v. Custom Seal, Inc.*, Fed.Cir.2003, 321 F.3d 1098, 1105-1108. The plaintiff moved for judgment as a matter of law at the close of the evidence. The verdict found the plaintiff's patent invalid for obviousness. The plaintiff renewed its motion and won judgment as a matter of law holding the patent not invalid. The Federal Circuit reversed because it concluded that the motion made at the close of all the evidence did not sufficiently specify the obviousness issue as a ground. "The requirement for specificity is not simply the rule-drafter's choice of phrasing. In view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL."

The Federal Circuit cited *Morante v. American Gen. Fin. Center*, 5th Cir.1998, 157 F.3d 1006, 1010. The court reversed judgment as a matter of law on an agency question, citing several decisions for the rule that a post-verdict motion cannot assert a ground that was not included in a motion made at the close of the evidence. This paragraph concludes by citing *Sulmeyer v. Coca Cola Co.*, 5th Cir.1975, 515 F.2d 835, 846 n. 17. The body of the *Sulmeyer* opinion ruled that the plaintiff's post-verdict motion for judgment n.o.v. could not be supported by arguing a claim that had not been presented in any way at trial. The footnote observed: "It would be a constitutionally impermissible re-examination of the jury's verdict for the dsitrict court to enter judgment n.o.v. on a ground not raised in the motion for directed verdit. Compare *Baltimore & Carolina Line, Inc. v. Redman* * * * with *Slocum v. New York Life Ins. Co.* * * *."

As interesting as this tenacious bit of history is, it does not justify the conclusion that the Seventh Amendment demands that a post-verdict motion can be supported only on grounds stated in a motion made at the close of all the evidence. At most, the Seventh Amendment might be said to require that the ground have been raised during trial. The proposal suggested below retains that requirement.

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 Committe 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 see
ms 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.

Evidence introduced at trial after the pre-verdict motion may bear on the post-verdict motion. Evidence favorable to the party opposing the motion must be considered. The court also may consider evidence unfavorable to the party opposing the motion if it is evidence that the jury must believe unless there is reason to believe the opposing party had no fair opportunity to meet that evidence.

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 renewe 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.

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 summarize d in conjunction with the 1995 proposals. Still other revisions might be considered; the purpose of this memorandum is to open Rule 15 for general discussion.

Finally, the Rule 15(c)(3) materials are carried forward from the October 2002 agenda. Judge Becker has made a persuasive case for a "simple" correction of the gloss that courts have placed on the requirement that there be a "mistake concerning the identity of the proper party." But the matter is not as simple as it might appear. One practical concern is that further expansion of the opportunity to escape limitations problems by changing parties will pull federal practice deeper into the morass of "Doe" pleading. A more conceptual concern is that Rule 15(c)(3) already pushes the limits of Enabling Act authority, particularly with respect to state-law claims. It may be better to leave old trespasses alone without pushing further along perhaps prohibited paths.

Rule 15: The 1995 Proposals: Amendment of Course

The proposal.

Rule 15(a) begins:

> **(a)** **AMENDMENTS.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. * * *

The Style version currently begins:

> **(a) Amendments Before Trial.**
> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
> **(A)** before being served with a responsive pleading; or
> **(B)** within 20 days after serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

A Rule 12 motion — most commonly a 12(b)(6) motion to dismiss for failure to state a claim — is a motion, not a responsive pleading, and does not cut off the right to amend.

District Judge John Martin wrote to suggest that the rule should be amended to cut off the right to amend when a motion addressed to the pleading is served. His suggestion was prompted by experience in a case in which the plaintiff served an amended complaint just as a decision on a motion to dismiss was about to be released. The amendment was available as a matter of right. He observed that while application of Rule 15(a) seems clear in this setting — and is clearly undesirable — it becomes more confused after announcement of a decision granting a motion to dismiss. If the decision also grants leave to amend, there is no problem. But some courts have held that a decision granting a motion to dismiss without addressing leave to amend does not cut off the right to amend, which survives until a responsive pleading is served or a final judgment of dismissal is entered. This problem also becomes entangled with questions of appeal finality, where a variety of answers have been given. See 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.1.

Magistrate Judge Judith Guthrie also wrote about Rule 15(a), suggesting a different problem that arose from the practice in the Eastern District of Texas of holding hearings in prisoner civil rights cases before requiring an answer from any defendant. Many cases are dismissed without an answer being filed. But some prisoner-plaintiffs manage to continually file amended pleadings, raising new claims and joining new parties, before a dismissal can be entered. She suggested that Rule 15(a) should be amended by deleting the right to amend even once as a matter of course. As an alternative, she suggested that an amendment made as a matter of course may not add new parties or raise events occurring after the original pleading was filed.

Judge Guthrie's suggestion raises the basic question whether there is any need to permit amendment even once as a matter of course. There is a fair argument that amendment should be available only by leave. This approach would encourage more careful initial pleading, supplementing Rule 11. It might permit more efficient disposition of attempted amendments by

denying leave without going through renewal of a motion to dismiss and renewed consideration of the motion. Rule 15(a) still would encourage a free approach to amendments. The drafting chore would be simple. The first sentence of present Rule 15(a), to be Style 15(a)(1), would be deleted. "Otherwise" would be deleted from the second sentence in present Rule 15(a); "other than as allowed in Rule 15(a)(1)" would be deleted from the Style rule.

There may be sufficient benefit from permitting amendment as a matter of course to continue some version of the present rule. As careful as we want pleaders to be, it may be thought that occasional slips are inevitable and should not be taken seriously. It also may be thought that leave to amend is so freely given that a limited right to amend "once as a matter of course" simply avoids the bother of making a request that almost always would be granted.

If there should be a limited right to amend once as a matter of course, it remains to determine what event should cut off the right. The least forgiving approach would allow the amendment only if made before an adversary has pointed out a defect. A more generous approach would allow the amendment after an adversary has pointed out the defect. The present rule muddles these choices by adopting a strange middle ground: there is a right to amend if an adversary presents the defect by motion to dismiss, but there is not a right to amend if an adversary presents the defect by a responsive pleading. Although more time, expense, and strategic disclosure may be involved in framing an answer than in making a motion, it is difficult to guess why the reward should be cutting off the right to amend.

The most modest reaction, in line with Judge Martin's suggestion, would be to cut off the right to amend when a responsive motion is filed as well as when a responsive pleading is filed. It may be possible to do this clearly by adding two or three words. Using the Style Draft:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:
>
> > **(A)** before being served with a responsive pleading or [responsive] motion; * * *

[Although it is subject to style objections, it may be safer to say "responsive motion." A motion for an extension of time to answer would not qualify. A motion to dismiss for lack of subject-matter jurisdiction might present some uncertainty: an argument could be made that it should cut off the right to amend the jurisdiction allegations but not to amend the claim.]

An alternative approach would be to cut off the right to amend after 20 days or some other brief period, unless a responsive motion or pleading is filed earlier:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if:
> **(A)** a responsive pleading or motion has not been served, or
> **(B)** a responsive pleading is not permitted and the action is not yet on the trial calendar.

April 1995 Minutes: The April 1995 minutes include this: "Brief discussion included the observation that leave to amend is almost never denied unless the underlying claim is patently frivolous. The Committee concluded that this topic should be carried forward on the agenda for further discussion, including consideration of alternatives that would expand the right to amend as a matter of course,

treat responsive motions in the same way as responsive pleadings are now treated, establish tighter limits on the right to amend as a matter of course, or abolish the right to amend as a matter of course. (The November 1995 Minutes are indirect: "Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process.")

Variations: Mix-and-match variations abound. One would create a right to amend without regard to responses or the trial calendar, but limit it to a tight period:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after serving the pleading if the action is not yet on the trial calendar.

Another would expand the present rule by allowing amendment as a matter of course within 20 days after either a responsive pleading or motion:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within 20 days after:
>
> > **(A)** a responsive pleading or motion has been served if a responsive pleading is permitted, or
> > **(B)** serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar.

Yet another, more complicated, approach would allow amendment as a matter of course until some later event. The possibilities include such events as a ruling on the sufficiency of the pleading, placing the case on the trial calendar, or dismissal of the claim addressed by the pleading:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course until:
>
> > **(A)** the court has ruled on the sufficiency of the pleading;
> > **(B)** the claim [or defense] addressed by the pleading is dismissed; or
> > **(C)** the action is placed on the trial calendar.

Style Process Suggestions

"Trial calendar" cut-off. The provision of Rule 15(a)(1)(B) that cuts off the right to amend if the action is on the trial calendar was questioned on the ground that many courts do not have a "trial calendar." One approach would be to delete this provision, relying on Rule 15(b), Rule 16, and perhaps inherent authority to authorize whatever control is needed when it would be disruptive to have an amendment as a matter of course within 20 days after serving a pleading to which no responsive pleading is required. Another would be to find some substitute. None has yet been suggested.

Relation of Rule 15(a), 15(b) standards. Professor Marcus reviewed Rules 8 through 15 at a time when it was unclear whether the Style Project would include modest changes in the substance of the rules. He raised an important question — whether the language of Rule 15(b) encourages trial amendments more than should be.

Style Rule 15(a)(1)(B) carries forward the standard for pretrial amendments: "The court should freely give leave when justice so requires." Style Rule 15(b)(1) carries forward the standard for amendments during trial: "The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting the evidence would prejudice that party's action or defense on the merits."

The close parallel between "freely give leave" and "freely allow an amendment" may unduly encourage amendments at trial. Or it may suggest a liberality that is not reflected in actual practice. And it may cause confusion in conjunction with Rule 16(e). Rule 16(e) allows amendment of an order following a final pretrial conference "only to prevent manifest injustice." If a final pretrial order specifies the claims, issues, or defenses for trial, Rule 16(e) should not be subverted by allowing free amendment of the pleadings.

The question, then, is whether Rule 15(b) should be revised for any of three reasons: it gives a false impression of actual practice; it accurately reflects a practice that is too liberal; or it causes confusion with Rule 16(e). No work has yet been done to determine whether any of these possibilities reflects a real need to revise the rule. Practical advice on the need for further work is essential.

Complete Replacement Pleading. Professor Marcus also raised a question whether Rule 15 should provide that any amendment must be made by filing a complete new pleading. Particularly given the ease of reproducing a complete amended pleading by word processing, the advantages of having a single document to consider would be offset only by the added bulk of paper files. But this may be a level of detail that the national rules should not address.

Integration with Rule 13(f). Another question put out of the Style Project is whether Rule 13(f) should be directly integrated with Rule 15 or simly 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:

(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 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

[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:"

the action]{filing the claim},[2] or within the[3] 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;[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~~Delivering or mailing ~~of~~ process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of items (i) and (ii) ~~subparagraphs (A) and (B) of this paragraph (3)~~ with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.[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

---

[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.

[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 * * *."

In any event, the formulation in the rule needs to be clarified. A conservative approach to the Enabling Act would suggest that the period provided by state law should control. The 120-day period, taken by analogy to the present incorporation of Rule 4(m), would apply only if state law gives no answer or, perhaps, if there is a federal claim.

[5] Is this right? Suppose the officer is brought into the action in an individual capacity?

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 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*, 266 F.3d 186 (3d Cir.2001).

Rule 15(c)(3) Puzzles

The excuse for addressing Rule 15(c)(3) is 98-CV-E, a law student's suggestion that something should be done to overturn the unfortunate result in *Worthington v. Wilson*, 7th Cir.1993, 8 F.3d 1253, and like cases. That suggestion will be addressed in due course. As often happens, however, consideration of one possible defect in a rule suggests consideration of others. Rule 15(c)(3) was amended in 1991 to supersede the decision in *Schiavone v. Fortune, Inc.*, 1986, 477 U.S. 21. It seemed like a good solution at the time. But literal reading leads to a number of puzzles. The puzzles may have satisfactory answers, but they present genuine difficulties.

---

[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.

A first warning may be useful. These problems all involve statutes of limitations, commonly state statutes of limitations. There are real questions about the propriety of using the Enabling Act to achieve what seems to be sound limitations practice that supersedes practices bound up with the underlying statute.

Limitations Background

28 U.S.C. § 1658 provides a general four-year limitations period for federal statutes enacted after December 1, 1990, apart from statutes that contain their own limitations provisions. Some statutes enacted before December 1, 1990 have their own limitations provisions. Most do not. Federal courts have long chosen to adopt analogous state limitations periods for these statutes. (In some settings, the analogy instead is drawn to the limitations period in a different federal statute.) The alternatives of having no limitations period, or creating limitations periods in the common-law process, are very unattractive. One frequently encountered illustration — the one involved in the *Worthington* case — is 42 U.S.C. § 1983.

State limitations periods also are applied by federal courts when enforcing state-created claims. One of the well-known wrinkles occurs when the state limitations scheme provides time limits not only for commencing the action but also for effecting service. *Walker v. Armco Steel Co.*, 1980, 446 U.S. 740, confirmed the rule that Civil Rule 3 does not supersede the state service requirements in these settings. The Rule 3 provision that an action is commenced by filing a complaint was not intended to address this issue.

Civil Rule 15(c) generally addresses the question whether an amendment to a pleading "relates back" to the time of the initial pleading. Rule 15(c)(1) provides the most general rule: if "relation back is permitted by the law that provides the statute of limitations applicable to the action," relation back is permitted. If federal law provides the statute of limitations, relation back can be addressed as a matter of federal law, supplemented if need be by Rule 15(c) paragraphs (2) and (3). If state law provides the statute of limitations, state-law relation-back doctrine is the first fall-back.

Rule 15(c)(2) allows a claim or defense asserted in an amended pleading to relate back if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This is a nice functional provision that of itself creates few problems. It may raise a question when an attempt is made to add a new plaintiff, a separate issue described below.

Rule 15(c)(3) deals with relation back when an amendment "changes the party or the naming of the party against whom a claim is asserted." The first requirement for relation back is that the claim satisfy Rule 15(c)(2) by arising from the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. So far, so good. Beyond that point, the rule has been framed in response to the *Schiavone* ruling.

In the *Schiavone* case the plaintiff claimed that he had been defamed in an article in Fortune Magazine. Ten days before the last day that could be argued to be the end of the limitations period, he filed an action captioned against "Fortune." "Fortune" exists only as a tradename and as an unincorporated division of Time, Inc. The complaint was mailed to Time, Inc.'s registered agent, who refused to accept service because Time was not named as defendant. The plaintiff promptly amended the complaint to name "Fortune, also known as Time, Incorporated." The amendment was not allowed to relate back, and the action was dismissed as time-barred.

The critical phrase in the 1966 version of Rule 15(c)(3) allowed relation back if the new or renamed defendant had notice of the action satisfying specified criteria "within the period provided by law for commencing the action against" the new defendant. The Court concluded that the "plain language" of the rules defeated relation back. The time permitted to commence the action — to file the complaint — is the limitations period. The complaint must be filed by the end of the limitations period. That is the period in which the "new" defendant must have notice of the action.

The difficulty with the *Schiavone* conclusion is that it requires notice to the "new" defendant at a time earlier than would be required if the new defendant had been properly identified in the initial complaint. As the practice then stood, if a complaint was filed on the last day of the limitations period, it sufficed to accomplish service on the defendant within a reasonable time. Time, Inc. had actual notice of the lawsuit — and surely knew exactly what was intended — at a time that satisfied all limitations requirements. There was an obvious reason to conclude that Rule 15(c)(3) should be amended to allow the action to proceed in such circumstances.

The amended version of Rule 15(c)(3) allows the amendment changing or renaming the defendant to relate back if the defendant had notice "within the period provided by Rule 4(m) for service of the summons and complaint." The base-line Rule 4(m) period is 120 days from filing. If the action is filed on the last day of the limitations period, it is good enough to effect notice within 120 days (or more, as discussed below). So far, so good. But it seems likely that the many questions that arise from this incorporation of Rule 4(m) were engendered by focusing on the "last-day" filing; if the complaint is filed well within the limitations period, awkward results seem to follow. These results are discussed below after beginning with the "mistake" question that prompts the discussion.

Mistake

Notice to the new defendant must satisfy two Rule 15(c)(3) criteria that are crafted to reflect the major purposes of limitations statutes. Within the Rule 4(m) period, the new party must have:

> (A) * * * received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party.

The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering. Knowing that the new party would have been sued if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period.

The *Worthington* case involved a not uncommon problem. The plaintiff was arrested. The plaintiff believed that the arresting officers had used unlawful force, causing significant injuries. The plaintiff did not know the names of the arresting officers. At the end of the two-year limitations period provided by Illinois law, the plaintiff sued the village and three unknown-named police officers. There was in fact no tenable § 1983 claim against the village, given the limits on respondeat superior liability in § 1983 actions and the inability to claim a village policy or the like. But the plaintiff was able to discover the names of two arresting officers and sought to amend to name them as defendants. It was conceded that the officers had notice of the action within 120 days, and that the notice satisfied the Rule 15(c)(3) requirements. Relation back was denied, however, because there was no "mistake." It was not as if the plaintiff thought that Sergeant Preston had arrested him, and discovered only later that in fact it was Officers Wilson and Wall. The plaintiff

knew from the beginning that he did not know the identity of the proper defendants. This was ignorance, not mistake.

On its face, the result in the *Worthington* case seems strange. The plaintiff very well may have faced insuperable difficulties in learning the identities of the arresting officers. Neither the arresting officers nor their police-department compatriots may have been willing to come forward. Many departments may lack sufficiently rigorous internal investigation procedures to ensure a reasonable opportunity to penetrate the wall of silence. Filing an action and discovery may be the only way to force production of the critical information. Why should the plaintiff be left out in the cold when state law does not provide a tolling principle that would invoke Rule 15(c)(1)?

If the result is in fact untoward, it would be easy to amend Rule 15(c)(3) to correct the result in a rough way. Subparagraph (2) could require that the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" it. This approach is rough because it does not look to the diligence of the plaintiff who lacked information. It might be enough to add one more word: "but for a mistake or reasonable lack of information." But this too is rough, because the setting requires that the new defendant know that it is a reasonable lack of information, and how is the new defendant to know that? More complicated redrafting will be required to specify that the plaintiff's lack of information remained after diligent effort to identify the proper defendants, and that the new defendant knew it would have been named but for a mistake or lack of information.

That leaves, first, the question whether there is some principled ground to be more demanding when the plaintiff knows that he does not know the identity of one or more proper defendants. It can be argued that indeed there is. The plaintiff in these circumstances knows that if he waits to file until the end of the limitations period, it will not be possible to get notice to the proper defendants within the limitations period or even very soon after it has expired. Perhaps this plaintiff should be forced to file well before the limitations period has expired, to facilitate notice to the defendant within the limitations period or within a brief time after the limitations period. This argument could be bolstered by observing that it minimizes the intrusion on state law when it is state law that supplies the limitations period. If state law does not allow relation back, why should a federal court, even if the federal court is enforcing federal law?

That argument may not seem forceful, but it is the most plausible one that comes to mind. It may gain some force from a different consideration. The problem facing the plaintiff in the *Worthington* case is not easily met by filing an action well within the limitations period. Who is to be the defendant? The plaintiff escaped Rule 11 sanctions for suing the village only because the complaint was filed in state court, and under the version of Rule 11 then in effect the court concluded that it could not apply sanctions. The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts. See, e.g., *Petition of Ford,* M.D.Ala.1997, 170 F.R.D. 504. Perhaps it would not do much good to allow correction when the defendant lacks information as to the identity of the defendant. But there will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.

An amendment supplementing the "mistake" language in Rule 15(c)(3)(B), in short, is attractive, but it may not reach very many cases. Drafting also may not be as easy as might be wished.

Any draft should confront — at least in Committee Note — the distinction between two problems. In one, the plaintiff can — within the limits of Rule 11 — identify one real defendant, but hopes to enhance the quality of notice to unidentified defendants by pleading that there are others who will be sued when they can be identified. Adding a "Doe" or "unknown-named" defendant, as an "unknown-named police officer," does carry a message to the unidentified defendant that the plaintiff wants to sue. That practice might well be blessed in the Note, to avoid Rule 10 questions. In the other, the plaintiff is unable to name any real defendant without violating Rule 11. What advice do we give for that situation? That it is, after all, proper to sue only unknown-named defendants, so long as Rule 11 is satisfied as to the existence of a claim against someone unidentifiable? Does an action against parties who are real but who cannot be identified satisfy Article III — is there a real case or controversy? If the only purpose of protecting the opportunity to sue is to provide a vehicle for discovery, would it be better after all to create a procedure for discovery in aid of framing a complaint?

Rule 4(m) Incorporation

The specification that the new defendant must know of the mistake within the period provided by Rule 4(m) for effecting service of the summons and complaint is easily understood when the complaint is filed at the end of the limitations period. Suppose a 2-year, 730-day limitations period applies. The complaint is filed on Day 730. If the proper defendant is properly named, the effect of Rule 4(m) — putting aside Erie complications for the moment — is that service up to Day 850 is proper. Since a properly identified defendant is exposed to actually learning of the suit as late as Day 850, it seems to make sense to say that it also is enough that the properly intended defendant, although not named, should be exposed to substitution if knowledge of the mistake was brought home at any time up to Day 850. That is the problem of the *Schiavone* case, and it is cured by the incorporation of Rule 4(m).

The snag is that Rule 4(m) begins to run with the filing of the complaint, not the expiration of the limitations period. If the complaint is filed on Day 180, the plaintiff has until Day 300 to effect service. If the new defendant learns of the mistake on Day 190, everything is fine, even if the plaintiff does not become aware of the problem until Day 735. But if the defendant learns of the mistake on Day 350, the Rule 4(m) period has expired and the condition of Rule 15(c)(3) seems not to be satisfied. Of course there is no problem if the plaintiff also learns of the problem before Day 730 and amends to bring in the new defendant — the limitations period is met without any need for relation back. But if the plaintiff learns of the problem on Day 735, it is too late. It is too late even though the plaintiff would have been protected if the plaintiff had waited to file until Day 730 and the new defendant had learned of the action on day 734, not day 350.

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

[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.

easily excused when there was no defendant to tell it of the mistake, even though the new defendant has little concern with that? Or is it an extension of time for service on the new defendant? But if it is an extension of time for service on the new defendant, the scheme takes hold only when the plaintiff has learned of the new defendant and asks for an extension. By then, the determination of the extension period also will involve a discretionary determination of the extent to which the limitations period should be extended.

It may be possible to read the incorporation of Rule 4(m) in a still more expansive way. Although the Committee Note illustrates only an extension actually granted, it does not specify the time when the extension was granted. Perhaps invocation of the Rule 4(m) power to extend the time for service would support an ad hoc determination that the time when the new defendant learned of the action and the mistake was "soon enough," so the court will "extend" the time for "service" to include that time even though there is in fact no problem of service at all. This interpretation would create an open-ended power to suspend the statute of limitations in favor of a plaintiff who mistakes the proper defendant, even though there is no such power to favor a plaintiff who simply waits too long to sue (often in a layman's forgivable ignorance of the limitations period). That would be exceedingly strange, and directly contrary to the general belief that limitations periods should be held as firmly as possible.

Putting these problems together, the drafting decision to incorporate Rule 4(m) into Rule 15(c)(3) seems very strange. Only with brute force can the text of the two rules be made to generate sensible answers, supposing we know what the sensible answers are.

Adding Plaintiffs

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.

Calendar for March 2004 - May 2004 (USA)

March 2004

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

April 2004

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

May 2004

Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Holidays and Observances

9 Good Friday
11 Easter Sunday
12 Easter Monday
9 Mother's Day
31 Memorial Day

Calendar generated on http://www.timeanddate.com/calendar/