ADVISORY COMMITTEE
ON
CIVIL RULES

Brooklyn, NY
April 19-20, 2007

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 19-20, 2007

1. Introductory Remarks by Chair and Reporter; Report on Standing Committee Meeting of January 2007 and Judicial Conference Meeting of March 2007

2. **ACTION** – Approving minutes of September 7-8, 2006, Advisory Rules Committee meeting

3. **ACTION** – Approving for publication proposed new Rule 62.1, dealing with indicative rulings

   A. Text of proposed new rule
   B. Background information, including material on proposed conforming Appellate Rule 12.1

4. **ACTION** – Approving for publication proposed rule amendments on time computation

   A. Further revisions to the template for calculating time
   B. Time periods adjusted in specific rules
   C. Statutory provisions specifying time periods

5. **ACTION** – Approving for publication proposed rule amendments to Rule 81(d) on application of the rules to "territories"

6. Report of Rule 26 Subcommittee

   A. Memorandum on Rule 26(a)(2) issues
   B. Report on meeting with New Jersey lawyers experienced in expert witness local rule
   C. Minutes of a January 13, 2007, mini-conference held on expert witness issues

7. Report of Rule 56 Subcommittee

   A. Memorandum on issues amending Rule 56
   B. Text of possible amendments to Rule 56
   C. Redline version and Committee and Reporter's Notes
   D. Memorandum on local rules dealing with summary judgment
   E. Status report on proposal to amend Rule 12(e), dealing with notice pleading

8. Report of the Federal Judicial Center on class actions study (materials to be circulated later)

9. Report on Status of Proposed Amendments to Rule 68

10. Dates of next meeting to be announced

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Chair:

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Washington, DC 20544

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Chilton Davis Varner, Esquire
Daniel C. Girard, Esquire
Anton R. Valukas, Esquire
Professor Richard L. Marcus, Special Reporter
DOJ Representative

Subcommittee on Rule 56 – Pleading
Judge Michael M. Baylson, Chair
Judge Paul J. Kelly, Jr.
Judge Vaughn R. Walker
Judge C. Christopher Hagy
Justice Randall T. Shepard
Robert C. Heim, Esquire
Anton R. Valukas, Esquire
DOJ Representative

Subcommittee on Time Counting
Subcommittee A
Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
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Honorable Peter D. Keisler

Subcommittee B
Judge Michael M. Baylson, Chair
Judge Jose A. Cabranes
Judge Vaughn R. Walker
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

March 20, 2007
Projects

ADVISORY COMMITTEE ON CIVIL RULES

			Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	Member: 1996 Chair: 2003	---- 2007
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2007
Jose A. Cabranes	C	Second Circuit	2004	2007
David G. Campbell	D	Arizona	2005	2008
Steven S. Gensler	ACAD	Oklahoma	2005	2008
Daniel C. Girard	ESQ	California	2004	2007
C. Christopher Hagy	M	Georgia (Northern)	2003	2009
Robert C. Heim	ESQ	Pennsylvania	2002	2008
Peter D. Keisler *	DOJ	Washington, DC	----	Open
Paul J. Kelly, Jr.	C	Tenth Circuit	2002	2007
Randall T. Shepard	CJUST	Indiana	2006	2009
Anton R. Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2007
Vaughn R. Walker	D	California (Northern)	2006	2009
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

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* Ex-officio

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Honorable Thomas S. Zilly United States District Judge United States District Court United States Courthouse 700 Stewart Street, Suite 15229 Seattle, WA 98101	Professor Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
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JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 27, 2007

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Supplemental Rule C(6)(a) and Proposed Amendments to Civil Rules 13(f) and 15(a)*

The materials behind Tab 1 include the Preliminary Report of the Judicial Conference approving the technical amendment to Supplemental Rule C(6)(a) and agreeing to transmit it to the Supreme Court with a recommendation that it be approved and transmitted to Congress. Also attached are the proposed amendments to Civil Rules 13(f) and 15(a), which were approved for publication by the Standing Committee at its January 2007 meeting. The proposed amendments are expected to be published for comment in August 2007.

John K. Rabiej

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 13, 2007

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

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At its March 13, 2007 session, the Judicial Conference of the United States:

Elected to the Board of the Federal Judicial Center, each for a term of four years, Judge David O. Carter of the District Court for the Central District of California to succeed Judge James A. Parker of the District Court for the District of New Mexico, and Judge Philip M. Pro of the District Court for the District of Nevada to succeed Judge Sarah S. Vance of the District Court for the Eastern District of Louisiana.

COMMITTEE ON THE ADMINISTRATIVE OFFICE

Agreed to support the Department of Justice in its efforts to secure legislation extending its statutory deadline for submitting wiretap data to the Administrative Office, provided that any such modification include a commensurate extension of the judiciary's deadline for submitting the annual wiretap report to Congress.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the Administrative Office to transmit to Congress proposed legislation authorizing: (1) three additional bankruptcy judgeships for the Eastern District of Michigan and one for the Northern District of Mississippi, and (2) the conversion of the existing temporary positions to permanent (one each) in the Eastern District of Michigan, the Southern District of Georgia, the Southern District of Illinois, and the Western District of Tennessee

Rescinded its 1991 position to seek legislation as a means to assure that trustees in cases converted to chapter 7 of the Bankruptcy Code receive compensation equivalent to the compensation received by trustees in cases originally filed under that chapter.

Approved raising the "informal recognition" non-monetary award cap from $50 to $100 per court employee, per year.

COMMITTEE ON JUDICIAL SECURITY

Agreed to support the efforts of the United States Marshals Service, through administrative and/or legislative remedies, to assume the security functions currently performed by the Federal Protective Service in courthouses, as appropriate, and the associated funding.

Endorsed judiciary participation in the Homeland Security Presidential Directive-12 program, which establishes a secure form of identification to be issued by the federal government to its employees and contractors.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved a proposed amendment to Rule C(6)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and agreed to transmit this change to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Endorsed the proposed Five-Year Courthouse Project Plan for FYs 2008-2012, subject to revisions related to project costs, funding phases, or congressional action.

Approved, pursuant to the budget check process, the actions taken by the Committee on Space and Facilities regarding several space requests.

For prospectus-level courthouse projects, agreed that the Conference must specifically approve each departure from the *U.S. Courts Design Guide* approved by a circuit judicial council that results in additional estimated costs of the project (including additional rent payment obligations), after review by the Space and Facilities Committee. If the departure is approved by the Conference, the chairperson of the circuit space and facilities committee or the chief judge or project judge requesting construction that exceeds *Design Guide* criteria must be willing, if requested by the Committee on Space and Facilities, to appear before Congress concerning funding for such construction.

Endorsed the use of the following naming conventions for federal courthouses:

a. For a facility occupied solely by a federal court, the title "United States Courthouse" should be used;

PROPOSED AMENDMENT TO THE RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS*

Rule C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) ~~*Maritime Arrests and Other Proceedings*~~ *Statement of Interest; Answer.* **In an action in rem:**

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

* * * * *

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 13. Counterclaim and Crossclaim

* * * * *

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

* * * * *

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim is governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright,*

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

A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) ~~before being served with a responsive pleading;~~ 21 days after serving it, or

(B) ~~within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to

the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,** and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

**This statement anticipates adoption of Style-Substance Rule 40 on December 1, 2007.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Joan E. Meyer, Senior Counsel to the Deputy Attorney General, participated in the meeting on behalf of Deputy Attorney General Patrick J. McNulty, *ex officio* member of the committee. The Department of Justice was also represented at the meeting by Elizabeth U. Shapiro of the Criminal Division.

Also in attendance were Justice Charles Talley Wells, Judge J. Garvan Murtha, and Dean Mary Kay Kane (former members of the committee); Judge Patrick E. Higginbotham (former chair of the Advisory Committee on Civil Rules); Justice Andrew D. Hurwitz (member of the Advisory Committee on Evidence Rules); Patricia Lee Refo, Esquire (former member of the Advisory Committee on Evidence Rules); and Professor Stephen C. Yeazell.

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs of the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; Matthew Hall, law clerk to Judge Levi; and Joseph F. Spaniol, Jr., Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the committee.

Representing the advisory committees were:

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

INTRODUCTORY REMARKS

Judge Levi welcomed Chief Justice George, Judge Teilborg, and Professor Meltzer as new members of the committee. He noted that Chief Justice George had served at every level of the California state courts, been a very successful prosecutor, and served on the Judicial Conference's Federal-State Jurisdiction Committee. He explained that Judge Teilborg had built and led a great Arizona law firm and now sits as a U.S. district judge in Phoenix. He pointed out that Professor Meltzer teaches at the Harvard Law School, is a truly gifted legal scholar, authors the Hart and Wechsler text book, and serves on the council of the American Law Institute.

Judge Levi expressed regret that the terms of three outstanding members of the committee had expired on October 1, 2006 – Justice Wells, Judge Murtha, and Dean Kane. He presented them with plaques for their service signed by the Chief Justice. He praised Justice Wells for his great wisdom and for the unique perspective that he brought to the committee on issues affecting federalism and the state courts. He thanked Judge Murtha for his enormous contributions to the civil rules restyling project over the last several years, for chairing the committee's style subcommittee, and for his work as advisory committee liaison. He honored Dean Kane for her indefatigable work over several years on the civil rules restyling project and for her outstanding scholarship and uncanny problem-solving ability.

Judge Levi announced that he would be leaving the federal bench on July 1, 2007, to accept the position of dean of Duke Law School. He said that he would sorely miss the challenging work of the federal judiciary. But he would miss even more the people with whom he has worked. He said that the federal judiciary is comprised of the most astonishing group of men and women in the country. He added that he was excited about his new job, but would like to continue to be of assistance to the federal judiciary in the future.

Judge Levi reported that the September 2006 meeting of the Judicial Conference had been uneventful in that all the rule amendments recommended by the committee had been approved on the Conference's consent calendar without discussion. The approved rules included the complete package of restyled civil rules and the amendments to the civil, criminal, bankruptcy, and appellate rules to protect privacy and security interests under the E-Government Act of 2002. Judge Levi also reported that the controversial FED. R. APP. P. 32.1, allowing citation of unpublished opinions in all the circuits, had gone into effect on December 1, 2006.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on June 22-23, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on two legislative matters of interest to the committee. First, he said, Representative F. James Sensenbrenner, Jr., former chairman of the House Judiciary Committee, had asked the Judicial Conference to initiate rulemaking to address certain issues arising from the waiver of evidentiary privileges through disclosure. He reported that the Advisory Committee on Evidence Rules had drafted a proposed new FED. R. EVID. 502 that would explicitly address waivers of attorney-client privilege and work product protection. But, he explained, the Rules Enabling Act specifies that any rule amendment affecting an evidentiary privilege requires the affirmative legislative approval of Congress. Mr. Rabiej added that with the recent change in control of Congress from the Republicans to the Democrats, it will be necessary for representatives of the judiciary to discuss the proposed Rule 502 with the new leadership of the judiciary committees.

Second, Mr. Rabiej reported that on December 6, 2006, the Senate Judiciary Committee had conducted an oversight hearing on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He said that the judiciary had not sent a witness to testify at the hearing, but had submitted a statement from Judge Zilly, chair of the Advisory Committee on Bankruptcy Rules. The statement reported on the actions of the advisory committee in developing rules and forms to implement the Act, and it included extensive attachments documenting the enormous efforts made by the judiciary to implement the new statute.

Mr. Rabiej added that Senator Grassley had made a remark at the hearing complaining that the advisory committee had not faithfully carried out the intent of the law in drafting the new means test form for consumer bankruptcy cases. He said that Judge Zilly sent a letter to the senator explaining in detail that the advisory committee had faithfully executed the plain language of the statute in drafting the form. The committee will consider his letter at its April 2007 meeting, along with other suggestions submitted during the public comment period.

Mr. Rabiej reported that the proposed rule amendments approved by the Judicial Conference had been hand-carried to the Supreme Court in December 2006. He added that all the proposed rules, as well as public comments and other committee documents, have been posted on the judiciary's web site. He said that the Administrative Office is

working with the committees' reporters to give them direct access to all the documents in the rules office's electronic document management system.

Mr. McCabe added that all the records of the rules committees since 1992 are in the electronic document management system and fully searchable. In addition, all committee reports and minutes since 1992 have been posted on the judiciary's public web site, and all committee agenda books back to 1992 will soon be posted. In addition, he said, a majority of committee reports and minutes before 1992 have been located, converted to electronic form, and posted on the web site. But, he said, many rules records before 1992 are not available in the files of the Administrative Office. The staff has been searching the archives of law schools and the papers of former reporters and members to locate the missing documents. The ultimate goal of the rules office, he said, is to find and post on the web site all the key rules documents from the beginning of the rules system to the present and to make them readily searchable with a good search engine.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center. He directed the committee's attention to three research projects.

First, he said, judges have a great personal interest in how their courtrooms are being used. He reported that the Center was working with the Court Administration and Case Management Committee of the Judicial Conference on a comprehensive courtroom usage study in response to a specific request from Congress. Among other things, he said, members of Congress have noticed that the number of trials in the district courts has been declining steadily, and they question whether courtrooms are being used fully and effectively.

Second, Mr. Cecil said, the Center is developing educational materials for judges on special case management challenges posed by terrorism cases, based on lessons learned by judges who have already handled terrorism cases.

Third, he reported that the Center is continuing to gather information for the Advisory Committee on Civil Rules regarding summary judgment practices in the district courts. He added that Center researchers are examining summary judgment motions filed in 2006, how they were handled by the district courts, and what their outcomes were.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 6, 2006 (Agenda Item 5).

Informational Items

Judge Stewart reported that the advisory committee had met in November 2006 and had decided to approve in principle amendments to two rules.

First, a proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would eliminate an ambiguity created in the 1998 restyling of the appellate rules. The current rule might be read to require an appellant to amend its notice of appeal in any case in which the district court amends the judgment after the notice of appeal has been filed. Judge Stewart said that the advisory committee believed that the problem could be cured by fine tuning the language of the rule. He said that the committee would take another look at the exact language at its next meeting.

Second, Judge Stewart reported that the advisory committee had received a suggestion to amend FED. R. APP. P. 29 (brief of an amicus curiae). Modeled after Supreme Court Rule 37, the amended appellate rule would require the filer of an amicus brief to disclose whether the brief is authorized or funded by a party in the case. He said that the advisory committee had decided that a uniform national rule was preferable in this area to a variety of local circuit rules. He reiterated that the committee had approved the Rule 29 amendment in principle, subject to further refinements. One member suggested, though, that the Supreme Court rule may not be particularly helpful and is not strictly enforced.

Judge Stewart noted that the advisory committee had been busy with the time-computation project. He pointed out that Professor Struve, the advisory committee's reporter, was also serving as the reporter for the overall time-computation project and had compiled a huge amount of valuable information. He added that a special Deadlines Subcommittee, chaired by Judge Jeffrey S. Sutton (6th Circuit), had reviewed each time limit in the appellate rules, especially the short periods that would be affected by the change in time-computation approach under the proposed new uniform rule.

Judge Stewart said that the advisory committee had also looked into whether it would be useful for the new time-computation rule to include a provision addressing dates certain, as opposed to dates that require computation, and it had concluded that such a provision was not necessary. He added that some members of the committee had

misgivings about the very need for the time-computation project, particularly with regard to its impact on deadlines set forth in statutes. Nevertheless, he said, the committee would proceed with the project at its April 2007 meeting.

Judge Stewart reported that the advisory committee was continuing to consider whether too many briefing requirements are set forth in the local rules of the courts of appeals. He said that the Federal Judicial Center had completed an excellent study identifying and analyzing all the briefing requirements of the circuits, and he had written a letter to the chief judges of the circuits expressing the advisory committee's concern over local requirements and whether all were necessary. He said that the letter to the chief judges referred to the work of the Federal Judicial Center and emphasized the need to make all local procedural requirements readily accessible to practitioners. He added that the chief judges of six of the circuits had responded to his letter, and the advisory committee would consider the responses at its April 2007 meeting. Professor Capra added that, in the course of reporting the results of the district court local rules project, the chief district judges had been very positive in responding to the letters from the Standing Committee identifying local rules that appeared to be inconsistent with the national rules.

One member pointed out that some local rules are of substantial benefit to the circuit courts, and there will be a great deal of opposition to eliminating them. But, he said, some of the beneficial provisions now contained in local rules might well be incorporated into the national rules. Judge Stewart responded, though, that there are a great many variations among the circuits in their local rules, and it would be very difficult to reach agreement on the contents of the national rules. A member observed that circuit courts do not hear many complaints from the bar about their local rules because attorneys who practice regularly before a particular court get used to the local requirements. Courts, he added, rarely hear from attorneys who have a national practice.

Another member noted that he finds it increasingly difficult as a practitioner to know how to prepare briefs because of the proliferation of local rules. Many local requirements, he said, are little more than busy work and create potential traps for the bar. Moreover, the staff of the clerks' offices waste time kicking the papers back to lawyers for noncompliance with the local rules. He encouraged the advisory committee to continue its work in the area. But he concluded that local briefing requirements, while annoying, do not rise to the level of importance in the overall scheme of the advisory committee's work, for example, as the new FED. R. APP. P. 32.1, which has overridden local circuit rules that had barred lawyers from citing unpublished opinions.

Judge Levi pointed out that the rules committees should continue to be concerned about local rules. He noted that some local rules affect substance, and many increase costs and create confusion for the bar. Professor Coquillette added that Congress, too,

has expressed concerns regarding local court rules – as opposed to the national rules – because local rules do not go through the Rules Enabling Act process, which affords Congress an opportunity to review and reject the rules.

Judge Stewart reported that the advisory committee had on its study agenda a proposal from the Virginia State Solicitor General to amend FED. R. APP. P. 4 (notice of appeal – when taken) and FED. R. APP. P. 40 (petition for panel rehearing) to treat state-government litigants the same as federal-government litigants for the purpose of giving them additional time to take an appeal or to seek rehearing. He mentioned that members of the advisory committee had questioned the need for the changes, as well as the scope of the proposed amendments. He said that the committee would study the proposal further.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of November 30, 2006 (Agenda Item 8).

Amendments for Publication

FED. R. BANK. P. 7052, 7058, and 9021

Judge Zilly reported that the advisory committee was seeking authority to publish amendments to FED. R. BANK. P. 7052 (findings by the court) and FED. R. BANK. P. 9021 (entry of judgment) and a proposed new FED. R. BANK. P. 7058 (entry of judgment). The package of three rules would address the requirement of FED. R. CIV. P. 58(a) that every judgment be set forth on a "separate document" and coordinate the bankruptcy rules with recent revisions to the civil rules.

He explained that when a court fails to enter a judgment on a separate document, revised FED. R. CIV. P. 58 provides a default 150-day appeal period, rather than the normal 30-day appeal period in the civil rules. Bankruptcy matters, he said, usually require prompt finality, and the bankruptcy rules provide for a shorter 10-day appeal period generally. The key questions for the advisory committee, thus, are: (1) whether the bankruptcy rules should continue to contain the separate document requirement; and (2) whether the bankruptcy system can live with the default 150-day appeal period of the civil rules. He explained that the advisory committee had decided to retain the separate document requirement for adversary proceedings because they are similar to civil cases. But the more difficult question is whether to retain the separate document requirement for contested matters.

Judge Zilly noted that the advisory committee had a heated discussion on the matter. Half the members favored enforcing the separate document requirement for all judgments in bankruptcy cases, including judgments in contested matters, because it provides certainty to the litigation process. The other half argued, though, that many bankruptcy courts simply do not comply with the present rule, finding it administratively difficult to enter separate judgments on every matter when bankruptcy judges commonly dispose of large numbers of contested matters on a single calendar. Judge Zilly reported that the committee had decided ultimately, on his tie-breaking vote, that contested matters should no longer be subject to the separate document rule. Thus, in contested matters, the docket entry of the judge's decision will be sufficient to start running the appeal period.

As a matter of drafting, Professor Morris explained that Part VII of the Bankruptcy Rules applies the Federal Rules of Civil Procedure to adversary proceedings. There is, however, no counterpart to FED. R. CIV. P. 58 in Part VII. Instead Civil Rule 58 is made applicable to both adversary proceedings and contested matters through FED. R. BANKR. P. 9021. The advisory committee's proposal would confine the separate document requirement of Rule 58 to adversary proceedings by: (1) creating a new FED. R. BANKR. P. 7058 just for adversary proceedings; and (2) eliminating the reference to Civil Rule 58 in FED. R. BANKR. P. 9021.

Several committee members suggested changes in the language of the proposed amendments, and Judge Zilly agreed that the advisory committee would address the suggestions at its March 2007 meeting.

Judge Hartz moved to approve the proposed amendments in principle, with the understanding that the advisory committee would consider additional changes in language. The committee by voice vote unanimously approved the motion.

Informational Items

Judge Zilly reported that the advisory committee had published a large package of rules amendments and forms in August 2006 designed to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Most of the rules, he said, were derived from the interim rules used in the bankruptcy courts since October 2005. He noted that the public hearing on the amendments had been cancelled because no witnesses had asked to appear. The committee, he said, would consider all the written public comments at its March 2007 meeting and return to the Standing Committee in June 2007 for final approval of the package.

Judge Zilly reported that the advisory committee had created a subcommittee to apply the proposed new time-computation proposals to the bankruptcy rules. He noted that the subcommittee already had identified more than a hundred time limits in the

bankruptcy rules that would be affected by the proposals. He noted, moreover, that the bankruptcy rules currently differ from the other federal rules because they exclude weekends and holidays in computing time periods of fewer than 8 days, rather than periods of fewer than 11 days.

Judge Zilly explained that the advisory committee would be prepared to present appropriate amendments dealing with time limits for approval at the June 2007 Standing Committee meeting. But, he said, members of the committee had expressed concern over going forward with more changes to the bankruptcy rules so soon after having published a large package of proposed amendments in August 2006. Moreover, many of the time-limit changes arise in rules already being amended for other reasons.

Judge Zilly noted that the advisory committee had also identified a modest number of provisions in the Bankruptcy Code that impose time limits of fewer than 8 days. He said that legislation to amend the Code should be pursued because the new time-computation rules will effectively shorten these short statutory periods even further by including weekends and holidays in the count.

Judge Zilly reported that the advisory committee was considering potential changes in the bankruptcy rules to implement section 319 of the 2005 bankruptcy legislation. Section 319 would enhance the obligations of debtors' attorneys (and pro se debtors) regarding the papers they file with the court and with trustees. It states that it is the sense of Congress that FED. R. CIV. P. 9011 (sanctions) should be modified to require that all documents, including schedules, submitted on behalf of a debtor under all chapters of the Code contain a verification that the debtor's attorney (or a pro se debtor) has "made reasonable inquiry to verify that the information contained in [the] documents" is well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law. He noted that the language of the statute is different from that of the current Rule 9011.

Judge Zilly pointed out that a separate section of the new law, now codified at 11 U.S.C. § 707(b)(4)(C) and (D), made similar, but not identical, changes affecting the obligations of attorneys in Chapter 7 cases only. Section 707(b)(4)(C) provides that a debtor's attorney's signature on a Chapter 7 petition, pleading, or written motion constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" to determine that the document is well grounded. Section 707(b)(4)(D) provides that an attorney's signature on a Chapter 7 petition constitutes a "certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Zilly explained that the advisory committee had decided originally not to propose an amendment to FED. R. CIV. P. 9011 (signing of papers, representations to the court, and sanctions) to mirror the statute because the statute itself is so specific regarding the obligations of debtors' attorneys. But, he said, the committee had agreed to change the official petition form to include a warning alerting attorneys to the new obligations imposed on them by the 2005 legislation.

Judge Zilly added that letters had been received from Senators Grassley and Sessions urging the advisory committee to amend the bankruptcy rules to reinforce the statutory provision. Judge Zilly pointed out that the advisory committee was continuing to study the issue and might change its original position. He noted that because the statute was designed by Congress to push more debtors from Chapter 7 into Chapter 13, the committee might recommend that the same debtor-attorney verification now applicable in Chapter 7 cases by statute be extended by rule to filings under all chapters of the Code.

Judge Zilly reported that a Senate Judiciary Committee subcommittee had held an oversight hearing in December 2006 to review implementation of the 2005 bankruptcy legislation. He noted that he had been invited to speak, but had been tied up in a criminal trial and could not attend. He did, however, submit a written report documenting the enormous efforts of the judiciary to implement all the requirements of the legislation.

At the hearing, he noted, Senator Grassley had submitted written comments criticizing the advisory committee for including an entry on the new means-testing form that allows a debtor to claim certain expenses that the debtor may not have actually incurred. Judge Zilly pointed out, though, that the committee had scrupulously followed the language of the statute in drafting the form. He added that he had sent a response to Senator Grassley explaining that the plain language of the statute compelled the language adopted by the advisory committee. Moreover, he added, the form in question was part of a package of rules and forms still out for public comment.

Judge Levi pointed out that the advisory committee had faithfully complied with its obligation to implement the statute as written. He congratulated Judge Zilly, Professor Morris, and the entire advisory committee for a monumental achievement in producing a comprehensive package of rules and forms to implement the 2005 legislation.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of December 12, 2006 (Agenda Item 9).

Judge Rosenthal pointed out that most of the items in the advisory committee's report had been brought to the Standing Committee's attention previously, some of them in connection with the project to restyle the civil rules. She noted that the advisory committee had delayed moving on the proposals until it had completed its work on the restyling and electronic discovery projects.

Amendments for Final Approval

SUPPLEMENTAL RULE C(6)(a)

Judge Rosenthal reported that the proposed changes to Supplemental Rule C(6)(a) (statement of interest) were purely technical and did not have to be published. They would correct a drafting omission occurring during the course of adopting Supplemental Rule G, which took effect on December 1, 2006. The new Rule G abrogated portions of other supplemental rules and gathered in one place the various provisions of the supplemental rules dealing with civil forfeiture actions in rem.

In amending Rule C, though, the committee forgot to capitalize the first word of subparagraph (6)(a)(i). Judge Rosenthal explained that the omission could be cured simply by inserting the capital letter, but the advisory committee had decided to make some additional minor changes to improve the way the rule reads and to make it parallel with other subdivisions of the rule.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

Amendments for Publication

FED. R. CIV. P. 13(f)

Judge Rosenthal reported that the advisory committee was recommending deletion of Rule 13(f) (omitted counterclaim). The committee, she added, had considered eliminating the rule as part of the restyling process, but had decided that the change was substantive in nature.

Rule 13(f) allows a court to permit a party to amend its pleading to add a counterclaim if justice so requires. She explained that it is largely redundant of Rule 15(a) (amended and supplemental pleadings) and is potentially misleading. She noted that the standards in the two rules for permitting amendments to pleadings sound different, but they are administered identically by the courts. Deletion of Rule 13(f), she said, will bring all pleading amendments within Rule 15 and ensure that the same amendment standards apply to all pleading amendments.

The committee without objection by voice vote approved deletion of Rule 13(f) for publication.

FED. R. CIV. P. 15 (a)

Judge Rosenthal reported that the advisory committee was proposing a change in Rule 15(a) (amendments to pleadings before trial) that would give a party 21 days after service to make one pleading amendment as a matter of course. The change, she said, would make the process of amending pleadings less cumbersome for the parties and the court. She noted that the committee had also considered making changes to Rule 15(c), dealing with the relation back of amendments to pleadings, but had decided not to do so because the subject matter is enormously complicated and the textual problems in the current Rule 15(c) do not seem to have caused significant difficulties in practice.

Judge Rosenthal pointed out that the proposed revision in Rule 15(a) would set a definite time period within which a party may amend a pleading as a matter of right. Under the current rule, serving a responsive pleading terminates the other party's right to amend as a matter of course. On the other hand, serving a motion attacking the pleading delays the time to file a responsive pleading and thus extends the time within which a party may amend a pleading as a matter of right. The rule causes problems because the party filing a motion attacking the complaint – and the judge – may invest a good deal of work on the motion only to have the pleader amend its pleading as a matter of right. In many cases, he noted, after an opponent points out an error in a pleading, the pleader will simply admit the error and amend the pleading.

Judge Rosenthal said that the advisory committee had decided that there was no reason to continue that distinction. Accordingly, the proposed amendment gives a party the right to amend its pleading within 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f). She added that the amendment recognizes the current reality that courts readily give pleaders at least one opportunity to amend.

In addition, Judge Rosenthal explained that the advisory committee had extended a party's response time from 20 days to 21 days in light of the general preference of the time-computation project to fix time limits in 7-day intervals. The amended rule also

eliminates the current reference to a "trial calendar" because few courts today maintain a central trial calendar. Finally, she noted, a party may also continue to seek leave to amend under Rule 15(a)(2) or Rule 15(b).

Professor Cooper mentioned that the advisory committee for several years had been looking at recommendations to reconsider notice pleading as one of the basic features of the civil rules. But, he said, it had always decided that the time was not right to make such a change. Allowing the parties great flexibility to amend pleadings reflects the spirit of the current notice-pleading system. Since the courts freely allow parties to amend pleadings, the advisory committee decided that it would make considerable sense to give a pleader 21 days to amend as a matter of course.

Professor Cooper said that the proposed rule would take something away from plaintiffs by cutting off their automatic right to amend after 21 days in all cases. It would also take something away from defendants by eliminating their right to cut off the plaintiffs' automatic right to amend through the filing of an answer. The advisory committee, he said, had concluded that the current distinction may make some sense, but on balance it is not needed. In most cases when a motion to dismiss is filed, it is filed before an answer is filed. The proposed rule, therefore, would only make a difference in the rare case where a motion to dismiss follows, rather than precedes, an answer.

Judge Rosenthal reported that, following the advisory committee meeting, a Standing Committee member had submitted thoughtful comments questioning the wisdom of the proposed amendment. She pointed out that his comments, together with a response from the advisory committee's Rule 15(a) Subcommittee, had been included in the agenda book for the information of the Standing Committee.

The member asserted that it is important for defendants to have the ability, by filing an answer, to cut off a plaintiff's right to amend a complaint without leave of court. He said that the proposed rule takes this right away from defendants, and in so doing alters the current balance between plaintiffs and defendants. He acknowledged that in the normal case, a defendant will challenge a defective pleading by filing a motion to dismiss, rather than an answer. But in the infrequent case where the defendant believes that it has a complete defense on the law, it will file an answer first and only then file a motion to dismiss.

By removing this possibility, the proposed rule would do more than restrict the defendant's options in those infrequent cases where the defendant would file an answer first. The proposed rule would have broader negatives consequences in a wide range of other cases.

He explained that some commercial litigation is initiated by badly drafted, badly conceived complaints, often in complete ignorance of the law. The first motion filed by the defendant is often a treatise in the form of a motion to dismiss, requiring the plaintiff to file a whole new complaint. By this tactic, the plaintiff manages to impose on the defendant the cost of educating the plaintiff about the applicable law. Then the defendant has to incur the further expense of filing a second motion to dismiss the new complaint.

The current Rule 15, however, gives plaintiffs cause to pause before filing their complaint, because if the defendant files an answer instead of a motion to dismiss, the plaintiff needs leave of court to amend the complaint, and the plaintiff cannot be certain that leave will be granted. Plaintiffs have to take into account the possibility that the defendant can cut off their right to amend their defective complaint by filing an answer first, followed by a motion to dismiss. This, he said, makes some plaintiffs more careful in preparing the complaint. It is a benefit that accrues to the system in a wide range of cases, not only to the particular defendants in those few cases where an answer actually is filed first. The impact is hard to quantify, he said, but it is real. The rules should encourage plaintiffs to put formality and forethought into their filings, and the proposed change would undercut that.

Under the proposed rule, he said, there will be no means by which the defendant can cut off the plaintiff's right to amend, and plaintiffs will know that. The proposed rule will have the effect of requiring defendants, even if they have a strong legal defense, to incur the costs of filing two motions to dismiss without any corresponding burdens on the plaintiff.

Another member pointed out that the problem raises the more fundamental issue of reconsidering the whole concept of notice pleading. Judge Levi responded that the issue was on the long-term agenda of the advisory committee. But, he said, the committee was not inclined to address the matter as a global issue. Rather, he said, it is was looking at modifying the practice of notice pleading in specific situations.

Judge Rosenthal added that the advisory committee had looked at notice pleading when it drafted the 2000 amendments to the discovery rules, tying discovery to the pleadings and encouraging more specific pleadings. She added that the committee was also considering whether motions for a more definite statement under FED. R. CIV. P. 12(e) could be made more vigorous. She said that a motion for a more definite statement is rarely granted today because the standard for granting them is so high. The committee might want to make it more readily available. That way, she said, the committee would address the impact of notice pleading in specific situations without having to rebuild the whole structure.

One member reported that by local rule in his district, discovery does not begin until the defendant files an answer. As a result, defendants simply do not file answers. Instead, they always file motions to dismiss, which leads to a good deal of unnecessary effort on the part of the judges. They are often faced with starting all over again when the plaintiffs exercise their right to file an amended pleading. Thus, he said, the proposed amendments to Rule 15 are enormously attractive to him because they will avoid judges having to waste efforts on motions to dismiss. Second, he complimented the advisory committee for the brevity of the committee note. He said that it was a model of what a note should be – identifying the changes in the rule and succinctly explaining the reasons for the changes.

Judge Rosenthal responded that these anecdotes highlight the incentives and tactics of modern civil litigation and the shifting of costs. It is rare, she said, that both a motion and an answer are filed. She said that the advisory committee would like the Standing Committee to authorize publication of the proposal, and the particular problems raised in the discussion could be highlighted in the publication with an invitation for the public to comment on them. She added that the proposed amendments to Rule 15 do not represent major changes, given the fact that circuit law across the country liberally gives, or requires, one amendment as a matter of right.

Some members agreed with the suggestion to publish the proposals for public comment and said that it could produce valuable information. One shared the concern that the change in Rule 15 might cause a burden to defendants, but only in very rare cases. He concluded that it is probably not a significant issue, but it would be helpful to get more information during the public comment period.

The committee with one objection voted by voice vote to approve the proposed amendments for publication.

FED. R. CIV. P. 48

Judge Rosenthal reported that the proposed new Rule 48(c) (polling) would provide a procedure for polling jurors in civil cases. It is modeled after FED. R. CRIM. P. 31(d), but also includes a provision referring to the ability of the parties in a civil case to stipulate to less than a unanimous verdict.

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

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the proposed new Rule 62.1 (indicative rulings) had its origin in a suggestion several years ago to the Advisory Committee on Appellate Rules from the Solicitor General. Since the basic question addressed by the proposed rule involves the authority of a district judge to act when an appeal is pending, the appellate rules committee concluded that the rule would be better included in the Federal Rules of Civil Procedure.

The proposed rule adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) (relief from judgment or order) to vacate a judgment that is pending on appeal. The rule, though, goes beyond Rule 60(b) and would apply to all orders that the district court lacks authority to revise because of a pending appeal. It would give a district judge authority to "indicate" that he or she "might" or "would" grant the motion if the appellate court were to remand for that purpose. Judge Rosenthal added that the procedure is well established by case law, but it is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.

Judge Rosenthal pointed out that the advisory committee would publish the proposed rule with alternative language in brackets. The choice for public comment would be between having the district court indicate that it "might" grant relief or indicate that it "would" grant relief. She said that good arguments can be made for either formulation. The advantage of the "might" language, she pointed out, is that it would likely preserve judicial resources because the trial judge would not have to do all the work to resolve the motion in advance of remand.

Judge Rosenthal noted that members of the Standing Committee had raised a couple of questions about the proposed rule at the June 2006 meeting. The first was whether the location of the rule as new Rule 62.1 was appropriate. The advisory committee, she said, had considered the location anew and had concluded that Rule 62.1 made the most sense. She noted that it belonged in Part VII of the rules, dealing with judgments, but because of its broad scope, it did not fit in with the other judgment rules – Rules 54, 59, 60, 61, or 62. Moreover, Rule 63 shifts to another topic.

The second concern expressed was whether the title "indicative ruling" was appropriate. She said that it had been selected because it is a term of art familiar to appellate practitioners and embedded in the case law, although it may not be recognized by lawyers whose practice is not centered on appeals. The advisory committee, she noted, had reached no firm conclusion on an alternative caption. One suggestion, she said, was to expand the caption of the rule to "Indicative Ruling on Motion for Relief Barred by Pending Appeal."

Judge Rosenthal noted that the Advisory Committee on Appellate Rules had suggested that it might want to make a cross-reference to the new rule in the appellate rules. She said that this would be very helpful. Judge Stewart said that his committee had discussed the matter and would add a cross-reference. He added that the committee had not expressed a preference between "might" and "would." He noted that the court of appeals would be more likely to remand a case back to the district court if the trial judge were to indicate that he or she "would" grant the relief than if the judge merely indicated that he or she "might" grant it. But, he said, his committee recognized the additional burden that would be imposed on the district judge in the former case.

One member supported the rule and said that it would provide helpful clarification in a difficult area. But he expressed concern that it might provide district judges with open-ended authority once a matter is pending on appeal and could give lawyers an opportunity to amend the record.

Professor Cooper responded that the key point is that the court of appeals remains in control. He noted that the advisory committee had been very cautious in expanding the authority from its basis in Rule 60(b) to other kinds of relief. The district court, he said, should be allowed to deny a motion that does not have merit and get it over with. Judge Rosenthal emphasized that the rule permits better coordination between the two courts.

One participant pointed out that there are a number of limited remands in his court. He asked whether it might be better for the rule to state that the only options for the court of appeals are either to deny the remand or order a limited remand. This would institutionalize the concept of a limited remand, under which the court of appeals keeps the case, but remands solely for the purpose of deciding one issue. He suggested that the language of Rule 62.1(c) might be amended to track the language of the committee note on this point. Professor Cooper agreed that the advisory committee might want to consider adjusting the language.

Judge Levi pointed out that the Standing Committee did not have to approve the rule for publication at the current meeting. Moreover, since the rule involves two advisory committees and some helpful language suggestions had been made, the advisory committee could work further on the language and come back for authority to publish in June 2007.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 18, 2006 (Agenda Item 6).

Informational Items

Judge Bucklew reported that the advisory committee had held its regular autumn meeting in October 2006. It also had held a teleconference meeting in September 2006 specifically to address the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection).

FED. R. CRIM. P. 32(h)

Judge Bucklew reported that the Standing Committee in June 2006 had returned a proposed amendment to FED. R. CRIM. P. 32(h) (sentencing – notice of possible departure) to the advisory committee for reconsideration in light of specific comments offered by Standing Committee members. The proposal, she said, was part of a package of amendments designed to conform the criminal rules to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). The current Rule 32(h) requires a court to give reasonable notice to the parties that it is considering imposing a non-guidelines sentence based on factors not identified in the presentence report or raised in pre-hearing submissions. The proposed amendment would also require reasonable notice when the court is considering imposing a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a).

She explained that the Standing Committee had asked for further consideration for a number of reasons. Some members, she said, had pointed to a difference in case law among the circuits, counseling that it would be premature to attempt to codify a rule. Others expressed concerns that the proposed rule might interfere with orderly case management by causing unnecessary continuances and adjournments. Other members suggested that since the sentencing guidelines are now advisory, there should be no expectation of a guideline sentence. Therefore, there is no reason for the court to give notice. Judge Bucklew reported that the advisory committee had taken all these arguments into consideration, and it had specifically considered correspondence from the federal defenders urging the committee to proceed with the proposed amendment. In conclusion, she said, the advisory committee was continuing to review the case law and consider a proposed amendment. Professor Beale added that the Supreme Court had recently granted certiorari in two sentencing cases that might shed some light on the wisdom of proceeding with the amendment.

FED. R. CRIM. P. 49.1

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been

suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs to be fail-proof. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than coram nobis.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially coram nobis, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the Federal Magistrate Judges Association for a rule to cover warrants for violation of supervised release or probation. Finally, she noted that the committee would be conducting a public hearing in Washington on January 26, 2007, at which five witnesses had signed up to testify on the proposed amendments to the criminal rules published in August 2006.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2006 (Agenda Item 7).

Informational Items

FED. R. EVID. 502

Judge Smith reported that the advisory committee had been devoting most of its time to the proposed new Rule 502 (attorney-client privilege and work product; limits on production), published for public comment in August 2006. He pointed out that a substantial number of witnesses had signed up to testify at the committee's two scheduled public hearings – one in Phoenix immediately following the Standing Committee meeting and the other in New York on January 29, 2007.

Judge Smith explained that the advisory committee was proceeding in accordance with the limitation of the Rules Enabling Act that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). He pointed out that proposed Rule 502 had been drafted in response to a request from former Chairman Sensenbrenner of the House Judiciary Committee asking the committee to initiate rulemaking to address issues arising from disclosure of matters subject to attorney-client privilege or work product protection. He said that the new Democratic leadership of the Congress had not yet been consulted on the proposal.

Judge Smith highlighted four preliminary actions taken by the advisory committee at its November 2006 meeting in response to public comments on the rule. First, he said, the committee had voted to retain the words "should have known" in the proposed language of Rule 502(b). It would condition protection against inadvertent waiver on whether the holder of the privilege took reasonably prompt measures "once the holder

knew or should have known of the disclosure." He said that a comment had been made that the language might give rise to litigation over exactly when the producing party should have known about a mistaken disclosure. But, he said, it was the sense of the committee that the language had substantial merit and should be retained.

Second, Judge Smith pointed out that proposed Rule 502(b) would provide protection from waiver against third parties when a disclosure is "inadvertent" and made "in connection with federal litigation or federal administrative proceedings." Proposed Rule 502(c) would provide protection when the disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." He said that a comment had recommended that the language of the two provisions be made identical by extending the protection for mistaken disclosures occurring during proceedings to those occurring during investigations.

Judge Smith said that a majority of the advisory committee was of the view that the difference between the language of the two subdivisions was justified. The committee, thus, decided that the protections of Rule 502(b) should continue be limited to mistaken disclosures made during court and administrative proceedings.

Third, Judge Smith said that the advisory committee had not decided whether to approve the "selective waiver" provision set forth in proposed Rule 502(c). It specifies that disclosure of privileged information to a government regulator does not constitute a waiver in favor of third parties. He explained that the committee had published this provision in brackets in order to emphasize that it was undecided about the matter and was seeking the views of the public as to the merits of including it in proposed Rule 502. He noted that the selective waiver provision had attracted strong opposition from lawyers and bar association representatives.

One participant noted that several public comments had opposed the selective waiver proposal on the grounds that it would erode the attorney-client privilege. A number of comments also referred to an alleged "culture of coercion" under which the Department of Justice considers a corporation's cooperation, including waiver of the attorney-client privilege and work product protection, as a factor in deciding whether to prosecute and on which criminal charges.

Judge Smith noted, too, that concern had been expressed by state judges that a federal selective waiver provision would subsume state waiver rules. He pointed out that Justice Hurwitz, a member of the Advisory Committee on Evidence Rules, had attended the most recent meeting of the Federal-State Jurisdiction Committee of the Judicial Conference and had had an opportunity to discuss with fellow state Supreme Court Justices the proposed rule and pertinent federal-state issues.

Fourth, Judge Smith reported that the advisory committee was in general agreement that arbitration proceedings should be covered by the protection of Rule 502 only if they are court-ordered or court-annexed arbitrations.

Judge Smith pointed out that these issues – and others listed in the agenda book and raised in the public comments and hearings – would be taken up again at the advisory committee's April 2007 meeting.

ADAM WALSH CHILD PROTECTION ACT

Judge Smith reported that the Adam Walsh Child Protection Act of 2006 had directed the advisory committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or 2) a child under the custody or control of either spouse."

The statutory provision, he said, appears to have been motivated by one aberrant circuit court decision allowing a criminal defendant's wife to refuse to testify even though the defendant had been charged with harming a child in the household. He said that the advisory committee had concluded that the case was of questionable authority and was even contrary to the precedent of its own circuit. Therefore, the Federal Rules of Evidence need not be amended to take account of it. Almost all other reported opinions, he said, have held that the protections provided by the marital privileges do not apply in cases where the defendant is charged with harm to a child.

Professor Capra noted that he had reached out to advocates for battered women for their views on whether it is good policy to have an exception to the privileges in a case where there may be harm to a child. He awaits responses from them.

Professor Capra added that the advisory committee would prepare a report for the Standing Committee to send to Congress. The report, he said, would include appropriate draft language of a rule amendment in case Congress disagrees with the conclusion that no rule change is necessary.

RESTYLING THE EVIDENCE RULES

Judge Smith reported that Chief Justice Rehnquist had expressed opposition to restyling the rules of evidence. Nevertheless, in light of the success in restyling the other federal rules and the presence of awkward language in the evidence rules, the advisory committee was taking a second look at the advisability of proceeding with a restyling effort. He noted that a couple of evidence rules had been restyled as samples for the

advisory committee's review, and it was the general sense of the members that the committee should continue with the effort at a modest pace, as long as the new chief justice agrees. Professor Capra added that an important argument in favor of restyling is that the evidence rules are strongly geared to the use of paper. Judge Levi asked whether it would be possible at the next Standing Committee meeting for the advisory committee to bring forward a couple of examples of restyled evidence rules. Judge Smith agreed to do so.

Judge Smith said that the advisory committee was doubtful that there was any need for changes in the evidence rules to take account of the new time-computation rules. He suggested that a reference to the evidence rules might better be included in the other rules. He also reported that the advisory committee was continuing to monitor the case law in the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with testimonial hearsay. He observed that the courts are addressing the issues in a very professional manner, and it is far too early for the advisory committee to act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 14, 2006 (Agenda Item 11).

Judge Kravitz reported that a great deal of work had been undertaken on the time-computation project by the subcommittee, the advisory committees, and the committee reporters. He pointed to the text of the proposed template rule in the agenda book and said that it would be adopted in essentially identical form for the civil, criminal, appellate, and bankruptcy rules. Its central focus is to simplify counting for the bench and bar by eliminating the current two-tier system of computing time deadlines, under which weekends and holidays are excluded in calculating time periods of fewer than 11 days (8 days in bankruptcy), but included in calculating periods of 11 (or 8) days or more. Under the new template rule, all days will be counted as days. Only the last day of a time period will be excluded if it happens to falls on a weekend or holiday.

Judge Kravitz noted that the template rule provides a method for counting both forward and backward and a method for counting time periods expressed in hours. The rule defines the "last day" for filing as: (1) midnight, in the case of electronic filing; and (2) the time the clerk's office is scheduled to close, in the case of filing by other means.

He also noted that there are some issues that the new rule does not address. For example, the rule applies only when a time period must be computed. It does not apply when a court fixes a specific time to act. It also does not change the "three-day rule," under which a party served by mail or certain other forms of service is given three extra

days to respond. Moreover, it does not address explicitly whether litigants can file papers at a judge's home or a clerk's home after hours in light of 28 U.S.C. § 452, which states that courts "shall be deemed always open for the purpose of filing proper papers." He pointed out that Professor Struve had prepared an excellent memorandum on that particular issue in the agenda book.

The proposed rule, he said, also does not attempt to define the "inaccessibility" of a clerk's office for filing, although it does eliminate language that limits "inaccessibility" to weather conditions. He reported that the Standing Committee had asked the subcommittee to consider defining the term, but the subcommittee's memorandum to the Standing Committee contained a lengthy explanation as to why additional time and experience are needed in the electronic filing world before this issue can be addressed properly. He noted that most courts have adopted a local rule specifying what lawyers should do when there is a technical failure of the court's computers. The local rules vary greatly, but most require affidavits by lawyers and permission by the court on a case-by-case basis. They do not give parties an automatic extension for filing.

Finally, Judge Kravitz reported that the subcommittee had decided to continue to include state holidays in the rule, but he noted that it had seriously considered eliminating them because federal courts tend to remain open on state holidays. A member of the Standing Committee repeated his earlier view that state holidays should not be included in the definition of a "legal holiday." Judge Levi suggested that the subcommittee's decision to retain state holidays as an exception in the rule might be highlighted in the publication as a means of soliciting the views of the public on the issue. Other members suggested that the committee note also include a reference to national days of mourning.

Judge Kravitz added that additional suggestions for improvement in the language of the proposed rule had been offered recently by Professor Kimble, the committee's style consultant. He noted that the advisory committees were using the template and revising the specific time limits in their respective rules to make sure that the ultimate net effect of the new rule would be neutral to attorneys. Thus, the advisory committees will likely increase the 10-day time limits in their rules to 14 days because a 10-day deadline in the current rule normally gives a party 14 days to act because of intervening weekends. Judge Kravitz pointed out that the advisory committees were also attempting to express rules deadlines in multiples of 7 days, for all deadlines of fewer than 30 days.

He pointed out that some reservations had been expressed as to the wisdom of proceeding further with the time-computation project. He noted, in particular, that some members of the appellate rules committee had suggested that the current system for counting time is not broken, the proposed changes are not needed, and problems are created with regard to deadlines expressed in statutes. Nevertheless, even though some members believe that the project is unnecessary, the appellate advisory committee was

proceeding to make appropriate changes in the appellate rules in light of the proposed template rule.

Judge Kravitz reported that the Federal Rules of Bankruptcy Procedure pose a number of additional complications. First, he said, there are many more short deadlines in bankruptcy. Second, bankruptcy is heavily impacted by statutory deadlines, including the many deadlines set forth in the Bankruptcy Code and state statutes. Third, he explained, the bankruptcy advisory committee had been extremely active recently in publishing a large number of rules changes and making wholesale revisions in the bankruptcy forms in order to implement the omnibus 2005 bankruptcy legislation. In light of all the proposed changes already underway, he said, more rule changes at this point would impose an additional burden both on the advisory committee and on the bankruptcy bench and bar.

Judge Kravitz suggested the possibility of proceeding with the time-computation changes in the civil, criminal, and appellate rules at this point, but delaying any changes to the bankruptcy rules. This approach would not be ideal, though, since it would make the bankruptcy rules inconsistent with the other rules for a while. Nonetheless, it might be the most practical approach in light of the sheer volume of rule changes being presented to the bankruptcy community.

Judge Kravitz noted that a good deal of angst had been expressed at the last Standing Committee meeting over the issue of changing the method of counting time limits fixed in statutes. He noted that, except for the criminal rules, the federal rules specify that the method of counting time applies to national rules, local court rules, and statutes. In addition, he said, case law in bankruptcy holds that the counting method prescribed by the bankruptcy rules applies when counting deadlines set forth in statutes. Professor Morris noted the additional complexity that the Rules Enabling Act does not extend its supersession authority to the bankruptcy rules.

Judge Kravitz noted that the feedback received from the bar – other than the bankruptcy bar – is that lawyers generally do not rely on the counting method specified in the federal rules when calculating statutory deadlines – unless they miss a deadline and have to argue to a court for additional time. Therefore, although statutory deadlines are a concern to the rules committees, a large body of the bar does not in fact rely on the two-tiered rules method for counting statutory deadlines. He added that the subcommittee was considering preparing a list of the most common short statutory deadlines that actually arise in court proceedings and then drafting a package of legislative amendments for Congress to consider. He noted that the chair had raised the issue of potential statutory amendments, on a preliminary basis, with leadership of the former Congress and had received a good reception.

Judge Kravitz noted another complication flowing from the text of the current rule. FED. R. CIV. P. 6(a) specifies a method for computing time for both rules and statutes. The next subdivision of the rule, FED. R. CIV. P. 6(b), gives a court authority to extend deadlines for cause, but it applies on its face only to rules, not statutes. He said that the committee might want to give a court explicit authority for good cause shown to extend a deadline set forth in a statute.

Judge Kravitz concluded that the committee needed to make three decisions: (1) whether to keep moving forward and present a package of amendments to the Standing Committee in June 2007 for publication; (2) whether to include the bankruptcy rules in that package or defer them for publication at a later date; and (3) whether to amend the rules to give a court explicit authority to grant extensions of statutory deadlines for good cause shown.

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had not yet decided whether to make all the time-computation changes at its March 2007 meeting. The committee, he said, had been very much concerned about further publication of rule changes and possible confusion in light of the proposed changes to 40 rules just published in August 2006. Moreover, he said, more than 100 changes in about 75 rules would be impacted by the time-computation changes – many of them the same rules that had just been published. He added, though, that it would be relatively easy for the advisory committee to make all the changes, adding that it would make the changes in the revised rules out for publication, rather than in the existing rules. The advisory committee, he said, would not ask for an extension of time, and it could have the changes ready for the June 2007 Standing Committee meeting. But, he explained, the key decision was whether to risk creating confusion by publishing another large package of bankruptcy rule changes on the heels of a comprehensive package of changes approved by the Judicial Conference in September 2006 to implement the 2005 legislation.

As for statutory deadlines, Judge Zilly reported, the advisory committee had identified 10 statutes imposing short time limits in bankruptcy cases, most of them deadlines of 5 days. One approach, he said, would be to specify in the bankruptcy rules that the existing counting method will continue to be used for those specific code sections. An alternative would be to ask Congress to change all the 5-day deadlines to 7 days in order to reflect the new counting method, because 5 days actually means 7 days under current bankruptcy case law. He said that some additional confusion had been added in the 2005 bankruptcy legislation because Congress had used the term "business days" in a couple of sections, but not in other places.

Judge Levi suggested that the bankruptcy advisory committee should discuss all these matters further at its March 2007 meeting. He saw no problem with delaying the

changes in the bankruptcy rules for a year or two in light of the practical difficulties and confusion that might result from publishing additional bankruptcy changes now.

One member pointed out that proposed template FED. R. CIV. P. 6(a) mandates that all time periods be computed according to Rule 6. Thus, the rule would trump any other time period specified in the federal rules, any statute, local rule, or court order. Thus, he questioned the purpose of proposed Rule 6(a)(4), defining the end of the last day of a time period "unless a different time is set by statute, local rule, or court order." Judge Kravitz and Professor Struve responded that the provision takes account of 28 U.S.C. § 452, which states that all federal courts "shall be deemed always open for the purpose of filing proper papers . . . . " Some court decisions, they noted, have held that section 452 and FED. R. CIV. P. 77(a) (district courts always open) permit a paper to be filed after hours by handing it to a judge or clerk at their home. In addition, Judge Kravitz noted that some courts maintain a box at the courthouse for lawyers to drop pleadings after hours. He explained that Rule 6(a)(4) was designed to deal with the ordinary course of events, and it does not address explicitly a court's authority to permit after-hours filings under the statute. The language "unless a different time is set by statute, local rule, or court order" was intended to leave room for particular courts to treat issues of after-hours filing as they see fit.

One member suggested that the last sentence of the first paragraph of the committee note was not needed. It specifies that a local rule of court may not direct that a deadline be computed in a manner inconsistent with Rule 6(a). He said that this might imply that other local rules can conflict with the national rules, given that the same limitation on local authority is not repeated in every other committee note. Judge Kravitz responded that the subcommittee simply wanted to emphasize the importance of national uniformity and to make it clear that local rules cannot alter the time-computation method specified in the new rule. But, he said, if the sentence causes any confusion, it could be eliminated. Another member suggested substitute language for the committee note that would reiterate the general principle that local rules may not conflict with national rules, but point out that a court may specify a time for the end of the last day.

Another member said that the proposed rule does not work in counting backwards when the last day of a time period is one in which the clerk's office is inaccessible. Under the proposed rule, one must continue to count backwards. This produces the impossible result that if the office is not accessible, the filing is due yesterday. As a matter of logic, one should count forward to the next accessible day, rather than continue to count backwards. Professor Struve responded that the subcommittee had struggled with that situation and would be open to suggestions for better language. Judge Kravitz cautioned, however, that it would be difficult for the rule to deal with every conceivable situation.

Professor Capra pointed out that there are no time-computation provisions and no relevant time deadlines in the Federal Rules of Evidence. Thus, he asserted, there was no need for the proposed time-computation template rule to be added to the evidence rules. He added that, nevertheless, the evidence advisory committee could draft a variation of the template rule and include it as FED. R. EVID. 1104. But, he said, time computation issues do not arise in evidence, and there is no need for any provision in the evidence rules.

Judge Levi suggested that it would be helpful to have the sense of the Standing Committee that the time-computation project is beneficial before asking the advisory committees to proceed with proposing specific amendments.

The committee without objection by voice vote agreed to encourage the advisory committees to proceed with the project.

PANEL DISCUSSION ON THE DECLINE IN THE NUMBER OF CIVIL TRIALS

The committee participated in a panel discussion on the decline in the number of civil trials and whether anything can, or should, be done to amend the federal rules to address the phenomenon. The panel was moderated by Patricia Lee Refo, Esquire of Snell & Wilmer in Phoenix – a prominent member of the Arizona bar and the American Bar Association and a former member of the Advisory Committee on Evidence Rules. The other panelists were: Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former chair of the Advisory Committee on Civil Rules; Professor Stephen C. Yeazell of the University of California at Los Angeles Law School; and Justice Andrew D. Hurwitz of the Supreme Court of Arizona, a member of the Advisory Committee on Evidence Rules.

Ms. Refo distributed a series of tables and charts documenting the "vanishing trial." She showed that from 1962 to 2005, the number of civil cases disposed of by the federal district courts increased more than five-fold, but the number of civil trials actually decreased by a third. Bench trials have declined by 45% since 1985, and consent civil trials by magistrate judges have decreased by nearly 50% since 1996. As a result, the percentage of civil cases resolved by a trial has dropped from 11.5% in 1962 to the current rate of 1.4%.

She showed tables breaking out cases by nature of suit. Civil rights cases are the most likely category of civil cases to go to trial in the federal courts, counting for 33% of all civil trials in 2002. Nevertheless, only 3.8% of civil rights cases were decided after a trial. Tort cases accounted for 23% of all civil trials in 2002, although only 2% of tort cases went to trial. And in 2005, she said, almost no contract cases went to trial.

She noted that fewer cases are being terminated during the course of a trial, and the data strongly suggest that trials are not increasing in length. She noted, too, that the decline in trials has also occurred in criminal cases, though for different reasons. She pointed out that during the same time period that trials have declined, the country has experienced substantial population growth and increases in gross domestic product, the number of lawyers, the number of pages in federal court opinions, and the number of pages in the Federal Register. Finally, she showed a table demonstrating that civil trials have also declined noticeably in the state courts.

Judge Higginbotham reported that in the early 1970s, federal district judges were conducting over 30 trials per judge each year, many more than today. Even so, the time for filing to trial was shorter than it is now. Although there has been a decline in both bench and jury trials, he noted, there has been a reversal in the proportions between the two. Bench trials used to predominate by 2-1, but jury trials now outnumber bench trials by 2-1. In criminal cases, he said, the number of guilty pleas has increased substantially, as a direct result of the additional power given to prosecutors over charging decisions by the federal sentencing guidelines.

Judge Higginbotham attributed the decline in trials to the growth of the "administrative model" of decision-making – a set of administrative alternatives to the traditional civil trial. He traced this trend to enactment of the Administrative Procedure Act in 1946, regularizing administrative decision-making in the executive branch, leading to great growth in administrative law judges and an administrative, bureaucratized approach to case-by-case decision-making. He said that the trend began to spread to the federal judiciary in the 1970s with the growth of the federal magistrate judges system. Since then, the court system itself has been moving more and more to this kind of administrative, bureaucratized decision-making, as part of which judges have adopted a series of procedures designed to avoid trials. In this sense, trials are not "vanishing," but moving – from the traditional approach to an administrative model. He noted that most observers account for this phenomenon, including the decline of trials, by pointing to the high costs of civil litigation in the federal courts, the fear of juries, and the indeterminacy of the judicial process.

He warned that this trend has dangerous effects. Lawyers and judges, he said, used to focus on fact questions and present them to the jury at trial. Outcomes, therefore, tended to depend very closely on the applicable normative standards of law. But now, the system has abandoned trials in order to focus on settlements, which are strongly affected by factors other than normative standards. The system, thus, has distanced itself from normative standards of law.

He complained that courts have become hostile to the trial of cases. He referred to two seminars for judges in which the faculty had expressed the attitude that a trial

represents a "failure" of the system. The judges were instructed by the faculty to work hard at obtaining settlements. An agreed-upon settlement is seen as better than a trial. In addition, there is now a much greater focus on alternative dispute resolution. He acknowledged that a settlement in the face of an impending trial may be perfectly acceptable – because it will be strongly influenced by normative standards of law – but not a settlement that occurs in the absence of any likelihood that there will ever be a trial.

Judge Higginbotham pointed out that the federal court system has been a great success because of its fairness, independence, and transparency. But, he said, there is a fundamental lack of transparency in both settlements and arbitration. Discovery materials, moreover, are not filed. Ms. Refo added that many cases that used to be disposed of with bench trials have now migrated to arbitration for largely this reason, because the parties do not have to reveal information to the public. Judge Higginbotham lamented that the courts have validated and embraced arbitration.

Professor Yeazell said that most of what would need to be done to produce a substantially increased rate of trials probably lies beyond the power of the rules process to affect. He strongly endorsed Judge Higginbotham's comments regarding the lack of transparency in settlements and the resulting diminishment of the integrity and legitimacy of the legal system. He noted, though, that it might be possible to address the transparency problem to some extent through rules.

He emphasized two points based on the empirical data presented by Ms. Refo. First, he said, the rate of trials has also been dropping in the state courts. But the rate of trials in state courts is still several times higher than in the federal courts, including the 35 states that use the federal rules as their procedural code. That, he said, leads one to believe that the principal causes of the decline lie in something beyond the federal rules and what rule changes might accomplish.

Second, he noted that the federal sentencing guidelines, with all their perceived defects, are superior to civil settlement practices as far as transparency is concerned. A criminal defendant, he said, may not think that his sentence is fair, but he knows that it will be probably the same sentence that the defendant in the next courtroom receives for the same offense.

That consistency, however, is simply not the case with civil settlements. There are enormous differences from case to case. The results may well be acceptable in individual cases because they are based on the consent of the parties. But for the legal system as a whole, the lack of uniformity and norms is very troubling. He pointed out that a great deal of research has been undertaken in this area. In these studies, a standard set of facts is given to experienced judges, lawyers, and insurance representatives, and they are asked what the case should settle for. They all believe that they know from

experience the value of a case. But the settlement figures they produce are in fact very different from each other. And the differences among similar cases are compounded by the lack of transparency, as no one really knows what other similar cases have settled for.

Professor Yeazell said that this is one problem that the rules process might be able to address in some manner. The justice system ought to be able to provide some notion of what similar cases have settled for. The federal rules might provide that settling parties must register, in some form, the outcome of a settlement in order to provide some notion to third parties regarding the range of settlement outcomes. This would bring about a greatly needed increase in transparency, and it may be something that could properly be done within the ambit of the Rules Enabling Act. The philosophy would be that however much some parties may want to keep outcomes private, this level of transparency would be the price – and an appropriate price – of entering the civil justice system.

Ms. Refo pointed out that there are now certain categories of cases in which trials never take place. Accordingly, a civil litigator has no benchmarks to determine what a case is worth or what the risks of trial may be. As a result, settlements are uninformed, and the uncertainty is a factor in the decline of civil trials.

Judge Hurwitz suggested that trying to pinpoint the causes for the decline in trials is akin to distinguishing between the chicken and the egg. The most important factor in the decline of trials, he said, is cost. He noted that when he and his colleagues used to try cases 30 years ago, they routinely tried small cases at low cost. Today, he said, the cost of litigation is so high that lawyers no longer try any small cases. They have become non-trial lawyers. As a result, a trial is scary to them because they have no experience in trying cases. So it is hard to tell whether uncertainty is the cause or the other factors that have led to the uncertainty. All have been combined to create a culture that avoids trials and views them as a failure. He noted from his personal experience in Arizona that many distinguished candidates applying for state judgeships have had many years of legal experience, but no trials.

Justice Hurwitz noted that trials in state courts are also decreasing, but they are declining at a lesser rate than in the federal courts. He suggested that the perceived unfriendliness of the federal forum is responsible in part for chasing cases from the federal courts into the state courts. He said that a civil case can normally be tried in the Arizona state courts in one year – a much shorter time than in the federal court. So, when plaintiffs have a choice of forum, they will normally choose the state court. Many of the cases, moreover, will remain in the state courts and not be removed to the federal court. He explained that when a case is filed in the federal court, it is randomly assigned to one of 13 very busy district judges, some of whom do not come from a civil background. On the other hand, in Maricopa County, a complex civil case in state court will be assigned to

a judge with substantial civil trial experience. That special procedure of guaranteeing experienced judges for complex cases also offers an attractive choice for plaintiffs.

Judge Higginbotham observed that there is a clear relationship between the decline in the number of trials and the increase in the amount of time it takes to get a case to trial. He noted the example of a federal district judge in Texas who receives an unusually large number of patent cases because he is able to bring them to trial very quickly. The attraction for the bar is the certainty that the judge will give them a firm trial date and a good trial.

Justice Hurwitz raised the fundamental question of whether the decline in civil trials is really a bad thing at all. Surely, he said, fewer lawyers today are able to try a civil case, but maybe all those small civil cases that used to be tried in the past would have been better resolved through settlement. In the past, moreover, lawyers almost never asked for summary judgment in small cases. He said that the legal culture had changed fundamentally, and it may be that not much can be done to change it through the rules process. He suggested that judges and lawyers may be overly nostalgic. Just because they liked the good old days does not mean that the system should return to them.

Ms. Refo pointed out that it was very difficult to conduct empirical research in this area, but her sense was that corporate America has lost confidence in jury results. She said that jury trials cost too much, and the results are too uncertain. She said that consideration might be given to two possible rules changes. First, the pretrial rules might be amended to move the parties to trial faster and more efficiently. Second, something might be done through rules changes to improve the fact finding at trials.

Judge Higginbotham said that the emphasis today is on summary judgment, rather than trial. He said that the traditional way of running a docket is the most effective. The judge makes key decisions early in the case after asking the lawyers when the case will be ready for trial. The judge sets a real trial date, and the parties concentrate on moving forward towards it. If the case is complex, the judge and the parties focus on the specific questions that are going to be asked in front of the jury, rather than on the details of the discovery process. The lawyers and the judge focus on the trial as the end target and work backwards from there. He recognized that most civil cases will settle in any event, but the whole process, he said, should be refocused from discovery to the trial.

As for juries, he said, all the literature proves that a 12-person jury is much more reliable than a smaller jury. He noted that the Standing Committee had approved an amendment to the civil rules that would have mandated a return to 12-person juries in civil cases, but it was not approved by the Judicial Conference. Ms. Refo added that the American Bar Association had issued jury principles in 2005 that urge a return to 12-person juries, and it is actively encouraging the states to return to 12-person juries.

Judge Higginbotham also pointed out that substantive developments have had an impact on the decline in trials, particularly punitive damages. The uncertainty of a jury result has been intensified by the very real fear of substantial punitive damages. He noted that court decisions have been cutting back on punitive damages, but the risk of them continues to deter corporations from opting for a jury trial. Corporate officers, he concluded, generally do what they are told to do by their lawyers, most of whom have not tried any cases themselves.

He suggested that the federal district courts are losing their distinctiveness and are becoming part of a bureaucratic enterprise. The phenomenon presents a serious challenge to Article III of the Constitution and to judicial independence. Increasingly, he said, trial judges are becoming processors of paper, and the court system has become more of an administrative process than a trial process. The bureaucratization, moreover, feeds on itself. He noted that the federal sentencing guidelines in criminal cases have contributed to uniformity in sentencing, but they have created a large bureaucracy in Washington that produces a large volume of manuals and statistics. He noted that the sentencing guidelines have led to substantially more appeals in federal criminal cases, but he pointed out that the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) was very helpful because the Supreme Court has helped to put the focus back on the jury.

Ms. Refo asked the panelists to compare state court rules with the federal rules to see whether any differences might be of help in revitalizing trials in the federal courts. For one thing, she noted, Arizona requires much broader disclosure in civil cases. And it has different rules on how trials are conducted, including a provision allowing juries to ask questions.

Justice Hurwitz said that the Arizona state rules were basically similar to the federal rules, but a number of innovations in Arizona might help the federal courts, at least at the margin. The size of the jury, he said, is a factor, but most plaintiffs do not want a 12-person jury. He noted that in the state court, unlike the federal court, the parties can pick the judge. Guaranteeing federal lawyers that they will get an experienced judge would be a very helpful improvement, but he noted that there is a price to pay for it in terms of judicial independence.

One of the members echoed the observation that there is a culture of hostility to trying cases – both in the federal courts and the state courts. He noted that substantial pressure had been placed on him by judges to settle, even in cases that have deserved to go to trial. He also noted that it takes much too long to reach trial in the federal court, and cases go to trial much more quickly in the state courts. Clients, he said, are resistant to waiting so long and facing uncertainty.

He noted that Arizona had organized a specialized civil court division for complex civil cases – as in New York, Delaware, North Carolina, and California – staffed by very experienced, highly regarded judges. The state bar, he said, has made the decision not to remove cases to federal court because they are pleased to have them stay in the complex civil division of the state courts. He noted that the judges in the special court conduct an early pretrial conference to lock in all dates. They also impose limits on disclosure and discovery that would otherwise apply in normal civil cases. The bar believes that the system works, at least in complex civil cases, both for plaintiffs and defendants. He noted that a similar system works very well in California.

Another member suggested that lawyers on both sides see state courts as much more lawyer-friendly places than federal courts. Federal courts are seen as very formal, and the lawyers do not have an opportunity to see the judge in person until late in the process. Another difference between the state and federal courts is that the lawyers get to select the jury in state courts, a matter of great importance to them.

Judge Rosenthal observed that the Advisory Committee on Civil Rules had drafted a set of simplified procedural rules to expedite smaller federal cases and provide prompt, economical trials. Under the proposal, parties opting into the simplified rules would be guaranteed a prompt trial, less discovery, fewer motions, and fewer expert witnesses. But, she said, when the advisory committee floated the idea, it encountered resistance from virtually every quarter. She said that the draft rules had substantial merit, and the advisory committee might wish to revisit them. She noted, too, that specialized rules are becoming more common in certain kinds of cases, such as patent cases.

One member suggested that the courts lose a great deal if complex civil cases vanish from the judicial system. He noted that California, Arizona, and New York make special provision for complex civil cases, including special courtrooms and training for the judges. One of the dangers of settlements, he said, that there is no development of stare decisis and no transparency in the system. Large cases simply are diverted to alternative dispute resolution, and small cases remain in the courts, creating a dual system of justice. Corporations, he said, need to see themselves as stakeholders in the court system. Because of the special efforts now being made in some states, lawyers and corporations are preferring to keep complex civil cases in the state courts, rather than removing them to the federal courts or turning to arbitration or other alternative dispute resolution.

Another member echoed the theme that it is bad for the country when litigants believe that the court system is more of a dispute resolution mechanism than a justice system. It is also wrong, he said, when lawyers and clients believe that a judge will punish them for not settling a case and when corporations choose private litigation over the court system. The net result, he said, is that the judicial system is losing social

capital. One of the foundations of the American judicial system, he emphasized, is that the public participates in it. But that participation has been declining, as courts have reduced the number of jurors used in civil cases and have reduced the number of trials. He suggested that there may be problems in the future when the courts need public support.

Ms. Refo noted that, as a practical matter, lawyers today almost never try a case. Associates, moreover, never get fired for taking depositions or serving interrogatories. They can only get in trouble for not taking depositions or serving interrogatories. In effect, the culture encourages too much discovery. She added that the system as a whole has lost a great deal through the growth of private litigation. Among other things, she said, great strides have been made to diversify the federal bench. The same development, however, has not occurred in private litigation, as only white males seem to preside. That, she said, is another hidden cost to the system.

Judge Higginbotham added that the privacy implications of discovery are a serious problem. He said that there is a value in openness and important social benefits in trials. Cases, he said, do not belong solely to the litigants. Even in private litigation, he said, the parties want discovery. What they want to avoid is public disclosure of their records and activities.

One participant noted that his court is moving towards allowing fewer matters to be filed under seal. On the one hand, he said, disclosure of documents and depositions may encourage parties to leave the court system for private litigation. But on the other hand, there is also a fundamental value in openness and public records.

One member said that his clients increasingly are resisting arbitration. The arbitration alternative, he said, was sold to parties on the basis of its being cheaper and faster. But, he said, it is neither. Moreover, decisions in arbitration usually involve the arbitrator splitting the baby, and there is no appeal from the decision. As one suggestion for change, he said that the committee might want to consider amending 28 U.S.C. § 1292(b) to allow more decisions to be brought to the courts of appeals.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held in Washington, D.C. on June 11-12, 2007.

Respectfully submitted,

Peter G. McCabe,
Secretary

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

SEPTEMBER 7-8, 2006

The Civil Rules Advisory Committee met on September 7 and 8, 2006, at Vanderbilt University Law School in Nashville, Tennessee. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David F. Levi, 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. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Vanderbilt Professors Richard A. Nagareda and Suzanna Sherry, Alfred W. Cortese, Jr., Esq., Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison), and Matthew Hall, Esq., attended as observers.

Judge Rosenthal opened the meeting by thanking Dean Edward L. Rubin and Professor Richard A. Nagareda for inviting the Committee to meet at the Law School. Dean Rubin welcomed the Committee, noting that the beautiful Vanderbilt campus is a national arboretum. The Law School is engaged in reforming its curriculum, rethinking what legal education should be for the Twenty-First Century. The "topography of law" has changed in the last 130 years, and the curriculum must reflect that. One area of change includes civil procedure and litigation. The realities of contemporary litigation should be brought into the classroom. The complexity of fact gathering, the real nature of the institutions of adjudication, and international dimensions all must be explored. The second and third years will be structured to enable students to make the most of these opportunities and similar opportunities in other areas. Professor Nagareda added that for litigation, the capstone will be a third-year seminar on the financing of large-scale litigation, the strategies pursued, and the rest of the real-world problems.

Judge Rosenthal noted that Judge Walker has completed his terms as a member of the Bankruptcy Rules Committee and will be succeeded by a new liaison to the Civil Rules Committee. The Bankruptcy Rules Committee has been forced into heroic efforts in the last few years, and Judge Walker's willingness to add the liaison duties to these chores is appreciated. His contributions to the Civil Rules discussions, both on the rules themselves and on integration with the Bankruptcy Rules, have been most helpful. The Committee will be fortunate to have a successor who is as congenial and helpful. Judge Walker responded that it has been a pleasure to work with the Civil Rules Committee, and a useful insight into common problems.

Judge Rosenthal also noted that this is the last meeting before expiration of the terms of members Cicero, Hecht, and Russell. Expressions of appreciation and farewell will be offered at the carry-over meeting next spring. She also expressed congratulations to Peter Keisler on his nomination to become a United States Circuit Judge. Finally, she noted that Judge Patrick Higginbotham, a former chair member who guided the Committee through exploration of a number of creative approaches to amending the class-action rules, has taken senior status.

Judge Levi reported on the June meeting of the Standing Committee. Both Chief Justice Roberts and Justice Alito appeared at the meeting; they joked that perhaps they had been appointed because their contribution to the development of Appellate Rule 32.1 in the Appellate Rules Committee reassured the President that the Rule would be approved by the Supreme Court. Chief Justice Roberts, both at the meeting and since, has shown keen interest in the work of the Standing Committee and the Advisory Committees. He is supportive of the rules work.

Judge Levi also summarized briefly the work of the other advisory committees. The Appellate Rules Committee has a new reporter, Professor Catherine Struve; her work with the Time-Computation Project Subcommittee is already familiar to — and admired by — the Civil Rules Committee as well as the other advisory committees. The Bankruptcy Rules Committee has been the busiest of all because of work mandated by the Bankruptcy Reform Act. They were given 180 days to develop a massive set of implementing rules. The task was complicated by problems in the Reform Act that were recognized even in Congress but left unresolved in the press for enactment. The technical problems are not likely to be fixed soon by Congress. This committee "meets all the time"; they have done a fair ten years' worth of rulemaking in one. It has been a marvelous job. The Criminal Rules Committee has been working on two contentious rules. One, Criminal Rule 29.1, was published this summer; it allows a pre-verdict directed verdict of acquittal only if the defendant waives the double-jeopardy protection against appeal by the government. The other is a revision of Criminal Rule 16 to codify the Brady Rule; this revision seems to be on the way to the Standing Committee. The Evidence Rules Committee published Rule 502 for comment this summer. It deals with some aspects of inadvertent waiver, a subject that has troubled development of the civil discovery rules, and also includes a bracketed provision on selective waiver. Congress has already expressed support for this Evidence Rules project.

Judge Rosenthal expanded the discussion of Evidence Rule 502 by observing that it dovetails in important ways with the e-discovery rules that remain on track to take effect this December 1. The Civil Rules Committee is grateful to have been allowed to participate in the Evidence Rules Committee's work developing the rule.

John Rabiej reported that things are quiet on the legislative front. The perennial bills to revise Civil Rule 11 are not moving. Concerns about some of the Criminal Rules have been expressed in the Senate and are being addressed by the Administrative Office staff. Bills to protect the confidentiality of news sources are ready for markup.

Judge Rosenthal said that the Civil Rules Style Project is on the consent calendar for the September Judicial Conference meeting and so far no member has asked to move it to the discussion calendar.

Finally, Judge Rosenthal reminded the Committee that for once the agenda concentrates on future work. Last spring the Committee decided not to ask for publication this summer of its completed proposals to amend Rules 13(f), 15(a), and 48 and to adopt a new Rule 62.1 on indicative rulings. Instead, those proposals will be recommended to the Standing Committee for publication in August, 2007. This delay will allow an interval for the bench and bar to become accustomed to the important amendments scheduled to take effect this December 1, including the e-discovery amendments, and to the Style Project, aimed to take effect on December 1, 2007.

May 2006 Minutes

The draft Minutes for the May 2006 meeting were approved, subject to correction of typographical errors and similar matters.

Time-Computation Project

Discussion of the Time-Computation project involves two separate blocks of material. One is the common provisions being developed for all of the rules sets other than the Evidence Rules. The Standing Committee Time-Computation Project Subcommittee has helpfully framed its template as Civil Rule 6(a). The template rule has been developed further over the summer, primarily through the work of Judge Kravitz and Professor Struve, in response to matters discussed at the June

Standing Committee meeting. It is in fine shape, but no doubt further revisions will be suggested in the several advisory committee meetings this fall. The other block of material emerges from the work of the two Civil Rules Subcommittees that have considered the time periods set in all of the Civil Rules both for adjustment to the new template rule and for intrinsic usefulness.

The template, Rule 6(a), was introduced by suggesting that three subjects may deserve consideration at this point. These include the new definition of the "last day," the restoration of the provision that includes state holidays in the definition of "legal holiday," and the impact on statutory time periods of the decision to eliminate the rule that excludes intermediate Saturdays, Sundays, and legal holidays in calculating periods less than eleven days. The statutory time period question will be deferred to the end of the discussion.

Last Day defined. Several aspects of subdivision (4), defining the end of the last day, were accepted without discussion. Allowing the day to run to midnight in the court's time zone for electronic filing was accepted without demur. Concluding the day for filing by other means at the close of the clerk's office or the time designated by local rule was accepted apart from the difficulties generated by the problem of filing by delivery to a court official after that time. The court's authority to set a different concluding time "by order in the case" also was accepted as important for all methods of filing.

Discussion focused primarily on paragraph (4)(B)(ii), which allows a paper filing to be made after the closing of the clerk's office by personal delivery "to an appropriate court official" "prior to" midnight. It was recognized that "prior to" will become "before" in the Style process. The provision otherwise presents difficult questions.

Item (ii) was added to subparagraph (B) as a response to 28 U.S.C. § 452 and the rules provisions that reflect it, such as Civil Rule 77(a). The statute and rules say that the court is "deemed" or "considered" always open. Apart from the fiction inherent in "deemed," these provisions have never been interpreted to mean that the court must be physically open at all times. Nor is there any indication that the statute was intended to address filing time. Instead, it seems most likely that it was adopted to ensure that judges — the court — have authority to act at any time. But Professor Struve's research shows that some decisions have relied on this statute in recognizing filing by delivery to a clerk, deputy clerk, or judge. Civil Rule 5(e), moreover, defines filing "with the court" to mean filing with the clerk or with a judge who permits filing by that means; it does not say that filing must be made with the clerk during the clerk's office hours.

The first comment was that the need for filing by delivery to a court official ties to the provision that extends time when the clerk's office is inaccessible. The rule cannot require pro se litigants who lack access to electronic filing to resort to electronic filing when the clerk's office is inaccessible. But service by hunting down a court clerk or a judge presents obvious and serious problems of security. The question is how seriously this method should be discouraged.

The next question was whether adoption of the template as now drafted would make it desirable to amend Rule 5(e) (to become Style Rule 5(d)) — to substitute "appropriate court official" for the choice of filing with the clerk or with a willing judge. But the revision might not be quite so straight-forward; the notion that filing with the judge is permited only if the judge agrees to accept filing should be carried forward.

It was then asked whether there is a reason why a court should not have a time-stamped depository for filing. The response was that increased security concerns, often reflecting specific courthouse design and security capabilities, have led some courts to abandon facilities of this sort in recent years.

It was suggested that it would be better to confine Rule 6(a) to a statement that the last day ends at midnight for all forms of filing, without offering any advice on how to accomplish filing after the clerk's office closes. But that approach might in fact encourage people to go off in search of a clerk or judge at home — the rule would seem to encourage paper filing as well as electronic filing at any time up to midnight. The potential for encouragement might be reduced, however, by framing the rule as allowing filing with an official who is willing to accept the filing.

The question whether all of this concern with filing after the close of the clerk's office hinges on § 452 went largely unanswered. But it was noted that there are circumstances that make after-hours filing important, even for litigants who have ready access to electronic filing. Needs for a temporary restraining order, attachment of a vessel about to sail, or for a receivership may arise after hours. But Rule 5 can accommodate emergency needs without saying anything about the topic in Rule 6(a).

The element of the draft that recognizes local rules was remarked with approval. It should be clear that a court willing to maintain a drop-box is free to do so, and to set the terms for use.

In the same vein, the provision for filing as directed by order in the case was suggested to be sufficient for the needs that cannot be addressed by local rules tailored to the circumstances of each particular court. This authority should apply to electronic filing as well as paper filing.

The conclusion of this discussion was a recommendation that the Time-Computation Project Subcommittee consider deletion of any express reference to filing by personal delivery to an appropriate court official, revising the structure to read:

(4) ***"Last Day" Defined.*** Unless a different concluding time is set by local rule or by order in the case, ~~T~~the last day concludes:

(A) ~~(i)~~ for electronic filing, at midnight in the court's time zone, and

(B) ~~(ii)~~for filing by other means, at the closing of the clerk's office. ~~or the time designated by local rule, unless~~

~~**(B)** (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.~~

Or the local rule provision could be limited to filing by other means, establishing a mandatory national rule that all courts must permit electronic filing up to midnight local time.

No views were expressed on the wisdom of discussing filing with a court official, § 452, or Rule 77(a) in the Committee Note.

State Holidays. An observer recounted a personal experience. A 10-day TRO prohibited a transfer of funds. The tenth day was a state holiday. The funds were disbursed, leaving the question whether the order had been violated because the tenth day was automatically extended to the next day that was not a Saturday, Sunday, or "legal holiday." Other problems arise with events that are not legal holidays — or may not be — within the Rule 6(a)(5) definition. A local order "closes" the court for Friday, January 2, or the President declares the Friday after Thanksgiving a federal employee holiday. A litigant could easily be confused. Electronic filing can easily continue on those days; commonly a skeleton crew will staff the clerk's office. And there is another wrinkle. Some courts distinguish between holidays and "days of holding court," designating days that are not holidays as days when court is not held.

It was pointed out that multidistrict litigation presents a particular problem for lawyers in states away from the consolidation court. Any attempt to calendar a motion will require research into local holidays observed where the consolidation court sits. The problem can be resolved, but it will be a nuisance.

This discussion led to the pointed reminder that the definition governs not merely filing but also "real world events" such as the expiration of a TRO. It also will reach rules that address obligations to serve rather than file. Perhaps the most noteworthy example is the Rule 4(m) presumptive 120-day period to serve the summons and complaint: the 120th day may fall on a state holiday when offices are closed and individuals are away from home.

Similar discussions in the past, while noting the risks of confusion, also have encountered reluctance to complicate this part of the rule still further.

Discussion turned to the provisions that extend filing time when the clerk's office is inaccessible. Closing to honor a state holiday may make the office inaccessible for physical filing, but not for electronic filing. This discussion in turn digressed to the familiar questions that arise from system failures in electronic filing. A model local rule was recently adopted to address failure of the court's system. But earlier discussions have tended to conclude that it is better to rely on the court's discretionary power to extend most time periods when the filer's system fails. The periods that cannot be extended under Rule 6(b) present some difficulty on this score, but the difficulty will be reduced if some softening is introduced into the Rule 50, 52, and 59 periods. It is not clear whether the Committee Note to Rule 6(a) should attempt to offer advice on any of these problems.

"Next Day" Defined. The paragraph (3) definition of "next day" was discussed briefly. Some Committee members thought it difficult to unravel the directions to "count forward" and to "count backward." One suggestion was that the drafting would be improved by changing the references to "next" day, beginning with (a)(1)(C), to "first" day. So the period continues to run to "the first day that is not" an excluded day; counting continues forward or backward to the "first day" that is not excluded.

Statute Time Periods Less Than 11 Days. The Rule 6(a) template continues to establish rules for computing a time period specified in a statute. Rule 6(a) has included statutory time periods from its birth in 1938. Last spring the Appellate Rules Committee raised the question whether it is unfair to the practicing bar to reduce the practical effect of many statutory time periods by eliminating the rule that excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11 days. This question was discussed extensively at the May meeting and at the June Standing Committee meeting. No clear answer was reached.

Uncertainty clouds the premise that dropping the "less-than-eleven-days" rule will have a significant effect on current practice. It is far from clear that many lawyers very often rely on Rule 6(a) to extend the periods set by statute. It may be that only a small set of highly sophisticated lawyers are even aware of the potential uses of the rule, much less willing to rely on it. At least one participant in the project reports that there is "mass confusion" in the bar about the impact of such rules as Rule 6(a). Mass confusion does not suggest widespread reliance on the rules to extend statutory time periods. The impetus for the whole Time-Computation project has been the bar's desire for clear time-counting rules. Uniform abolition of the "eleven-day" rule may be better for the bar than any other approach.

The obvious alternatives in addressing possible effects on statutory time periods in practice are unattractive. One is to maintain uniformity by restoring the "less-than-eleven-days" rule for all purposes. That would be a great step backward in the project. Another is to retain the rule only for

calculating statutory time periods, either by drafting Rule 6(a) that way or by urging Congress to adopt the rule by a general statute. That may be the worst of all possible worlds, afflicting the bar with different methods of time counting. The problem of different methods would be particularly troubling when the same question seems to be addressed both by statute and court rule. It is not uncommon for a statute to set a 10-day period for a temporary restraining order. Rule 65(b) sets a 10-day period for no-notice TROs. Computing the statutory period by a different method could cause real confusion. A third approach would be to abandon any reference to statutory time periods in Rule 6(a). That approach would lose the advantage of applying the rest of Rule 6(a) to statutory time periods, including the rules that exclude the day of the initiating event, include the last day, extend time when the last day is a Saturday, Sunday, or legal holiday, define the "next day," and define the end of the day.

These considerations led to a suggestion that it may be best to continue to address statutes in Rule 6(a), and to adhere to the decision to delete the "eleven-day" rule. When it seems important to extend a statutory time period that is integral with the rules, the supersession effects of the current rules could be carried forward on a rule-specific basis. The clear example is Rule 72. 28 U.S.C. § 636 sets a 10-day period to object to a magistrate judge's report and recommendations. Rule 72 adopts the 10-day period. Today the effect of Rule 6(a) is to extend the 10-day period to a minimum of 14 days. Elimination of the "eleven-day" rule can be offset by changing the time in Rule 72 to 14 days. The result is to carry forward the same supersession that has been in effect for many years. Another illustration is Rule 4 of the § 2254 habeas corpus rules; since 1976, this rule has superseded the § 2243 time to respond to a petition.

Since last spring, Professor Struve has begun to compile a lengthy list of statutes that direct action in periods shorter than 11 days. The list is not yet complete, and — particularly given the difficulty of searching statutes not in the United States Code — is not likely to be complete even for statutes now in force. But it is long and varied enough to give a good picture of the problems that would be encountered by any thorough-going attempt to consider each statute. The problems arise not only from number and variety, but also from the difficulty of understanding the practical demands that are placed on lawyers in each context. The first entry in Professor Struve's chart provides an illustration. 2 U.S.C. § 8(b)(4)(B) sets time limits for an action to challenge an announcement by the Speaker of the House of Representatives that "vacancies in the representation from the States in the House exceed 100." The action must be filed "not later than 2 days after the announcement." The final decision "shall be made within 3 days of the filing of such action and shall not be reviewable." In most settings at least one of these very brief periods would be extended by the "eleven-day" rule. It is safe to surmise that — unlike many other statutory periods — there is no obscure body of real-world practice that might illuminate our understanding of the impact of applying, or not applying, the "eleven-day" rule. Many other statutes obscure to most lawyers, however, may have generated clear understanding of time-computation methods within a small and highly specialized bar. Learning those understandings and measuring their importance would be a challenging and often frustrated task.

Additional problems arise from any attempt to find an abstract definition of the point at which a statutory time period sufficiently involves court procedure to come within Rule 6(a). A statute that directs a Cabinet Secretary to act on a matter in 10 days does not seem a legitimate subject of regulation by court rule. But a related subsection that requires any petition for review to be filed with a court within 10 days may be a legitimate subject of court rule concern. Yet it would be confusing to apply different computation rules to successive subsections in a single statute.

Many brief statutory periods, moreover, address topics of great sensitivity. Labor statutes addressing temporary restraining orders or preliminary injunctions are a familiar example that may be satisfactorily addressed by Rule 65(e), which says that the Civil rules do not modify any federal statute addressing TROs or preliminary injunctions "in actions affecting employer and employee." But other examples abound. 28 U.S.C. § 144 requires that an affidavit of a judge's personal bias or prejudice "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard." Formal terms have been abolished, § 138, creating an indistinctness about the point that sets the time period. Apart from that, the rulemaking process should be cautious in extending a deadline in a way that makes it more difficult to challenge a judge. Section 754 directs that a receiver for property situated in different districts has 10 days after appointment to file copies of the complaint and the order of appointment in each district in which property is located. The statutory desire for prompt action is manifest, but this period may be much less sensitive.

General discussion began by noting that the Criminal Rules do not apply the rule time-counting provisions to periods set by statute. The Criminal Rules Committee is currently deliberating this question. Adding statutes to the Criminal Rule (or perhaps it will be restoring — apparently the pre-Style rule was ambiguous) would not disrupt justified reliance on the "eleven-day" rule. And the absence of an "eleven-day" rule may lend some support to carrying forward with Rule 6(a) as currently drafted. Uniformity across civil and criminal practice is desirable absent some clear reason for disuniformity. The advantages of including statutory time periods would be the same as in the Civil Rules. It will be important to assist the Time-Computation Project Subcommittee in coordinating the separate sets of rules.

The difficulty of defining the reach of Rule 6 was offered as a reason for deleting the "eleven-day" rule for all purposes. Rule 1 limits application of the rules to civil actions or proceedings in the district courts. Some statutory periods clearly address matters too removed from court proceedings to be covered by Rule 6(a). Others may present more ambiguous questions. And there may be some uncertainty about the reach of Rule 6(a) "in computing any time period." 15 U.S.C. § 1116(d)(10)(A), for example, directs the court to hold a hearing on the date set in the order of seizure, which "shall be not sooner than ten days after the order is issued and not later than 15 days after the order is issued." This statute can be read to include time periods that must be computed, so that the 10 days becomes at least 14 days under the "eleven-day" rule. Or it can be read as a direction to set a date, an interpretation that makes more sense because it seems unlikely that Congress intended to set a choice at 14 or 15 days, and even more unlikely that it intended the bizarre consequence that would follow when a pattern of holidays means the hearing must be set no later than 15 days but no sooner than 16 days after the order issues.

It was reported that at least one member of the Appellate Rules Subcommittee designated to study the statutory time-period problem thinks the problem is so serious that the "eleven-day" rule should be retained for all purposes. But it was suggested that this view may be an over-reaction to the sudden emergence of a difficult question at a time when the project was making great progress. Congress is not likely to be offended by whatever answer seems best at the conclusion of the rulemaking process. It is clear that many statutes reflect a desire to direct prompt action by setting short periods. But if a specific statute seems to present a real problem, either of two approaches is likely to be acceptable. One is a situation-specific exercise of the supersession power. That is particularly easy with respect to statutes that already have been superseded, as with Rule 72 on objections to a magistrate judge's report. The other is to ask Congress to amend the statute. Congress is receptive to addressing specific problems of this sort in the periodic judicial improvement bills. But so far no advisory committee has identified a statute that seems to call for revision.

Discussion concluded with consensus that the project brings great benefits for the bar. For the world of statutes, the present rules do not establish clear conventions that lawyers can rely on. It is better to go forward with the template that applies Rule 6(a) to statutes and deletes the "eleven-day" rule for all applications. Problems raised by specific statutes should be addressed on a specific basis. Rule 72 is a good example of a situation that readily justifies extending a statutory 10-day period to a rule 14-day period to offset deletion of the "eleven-day" rule.

Specific Rule Time Periods. Two subcommittees, chaired by Judges Baylson and Campbell, reviewed the time periods in all of the rules. Many of the recommended changes fall into common patterns that are readily answered by routine amendments. Most 10-day periods will be changed to 14 days, recognizing that the present "eleven-day" rule means that a 10-day period is at least 14 days and may be longer still. Some, however, may deserve different treatment, as proved to be the case with Rules 50, 52, and 59. Periods shorter than 10 days require individual examination to balance apparent desires for urgent action against occasionally unrealistically brief times to act. Twenty-day periods are routinely extended to 21 days to realize the simplification of counting in week-long units. Periods set at 30 days or more, on the other hand, commonly are left untouched. Discussion accordingly focused on specific issues that presented special questions in subcommittee deliberations.

Rule 5.1. This new rule requires the Attorney General to intervene in an action challenging the constitutionality of a statute at the earlier of 60 days after the notice challenging the statute is filed or 60 days after the court certifies the challenge. The Department of Justice has again considered this period and considers it workable. No change will be recommended.

Rule 6(d), Style 6(c)(1) and (2). It was accepted that the time to serve a written motion and notice of hearing should be extended from 5 days to 14 days. But a question was raised whether the rule adequately addresses a TRO issued after notice. One of the exceptions applies when a motion "may" be heard ex parte — that may reach all TROs, which may be heard ex parte even though a hearing is provided in the particular case. (It was noted that some orders must issue ex parte, as if it is not known yet who the "defendant" will be and the order is issued conditioned on serving the person to be restrained.) Another exception applies when the court sets a different period. The order setting a hearing seems to fall within this exception. It was concluded that the rule does not need further changes.

Rule 16(b). Some concern has been expressed that the 90- and 120-day periods for issuing the scheduling order are compressed when the defendant has 60 days to answer, as in actions against the government. But the Department of Justice has concluded that there is no need for change. Although the period between answer and scheduling order is shorter than in cases with a 20-day period to answer, the difference is partly offset by the time available to answer.

Rule 23(h)(1). It was agreed that any consideration of the time to move for attorney fees in a class action should be treated as a new agenda item independent of the Time-Computation Project.

Rule 26(f). Subcommittee A considered the question whether the time for the parties' conference should be pushed back to 14 days before a scheduling conference is held, and the report to 7 days after the parties' conference. The Committee concurred in the recommendation that no change be made, observing that the question may deserve further attention as experience develops under the new rules on discovery of electronically stored information.

Rule 41(c). The Committee concluded that the Time-Computation Project is not the occasion to decide whether a motion for summary judgment should cut off the right to a unilateral voluntary dismissal without prejudice of a counterclaim, cross-claim, or third-party claim.

Rule 50, 52, 59. Rule 6(b) prohibits extension of the 10-day time periods set in these rules. Preliminary discussion focused on a suggestion that the 10-day period should be retained without following the general conversion of 10-day periods to 14 days, but that authority should be created to extend the period. After brief discussion of the value of uniformity in setting 14-day periods, further discussion was postponed for separate consideration of Rule 6(b).

Rule 54(d)(1). This Rule now provides that the clerk may tax costs on one-day's notice. Informal inquiries suggest that practice varies greatly among different courts. But 1-day's notice allows very little time to respond. The Committee adopted the recommendation to extend the notice period to 14 days, and — adhering to the convention — to extend the time to serve a responding motion to 7 days.

Rule 56. Rule 56 is the subject of a separate project. The time provisions need serious changes, and have been studied by both subcommittees. It may prove possible to publish a proposed Rule 56 at the same time as the time rules. But if not, the time provisions can be adopted as part of the Time-Computation Project; the constraints that applied in the Style Project do not apply to time computation — "substantive" changes are permitted. Perhaps the most important observation is that commonly the time for summary-judgment motions will be set by a scheduling order. The "default" time periods provided by Rule 56 remain important, however, and the proposed revisions include express provision for a motion to be served "at any time," including with the complaint. A motion served with the complaint almost inevitably will be made before the scheduling conference.

A clear weakness in the current rule allows an opposing party to "serve" affidavits before the hearing day. Service by mail almost ensures that the affidavits will not be received before the hearing. Many local rules set more realistic periods; if they are not invalid, it is only because they correct an inappropriate national rule.

The proposed rule, unlike the present rule, establishes a cut-off for filing a summary-judgment motion. The motion may be made at any time "until the earlier of 30 days after the close of discovery or 60 days before the date set for trial."

Discussion began by noting that the "close of discovery" is not always a clear moment. A scheduling order, for example, may set a time to end discovery, and a different time to end "expert discovery." Should the rule be "the close of all discovery"? Or discovery may be staged, limiting initial discovery to defined topics — among other motives, the purpose may be to address first an issue or set of issues that may be likely candidates for disposition by summary judgment or other court action. Interpretation of a patent claim, a matter for the court, might be first, or issues of validity. The question is not so much a matter of the concept as the need for clarity. One response might be to refer to the close of discovery "on the issues for which summary judgment is sought," although that approach is likely to work only when there is an order clearly staging discovery on different issues. But it may be that clarity is best achieved by the general reference as drafted, relying on intelligent application and on the expectation that when a court order sets a time or times to complete discovery the order is also likely to address the time for summary judgment. A different form of indeterminacy will arise in cases that do not have an order defining the time to complete discovery. Rule 16(b) allows exemptions from the scheduling-order requirement. But those situations too are likely to yield to common-sense application.

It was suggested that the period set at 60 days before trial is too short. Lawyers need a ruling before the time to make Rule 26(a)(3) pretrial disclosures. The local rule in the Northern District of Texas sets 90 days before trial, "and that's a minimum. 120 days would be better."

A response suggested that it would be better to have only one cut-off date: 30 days after the close of discovery. But it was observed that it may be necessary to carry on discovery until a time just before trial. One instance would be consolidation of a preliminary-injunction hearing with trial on the merits. For that matter, surprise events may be met by a continuance to allow mid-trial discovery.

A different perspective was offered. "There is only so much we can do with case management in the Rules." Reference to the close of discovery is ambiguous. The better approach would be to set the limit at 90 days before trial. But this suggestion was met with the observation that the local rule in the Northern District of Georgia sets the time at 20 days after discovery. That rule forces judges to enter scheduling orders — and they commonly set a different period. They do not set trial dates, so the cut-off must be defined by the close of discovery.

This complication led to the suggestion that if different districts take different approaches to defining a cut-off now, it may make most sense to carry forward the alternative cut-off points, aimed both at the conclusion of discovery and at trial. The Rule 56 provisions will serve only as a default for cases without a scheduling order that sets the time, but also will help by suggesting approaches that generally work in framing a scheduling order. Setting alternatives also reinforces the integration with Rule 56(f)'s provisions for deferring action on a motion when the nonmovant needs more time for discovery or other investigation. The alternatives allow greater flexibility, including cases in which there is no discovery. Many cases, for example, come up for decision on an administrative record and readily lead to "summary judgment" without need for any discovery.

This discussion led back to the question whether there is a need for a national rule. There are many local rules now. Individual case management is provided for most of the cases that need a firm schedule. Setting the time at 30 days after the close of discovery can be too short — deposition transcripts may not be immediately available. At least, there should be an exception that recognizes the legitimacy of local rules that depart from the national rule. The need for local rules may be reduced by adoption of a satisfactory national rule, but it should be remembered that the reason the Local Rules Project did not challenge summary-judgment rules that seem inconsistent with the national rule is because the local rules often seem better. On the other hand, a national rule may be welcomed because it reduces the need for scheduling orders in all cases, including categories of cases exempted from Rule 16(b) by local rule.

The suggestion that the cut-off should be tied to the trial date was renewed, with the time set at 120 days to be "symmetrical with the 120-day period in Rule 16(b)." Lawyers want the summary-judgment ruling before they prepare for the final pretrial conferences. And if the reference to the close of discovery is carried forward, it should be made clear that it does not mean that summary judgment may be sought only after discovery is completed.

In similar vein, it was noted that the reference to the completion of discovery will lead to cases without a clear cut-off. It is easier to set a cut-off by looking to the trial date.

This discussion led to the question whether the attempt to set a cut-off date is an attempt to fix something that is not broken. The rule does not now set a cut-off. Does adding this to the rule "tread too much on the court's autonomy"?

The first response was that the system — or at least the national rule — is broken. A default should be set. But it must be recognized that the default in the national rule will tend to be viewed as the standard. That seems to have happened with the period set by Rule 26(a)(2)(B) for disclosing an expert trial witness report.

Further discussion led to several conclusions. The rule should have alternative cut-offs that relate to the close of discovery and to the trial date. Some courts do not set trial dates; a cut-off directed only to the trial date could catch the parties by surprise when they suddenly find that trial will occur at a time that cut off the summary-judgment period before any motion was made. 120 days before trial may allow too little time in cases in which early trials are set. Exceptions should be made for local rules. And the court's authority to set a different time should clearly apply to the nonmovant's response as well as to the initial motion.

Public comment on a published proposal may provide useful information about the pressures encountered in practice.

The result, subject to further consideration by the time-computation and summary-judgment subcommittees, is a tentative draft:

(a) Unless a different time is set by local rule or by an order in the case:

(1) a party may move for summary judgment on all or part of a claim or defense at any time until the earlier of 30 days after the close of discovery or 60 days before the date set for trial; and

(2) a party opposing the motion may file a response within 20 days after the motion is served.

A postscript observed that setting the time to respond by service of the motion renews the continual question whether time periods should be set by filing rather than service. Filing is a clearly defined event. The time of service may be disputed. And reliance on filing may become easier as service comes to be made by electronic means that essentially coincide with filing.

Rule 59(c). Rule 59(c) provides that a party opposing a new-trial motion that is supported by affidavits may file opposing affidavits within 10 days after being served, "but that period may be extended for up to 20 days." Changing 10 days to 14 and 20 days to 21 conforms to the consistent format adopted for many rules. But closer examination shows an apparent dissonance with Rule 6(b). Rule 6(b) on its face authorizes the court to extend the times set by Rule 59(c) without setting any outer limit. The ordinary reaction would be that the more specific limit set in Rule 59(c) should control. But until 1948, Rule 6(b) specifically directed that time could be extended under Rule 59(c) only as directed in Rule 59(c). This reference to the limit in Rule 59(c) was deleted in 1948. The Committee Note says clearly that there is no reason to carry forward a specific limit on the time allowed to file opposing affidavits. The new-trial motion has upset finality and the court should have its ordinary discretion to allow the time appropriate to the needs of the situation. This question is independent of the strict rules that set nonextendable 10-day limits for motions under Rules 50, 52, and 59. It was agreed that Rule 59(c) should be amended to read: "The opposing party has 14 days after being served to file opposing affidavits~~; but that period may be extended for up to 20 days~~." Extensions will be governed by Rule 6(b).

Rule 65(b). Subcommittee B recommended that no change be made in the Rule 65(b) provision allowing a motion to dissolve or modify a no-notice TRO "on 2 days' notice." Depending on the day of the week chosen to file the motion, the result may be less notice than is provided by application of the "eleven-day" rule. But the unique nature of TROs makes that appropriate. The Committee agreed.

Rule 68. Rule 68 allows an offer of judgment to be served at least 10 days before trial. The 10-day period will be extended to 14. In addition, the Committee agreed that uncertainty about trial dates should be addressed by adding three words: "At least 14 days before the date set for trial * * *."

Rule 81(c). Subcommittee B recommended that the 10-day period to demand jury trial after removal either be reduced to 7 days or set at 14 days. No reason was found to reduce the time now available. The Committee concluded that the time should be set at 14 days, giving the same practical effect as the present rule. Removal itself can raise complicated questions and the time may well be needed.

Supplemental Rule G(4)(b)(ii)(C). This rule specifies that notice of a civil forfeiture action must state that an answer or a Rule 12 motion must be filed no later than 20 days after filing a claim. The civil asset forfeiture reform legislation sets the 20-day period. Nonetheless it seems appropriate to add the extra day to conform to the uniform rules preference for 21 days. This is the mildest form of supersession imaginable, and is an even smaller change than other departures from statutory time periods deliberately adopted and defended in drafting new Rule G.

Rule 6(b); Rules 50, 52, 59, and 60. Rule 6(b) establishes the general authority to extend time periods set by the rules. As expressed in Style Rule 6(b)(2), it also says: "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow."

One aspect of Rule 6(b) seems to call out for revision. None of the rules referred to allows an extension of time. These words seem to have hung on in the rule from earlier days when the list included former Rule 73's appeal-time provisions and an explicit reference to the Rule 59(c) provision that did allow an extension of time. They must cause many anxious moments as puzzled lawyers and judges search the rules for provisions that allow an extension. These words should be deleted.

The more important question ties directly to the time periods set in Rules 50, 52, and 59. Each rule requires post-trial motions to be filed within 10 days from the entry of judgment. Experience has shown that often the 10-day period is too short. A well-crafted motion requires more than 10 days to prepare when the case is complex, when a trial transcript is not immediately available, or when other circumstances place competing demands on the parties' time. Courts respond to this problem in a variety of ways. The simplest is to defer the entry of judgment. This tactic often inspires feelings of guilt because it seems a questionable tactic to subvert Rule 6(b). Guilt may in turn cause a court to enter judgment promptly even though it might wish to defer. A different reaction may be to insist on a timely motion, but to provide an extended time to brief the motion and to take an indulgent view of the motion in determining that the arguments in brief are supported by the motion, or else to exercise the authority to grant a timely motion on grounds not stated in the motion. These reactions of themselves suggest that it might be better to relax the absolute prohibition.

Additional reasons to relax the prohibition appear in the continuing occurrence of cases in which lawyers — at times with the apparent concurrence of the court — mistakenly request and receive extensions forbidden by Rule 6(b). Reliance on an unauthorized extension may mean only that relief under Rule 50, 52, or 59 cannot be granted. But it also may mean loss of the opportunity to appeal, since only a timely motion suspends appeal time under Appellate Rule 4. Sympathy for lawyers who make such mistakes generated a "unique circumstances" doctrine that gave effect to an untimely motion if the court went beyond mere granting of an extension to affirmative statements that induced reliance on the belief that the extension was effective. The "unique circumstances"

doctrine is at best under a cloud; recent restatements suggest either that it has become very narrow or that it has been abandoned.

Several responses are possible. The easiest is to do nothing. The rules were deliberately crafted in the belief that strict time limits should be set once final judgment is entered. At that point it is important either to achieve true finality or to expedite the launching of an appeal. There is little reason to grieve for clients whose lawyers fail so simple a task as the duty to read the rules. But this view provides an uncertain response to the many courts that have found it desirable to extend time by resort to devices not spelled out in the rules.

Another possible approach would be to amend Rule 58 to expressly authorize the common practice of deferring entry of judgment to afford the time needed to prepare and file post-trial motions. This approach would avoid technical complications, at least so long as attorneys can be trained to find the rule and remember it.

Still another approach would be to amend Rule 6(b) to authorize extensions under tight control. Good cause would be required. The motion for an extension would be required within the initial 10-day period, and a maximum extension would be specified — perhaps no more than an additional 30 days, setting an outer limit at 40 days from judgment. But the drafting would prove complex. If the court does not act on the motion for an extension by the 10th day, the party seeking an extension must file the motion or run the risk that no motion can be filed because the extension will be denied. That risk could be addressed by requiring a ruling by the 10th day, but that will not work unless the motion must be filed early in the 10-day period. A similar problem would arise if there is no ruling on the request for an extension within appeal time: the notice of appeal must be filed even though the moving party still hopes to be allowed to file a motion for post-judgment relief. The response again must be complicated.

Yet another approach was suggested. Why not avoid any further complication — and the attending need to add corresponding reflexes in the bench and bar — by adhering to the present rule, but establishing a uniform 30-day period to make any of the Rule 50, 52, and 59 motions now constrained by a 10-day limit. An appellate judge observed that appellate courts would not be at all concerned with such a change. It also was observed that a 30-day period is congruent with the appeal time set for most civil actions: all parties know that a final judgment remains vulnerable to post-trial attack or appeal for 30 days. Nor will the change have any complicating effects on Rule 62(b), which allows a stay of execution or enforcement pending disposition of motions under Rules 50, 52, 59, or 60.

A motion to set the times in Rules 50, 52, and 59 at 30 days was approved without dissent.

Finally, it was agreed that there is no reason to change the maximum one-year time allowed to seek relief from a judgment under Rule 60(b)(1), (2), or (3). One year is a good point to achieve true finality as against belated attack on these grounds.

Discovery Subcommittee

Judge Campbell and Professor Marcus delivered the report of the Discovery Subcommittee.

Rule 30(b)(6)

The Discovery Subcommittee reported on its study of Rule 30(b)(6) at the May meeting. The Committee accepted its recommendation to abandon present work on several possible amendments. But three issues were recommended for further study. The Subcommittee now recommends that none of these three be acted on now.

The first open issue is whether Rule 30(b)(6) should be amended to address the "binding" effect of the deposition answers given by a person designated to testify for an organization named as deponent. Some comments have urged that the answers should be more binding, arguing that organization deponents often fail the duty to prepare the witness adequately. This approach seems to involve the obligation to prepare the witness. But case law is clear that the organization is obliged to prepare one or more witnesses to provide all "matters known or reasonably available to the organization." Other comments urge that courts now give the deposition answers greater binding effect than they deserve. But a survey of the cases suggests that courts are generally getting it right. The deposition testimony is not treated as a judicial admission. The testimony instead is treated as any deposition testimony by a party deponent. Cases that seem to give greater "binding" effect generally involve sanctions for failure to prepare the witness. The concern that the answers may have undue effect seems to arise not from the case law but from the statement in Moore's treatise that the answer is binding on the organization. It may be more appropriate for the editors to reconsider the position taken in the treatise than to amend the rule to negate it.

The second open issue is whether there should be an express provision allowing an organization deponent to supplement the deposition testimony of its designated witness. This issue springs from the concern that the testimony may be given an undue binding effect. Since there is little apparent problem with binding effect in practice, there seems little reason to amend the rules.

The third open issue is whether something should be said in the rules about the effects of sharing work-product material with the designated witness during preparation to testify. This issue ties to the work-product and privilege questions that arise from Rule 26(a)(2)(B), to be discussed in the second part of the report. The present recommendation is that consideration of this aspect of Rule 30(b)(6) be deferred for study along with the expert trial witness issues.

A practitioner observed that there is a lot of concern about the role of work-product information used to prepare organization witnesses to testify to matters known or reasonably available to the organization. Almost inevitably the task of gathering the information will be directed by counsel. It is almost as inevitable that counsel will direct the process of educating the witness in what the organization knows. As an illustration, a company may hire counsel to investigate "an event in the company." Counsel reports to the board on the facts as counsel understands them. Does the company have an obligation to educate the designated witness in the facts as counsel found them? It has been argued that these facts should be revealed to the witness. A different approach would be that counsel's investigation is protected as work product if the facts can be found from independent sources in discovery. The problem may be best focused when counsel relies on information from sources within the company. The same information would have to be sought out in response to the deposition notice, and transmitted from the company sources to the witness, if counsel had not undertaken any prior investigation. If the information came from sources outside the company, on the other hand, the outcome may be more confused. Perhaps the witness should be educated in the identity of the sources, but not made to paraphrase counsel's paraphrase of what the sources know. Another source of confusion will arise when counsel has gathered information from sources outside the company that counsel does not believe true.

These questions will remain under study in conjunction with the parallel questions that arise from disclosure and discovery of expert trial witnesses.

Rule 26(a)(2)(B)

The introductory statement identified three broad categories of questions arising under Rule 26(a)(2)(B). One involves identification of the trial witnesses that should be required to prepare a

report — questions have arisen both as to a party's employee whose duties do not regularly involve giving expert testimony, a matter identified in rule text, and also as to a treating physician, a matter identified in the 1993 Committee Note.

The second category involves the impact on privilege and work-product protection of the mandate that the trial expert witness report state "the data or other information considered by the expert in forming the opinions." The 1993 Committee Note says, perhaps ambiguously, that this obligation means that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." There is a lot of confusion about this issue. In 2000 a New York State Bar Association committee recommended that the confusion be resolved by requiring disclosure of everything considered by the witness, defeating any privilege or work-product protection that otherwise would apply. This summer the American Bar Association House of Delegates approved a recommendation by the Section of Litigation that otherwise privileged or protected information should remain protected despite disclosure to an expert trial witness in the course of developing the expert opinion.

The third category involves the retention and discovery of draft reports. Rule 26(a)(2)(B) and (b)(4)(A) do not now address this question. Many experts go to great lengths to avoid keeping any draft reports.

Professor Marcus elaborated on this introduction, observing first that these issues have been developing for several years. The line has been moving toward more disclosure; perhaps it has moved too far. It might be attractive to develop bright lines, but bright lines may be difficult to draft.

The context of the present problem goes back to the 1970 discovery amendments. Before 1970 courts divided in their treatment of expert witnesses, but discovery was very difficult in most courts. The 1970 amendments expanded discovery, but discovery of right was limited to interrogatories demanding identification of the subject on which each expert would testify, the substance of the facts and opinions to be stated, and a summary of the grounds for each opinion. Practice under this rule apparently developed differently in different parts of the country. In some places it became common practice to depose trial experts. In other places depositions were not common. There also was a problem in getting an expert to agree that the opinion relied on a learned treatise.

The expert-witness disclosures required by Rule 26(a)(2) in 1993 somehow failed to draw much attention. The focus of debate was on the initial disclosure provisions in 26(a)(1). The 1993 amendments, however, greatly expanded access to an adversary's trial experts. All must be identified. Elaborate reports must be disclosed as to most, including identification of matters "considered" rather than those "relied upon" in forming expert opinions. And there was a right to depose a trial-expert witness, although it is postponed until a report has been disclosed if the expert must provide the report. The hope was that the report would at least focus and expedite the deposition, and even avoid any need for a deposition in some cases.

Along the way, Evidence Rule 701 was amended to state that lay opinion testimony that relies on expert knowledge must be evaluated under Rule 702. It was noted that the disclosure obligations of Rule 26(a)(2) would apply to a lay witness relying on expert knowledge.

The treating physician question was addressed in the Committee Note as an illustration of an expert witness not retained or specially employed to provide expert testimony. The fear was that preparation of a report would be an undue burden, an intrusion on treatment of other patients, and a deterrent to testifying at all. But the complication is that it may become difficult to distinguish the

roles of a treating physician who also testifies to the likely future effects of an injury, pain and suffering, or other matters that do not arise naturally from treating the injuries.

The distinction between employees whose duties do not regularly involve giving expert testimony and employees whose duties do regularly involve expert testimony is not clearly explained in the 1993 Committee Note. The purposes are left to inference. At the extreme, it might be argued that as soon as an employee is designated to provide expert testimony the employee has been retained or specially employed for that purpose. That approach dissolves the distinction deliberately drawn in the rule, however, and is not convincing. A different problem arises with the employee who is both an actor or viewer with respect to events in suit and also an expert in the subject. The Eleventh Circuit says that a Rule 26(a)(2)(B) report should be provided when the employee is a "pure expert," but not when the employee is also an actor or viewer. But a report has value whenever expert opinions are to be expressed. The article that was filed as a proposal to amend the rule says that reports are essential. It also predicts that if reports are not required of the "regular employee," use of such witnesses will expand rapidly.

The 1993 Committee Note reference to materials considered by an expert and privileged or otherwise protected does not explain why waiver should be required only if a report is required by 26(a)(2)(B). For that matter, it is not quite clear what it means. It builds on the obligation to disclose "information" considered by the expert. "Information" could be read in pari materia with "data," looking for facts and general theory in the expert's field, not case strategy discussed by the lawyer. It has been read broadly, however, to effect waiver. The American Bar Association report says that this approach is too intrusive. It adds that the intrusiveness is recognized by experienced lawyers, who often stipulate out of this effect.

Evidence Rule 612(2) may seem to relate to the waiver question. It provides that a court may order production of materials considered by a witness to refresh memory before testifying. But it is not clear that materials considered to form an opinion are used to refresh memory.

Drafts of expert witness reports are not explicitly addressed by Rule 26(a)(2)(B) unless it be as materials considered in forming an opinion. There is a strong tendency to compel discovery. The American Bar Association asserts that the reaction by experts is to take care to avoid ever having a draft that can be disclosed. In turn, some judges respond by ordering that drafts be retained, and have imposed sanctions for disobedience.

The American Bar Association recommendations rest on the belief that collaboration between attorney and expert witness should be protected by confidentiality. The expert needs privacy in developing opinions. What the lawyer told the expert should be protected, as should the process by which the expert developed an opinion in the framework of working with the lawyer. The 1993 Committee Note recognizes that the lawyer may assist in preparing the expert witness's report; that does not of itself speak to protecting their interaction from disclosure or discovery.

The other side of the argument can be illustrated by imagining an expert report delivered to the lawyer who responds that a different report is required — the answer should be "no," not "yes." Should only the final "no" report be discoverable?

Any number of rules changes might be considered in responding to these questions. Many are sketched at pages 222 to 225 of the agenda materials. An obvious possibility would be to require a disclosure report of any employee who will offer an expert opinion, deleting the exemption for an employee whose duties do not regularly involve giving expert testimony. This possibility could be complicated by distinguishing between the "pure" expert employee who is not an actor or viewer of the events in suit and a "hybrid" employee who is an actor or viewer and also has expert knowledge.

Something might be done as to the treating physician, perhaps by attempting to distinguish between opinions formed in the course of treatment and opinions developed for the purpose of trial.

The problem of privileged or work-product material shared with an expert witness could be separated from the disclosure report. A broad approach might be to narrow the requirement to disclose all information "considered" to a requirement to disclose only information "relied upon" in forming an opinion. Or "core" work product might be exempted from disclosure. Or an attempt might be made to protect privileged and work-product information that comes to an employee in the regular course of work, not only in collaboration with counsel in preparing an expert opinion.

More general approaches might address work-product and privilege explicitly in Rule 26(a)(2)(B). Or the project could undertake a more general review of the work-product provisions in Rule 26(b)(3). The Rule protects only documents and tangible things, leaving other work product to protection by decisional law. It does not define "core" work product. It does not clearly say whether a party can generate core work product, or only an attorney. But further development of 26(b)(3) would be challenging.

Rule 26(a)(2)(B) could be revised to insulate draft reports. But that must confront the risk that it really was the lawyer who wrote the report's content as well as the expression. Do we really want to protect that information?

If the conclusion is that maximum disclosure and intrusion is desirable, there is little apparent need to amend the rules. That is where we seem to be now. The Committee could let things percolate along, bypassing minor wrinkles. Assuming that the 1993 amendments were intended to establish complete disclosure and discovery, they are working pretty much as intended.

Discussion followed. The first observation was that indeed the law seems to be moving away from the rule's clear meaning with respect to reports from employees whose duties do not regularly involve giving expert testimony. In a pharmaceutical product action, for example, an officer-employee might be asked whether the company properly designed a clinical trial. It will be objected that a report was required. But you have to ask the question — the jury will wonder why you did not. The 1993 rule got it right; the cases that require reports, disregarding the rule, are wrong. The 1993 Committee Note also got it right as to treating physicians. These witnesses "did not go looking for employment as expert witnesses. They would rather not be witnesses." A treating physician may refuse to testify at all if a report is required. The regular employee often has privileged information not because of the witness role but because of ordinary work duties.

The general question was renewed directly: Why should waiver of privilege and work-product protection depend on whether Rule 26(a)(2)(B) requires a disclosure report? If waiver is proper because the court needs to assess the line between witness as expert and witness as advocate coached by the lawyer, why should there not be waiver as to all expert opinions at deposition and at trial no matter whether a disclosure report is required? And for that matter, why is it proper to tie waiver of privilege to the discovery rules — the argument seems to be that it is privileged, but we have decided to require discovery so you waive privilege by complying with the discovery rules. Clearer justification is needed.

This broad approach was extended still further, not only picking up the question whether the disclosure and discovery issues can be addressed without addressing waiver for all purposes but also asking whether the choice between waiver and protection can be made without addressing the general problems with the ways in which expert witnesses are used.

This discussion was tied back to the Rule 30(b)(6) discussion by observing that work-product waiver must be confronted whenever an organization's attorney participates in preparing the organization's designated witness for the deposition. To be sure, many 30(b)(6) witnesses are not testifying as experts. But among other common threads, the use of materials to educate the witness presents the issue whether this is to "refresh" recollection within the meaning of Evidence Rule 612 or whether it is to impart new understanding.

The "hybrid employee" question came back with the observation that this question may not have been considered in drafting Rule 26(a)(2)(B). Perhaps the drafters were thinking only of excluding any report requirement when an employee is asked a question like "what do you do in operating this machine?". This was followed by observing that it is not possible to draft a rule that fairly addresses all of the soft edges of privilege and work-product protection. Suppose an employee sues the employer and the manufacturer of a machine involved with the employee's injury. Coworkers are asked about the working of the machine. Their knowledge may qualify as "expert" knowledge. And they may have had communications with counsel on the subject. Separating fact from communication can be difficult, yet a fact cannot be made privileged by communicating it to a lawyer.

Looking back to Evidence Rules 701 and 702, it was stated that the amendments reflected concern that expert testimony was being introduced through lay witnesses, bypassing the Rule 26(a)(2) disclosure requirements. Another participant observed that Rule 26(a)(2)(B) was in fact drafted with an eye to excluding the drill press operator from the report disclosure requirement.

More generally, it was reported that in complex cases there is a protocol that counsel may agree to: no one exchanges or seeks discovery of export report drafts. The expert discloses anything relied upon, but not all things that were considered. As to employee witnesses, on the other hand, they may present "very expert testimony" and it is desirable to have reports from them. In cases where the lawyers do not agree to this protocol, "we fall back on the rules, but these protocols are surprisingly common." They may be more common, however, in cases in which both sides have much discoverable information; practice in "one-way" discovery situations may not be as prone to these agreements.

In presenting the ABA resolution, Mr. Greenbaum suggested that proponents of the "full disclosure" approach tend to be judges and professors not involved in daily expert-witness practice. They like the theory, and are pushing the case law in that direction. But the results defy common sense, and often give advantages to wealthy litigants who can retain separate sets of consulting experts and trial-witness experts. Practicing lawyers strongly urge change. The American Bar Association Task Force includes lawyers both for plaintiffs and defendants, as does the House of Delegates. The ABA resolution "solves many of the problems." The purpose of the report requirement adopted in 1993 was to help the adversary decide whether it needed to hire its own expert, whether it needed to depose the reporting expert, and how to conduct the deposition efficiently if one is needed. Everyone understands that a trial expert witness will testify in favor of the side that presents the witness. Everyone understands that the favorable testimony will be formulated in exchanges with counsel that educate the witness on the issues in the case, and that the expert's testimony will be reviewed with counsel. It is not useful to find out what role the attorney played in a particular case, and in any event you never really find out. The interchange between counsel and witness is evolutionary, and when asked the witness will remember only in (usually innocuous) part. The question at trial should be whether the opinion is well-founded in its own terms. Massachusetts, Texas, and New Jersey do not allow discovery of expert reports. Their systems work well.

These observations continued by asserting that the requirement that the expert disclosure report include all information considered was intended to support cross-examination on facts similar to "data." "[I]nformation" was not intended to include work-product revealed by counsel. Work-product protection should extend to all exchanges with trial expert witnesses. "Fair notice of what the expert is going to say is all we should require."

The lawyer for one side, further, needs an expert to prepare to depose or examine the other side's experts. If the client can afford a separate consulting expert, the preparation can proceed unimpeded by concerns for discovery of the expert's participation. But if only a trial expert witness can be afforded, is it fair to require disclosure and allow discovery of all communications between witness and counsel?

Discovery of draft reports in addition to communications means that in reality there are no drafts. Experienced expert witnesses have learned not to keep them. Their habits in turn open the specter of costly computer forensic inquiry into the not-quite-deleted contents of their computer hard drives. "This is uncomfortable behavior." Lawyers feel obliged to advise the witness not to print or e-mail a draft report, but instead to bring it along on a lap-top computer or to read it over the phone. They go to great lengths to avoid creating material that might hurt the case. Reasonable lawyers stipulate out of such discovery, but not all lawyers are reasonable. And it would be better for experts to be able to make and keep notes; good expert witness preparation is harmed by overbroad discovery.

In response to a question it was reported that the Litigation Section Resolution reflects a strong consensus, but not a unanimous view. Two judges on the task force abstained. In the section Council, one person was a "purist" who believed that "everything should come out." After vigorous debate, the House of Delegates approved the resolution with more than sixty percent in favor.

The New Jersey rule "is a pleasure to work with." It makes it possible to work more effectively with "my own experts."

A Committee member agreed that discovery in this area has become "pretty artificial," but asked Mr. Greenbaum how he would argue the other side. The response was to recall a particular case in which the attorney simply presented the expert with a report of the testimony the expert should offer. Discovery was allowed. But even that case is not persuasive. The expert's testimony would not have stood up under cross-examination. The price of the ABA proposals is not high. To borrow a phrase used to describe a long-ago class-action proposal, all the obfuscation and effort that go into much present discovery of expert testimony "just ain't worth it." And this was a problem before discovery of electronically stored information — drafts were not retained in paper form. In short, facts and data considered by the expert are fair game for discovery. Consultation with the attorney is not.

A Committee member observed that when you are trying to retain a good expert who is not a "practiced expert witness," it can be difficult to overcome the reluctance that arises on learning everything that must be done to thwart discovery.

Discussion turned back to the practice of stipulating to narrow discovery. It was agreed that some lawyers do this, but the stipulation may not extend to all issues in the case, and it is not followed in all cases. If you have to go to court, the court will resolve disputes by ordering that drafts be produced. But that is undesirable. The expert has to defend the opinion in its own terms; that should suffice. The general work-product tests are good, and should apply to communications between counsel and expert witness — the attorney should be able to discuss work-product with an

expert witness, protected against disclosure or discovery unless the 26(b)(3) showings of substantial need and undue hardship can be made.

Turning to employees as "experts," the line between lay opinion and expert opinion should be the same for disclosure and discovery as at trial. "The opinion should be disclosed" when the employee has the skills and learning needed to give an expert opinion.

Judicial management was suggested as an answer to these problems. The discussion has been illuminating, but it does not point up a need to revise the rules, apart from a rule denying discovery of draft reports. Imagine this event: the lawyer tells the expert witness that a part was missing from the malfunctioning machine. The expert prepares a report that addresses the malfunction both if the part was missing and if the part was not missing, but without expressly referring to the part's absence. The fact that the part was missing should be subject to disclosure and discovery.

The relationship between Rules 26(b)(3) and (b)(4) was noted. From 1970 to 1993, Rule 26(b)(4) opened by stating that discovery of facts known and opinions held by an expert and acquired or developed in anticipation of litigation or for trial "may be obtained only as follows." That clearly superseded application of the (b)(3) tests. This language was deleted from (b)(4) by the 1993 amendments without changing the introduction that makes (b)(3) "subject to the provisions of subdivision (b)(4)." There is no indication that any thought was given to the effect of this change on the relationship between (b)(4) and (b)(3). As a matter of rule text, it is easy to read (b)(3) to apply to an expert witness as a party's representative or as a party's consultant. If the purpose in 1970 was to substitute the apparently more discretionary standard of 1970 (b)(4)(A) and the apparently more demanding standard of 1970 (b)(4)(B) for the work-product tests of (b)(3), the purpose of the present structure is more difficult to fathom. Perhaps it would help to reconsider the interrelation of (b)(3) with (b)(4) in light of the present problems.

Turning again to discovery of draft reports, an expert witness from Massachusetts reported that practice under the Massachusetts state rule is much better. The Massachusetts rule fully protects attorney-expert communications, and bars discovery of draft reports. This practice is much less expensive for the client than the procedure in Massachusetts federal courts. The federal rules lead to lengthy depositions. "Then they settle." State-court cases are more likely to be tried. Cross-examination goes much faster at trial than in the federal cases that do go to trial. Speedy cross-examination is better for the jury. And lawyers are much more respectful of the witness in front of a jury than they are at deposition.

After adjournment for the evening, discussion resumed by focusing on the most promising paths for further work. Professor Marcus summarized a number of possible topics suggested by the earlier discussion:

Disclosure of "data or other information considered by the witness" could be revised to exclude work-product from the apparently all-encompassing reach of "information."

The rules could "move away from the idea" that we need disclosure and discovery of all interchanges between attorney and a trial-expert witness.

It may be possible to add a definition of "core" work product, and to distinguish between communications that share core work product with a trial expert witness and communications that share other, less protected forms of work product.

Disclosure of all information "considered" might be tightened by limiting disclosure and discovery to information "relied upon."

The contents of the disclosure report might be reconsidered, perhaps with a view that the limits of discovery would coincide with the limits on the reporting obligation.

Rule 26(b)(3) might be considered for revision, but that may be reaching further than the present issues warrant.

The rules might clearly sever any notion of waiver from the disclosure report.

It would be possible in much the same way to provide that the disclosure report need not disclose discussion of work-product material between attorney and expert, while such discussions remain a proper subject of inquiry at deposition.

An attempt could be made to define a distinction between the employee witness who is only an actor or viewer of events in suit and the "hybrid" employee witness who is both actor and viewer and also a source of expert opinion testimony.

An immediate response was that as to privilege and work product, the same rules should apply to the disclosure report and to deposition. And the rules should protect privilege and work product, particularly as to the "hybrid" employee witness who may be exposed to protected information during the course of ordinary work duties.

The prospect that the rules might be narrowed back to information "relied upon" by the expert was questioned by observing that the "rely upon" standard provoked frequent disputes when it was the standard. Is the risk of still further disputes of this sort a reason to stay with information "considered"? One member responded that anything considered should be fair game, but that it would help to find out — perhaps by comment on a published proposal — whether the bar generally shares this view.

The "other information" words prompted a statement that the Committee that prepared the 1993 amendments would have been surprised by the expansive meaning given these words. They were thinking of hard fact information, not theories. It also was pointed out that the 1993 amendments were crafted, and were almost on the point of taking effect, before the Daubert case was decided. The Daubert approach to expert testimony was not considered.

It was also observed that the present rules create an uneven playing field when one side can afford to retain both consulting experts shielded from discovery and trial-expert witnesses whose education by counsel is focused so as to minimize discovery.

The desire for empirical information about the working of the state-court rules in Texas, New Jersey, and Massachusetts was dampened by the statement that it is difficult to get at such information. Practice "takes place behind a curtain" that is not easily penetrated. Survey research is about all that is possible, and it is very difficult to get hard information that way. But one form of empirical information may be available in the form of agreements among lawyers. Agreements may be that the lawyers will produce what the expert witness relied on, leaving it fair at deposition to inquire into what the witness considered. The result is to avoid disputes about what was "considered" but not disclosed; absent agreement, such disputes are all too common. A variation on this practice was noted in the form of an agreement to list everything shown to an expert witness but to reserve the right to assert privilege against a demand to produce. But diffidence was expressed about relying on this practice without a better sense of how general it is. It may be familiar to highly accomplished lawyers who trust each other, but may not work as well as a general practice.

Protection against discovery of draft reports was urged again, with the suggestion that the protection both for draft reports and for communications with counsel might be subject to the escape

provided in Rule 26(b)(4)(B). Discovery would be allowed "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," or under an adaptation that focuses on the impracticability of effectively testing the expert testimony by other means. This standard is "extraordinarily protective" and may require the adaptation.

In response to a question, it was reported that in Texas state practice there is not much law on discovery of draft reports. "I understand they are not produced." The feeling seems to be that "you just have to stop somewhere," especially in light of the opportunities for costly and intrusive computer forensic searches. There also is concern about encouraging experts to play games with what they do or do not preserve. As to communications between attorney and expert trial witnesses, however, the practice is that everything shown to an expert is fair game for discovery. There is no desire to be forced into distinguishing between information considered and information relied upon. But it is not clear what would be done about discovering notes an expert makes of conversations with an attorney.

Discussion concluded by reflecting on the opportunities that may be available to ask bar groups for further information. The ABA resolution reflects careful and hard work. Other groups could be consulted — remember that the 2000 report of the New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section advanced recommendations different from the ABA recommendations. Several other bar groups have been helpful in past discovery work. Those who made comments on the e-discovery proposals were asked to comment on the Rule 30(b)(6) study and provided helpful comments. There is room for concern, however, about imposing too many burdens too often on groups that have been valuable resources and whose good will should be encouraged. Perhaps the subjects will prove so complex in relation to actual practice needs that it will be helpful to stage a conference on the model of earlier discovery conferences.

Many possibilities remain open for study. The Discovery Subcommittee will continue its work.

Rule 12(e)

The agenda materials include drafts illustrating the ways in which Rule 12(e) could be expanded to provide more frequent use of orders for more definite pleadings. These drafts represent the current focus of the broader inquiry into notice pleading. A number of more direct alternatives have been put aside for the time being. There is no present disposition to recommend that notice pleading be abandoned or somehow redefined and tightened. Nor is there any enthusiasm for defining more particularized pleading requirements for specific types of cases. At the same time, there is concern that current pleading rules and practices mean that some cases endure longer, at greater cost, than should be. In rejecting ad hoc judicial development of heightened pleading requirements for some cases, the Supreme Court has noted that more demanding pleading standards should be adopted in the rulemaking process. The question remains whether some form of response can be found.

Part of the impetus for the overall pleading inquiries and for this more specific set of proposals is the sense that in practice lower courts often enforce pleading standards higher than general concepts of notice pleading. Persisting desires for more detail may reflect a genuine need that can be better addressed by bringing it out into the open and regularizing it.

The focus of the Rule 12(e) proposals is on developing a tool that is available to the court in cases that may be advanced by more precise initial pleading. There is no thought of going back to

the bill of particulars practice that was carried forward in the original 1938 rules and abandoned in 1948. Instead the hope is that there may be a way to use pleading, perhaps in conjunction with focused and limited initial discovery, to identify cases that do not warrant the cost and delay of full discovery and summary-judgment practice. The procedure would provide case-specific authority to raise pleading standards without attempting to impose more demanding standards in all cases and without attempting to define substantive categories to be held to higher standards.

The drafts suggest different approaches. The first would expand the more definite statement to support disposition on the pleadings by motions under Style Rule 12(b), (c), perhaps (d), and (f). This focus on pleading disposition would likely be the least expansive. It would make most sense when the pleader is likely to have access to reliable fact information sufficient to resolve the dispute without need for discovery. It might also work in cases that are susceptible of disposition after limited discovery enables a party to plead confidently the most favorable version of facts it is willing to attempt to prove, but that situation may prove rare.

Other drafts focus more directly on all aspects of pretrial management. One would authorize an order for a more definite statement if that would "facilitate management of the action." A variation would ask whether "a more particular pleading would enable the parties and the court to conduct and manage discovery and to present and resolve dispositive motions." This approach looks for a more complex, and more likely staged, integration of pleading with discovery and summary judgment.

An initial observation was that some such expansion of Rule 12(e) should be encouraged. There are too many cases with enormous waste pretrial activity. The link to case management reflects expanded Rule 16 practices that have evolved since the initial adoption of notice pleading in 1938 and the abolition of bills of particulars in 1948. The integration of pleading and pretrial management could be a good thing.

A specific illustration was offered. The complaint in an action for negligent misrepresentation may be sufficiently definite to support a responsive pleading. It is outside present Rule 12(e). But it is not possible to tell whether there is complete ERISA preemption, supporting federal-question jurisdiction, or only conflict preemption, presenting a defense to a state-law claim that does not support federal-question jurisdiction. The answer will turn on what was said to support the claim.

A judge offered quite a different response. Parties often "throw up roadblocks." Many Rule 12(b)(6) motions are premature summary-judgment motions. Rule 12(e) motions for a more definite statement are an effort at discovery. We should be concerned about creating new opportunities for obstruction. The proposed new tool is unnecessary in almost all cases.

A different response was that any expanded rule should address all pleadings, not only the complaint. The drafts are written that way, recognizing that more definite pleading of an answer, a reply, and other pleadings can be helpful.

A different concern was expressed. Recognizing the merit of some such proposal, the project may be perceived as an effort to deter disfavored claims, "as barring the right to pay $250 and start discovery." Perhaps it would be better to provide for a "contention statement" after preliminary discovery? Present practice produces many cases in which the court does not know what the plaintiff's theory is until the plaintiff replies to a motion for summary judgment. A similar concern was expressed — the idea may be good, but "it sends up red flags."

Yet another judge expressed the same concerns. A pro se case may present a complaint that reads like a book, and is nearly as long. Knowing nothing else, the plaintiff presents a narrative of the sense of grievance. Expanding Rule 12(e) will lead to more motions — too many motions.

Still another judge stated that we should not go back to the bill of particulars. The Northern District of Texas had a local rule, only recently repealed, that barred 12(e) motions seeking information that can be got by discovery. It still has a rule that requires court permission to file more than one summary-judgment motion. The result is to encourage motions to dismiss under Rule 12(b)(6). If Rule 12(e) is expanded, the summary-judgment limit will likewise encourage Rule 12(e) motions.

A lawyer responded to these concerns by doubting the danger that ill-founded motions would be encouraged. Some lawyers, to be sure, like to file motions. But many good lawyers recognize the importance of filing only well-founded motions. The tone set by a mediocre motion is likely to resonate throughout all later stages of the action. The draft that focuses on enabling the court and parties to conduct and manage discovery and to present and resolve dispositive motions is the most attractive. And it should send a message inviting more rigorous initial pleading.

A possible part-way approach through Form 35 was suggested as an alternative. Form 35 could be amended to suggest that the parties' report on the Rule 26(f) conference include pleading issues in addition to the time limit on amendments already noted.

In a different direction, it was asked what would be provided by expanding more definite statement practice that could not be achieved under present rules. In a case presenting inscrutable possibilities of ERISA preemption, for example, focused discovery can be limited to the facts that will support an informed decision on jurisdiction. Case management under Rule 16 may be better than elaborating on pleading practice.

This discussion was summarized by observing that the judges seemed to be reflecting experiences different from the experiences of the lawyers. The lawyers represented careful, thoughtful, desirable practice. They can understand the potential good uses of case-specific pleading orders as means to more efficient identification of the issues, control of discovery, and perhaps resolution by dispositive motion. The judges confront lawyers who do not practice to these standards, and fear misuses that will add to delay and impose burdens on the court that are not sufficiently alleviated by simply denying the ill-founded motions. The many tools available to shape discovery and to manage an action more generally may counsel that nothing be done. The idea still may deserve development, but great care will be required.

Because of the tie between pleading and summary judgment, the Rule 56 Subcommittee was asked to add consideration of the Rule 12(e) proposals to its chores.

Rule 56

Judge Baylson introduced the Rule 56 Subcommittee report.

The first part of the report proposes substantial changes in the time for making and responding to summary-judgment motions. Those changes were reviewed and acted on as part of the Time-Computation Project earlier in this meeting.

Apart from time, the proposals focus on the procedure of summary judgment, not the standards that govern grant or denial.

One proposal is to require both motion and response to provide a statement of undisputed facts, supported by citations to the record.

A second set of proposals seeks to clarify the court's responsibility when there is no response to a summary-judgment motion, and also when a response is made in a form that does not comply with the rule.

A third proposal explicitly states the court's authority to initiate summary judgment on its own.

A fourth proposal would adopt into Rule 56 the "partial summary judgment" terminology widely employed in practice, and offer guidance on the court's responsibilities when it is not appropriate to dispose of an entire case by summary judgment.

A fifth proposal is more a question — is it useful to carry forward present Rule 56(g) as a largely redundant and little-used sanction for filing affidavits in bad faith?

FJC Study. In addressing these and other questions, it will be helpful to seek as much guidance as the Federal Judicial Center can provide in updating its regular study of Rule 56.

Joe Cecil reported that the FJC launched studies of Rule 56 to support the Committee's work in the 1980s and has carried the work forward after the 1992 termination of the Committee work without any Rule 56 amendments. A summary of recent work has been made available for this meeting. It shows remarkable variations in summary-judgment activity across courts. The next step, if the Committee is interested in developing the work, will be to investigate CM/ECF data. These data will support consideration not only of Rule 56 activity but also of other dispositive motions, such as judgment as a matter of law under Rule 50, and even pleading. It is much more efficient to expand beyond Rule 56 into these related topics during one search process.

The Committee agreed that further FJC study will be important, and invited as much work as can be accomplished within available resources and within a time frame matched to the progress of Committee work on Rule 56. A specific question was noted for possible inclusion in the study if feasible. This question would test the observation that some lawyers seem to be using Rule 16(c)(1), which looks to the formulation and simplification of the issues, including the elimination of frivolous claims or defenses, as a substitute for summary judgment. This practice may reflect an attempt to focus the case on an issue the party finds comfortable.

Role of Local Rules. Discussion opened by observing that the many local rules addressing summary judgment provide the inspiration for reconsidering Rule 56. They also provide an abundant source of ideas. As one example, many courts require detailed statements of the facts claimed to be established beyond genuine issue, supported by specific references to supporting materials. These rules are distilled into several paragraphs of the agenda draft Rule 56(c). This is a matter of summary-judgment procedure, not the standards for grant or denial.

Statement of Undisputed Facts. The statement of "undisputed facts" provisions in the draft, subdivision (c), are adapted not only from local rules but also from the proposed amendments that ultimately failed of approval by the Judicial Conference in 1992. They separate the motion from argument, explicitly requiring that the motion and response be "without argument." Contentions as to the law and the evidence respecting the facts are to be made in a separate memorandum. The draft does not now provide for a movant's reply to new facts asserted in a response, but a paragraph can easily be added to address that need.

The motion and response provisions in draft subdivision (c) include a provision, (2)(B)(ii), that expressly states that if the nonmoving party does not have the trial burden on a fact the response may simply state that the record does not support a fact asserted in the motion. It was suggested that this provision comes too close to bringing part of the Celotex decision into rule text. It would be better to leave this thought to the Committee Note.

Concerns were addressed to the rule text stating that the motion should recite "the specific facts that are not genuinely in dispute." These words might invite the colossal waste of listing every fact thought to be undisputed. The motion should focus only on material facts, and may properly be limited to one or more facts that would make other facts — whether or not genuinely in dispute — not material. A motion is more likely to be made by a party who does not have the trial burden, and may properly focus on a single dispositive fact — it was not the defendant who drove the vehicle involved in the accident. This problem may prove particularly important in employment discrimination cases because of the intrusion of the "prima facie" case that shifts a burden of explanation but not of proof. Although the draft was not intended to require a statement of all undisputed facts, the reference to "*the* specific facts that are not genuinely in dispute" may invite that reading. Further work on the language is indicated. It will be important, however, to take care in deciding whether to refer to "material" facts at this point in the rule.

Reliance on local rules in drafting subdivision (c) prompted the further observation that many districts have local Rules 56. We should be careful to fix the many problems in present Rule 56 without doing anything that would invalidate the local rules. The local rules reflect local culture. Not every good practice can be added to the national rule. For example, the draft requires citation to the pages of affidavits, deposition transcripts, and the like. The local rule in the Northern District of Texas instead requires that the motion be supported by an appendix and that citations be to the appendix. The local rule could be reconciled with the national rule draft, but such potential collisions should be considered. This plea was seconded by recalling that the Local Rules Project uncovered many rules that seemed inconsistent with Rule 56, but left them alone because they seemed better than Rule 56.

The draft direction to recite specific facts not genuinely in dispute requires citation of "materials supporting the facts." How do these words apply when the motion is made by a party who does not have the trial burdens and who, under Celotex, says only that "there is no evidence that the defendant did any wrong"? This question points to drafting difficulties that are hard to resolve. One illustration of the difficulty is W.D.Tenn. Rule 7.2(d)(2):

> If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion.

A quite different illustration is provided by the effort in the failed 1992 Rule 56 proposal:

> A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

How does a party point to precise portions of the record that show there is nothing? Demonstrate the lack of evidence available for use by the other party at trial? The trick is to develop a procedure

and, perhaps more difficult, a statement of the procedure that avoid the need to incorporate the Celotex distinctions in rule text. But perhaps that is not a desirable trick after all. It was noted that the Evidence Rules have incorporated the Daubert decision; why not incorporate Celotex in Rule 56? A draft effort is included in the agenda materials, but drew little comment. The difference from Daubert may be that the Evidence Rules were revised to synthesize emerging case-law insights, while practice has developed for 20 years under Celotex. Evidence Rule 702, further, was drafted in response to proposals for legislation that might have displaced the rulemaking process to questionable effect. Practice in at least one court seems to be that a movant who does not have the trial burden says either "there is no evidence of," or "we deposed [or put interrogatories to] the plaintiff, who produced no evidence of * * *." Another alternative is to allow a movant to state the facts it views as established beyond genuine issue without requiring that it point to support in the record. The nonmovant remains free to respond by pointing to record materials that do establish a genuine issue.

This discussion continued with an illustration. A defendant moves for summary judgment, asserting that the plaintiff cannot prove causation. It is not necessary to require the defendant to identify all of the record evidence on causation and explain why it does not generate a genuine issue. The focus should be to elicit a statement of the grounds for claiming victory by summary judgment, leaving it to the party who has the trial burden to point to the evidence that defeats summary judgment. In many cases the summary-judgment motion is made for the purpose of forcing the nonmovant to come forward to show the best case. But it remains necessary to direct the nonmovant to point to the record. Some pressure must be provided in the form of warning about the effects of failure to do so. That question is addressed with several variations in draft subdivision (c)(6).

Another strategy may be to ask the parties to submit a joint statement of undisputed facts. The draft reference to "stipulations <including those made for purposes of the motion only>" reflects this possibility. But a court request may fit better in the pretrial order context than in addressing summary judgment. If the lawyers are meeting and conferring about the case, however, there is room for joint statements of uncontested facts.

Partial Summary Judgment. "Partial summary judgment" became the next focus of discussion. The label is commonly used in practice, and might well be incorporated in the rule. But that leads to the question how far the rule should direct the court to dispose of specific facts when it is not appropriate to dispose of the whole case by summary judgment. Present Rule 56(d) says that the court "shall if practicable determine what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." Style Rule 56(d) relaxes this a bit, directing that the court "should, to the extent practicable, determine what material facts are not genuinely at issue." The agenda draft, subdivision (g), expands discretion by providing that if summary judgment is not rendered on the whole action, the court "may enter an order specifying any material fact * * * that is not genuinely at issue," and "may specify facts that are genuinely at issue." How far should discretion extend? One judge observed that ordinarily the litigants know more about the case than the judge; it is better to rely on them to frame a pretrial order setting out what facts are at issue. Another comment noted that it is useful to use summary judgment to dispose of separate claims or defenses, and at times to enter final judgment under Rule 54(b). But using summary judgment to dispose of some issues on a single claim or defense, while useful as a case-management tool, is chancier. The need to try related issues may suggest that it is better to forgo an effort to fence off some issues that would not complicate the trial in any event. The burden of sorting through individual issues may be too great to be justified.

A related question is presented by both subdivisions (f) and (g) of the agenda draft. Subdivision (f) includes a bracketed sentence directing that an order rendering summary judgment must specify material facts that are not genuinely at issue and that require judgment as a matter of law. This provision would enable parties and an appellate court to understand the ruling and evaluate it more readily. Subdivision (g), on the other hand, provides only that when summary judgment is not rendered on the whole action the court may specify facts that are genuinely at issue. Courts of appeals frequently observe that in cases that permit interlocutory appeal from a denial of summary judgment — most frequently on official immunity defenses — a statement of the fact issues that defeat summary judgment is highly desirable. It was observed that if a court grants a motion in part and denies it in part, the situation compels some explanation — the parties must be told what matters remain open for further proceedings, what matters are finally disposed of. If a plaintiff claims both discrimination and retaliation for complaining of the discrimination, the parties must be told if the summary-judgment ruling is that the discrimination claim is unsustainable while the retaliation claim survives for trial. But that need not be extended to require a statement of what fact issues remain open for trial on the retaliation claim.

This view was reinforced. It is dangerous to require specification of facts or issues still to be tried. Summary-judgment rulings may be made before discovery is completed; indeed the case may be managed in stages to ensure the opportunity for early disposition of some issues that will direct development in later stages. Explanation of the ruling is useful, but it may be better to avoid asking the judge to specify the issues that remain.

It was suggested that the subdivision addressing partial summary judgment might better speak of "issues" than of "facts." The distinction may be between identifying "facts" that are found established without genuine issue and "issues" that remain open for further proceedings. The standard for granting summary judgment has always referred to facts, at least in part because of the direct link to the Seventh Amendment theories that identify the jury as responsible for factfinding. If facts remain to be tried, however, it may be safer to identify the issues that arise from the facts rather than the facts themselves.

An observer suggested that explanation by the judge is very important. A summary-judgment motion is very expensive. The judge's view of the case after considering the motion is very helpful, both in moving toward settlement and in preparing for trial. A response was that an explanation should be required for an order granting summary judgment, but the court should not be required to specify the issues or facts that remain for trial. Explanation may be useful as to other issues even if the whole case is resolved by summary judgment on one ground. "The plaintiff has no evidence that the defendant was driving the car. Summary judgment is granted for the defendant. But if that is wrong, there is [not] sufficient evidence for trial on the driver's negligence."

The need for clarity that will tell the parties where they stand and how to go forward with the case may be addressed by further pretrial conferences rather than by the terms of the summary-judgment order. This opportunity is another reason to establish discretion as to the extent of detailed explanations in denying summary judgment.

This discussion was concluded with the observation that "may" probably is the better choice. Substantial time may be required to explain why there is a genuine issue, and the explanation may not be complete. Denial may rest not so much on a firm conclusion that there is a genuine issue as on the conclusion that eliminating a particular element will not change the nature or length of the trial; it is safer to carry it forward for trial. Or denial may rest on the discretionary preference for trial even though the summary-judgment record shows no genuine issue. Trial may provide a more certain basis for judgment as a matter of law, or important issues of law or public interest may

benefit from the illumination of a full trial record, or it may actually be more efficient to hold a relatively brief trial than to struggle through a difficult and uncertain summary-judgment ruling. An alternative might be to say nothing in the rule, omitting the complicated variations set out in present Rule 56(d).

Failure To Respond. Subdivision (c)(6) focuses on the problems that arise when a nonmovant fails to respond at all to a motion for summary judgment or else responds in a fashion that does not satisfy the requirements for a proper response. It offers several variations that reflect the disparate responses identified by local rules. An illustration was offered to test the variations: A prisoner plaintiff claims that guards beat him severely without provocation or reason. The guards assert that they used only moderate force necessary to restrain the plaintiff. Depositions are taken. The defendants move for summary judgment. On the record it is clear that credibility issues defeat summary judgment. But the plaintiff fails to respond to the motion. Should the motion be granted by default? Even if it is defective on its face? Should the court have discretion to choose between granting the motion by default or denying it if examination shows it fails to meet the summary judgment standard? Or should the court be required to evaluate the motion and the materials cited to support it, granting the motion only if the movant has carried the summary-judgment burden?

Local rules seem to adopt all of these approaches. The dominant view, however, seems to be that the court is obliged to review the motion and supporting materials and to grant it only if the summary-judgment burden is carried. That view can be changed by rule. A total failure to respond, for example, might be viewed as akin to default of answer or akin to a failure to prosecute. But once a defendant has appeared to defend on the merits, disputing the plaintiff's claims — the clear analogy to a pleading default — at least some cases express a tradition that the defendant is entitled to put the plaintiff to proof, whether by summary judgment or trial. On this view, the court should be required to evaluate the motion. This approach is suggested most clearly in the draft (c)(6) version 2, alternative b: the motion may be granted "if the motion and supporting materials show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." (Alternative c expresses the same thought without repeating the full text of the summary-judgment standard.) Support was expressed for this approach as the least disruptive.

Each of the variations of (c)(6) include an express statement that the court "is not required to consider materials outside those called to its attention" by the parties. Although several appellate opinions and local rules say as much, it was thought helpful to include this express statement in Rule 56.

Related questions were explored briefly, more as possible topics for a Committee Note than as suggestions for rule text. If there are successive motions for summary judgment, the Note might comment on the court's authority to review the record on both motions. If the court does start to explore the record on its own, is it obliged to canvass the entire record? Or can it look selectively, perhaps distorting rather than improving the picture sketched by an inadequate response? What happens if on appeal from summary judgment a party points to record materials not pointed out to the district court?

Sham Affidavits. The final Rule 56 question was whether the bad-faith affidavit provision of present Rule 56(g) serves any continuing purpose. Many cases reflect the "sham affidavit" problem arising when a party seeks to defeat summary judgment by submitting a self-serving affidavit that contradicts the party's own self-defeating deposition testimony. Courts generally agree that the affidavit can be disregarded unless a persuasive explanation is offered for changing the earlier position. But there is no indication that they go further by invoking Rule 56(g) sanctions. Although Rule 56(g) includes contempt as a sanction, going beyond Rule 11, there is no apparent reason to

believe that this sanction either is much used or is necessary for deterrence. Rule 11, perhaps supplemented by 28 U.S.C. § 1927, may suffice.

Judge Rosenthal congratulated and thanked the Rule 56 Subcommittee for its progress.

Rule 62.1

At the May meeting the Committee approved a recommendation to publish a new rule 62.1. Rather than seek publication of any rule proposals in 2006, however, it was determined that it would be better to defer this and other proposals for publication in 2007. The bench and bar will confront many important rule changes on December 1, 2006, including the e-discovery amendments, and the next year will confront the full Style package. A break for a year, deferring the next set of rules changes to December 1, 2009, seems desirable. Rule 62.1 was introduced to the Standing Committee at the June meeting nonetheless, to give advance notice and to elicit any interim suggestions that might be offered. Two questions were raised: is the rule best located between Rules 62 and 63, or would another location be better? And can a better caption be found — "Indicative Rulings" will not be familiar to many lawyers.

Location is influenced by the occasions for invoking Rule 62.1. Rule 62.1 describes the options available to a district court when a pending appeal ousts its "jurisdiction" to grant relief affecting the judgment on appeal. One of the draft versions was limited to motions for relief under Rule 60, and was framed as an amendment of Rule 60. But the Committee thought it better to address all situations in which an appeal cuts off district-court authority. The broader rule seems better situated between Rules 62 and 63 than anywhere else. There is a reasonably logical sequence. Rule 59 addresses post-trial relief, by new trial or altering the judgment. Rule 60 addresses post-final-judgment relief by motion to vacate. Rule 61 expresses a harmless error rule that covers both Rule 59 and Rule 60 motions. Rule 62 deals with stays of enforcement, a common form of action on a judgment pending appeal. Rule 63 swings off in a different direction entirely, dealing with inability of a judge to proceed. Rule 62.1 seems to fit best within the chapter, Rules 54 to 63, captioned "judgments." And there is no better place than between Rules 62 and 63.

Choosing a caption proved more difficult. "Indicative Rulings" reflects terminology familiar to appellate lawyers, arising from the common approach that allows a district court that cannot grant relief to "indicate" that it would grant relief if the court of appeals were to remand for that purpose. The terminology is not likely to prove familiar to all lawyers. One possible alternative would be to bring up the tag line for subdivision (a): "Relief Pending Appeal." Then a new line would be needed for subdivision (a) — perhaps "Relief Available," or "Action on Motion." The Rule title might be made longer: "Relief From Judgment Pending Appeal: Indicative Rulings." The Style Project has favored long titles as a useful index device, and this might not be too much. The Committee concluded that it will be appropriate to adopt whatever title is agreeable to the Standing Committee.

Rule 68

The Second Circuit in a recent opinion suggested that the Committee should explore amending Rule 68 to establish standards for comparing the judgment with an offer for judgment in cases that involve both money damages and specific relief. The case is a good illustration of the question. The plaintiff demanded damages and an injunction restoring him to his previous job. The defendant's Rule 68 offer was $20,001 without any mention of injunctive relief. The jury awarded $140,000 in compensatory damages, but the plaintiff accepted a remittitur to $10,000. As to money alone, the judgment was $10,001 less favorable than the offer. But the court also awarded an injunction restoring the plaintiff to his former job. The court of appeals resolved the Rule 68

comparison by asking whether the injunction was worth at least $10,001. On the facts of the case the injunction clearly was worth more than that; the judgment was more favorable than the offer.

It is easy to understand the Second Circuit concern with the difficulty of comparing a judgment to a Rule 68 offer in a case that involves specific relief. The differences between the plaintiff's original job and new job in responsibilities, prestige, and opportunities for accomplishment were manifest and great. Other cases will present much more difficult comparisons. Comparisons often will be difficult when the focus is on specific relief alone. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to an injunction enjoining sale of five products in one state for two years. The injunction might cover four of the five products, add two others, and extend to two states for two years. Which is more favorable? Or if it is easy to say that offer or judgment is more favorable — the offer is for a one-year injunction and the judgment is for six months or two years — how can that be compared to an offsetting difference in damages?

When Rule 68 was last considered in depth, the draft required separate comparisons of damages to damages and of specific relief to specific relief. As to specific relief, a judgment would be more favorable than the offer only if the judgment included all of the nonmonetary relief offered "or substantially all the nonmonetary relief offered and additional relief." The draft Committee Note concluded: "Gains in one dimension cannot be compared to losses in another dimension." That approach is quite different from the path followed by the Second Circuit, and should be easier to administer. That does not ensure that it is better.

The decision whether to take up the Second Circuit's suggestion is tied to broader Rule 68 questions. Suggestions to revise Rule 68 are made periodically by various sources. Usually the suggestions focus on a desire to add more effective sanctions so that Rule 68 offers will become more common. The hopes are to achieve earlier settlements and more settlements. Another hope is to encourage plaintiffs to bring small but strong claims, relying on an offer of judgment to recapture litigation costs that would include attorney fees. The Committee has twice developed elaborate proposals along these lines, once in the early 1980s and again in the early 1990s. Both times the projects were abandoned. The 1980s project proceeded to a point that generated substantial opposition. The 1990s project faltered in the face of ever-growing complexity, doubts whether attorney-fee sanctions fit comfortably within Enabling Act limits, and concerns about the impact of Rule 68 in the one area — claims that support statutory fee awards — where it is now used with some frequency.

It would be possible to limit a Rule 68 project to the narrow confines of the Second Circuit's suggestion. But there are so many causes for dissatisfaction with some of its present incidents that it might prove difficult to justify any project that passes by clear problems while responding to one particular issue.

It was noted that in Texas, at the insistence of the legislature, the Supreme Court wrote an offer-of-judgment rule. The project demanded serious effort. The result was meant to be a balanced rule, favoring neither plaintiffs nor defendants. It allows a 20% margin between judgment and offer before sanctions are imposed; that figure itself was much debated. It includes such provisions as one allowing retraction and subsequent renewal of an offer. As near as appears, the rule is not used at all.

Some help may be on the way. Professors Thomas A. Eaton and Harold S. Lewis, Jr., are completing work on proposals to amend Rule 68 for statutory fee-shifting cases. The proposals draw from information gained in intensive interviews with plaintiff and defense attorneys in many

different states, focusing on employment discrimination and civil rights cases. The empirical foundations for their work could prove valuable in deciding whether to return once again to Rule 68.

The Committee agreed to defer further consideration of Rule 68. One participant, drawing from the Minutes reporting on deliberations in 1993 and 1994, reminded the Committee that one option may be abrogation.

Supplemental Rule C(6)(a)

Adoption of Supplemental Rule G led to several conforming amendments that withdrew provisions for civil asset forfeiture proceedings from other Supplemental Rules. An unintended omission failed to capitalize the first word in Rule C(6)(a)(i). One cure would be simply to capitalize "A." But a better parallel to subdivisions (1), (2), and (5) might be achieved by adding a few words:

(6) Responsive Pleading; Interrogatories.

(a) ~~**Maritime Arrests and Other Proceedings**~~ ***Statement of Interest; Answer***. In an action in rem:

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest: * * *.

The Committee agreed to recommend that the Standing Committee approve this revision for adoption without publication as an entirely technical amendment.

Federal Judicial Center Report

Thomas Willging reported on the Federal Judicial Center study of the Class Action Fairness Act. The study is aimed at measuring the impact of CAFA on federal-court resources. Since the report at the May meeting the study has expanded to include all 85 of the federal districts that will be studied. The period covered runs from July 2001 to June 30, 2005. That gives barely more than four months of experience with CAFA. Data will be added as the study goes on. But already, surprisingly, it has been possible to note an immediate impact on filings and removals. The rate of filing class actions has increased from 10.5 per day to 12 per day. Not all new class actions are related to CAFA. But there are significant increases in contract, tort, and "other" actions of the sort expected to be CAFA cases. The increase in labor cases, on the other hand, reflects Fair Labor Standards Act cases, not attributable to CAFA; this increase appears to be part of a long-term trend. The percentage of class actions based on diversity jurisdiction has increased from 13% to 19%. And cases removed rose from 18% of all class actions in federal court to 23%. Further work will provide more information about long-term trends, and also will reveal geographic patterns.

Judge Rosenthal expressed appreciation for the amount of work already done, and noted that this study will be very helpful in discharging the duty to report to Congress under CAFA.

New Topics

During the discussion of state holidays for the Time-Computation Project, the definition of "state" in Rule 81 was addressed. It was suggested that the Committee should consider adding territories to the definition. The topic will be put on the agenda.

Discussion of Rule 23(h)(1) suggested that the Committee may want to give further thought to the need for clear expression of the relationship to Rule 54(d)(2), and also to the possibility that it would be better to set a fixed time for fee motions in class actions.

At some point the Committee may want to study the discrepancy between Style Rule 41(a)(1)(A)(i), which cuts off a plaintiff's right to dismiss an action by service of an answer or a motion for summary judgment, and Style Rule 41(c)(1), which cuts off dismissal of other claims only on service of a responsive pleading. It has been said that the difference reflects a mere oversight in 1948 amendments.

Next Meeting

The most likely dates for the next meeting will be either April 12-13, 2007, or April 19-20, depending on reconciliation of all competing schedules.

Respectfully submitted,

Edward H. Cooper
Reporter

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 26, 2007

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Proposed New Rule 62 on Indicative Rulings*

The text of proposed new Rule 62.1 on Indicative Rulings immediately follows this memorandum. The material behind Tab B includes a report to the Advisory Committee on Appellate Rules on proposed new Appellate Rule 12.1, which conforms to proposed new Civil Rule 62.1. The report provides background information on the origin and purpose of the proposal and the rules committees' actions on it, beginning in 2000 when the Solicitor General first recommended that the Appellate Rules be amended to recognize indicative rulings.

John K. Rabiej

Indicative Rulings: Civil Rule 62.1

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

Some changes have been made in the version that was approved last year. They respond both to discussion in the Standing Committee and to the new opportunity to integrate Rule 62.1 with Appellate Rule 12.1. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The discussion is summarized in footnote 1. The outcome is a recommendation to publish with "might or" in brackets. The letter transmitting the proposal for publication will invite comment on the question whether the rule should require that the district court state that it "would" grant relief, or should give the choice to state whether the court "might" grant relief without a firm commitment.

The second footnote flags a question raised by the circuit clerks consulted by the Appellate Rules Advisory Committee. The alternatives indicated in the draft are the same as the alternatives to be presented to the Appellate Rules Committee.

The third footnote indicates the revisions made to seize the new opportunity to integrate with an Appellate Rule. Discussion in the Standing Committee highlighted the difficulties that may arise if the parties and the court of appeals do not think carefully about the terms of a remand. It is better that Rule 62.1 not anticipate these problems so long as there is to be an Appellate Rule addressing this question.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 62.1 Indicative Ruling on Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because ~~of~~[1] an appeal ~~that~~ has been docketed and is pending, the court may:

(1) defer consideration[2] of the motion;

(2) deny the motion; or

(3) ~~indicate~~ state that it [might or][3] would grant the

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[1] "of" and "that" were removed at the suggestion of the style consultant. Should they be restored to give a more direct statement that we are addressing only the beginning and end of the district court's authority to act on the motion, not any other question that might arise during the limbo between the time a notice of appeal is filed and docketing and remand?

[2] The style consultant prefers "defers considering the motion."

[3] The drafting choice was discussed at the Standing Committee

meeting in January, and has been developed by the Appellate Rules Committee.

The argument that notice should be given only if the district court states that it would grant relief if the appellate court remands includes at least two elements. One looks to disposition by the court of appeals. The court may prefer to remand, disrupting the appeal, only if presented with a fully considered determination that the case for relief has been made and that decision of the appeal on the original judgment and record would be unwise. The other element looks to the burden on the circuit clerks. Charles R. Fulbruge III, the Fifth Circuit Clerk, surveyed the circuit clerks for the Appellate Rules Committee. Two responded. "The consensus is that we do not want to know if the district court 'might' grant a motion. * * * Letting the parties advise us that they have filed a motion and then the judges advise us that they would deny the motion creates more work from an appellate clerk's office standpoint."

The argument for providing notice that the district court "might" grant the motion is familiar. The motion may raise difficult issues that can be resolved only after burdensome proceedings. The district court may have no idea how far the appeal has advanced, particularly if it has been submitted for decision. Nor may the district court have any idea whether the court of appeals thinks it better to resolve the issues presented by the appeal — if the court of appeals has at least an inkling of the likely disposition, it will be better able than the district court to know whether the motion will even remain relevant and whether the questions raised by the motion will be changed by the decision. The district court may believe that the burden of actually deciding the motion is justified only if the appeal is stayed.

Recognizing the district court's authority to temporize by

motion if the ~~appellate~~ court of appeals ~~should~~ remands for that purpose.

(b) Notice to ~~Appellate~~ the Court of Appeals. The movant must notify the circuit clerk ~~of the appellate court~~ under Federal Rule of Appellate Procedure [12.1] [when the motion is filed and when the district court acts on it ~~the motion~~][if the district court ~~indicates~~ states that it {might or} would grant the motion[4]].

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stating that it "might" grant the motion does not diminish the court of appeals' full control of the decision whether to remand. The court of appeals can consider the district court's statement — which should include the reasons for preferring to defer full consideration of the motion until it knows whether the action will be remanded — and act in its own best discretion. And it can, if it sees fit, decide not to remand without undertaking any lengthy review of the district court's statement.

4 This alternative reflects the preference of the three circuit clerks in the report described in note 1 above. They prefer not to be afflicted with notice whenever a motion is filed, noting that many of these motions are filed in pro se cases.

No doubt a burden would be imposed by requiring notice of

ill-founded motions that will soon be denied by the district court. The extent of the burden, however, may not be great. The Fifth Circuit clerk estimates that the court may encounter 30 of these motions a year.

A more important question is whether it is important to the court of appeals to know that a motion has been filed so it can decide whether to defer work on the appeal. There are likely to be some cases in which a motion raises issues that obviously are important. The prospect that the judgment may be vacated may appear sufficiently substantial on the face of the motion that the court of appeals would prefer to await the outcome before deciding issues that may be mooted or significantly changed. Experience with post-judgment motions under Rule 60(b), moreover, may not help much in anticipating other motions also covered by the rule. For one example, at least some courts rule that a district court cannot modify a preliminary injunction that is pending on interlocutory appeal. A motion to vacate or modify the injunction may raise issues that are better addressed by the district court. The court of appeals cannot consider the question unless it is told of the motion. (To be sure, this illustration can be seen in a different light. A district court does retain jurisdiction to dismiss the action pending appeal from the interlocutory injunction; the rule does not provide for notice. No one has proposed adoption of a rule that would require notice to the court of appeals of matters that remain in the district court's jurisdiction notwithstanding a pending appeal.)

The second alternative formulation is suitable if the rule applies only when the district court indicates that it "would" grant the motion. Some further drafting may be appropriate if notice is to be given when the district court indicates it "might" grant the motion. A complete provision would address what happens when the district

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.[5] ~~If the district court states that it [might or] would grant the motion, the appellate court may remand for further proceedings in the district court[, and if it remands may retain jurisdiction of the appeal]~~.

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court translates "might" to "denied." It could be: "The movant must notify * * * when the district court indicates that it might or would grant the motion and when the district court grants or denies the motion."

5

Work on Appellate Rule 12.1 has progressed to a point that justifies revision of subdivision (c). The new version is underlined. The earlier version, as modified to reflect Standing Committee discussion, is overlined. Earlier drafts spoke to action by the court of appeals on the assumption that no other rule would apply. It is better that the Appellate Rules address the court of appeals decision whether to remand and on what terms. Still, it may be useful to complement the Appellate Rule by confirming the district court's authority on remand.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and ~~either~~ deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure [12.1] [when the motion is filed in the district court and again when the district court rules on the motion][when the district court states that

it {might or} would grant the motion {and when the district court grants or denies the motion}.][6] Remand is in the appellate court's discretion under Appellate Rule [12.1]. The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to ~~or may~~ remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed after the district court rules on the motion.[7]

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state the reasons why it might grant the motion and why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after ~~indicating~~ stating that it might do so; further proceedings on remand may show that the motion ought not be

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6 The bracketed alternatives reflect the choice described at note 2 above.

7 The shaded material should be deleted if Appellate Rule 12.1 is recommended for publication.

granted.[8]

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[8] This final paragraph is appropriate only if the rule allows the district court to state that it "might" grant the motion.

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

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JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[1] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[2] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[3]

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[1] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[2] *See id.*

[3] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[4] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[4] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[5] The court has three options: (1) deny the motion,[6] (2) defer consideration of the

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[5] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[6] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[7] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[8] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[7] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[8] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[9] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[10]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[11] Seventh[12] and D.C.[13] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[9] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[10] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[11] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[12] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

It is fairly straightforward to draft a rule that parallels the proposed Civil Rule 62.1. However, a number of questions suggest themselves. This section considers those questions.

Parts III.A. and III.B. observe that the indicative-ruling procedure is also employed in the criminal context and (at least occasionally) in the bankruptcy context. Accordingly, I have

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[13] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

drafted the proposed Rule to encompass contexts other than those implicated by proposed Civil Rule 62.1.

Part III.C. discusses the dangers that would arise from an unconditional remand; in particular, such a remand creates the risk that the district court will deny the motion for postjudgment relief and the movant will have lost the opportunity to challenge the underlying judgment. For this reason, I have added language to the Note urging that a limited remand will often be the preferable course. Part III.C. also considers the choice between requiring an indication that the district court "might" grant the motion and requiring a statement that it "would" grant the motion in the event of a remand.

Part III.D. notes that it may be useful to alert practitioners to the need for a new notice of appeal to challenge any denial of a motion for postjudgment relief; this observation is included in the draft Note. Part III.E. considers the Rule's reference to an appeal that "has been docketed and is pending," and discusses whether docketing is the appropriate point of demarcation in this context. Part III.F. discusses which events should trigger a duty to notify the court of appeals, and also considers whether the Rule or Note should address the logistics of communications by the parties and the district court to the court of appeals. Part III.G. lists alternative numbering possibilities for the draft Rule.

A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[14] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[15]

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[14] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[15] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S.*

Under the current rules,[16] a pending appeal affects motions under Criminal Rule 35(a) differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to

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v. Phillips, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[16] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

modify a final judgment under Rule 35(b)[17] while an appeal from that judgment is pending.[18] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[19]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

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[17] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[18] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[19] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

B. Should the Appellate Rule encompass remands in bankruptcy cases?

Ordinarily, appeals from bankruptcy court decisions are taken to the district court,[20] or to a bankruptcy appellate panel where such a panel exists.[21] Such appeals are governed by Part VIII of the Bankruptcy Rules.[22] Final decisions on such appeals are appealable, in turn, to the Court of Appeals,[23] and the Appellate Rules apply to the proceedings in the Court of Appeals.[24] The intermediate step may be bypassed – and an appeal taken directly the Court of Appeals from a bankruptcy court decision – if the requirements of 28 U.S.C. § 158(d)(2) are met.[25] Under the temporary procedures that currently govern such direct appeals, the Appellate Rules would

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[20] See 28 U.S.C. § 158(a).

[21] *See* 28 U.S.C. § 158(b).

[22] *See* Bankruptcy Rule 8001 et seq.; *see also* Bankruptcy Rule 8018(a)(1) ("Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with--but not duplicative of--Acts of Congress and the rules of this Part VIII.").

[23] *See* 28 U.S.C. § 158(d)(1).

[24] *See* 1983 Advisory Committee Note to Bankruptcy Rule 8001.

[25] Section 158(d)(2) provides in part:

> (2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--
>
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

generally apply.[26]

At least one Bankruptcy Appellate Panel has indicated that the indicative-ruling process followed in the Civil Rule 60(b) context applies equally when Rule 60(b) relief is sought from a bankruptcy court after an appeal has been taken to the district court from the bankruptcy court's decision. *In re Lafata*, 344 B.R. 715, 722 (B.A.P. 1st Cir. 2006) ("Clearly, under the law of *Zoe Colocotroni*, the bankruptcy court had jurisdiction to consider a Rule 60(b) motion filed during the pendency of an appeal of the December 8th orders."). But in *Lafata*, because the district court had decided the appeal, a request for Rule 60(b) relief in the bankruptcy court was improper. *See id.* at 723 ("Eastern cannot attempt to avoid the decision of the District Court through the use of a Rule 60(b) motion in the bankruptcy court, and a subsequent appeal to the Panel.").

From skimming through the cases on the indicative-ruling procedure, I get the impression that it may not be quite as widely used in the bankruptcy context. None of the three extant circuit provisions addresses its use in bankruptcy litigation. Accordingly, though the draft Rule should be broad enough to encompass such uses, the Note does not specifically refer to them.

C. "Might" versus "would" and the nature of the remand

As demonstrated by the recent discussions concerning proposed Civil Rule 62.1, arguments can be made for both the position that an indicative ruling must indicate that the district court "would" grant the relevant motion, and the position that the ruling can indicate either that the court "would" grant it or that the court "might" grant it. District courts may prefer the option of saying "might," since it means the district court need not fully analyze the motion unless and until the court of appeals remands; courts of appeals, by contrast, may prefer not to be asked to remand unless the district court has taken the trouble to determine whether it actually would grant the motion.[27] The Civil Rules Committee has discussed the choice between "might"

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[26] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Title XII, § 1233(b), Apr. 20, 2005, 119 Stat. 203 (2005).

[27] One case from the Second Circuit suggests that the court is unwilling to remand unless the district court states its *intent to grant* the motion. Thus, writing of Criminal Rule 33 motions, the court explained: "If the district court decides to grant the Rule 33 motion, the district court may then signal its intention to this Court. . . . Only when presented with evidence of the district court's willingness to grant a Rule 33 motion will we remand the case." *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

Sixth Circuit Rule 45 refers to the *First National Bank* case, which provides for remands after the district judge enters an order indicating that he or she "is disposed to grant the motion." *First National Bank*, 535 F.2d at 346. The D.C. Circuit Handbook refers to remands after the

and "would" at length, and is considering the possibility of using "might or would" in the version of proposed Rule 62.1 that is published for comment, in order to solicit comment on the choice.

The three circuit clerks who reviewed the proposed rule varied in their responses on this question. Marcie Waldron, the Third Circuit clerk, initially suggested: "[I]t is better to say 'might' than 'would.' Sometimes it's just that the 60(b) motion is substantial enough that the judge wants to have briefing." Her later email also seems to come out in favor of "might"; she points out that when a case has been calendared or argued, the appellate judges would rather get earlier notice "that there was a possibility of a change in the district court's decision."[28]

By contrast, Mark Langer, the D.C. Circuit clerk, objects to the choice of "might" because it "would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge 'would' grant the post-judgment relief." Fritz agrees that "would" is preferable to "might," since the latter would increase the burden on the appellate clerks.

Even if one is agnostic on this question, it underscores the need for care in dealing with a related issue: the scope of the remand. In a system where a remand can occur after the district court indicates merely that it "might" grant the requested postjudgment relief, an unconditional remand can be dangerous for the appellant.[29] Since the time to file a notice of appeal from the

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district court "indicates that it will grant the motion." Seventh Circuit Rule 57 concerns remands after the district court indicates that it is "inclined to grant the motion." The Seventh Circuit in *Boyko* suggested that a limited remand (for the purpose of further consideration of the motion) may be appropriate if the district judge thinks there is "some chance that he would grant the Rule 60(b) motion ...." *Boyko*, 185 F.3d at 675.

[28] The latter point might also be a reason for requiring the movant to notify the circuit clerk when the motion is made in the district court, but, as noted in Part III.F. below, Ms. Waldron does not support such a requirement.

[29] *Cf. U.S. v. Siviglia*, 686 F.2d 832, 837-38 (10th Cir. 1982) (en banc) (per curiam) ("We find nothing in Siviglia's motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion for dismissal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal "such denial," which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia's brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicates, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or that he should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.").

initial judgment will certainly have run by the time the district court (on remand) rules on the motion for postjudgment relief, the movant will have no opportunity to revive the appeal (by filing a new notice of appeal from the underlying judgment) in the event that the district court denies the postjudgment motion. Though the movant can appeal the denial of postjudgment relief, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978).[30]

Such considerations may well explain why some circuits provide for a "limited remand" to enable the district court to rule on the motion in question. *See, e.g., Fobian*, 164 F.3d at 892 (discussing Fourth Circuit approach); *Karaha Bodas*, 2003 WL 21027134, at *4 (discussing Fifth Circuit approach); *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114 (6th Cir. 1979) ("This Court granted a limited remand to the district court to allow presentation of the Rule 60(b)(6) motion."); *Chisholm v. Daniel*, No. 89-16430, 1992 WL 102562, at **2 n.1 (9th Cir. 1992) (unpublished opinion) ("This court granted Hwang a limited remand for the district court to decide the Rule 60(b) motion."); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 n.21 (9th Cir. 1989) ("The proper procedure in such a situation is to ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion."); *Rogers v. Fed. Bureau of Prisons*, 105 Fed.Appx. 980, *982 (10th Cir. 2004) (unpublished opinion) ("[W]e issued a limited remand so the District Court could consider the Rule 60(b) motion. We further noted our intention to remand the entire matter if the District Court decided to grant the Rule 60(b) motion ....").

Seventh Circuit Rule 57 purports to require that the court of appeals must remand all proceedings, rather than remanding for a limited purpose. Writing in the context of request for

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[30] Thus, the Seventh Circuit has observed that an "unlimited remand may not be a completely satisfactory solution" for litigants:

> Suppose that the district court, on remand, thinks better of it's inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he has had a chance to argue to the appellate court that the original judgment was correct-- is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). The *Boyko* court's suggestion that the scope of appellate review of the Rule 60(b) order can "probably" be extended to encompass a full review of the original judgment hardly seems like an unequivocal assurance that unconditional remands are safe for the would-be appellant.

relief under Civil Rule 60(b), the court explained that partial remands were inappropriate "because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooting the appeal." *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). However, the Seventh Circuit does not actually bar the use of limited remands; in that circuit, a limited remand would be the appropriate device when the district court has indicated that it might (rather than would) grant the relevant motion:

> [I]f the judge thought there was some chance that he would grant the Rule 60(b) motion, but he needed to conduct an evidentiary hearing in order to be able to make a definitive ruling on the question, he should have indicated that this was how he wanted to proceed. Boyko would then have asked us to order a limited remand to enable the judge to conduct the hearing. If after the hearing the judge decided (as we know he would have, since he did) that he did want to grant the Rule 60(b) motion, he should have so indicated on the record and Boyko would then have asked us to remand the case to enable the judge to act on the motion and we would have done so.

Boyko, 185 F.3d at 675.

In a similar vein, the Tenth Circuit has observed that the court of appeals has three options when faced with a request to remand so that the district court can consider a request for Rule 60(b) relief:

> [T]his court, confronted with the motion to remand before the trial court has heard the motion for a new trial pursuant to Rule 60(b), has three alternatives: (1) it can remand unconditionally as was done in *Siviglia* but at great risk to the appellant; (2) it can partially remand for consideration of the motion for new trial, retaining jurisdiction over the original appeal and consolidating any subsequent appeal from action on the motion for new trial after the trial court has acted; or (3) it can deny the motion to remand without prejudice, permitting the parties to proceed before the trial court on the motion, and grant a renewed motion to remand after the trial court has indicated its intent to grant the motion for a new trial. If the trial court denies the motion for new trial, it can do so without a remand from this court and appeal may be taken therefrom and consolidated with the original appeal if still pending.

Garcia v. Regents of Univ. of Ca., 737 F.2d 889, 890 (10th Cir. 1984) (per curiam). The court of appeals held that the last of the three options was the appropriate choice "unless the appellant indicates a clear intent to abandon the original appeal." *Id.*

These considerations indicate that the better practice is to exercise caution in setting the terms of the remand. If the district court has stated merely that it "might" grant the relevant motion, then an unconditional remand would be perilous for the appellant; in such cases, the

court of appeals should not grant an unconditional remand unless the appellant has clearly stated its intent to abandon the appeal. By contrast, if the rule requires that the district court state that it "would" grant the motion, one could perhaps, in some cases, follow a simpler procedure: The court of appeals could then remand for the purpose of allowing the district court to grant the motion. Arguably – because the motion is to be granted – the remand could be a full rather than a limited remand. But it still seems prudent for the unlimited nature of the remand to be conditional upon the grant of the motion; otherwise, if the district court were to change its mind and deny the motion, the appellant might be left without an opportunity to revive her appeal from the original judgment. Moreover, in some instances the court of appeals might wish to limit the remand so that it can proceed with the initial appeal even after the district court has granted relief on remand; the Note acknowledges this possibility.

D. Should the rule address whether a dissatisfied party must file a fresh notice of appeal with respect to action taken by the district court?

It may be worthwhile to include in the Committee Note some observations concerning notices of appeal.[31] In a circuit that shares the majority view that a pending appeal does not prevent a district court from *denying* a Civil Rule 60(b) motion,[32] the movant must make sure to take an appeal from such a denial in order to preserve the right to challenge the denial on appeal.[33] Likewise, "where a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals." *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

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[31] Both the Seventh Circuit rule and the D.C. Circuit handbook provision address this issue.

[32] *See, e.g., Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) ("If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal.").

[33] *See Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial).

E. Is docketing the right demarcation with respect to the transfer of jurisdiction from the district court to the court of appeals?

The draft Rule refers to motions the district court lacks authority to grant "because of an appeal that has been docketed and is pending." One question this suggests is how courts handle requests for postjudgment relief during the period between the filing of the notice of appeal and the docketing of the appeal.

Appeals as of right from the district court[34] are taken by filing a notice of appeal in the district court.[35] The district clerk "must promptly send a copy of the notice of appeal and of the docket entries ... to the clerk of the court of appeals."[36] Upon receiving these items, "the circuit clerk must docket the appeal."[37] Appeals by permission entail a petition for permission to appeal.[38] If permission is granted, no notice of appeal is necessary.[39] Once the district clerk notifies the circuit clerk that the petitioner has paid the required fees, "the circuit clerk must enter the appeal on the docket."[40]

The Fourth Circuit has held that in at least some circumstances the district court can grant relief from the judgment after the filing of the notice of appeal but prior to the docketing of the appeal.[41] Dictum in some other opinions suggests that docketing is the time when jurisdiction

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[34] The procedure appears generally similar, in pertinent respects, for appeals from district courts or bankruptcy appellate panels exercising appellate jurisdiction in bankruptcy cases. *See* Appellate Rule 6(b)(1).

[35] *See* Appellate Rule 3(a).

[36] *See* Appellate Rule 3(d)(1).

[37] *See* Appellate Rule 12(a).

[38] *See* Appellate Rule 5(a).

[39] *See* Appellate Rule 5(d)(2).

[40] *See* Appellate Rule 5(d)(3).

[41] *See Williams v. McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978) ("We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate."); *see also Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891-92 (4th Cir. 1999) (citing *Williams* with approval).

passes to the court of appeals.[42] Additional support for this view might, arguably, be gleaned from the role that docketing of the appeal plays with respect to motions under Rule 60(a). The docketing of the appeal demarcates the time after which the court of appeals' permission is necessary in order for the district court to correct clerical errors under Rule 60(a). To the extent that the choice of docketing as the demarcation point reflects the view that a court of appeals is unlikely to expend effort on an appeal before it is docketed,[43] similar reasoning would support the use of docketing to demarcate the time after which a remand is necessary in order for the district court to grant relief under Rule 60(b).[44] However, a possible counter-argument is that 60(b) relief can have a more significantly disruptive effect on the appeal than 60(a) relief, and therefore that more caution is called for – perhaps weighing in favor of using the filing of the notice of appeal as the cutoff time. Marcie Waldron points out that Appellate Rule 42(a) – which permits the district court to dismiss an appeal before the appeal "has been docketed by the circuit clerk" – provides additional support for the notion that docketing is the relevant demarcation for the shift from district court to appellate court authority.

In contrast to the Fourth Circuit's approach, some other circuits have indicated that it is the filing of the notice of appeal (and thus presumably not the later docketing of the appeal) that demarcates when jurisdiction passes from the trial to the appellate court.[45] Some of these courts echo the *Griggs* Court's statement that "[t]he filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at

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[42] *See Azzeem v. Scott*, No. 98-40347, 1999 WL 301363, at *1 (5th Cir. 1999) (unpublished opinion) ("A district court is divested of jurisdiction upon the docketing in this court of a timely filed notice of appeal.").

[43] *Cf., e.g., In re Modern Textile, Inc.*, 900 F.2d 1184, 1193 (8th Cir. 1990) ("The underlying purpose of this rule, we believe, is to protect the administrative integrity of the appeal, i.e., to ensure that the issues on appeal are not undermined or altered as a result of changes in the district court's judgment, unless such changes are made with the appellate court's knowledge and authorization.").

[44] Some courts have reasoned from this aspect of Rule 60(a) to conclude that the docketing of the appeal marks the passing of jurisdiction from the lower to the appellate court. *See, e.g., Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 932 (9th Cir. 1999) ("When Television Espanola's appeal of the district court's decision was docketed with the Ninth Circuit on October 22, 1997, the district court lost jurisdiction to review its October 6 entry of judgment.").

[45] *See, e.g., Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.").

58.[46] The view that filing the notice of appeal is the relevant time might also be supported by the fact that an appeal as of right is "taken" by filing the notice of appeal in the district court. Appellate Rule 3(a)(1).

Thus, my quick survey of the caselaw suggests that questions exist regarding the district court's power to grant relief from a judgment after the filing of the notice of appeal but before the docketing of the appeal in the court of appeals. One argument for using docketing as the point when jurisdiction passes from one court to another would presumably be that – at least in the case of appeals as of right – the court of appeals is unlikely to expend any time on an appeal before it is docketed. That may not be the case when it comes to appeals by permission, but there, too, the likelihood that the court of appeals would expend effort on the appeal between the grant of permission and the docketing of the appeal may be low.

The three circuit clerks who have commented on the proposed rule favor the use of docketing as the point of demarcation. Fritz has summarized their reasoning thus:

> Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely "lodge" an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket.

F. Issues regarding notification to the Court of Appeals

Proposed Civil Rule 62.1 requires the movant to notify the appellate clerk when the motion is filed and when the district court acts on the motion. The appellate clerks who reviewed the proposal, however, vigorously oppose the notion of requiring notification when requests are made or when the district court denies a request. As Marcie Waldron, the Third Circuit clerk, points out, "I don't want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion." Fritz points out, moreover, that most indicative-ruling issues in the Fifth Circuit arise in cases involving pro se litigants, who "are not a dependable source of information." Accordingly, draft Rule 12.1(a) includes two bracketed options – one that requires notification when the motion is filed and when it is resolved, and another that

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[46] *See, e.g., Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) ("As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal.").

requires notification only when the district court responds favorably to the motion. A parallel provision appears in proposed Civil Rule 62.1, and thus it will be important to coordinate with the Civil Rules Committee on this point.

Marcie Waldron does suggest, however, that notification would be useful, after a remand, when the district court has decided the motion:

> I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again.

(She notes, however, that "[t]his problem may evaporate with CM/ECF notifications.") Draft Rule 12.1(b) includes bracketed language that would implement this suggestion.

Another question concerns the mechanics of the procedure by which litigants and the district court communicate the required information to the court of appeals. The current draft Rule 12.1 does not specify the mechanics of those communications. Fritz notes that the circuit practices vary on this point, and suggests that it would be difficult to attain national uniformity with respect to these logistical details. Accordingly, the draft Rule does not specify the procedure for communicating the required information to the court of appeals, but the Note states that "[i]n accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b)."

G. Placement and title of the proposed rule

The DOJ's original proposal was that the rule be numbered 4.1; a Rule 4.1 would, of course, fall between the rules governing appeals as of right and appeals by permission. I have tentatively numbered the draft Rule "12.1" because that would place it at the end of the FRAP title concerning appeals from district court judgments or orders. Another possibility in the same title would be 8.1 (following Rule 8, which concerns stays or injunctions pending appeal). Other options would be in Title VII, concerning general provisions: 33.1 (following Rule 33 on appeal conferences); 42.1 (following Rule 42 on voluntary dismissal); or 49 (at the end of the title).

Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or] would grant the motion].

(b) Remand After an Indicative Ruling. If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the

relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733,

736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

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

TO: **Civil Rules Committee**

FROM: **Judge Lee H. Rosenthal**
Professor Edward Cooper

DATE: **March 30, 2007**

RE: **Time Computation Project**

Attached are the materials that will allow us to proceed with the next steps of the time-computation rules project. Behind the first tab are the materials generated by the inter-committee work: the present version of the time-computation rule and proposed committee note, memoranda explaining the most recent changes, and materials discussing the issue of statutory deadlines. Behind the second tab are the materials generated by this Committee's examination of all the Civil Rules to adjust for the changes the proposed time-calculation rule would make and to ensure that the deadlines and time periods set out in the Rules are reasonable. Other rules committees are considering the same sets of issues in their spring meetings. As with other trans-committee projects, it is likely that there will be some small discrepancies among the recommendations for the "template" provision that aims at as much uniformity as possible in each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Any discrepancies that appear will be reconciled through the Time-Computation Subcommittee on the way to the Standing Committee.

The project has proceeded on schedule for presentation to the Standing Committee in June and, if approved, publication for public comment in August. That progress is due to the hard work by the Time-Computation Subcommittee, chaired by Judge Mark Kravitz, for which Professor Cathie Struvie served as reporter, and to the hard work of this Committee and the other Rules Committees in examining their own sets of rules. Lawyers who have heard of this project are already expressing appreciation. The project promises to be helpful to both bench and bar.

MEMORANDUM

DATE: March 26, 2007

TO: Committee Reporters
John K. Rabiej
James N. Ishida

FROM: Judge Mark R. Kravitz
Catherine T. Struve

RE: Current time-computation template

For your convenience in assembling the agenda book materials for your spring meetings, we enclose the current time-computation template draft in both clean and redlined forms. It is redlined to show changes made since the version we circulated on March 6. The only changes to the text of the rule are those suggested in the March 13 memo, plus a style change to subdivision (a)(3) that we made in response to comments from Professor Kimble. (Also, the wording of the suggested change to subdivision (a)(6)(B) is slightly different from that suggested in our March 13 memo.)

The note shows a number of small changes we have made in response to comments we have received. Though not all those changes have been circulated to the group, we provide the current version in case it is useful for discussion purposes.

The bottom line: If you have already assembled your meeting materials using our March 6 and March 13 memos, that provides a good basis for the committee discussion. If you have not yet assembled the materials, the attached version incorporates the changes suggested in the March 13 memo and may be a useful addition to your meeting materials.

Encl.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

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

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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

(A) begin counting immediately on the occurrence of the event that triggers the period;

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

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

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

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Committee Note

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

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

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

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) 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)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday,

September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a).

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute[, local rule,] that does not specify a method o[r court order]f computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

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

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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

(A) begin counting immediately on the occurrence of the event that triggers the period;

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

([~~A~~]B) [~~on~~]during the last [~~day of a~~]hour for filing[~~ period computed~~] under Rule 6(a)([~~1~~]2), then the time for filing is extended to the [~~first day when~~]same time on the [~~clerk's office is~~]first accessible day that is not a Saturday, Sunday, or legal holiday[~~; or~~].

~~[(B) d... holiday.~~

~~]~~ (4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

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

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

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule,

includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Committee Note

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

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

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

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with

only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below[,] in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under [new]subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility~~[;]~~. Rather, the concept~~[of inaccessibility]~~ will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition,~~[while]~~ many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply ~~[to the computation of]~~in computing periods stated in hours under subdivision (a)(2)~~[. Subdivi...definition]~~, and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the ~~[court's au...ling under]~~effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course ~~[of events]~~without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A

backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) 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)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision~~[s]~~ (a~~[)(1) and (a)(2]~~).

MEMORANDUM

DATE: March 13, 2007

TO: Time Computation Subcommittee
Committee Reporters

FROM: Judge Mark R. Kravitz
Catherine T. Struve

CC: Judge David F. Levi
John K. Rabiej

RE: Two additional template issues

Since circulating the template draft last week, we have become aware of two issues that we would like to bring to your attention in advance of the Advisory Committee meetings this spring. At least one of those issues will require a change to the language of the proposed time-counting Rule.

The first issue concerns the template's effect on statutory provisions that both set a time period for use in litigation and provide explicit instructions on how the period should be computed. The second issue relates to the application of the "legal holidays" definition to litigation that takes place in the Territories, the District of Columbia or Puerto Rico. These issues are addressed in parts I and II below.

I. Statutory periods expressed in "business days" or similar language

Our subcommittee's master list of short statutory time periods omits periods that explicitly instruct that weekends and holidays not be counted. Those periods were omitted based on the assumption that since the statute specifies the manner of counting, no court would apply a contrary time-counting Rule. But it occurred to us recently that this assumption might have been hasty.

Most statutes that set time periods relating to litigation fail to specify how the periods should be counted. Some other statutes set periods in "calendar days";[1] those provisions are omitted from our master list on the assumption that they will continue to be counted the same way under the Rules' new days-are-days approach. And – of greatest relevance to this memo – a few statutes specify a time-counting method that is different from the one that will apply under the proposed template's approach; those provisions (13 statutes and one regulation) are listed in the enclosed spreadsheet.

As you know, the template states that its "rules apply in computing any time period specified in ... any statute...." And subdivision (a)(1) instructs that "[w]hen the period is stated in days or a longer unit of time" one must "count every day, including intermediate Saturdays, Sundays, and legal holidays." For all sets of Rules other than the Bankruptcy Rules, the supersession authority granted to the rulemakers means that once the template is adopted as part of the Rules, all statutory provisions to the contrary will be of no force and effect. So the question is whether any court would interpret the Rules' days-are-days time-counting directive to supersede an explicit statutory directive to use a non-days-are-days approach. As a policy matter, we believe it would be undesirable for the Rules to trump such directives. Those directives may have arisen, for example, from a legislative desire to set a short period but to avoid imposing hardship in the event that the period includes a weekend or holiday.

It is informative to consider the rationales that courts have used when applying existing or prior versions of the time-counting Rules to compute statutory periods. Some courts have applied those Rules as gap-filling measures in the absence of any contrary indication from Congress.[2] In some instances, courts have applied a time-counting Rule "by analogy," or as a reasonable estimation of congressional intent in enacting the relevant statutory scheme, rather

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[1] See, e.g., 12 U.S.C. § 3410(b) ("All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.").

[2] For example, the Third Circuit reasoned as follows in a Federal Tort Claims Act case: "Section 2401(b) does not contain a time computation rule. It does not say whether the day of the liability causing event is included or excluded. It says nothing about weekends or holidays at the end of the two year period. Both with its beginning and with its end interpretation is required. Aside from the government's rule of interpretation that the claimant ought always to lose, no more satisfactory rule has been called to our attention than that, approved by Congress, and announced in Rule 6(a)." Frey v. Woodard, 748 F.2d 173, 175 (3d Cir. 1984). See also United Mine Workers of America, Intern. Union v. Dole, 870 F.2d 662, 665 (D.C. Cir. 1989) ("The [Mine Safety and Health Act of 1977] ... makes no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a); we conclude therefore that Congress intended its time periods to be computed in accordance with the federal rule.").

than indicating that the Rule controls of its own force.[3] In other cases, courts have applied a time-counting Rule to compute a statutory period without giving much or any explanation for that application. But courts confronted with a specific statutory counting method have refused to apply a contrary directive in the relevant time-counting Rule.[4]

Clearly, courts applying a time-counting Rule as a gap-filling measure will not apply the Rule when the statute specifies a contrary time-counting method, for in that event there is no gap to be filled. Likewise, courts that look to congressional intent would infer from the statute's specification of a time-counting method that Congress did not intend them to use the time-counting Rule's contrary method. And courts that already reject the time-counting Rule when faced with a statutorily-specified time-counting method would continue to do so.

Nonetheless, a technical argument could be made that says that, as to statutes that predate the adoption of the template in the time-counting Rules, the later-adopted Rule trumps the previously-adopted statutory time-counting provision.[5] It would arguably rise to the level of absurdity to apply a days-are-days time-counting Rule to calculate a period explicitly set in

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[3] *See, e.g.*, Tribue v. U.S., 826 F.2d 633, 635 (7th Cir. 1987) (reasoning in Federal Torts Claims Act case that "if we found § 2401(b) ambiguous regarding whether to exclude the mailing date, we would exclude the mailing date by analogy to Rule 6(a)"); Pearson v. Furnco Const. Co., 563 F.2d 815, 819 (7th Cir. 1977) (holding "that in the light of the purposes intended to be served by Title VII, it is a sound interpretation of congressional intent" to apply Civil Rule 6(a)'s approach to the computation of the limitations period). Likewise, in an early decision interpreting the time limit for petitions for certiorari under 28 U.S.C. § 2101, the Supreme Court drew upon the approach stated in Civil Rule 6(a): "Since [Rule 6(a)] had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. s 2101(c)." Union Nat. Bank of Wichita, Kan. v. Lamb, 337 U.S. 38, 41 (1949).

[4] See F.D.I.C. v. Enventure V, 77 F.3d 123, 126 (5th Cir. 1996) ("In § 1821(d)(14)(A), Congress provided that the limitations period began 'on the date the claim accrues.' The use of the word 'on' is clear and creates a more specific rule which overrides the application of Rule 6(a)."); Slinger Drainage, Inc. v. E.P.A., 237 F.3d 681, 683 (D.C. Cir. 2001) (refusing to apply Rule 26(a) to determine the period's start date because "the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing 'within the 30-day period *beginning on the date the civil penalty issued*.' 33 U.S.C. § 1319(g)(8)(B) (emphasis added)").

[5] This argument assumes that the time-counting Rules' application to the relevant time period is valid under the Rules Enabling Act's scope limitation. That assumption may not always hold true. For example, 18 U.S.C. § 3142(d)'s time limit on detention may implicate substantive rights.

"business days" or "working days." If such applications are absurd, it seems a small step to conclude that it would likewise be absurd to apply the time-counting Rules' days-are-days approach when the statute explicitly directs one to exclude weekends and holidays. But even if this line of reasoning ultimately leads courts to reject the notion that the new time-counting Rules supersede explicit statutory directives concerning the method of computation, it would be best if we could draft the Rules to preempt litigation on this point.

We therefore suggest amending the first sentence in the template Rule as follows:

> The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute[, local ru...urt order.] that does not specify a time-computation method.

We also favor adding a sentence to the Note to observe that state-court interpretations of state statutes count as specifying a statutory method.

II. Legal holidays in the Territories, the District of Columbia or Puerto Rico

As you know, the Rules apply not only to district court proceedings held within states, but also to district court proceedings held within the District of Columbia and Puerto Rico. Moreover, the Rules apply in proceedings in various territorial courts.[6] The template rule defines "legal holiday" to include the listed holidays plus "any other day declared a holiday by the President, Congress, or the state where the district court is located." This provision may require amendment in order to ensure that the "legal holiday" definition functions appropriately in proceedings within the Territories, the District of Columbia, or Puerto Rico.[7]

The background definitional principles vary. Civil Rule 81(e) provides that "When the word 'state' is used, it includes, if appropriate, the District of Columbia." Our understanding is that the Civil Rules Committee may be considering whether this definition should be expanded

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[6] See, e.g., Criminal Rule 1(a)(1) (subject to certain exceptions, Criminal Rules govern criminal proceedings in district courts in Guam, Northern Mariana Islands, and Virgin Islands); Am. Jur. Federal Courts § 2585 ("[W]hile the District Courts of Guam, the Northern Mariana Islands, and the Virgin Islands are constituted by the respective Organic Acts for such territories, rather than by Chapter 5 of the Judicial Code, it is expressly provided in such acts that the Federal Rules of Civil Procedure apply in such courts.").

[7] Admittedly, courts may decide to interpret the existing language to include more than just states. Cf. Reyes-Cardona v. J. C. Penney Co., Inc., 690 F.2d 1, 1 (1st Cir. 1982) ("But that day was a legal holiday in Puerto Rico honoring Eugenio Maria de Hostos. See 1 L.P.R.A. s 75. As such it is not counted in the computation of time. Rule 6(a) F.R.Civ.P...."). But it seems advisable to clarify the matter in rule text.

to include more than the District of Columbia. Criminal Rule 1(b)(9) could provide a model for such expansion; that Rule provides that "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Appellate Rules contain no such definitional provision, and the Bankruptcy Rules appear to contain no relevant definition either.

We therefore would ask the Advisory Committees (other than the Criminal Rules Committee)[8] to consider whether they wish to adopt a general definition such as that in Criminal Rule 1(b)(9). If each set of Rules is amended to contain such a definition, then no change to the template's definition of "legal holiday" would be required. If such a definition is not adopted, however, then seems advisable to add the following at the end of the template's subdivision (a)(6)(B):

> The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.

* * *

We regret that these changes did not surface before we circulated the official version of the template last week for use in the Advisory Committee meetings this spring. Generally, our plan is to hold any smaller suggestions for change (such as small changes to Note wording) until later, so that the Advisory Committees and Reporters do not have to work with a moving target for purposes of their spring meetings. But these two changes seemed to us to warrant an exception to that policy, and we wanted to place these issues before the Advisory Committees for discussion at the spring meetings.

Thank you for your work on this project.

Encl.

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[8] Obviously, this request is relevant to the Evidence Rules Committee only if it decides to recommend adopting a time-computation provision in the Evidence Rules.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(b) Extending Time.

* * * * *

(2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)~~, except as those rules allow~~.

(c) Motions, Notices of Hearing, and Affidavits.

(1) ***In General.*** A written motion and notice of the hearing must be served at least ~~5~~ 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

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

(C) when a court order — which a party may, for good cause, apply for ex parte — sets a different time.

(2) ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least ~~1~~ 7 days before the hearing, unless the court permits service at another time.

* * * * *

Committee Note

None of the rules listed in former Rule 6(b) allow the court to extend the times to act set in those rules. The purported exception for extensions allowed by those rules is deleted as meaningless. The times allowed for motions under Rules 50, 52, and 59, however, are extended to 30 days.

The time provided by former Rule 6(c) to serve a motion and notice of hearing has been expanded from 5 days to 14 days before the time specified for the hearing, without changing the exceptions. The 14-day period sets a more realistic time for other parties to respond and for the court to consider the motion. The time to serve

an opposing affidavit is expanded from 1 day before the hearing to 7 days before the hearing. Even if actual delivery is accomplished 1 day before the hearing, a single day is not sufficient time to consider and prepare a response.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within ~~20~~ 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant

outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within ~~20~~ 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within ~~20~~ 21 days after being served with an order to reply, unless the order specifies a different time. .

* * * * *

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading

must be served within ~~10~~ 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within ~~10~~ 14 days after the more definite statement is served.

* * * * *

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within ~~10~~ 14 days after notice of the order or

within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within ~~20~~ 21 days after being served with the pleading.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See [the Note to] Rule 6.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than ~~10~~ 14 days after serving its original answer.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See [the Note to] Rule 6.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within ~~20~~ 21 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within ~~10~~ 14 days after service of the amended pleading, whichever is later.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See [the Note to] Rule 6.

Rule 23. Class Actions

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within ~~10~~ 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See [the Note to] Rule 6.

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

* * * * *

(2) ***Notice and Service.*** At least ~~20~~ 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise

represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See [the Note to] Rule 6.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

* * * * *

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than ~~11~~ 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B)

requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

* * * * *

(d) Waiver of Objections.

* * * * *

(3) ***To the Taking of the Deposition.***

* * * * *

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within ~~5~~ 7 days after being served with it.

* * * * *

Committee Note

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See [the Note to] Rule 6.

Rule 38. Right to a Jury Trial; Demand

* * * * *

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than ~~10~~ 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial

on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within ~~10~~ 14 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See [the Note to] Rule 6.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

* * * * *

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made 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. No later than ~~10~~ 30 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than ~~10~~ 30 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

* * * * *

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than ~~10~~ 30 days after the entry of the judgment.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

* * * * *

(b) Amended or Additional Findings. On a party's motion filed no later than ~~10~~ 30 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Rule 53. Masters

* * * * *

(f) Action on the Master's Order, Report, or Recommendations.

* * * * *

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than ~~20~~ 21 days after a

copy is served, unless the court sets a different time.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See [the Note to] Rule 6.

Rule 54. Judgment; Costs

* * * * *

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on ~~14~~

~~day's~~ 14 days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action.

* * * * *

Committee Note

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 55. Default; Default Judgment

* * * * *

(b) Entering a Default Judgment.

* * * * *

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a

general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least ~~3~~ 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

* * * * *

Committee Note

The time set in the former rule at 3 days has been revised to 7 days. See [the Note to] Rule 6.

Rule 59. New Trial; Altering or Amending a Judgment

* * * * *

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than ~~10~~ 30 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has ~~10~~ 14 days after being served to file opposing affidavits~~; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation~~. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~ 30 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and

an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than ~~10~~ 30 days after the entry of the judgment.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up 20 days for good cause or by

stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until ~~10~~ 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See [the Note to] Rule 6.

Rule 65. Injunctions and Restraining Orders

* * * * *

(b) Temporary Restraining Order.

* * * * *

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed ~~10~~ 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See [the Note to] Rule 6.

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. ~~More than 10~~ At least 14 days before the date set for trial ~~begins~~, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within ~~10~~ 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

* * * * *

Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins. It may be difficult to know in advance when trial will begin. The time is now measured from the

date set for trial. The former 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) ***Contents of the Notice.***

(A) *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within ~~20~~ 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

* * * * *

(e) Appearance or Answer.

* * * * *

(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within

~~20~~ 21 days after being served with the notice. The answer must:

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See [the Note to] Rule 6.

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must

consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

* * * * *

(2) ***Objections.*** Within ~~10~~ 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within ~~10~~ 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See [the Note to] Rule 6.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

* * * * *

(2) ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) ~~20~~ 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) ~~20~~ 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) ~~5~~ 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

* * * * *

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within ~~10~~ 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

* * * * *

Committee Note

The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See [the Note to] Rule 6.

SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Rule B. In Personam Actions: Attachment and Garnishment

* * * * *

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within ~~20~~ 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the

court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See [the Note to] Rule 6.

Rule C. In Rem Actions: Special Provisions

* * * * *

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within ~~10~~ 14 days after execution, the

plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.[**]

[**]A technical revision of Supplemental Rule C(6)(a) has been proposed for adopted without publication. That revision has no effect on the proposal to amend subparagraph (A) to extend the time to file from 10 days to 14 days.

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within ~~10~~ 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer

within ~~20~~ 21 days after filing the statement of interest or right.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See [the Note to] Rule 6.

Rule G. Forfeiture Actions In Rem

* * * * *

(4) Notice.

* * * * *

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of

the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than ~~20~~ 21 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

* * * * *

(5) Responsive Pleadings.

* * * * *

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within ~~20~~ 21 days after filing the claim. A claimant

waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within ~~20~~ 21 days after the motion is served.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within ~~20~~ 21 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's

motion to dismiss the action under Rule G(8)(b) until ~~20~~ 21 days after the claimant has answered these interrogatories.

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See [the Note to] Rule 6.

Time Project: Statutory Time Limits

The Time Project has been divided into three main parts. The first part is the template rule for computing time periods. Civil Rule 6(a) has been used to illustrate the template, but each of the other rules is to conform as near as may be to the same model. The second is reconsideration of all of the time periods designated in the Civil Rules. That part was substantially completed at the September meeting. The results are reflected in the September draft Minutes and in these materials. The third part involves study of statutory time periods.

Rule 6(a) establishes the method for computing statutory time periods that apply to civil actions. At least on the face of things, a statutory time period of less than 11 days will be shortened by the proposed revision of Rule 6(a). The former rule excluded intermediate Saturdays, Sundays, and legal holidays. A 10-day time period, for example, was always at least 14 calendar days. The proposed rule expressly includes intermediate Saturdays, Sundays, and legal holidays. Ten days will mean ten days. This effect has been addressed for periods set in the Civil Rules by reconsidering each period. The result has been to recommend extending most 10-day periods to 14 days. Civil Rules amendments cannot, however, directly revise statutory time periods.

Many participants in the Time Project have worried deeply about the effect of changing the computation method for statutory time periods. Several alternatives have been considered. One is to revise Rule 6 so that it no longer applies to computing statutory time periods that apply to civil actions. That approach would leave no sense of direction at all, leaving the question to a common-law process of statutory interpretation. The common-law process might seek a consistent approach by gravitating toward a second alternative. This approach would carry forward the method of present Rule 6(a), excluding intermediate Saturdays, Sundays, and legal holidays. The benefit of continuity in statutory time periods, however, would be offset by the confusion engendered by using two different counting methods. The confusion could be compounded if a statute and rule address the same issue, such as the duration of a temporary restraining order.

A third approach has been chosen. Professor Struve, Reporter for the Time-Project Subcommittee as well as the Appellate Rules Committee, has compiled a comprehensive list of brief statutory time periods. Each Advisory Committee is to review these statutes to determine whether the new computation method warrants a new statutory period. A full set of these recommendations will be compiled for submission to Congress.

There is no immediate need to compile a final list of statutory recommendations at the April 2007 meeting. It remains possible to parcel the list of statutes out to the time-computation subcommittees for study and recommendations. This memorandum is designed to facilitate the decision whether the task can be accomplished by Advisory Committee deliberations or whether instead the subcommittees should be recalled to action.

The need for subcommittee study will depend in part on the approach taken. One approach would be to attempt a careful study of real-world needs based on experience with each of the many statutes that have been identified. Experience may be readily available in some areas. Temporary restraining orders are a clear example. Experience will be difficult to come by in many of the more exotic substantive areas. And experience may be clouded by the relative obscurity of present Rule 6(a)'s impact on statutory time periods. Many participants in the time-computation project have ruefully admitted that recognition of this impact came only after many years of experience. There is a real prospect that many of these statutory time periods have often been applied on a calendar-day basis — experience may show confused practice, and a real prospect that the new Rule 6(a) calendar-day method conforms as closely to present practice as the present weekdays-only method. There is a real prospect that diligent study will identify many unanswerable questions.

A more relaxed approach would begin with a sense of deference to Congress. Statutory time periods of less than 11 days are likely to reflect a judgment that the particular issue deserves prompt

action. There is at least some reason to suspect that many of these periods have been set without any reliance on the present Rule 6(a) computation method. On this approach, statutory amendments should be recommended only when there is strong reason to believe that too little time will be allowed by a calendar-day approach.

These notes adopt the relaxed approach. The result is to recommend a small number of statutes as worthy candidates for amendment. Some of these statutes may be suitable for amendment even apart from revision of Civil Rule 6(a) to adopt a calendar-days counting rule.

The second part identifies some statutes that limit the duration of temporary restraining orders. The suggestion will be that none of them is a suitable candidate for amendment.

The third part identifies a few odd provisions without any thought that they might be candidates for amendment.

The underlying assumption is that Rule 6(a) will continue to govern computation of statutory time periods that become involved in a civil action or proceeding in a district court. The effect of changing computation methods does not justify the costs entailed by casting the subject adrift. It is further assumed that Rule 6(a) will use the same method for computing statutory time periods and time periods set by other authority such as a court rule, local rule, or order.

I. Amendment Candidates

This list was compiled without reviewing Title 11 — the Bankruptcy title — at all.

The approach is to recommend amendment only when a statute presents a serious problem and is not obviously a matter for sensitive political judgment. The list is further constrained by complete ignorance as to the underlying substantive law and experience in administering it. There may be areas of practice that rely heavily on the Rule 6(a) approach that excludes intermediate Saturdays, Sundays, and legal holidays in counting periods less than 11 days. Nothing of the sort is reflected here.

28 U.S.C. § 144. This statute requires filing of an affidavit that a judge is biased or prejudiced "not less than ten days before the beginning of the term at which the proceeding is to be heard," unless good cause is shown for failure to meet the deadline. 28 U.S.C. § 138 provides: "The district court shall not hold formal terms." Section 144 should be amended to provide a workable set of deadlines. That it should be amended does not lead ineluctably to the conclusion that the Judicial Conference should recommend amendment. The subject is highly sensitive.

28 U.S.C. § 158 note: This is for the Appellate Rules Committee. The statute provides a transitional rule governing the time to petition for permission to appeal after a bankruptcy judge, district court, or bankruptcy appellate panel has certified an appeal directly to the court of appeals. The question has an obvious parallel to § 1292(b) and (d).

28 U.S.C. § 636(b): We propose to amend Civil Rule 72 to establish 14-day time limits on district-court review of magistrate judge acts. This is the most important proposed change; statute and rule should be uniform.

28 U.S.C. § 754: This statute sets a 10-day limit after appointment for a receiver to file in every district where property that the appointment puts into the receiver's control is located. Quite apart from whatever effect present Rule 6(a) may have had, is 10 days — or for that matter 14 days — enough?

28 U.S.C. § 1292(b), (d): As with § 158 above, the Appellate Rules Committee has primary responsibility for the time period to petition for leave to appeal after the trial court certifies a question for immediate appeal.

28 U.S.C. § 2107(c): Clearly for the Appellate Rules Committee — this is an integration of the statute with Appellate Rule 4. Is there a better way to achieve integration, perhaps by a statute that simply refers to the Appellate Rules without attempting to achieve synchronization with every new Appellate Rule?

28 U.S.C. § 2243: Rule 4 of the § 2254 Rules supersedes not only the time period but the procedure. See the 1976 (original) Committee Note. Under Rule 1, this supersession extends to habeas proceedings not under § 2243 when the court orders it. This is for the Criminal Rules Committee, but it looks as if the statute should be amended.

II. TRO Provisions

The recommendation is to amend Civil Rule 65(b) to provide an initial 14 days for a no-notice TRO, followed by extension for no more than 14 additional days unless the parties consent to a greater extension.

The question whether to recommend amendment of statutes that set 10-day or shorter periods begins with the unanswered question whether courts or parties often recognize the apparent effect of present Rule 6(a) in extending these periods. It also must face the delicate political sensitivities stirred by at least some settings, most notably labor injunctions. The list that follows notes quirks about one statute or another, but does not recommend that any of them be considered for amendment.

There are obvious sources for comment on present practice and real-world needs on many of these provisions. The labor agencies, Department of Justice (asset forfeiture), agency designated by the statute, and so on. We must decide whether we need pursue these inquiries.

15 U.S.C. § 2319(c)(1): The statute provides for an action by the Attorney General or by the "Commission" [I think the FTC]. The court may issue a TRO or preliminary injunction. If the action is brought by the Commission, the court is to set a period not exceeding 10 days after issuance of the order for the Commission to file a complaint under 15 U.S.C. § 45. If the complaint is not timely filed, "the order or injunction shall be dissolved by the court * * *."

18 U.S.C. § 983(i)(3): A no-notice TRO with respect to property subject to civil forfeiture "shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period." Note that there is no apparent limit on an extension granted for good cause.

18 U.S.C. § 1514(a)(2)(C): A TRO prohibiting harassment of a victim or witness in a federal criminal case "shall expire at such time, not to exceed 10 days from its issuance, as the court directs." The order may be extended for good cause "for up to 10 days or for such longer period agreed to by the adverse party." Unlike § 983(i)(3), the 10-day limit is set for an unconsented extension.

18 U.S.C. § 1514(a)(2)(E): Sets 2-day notice for a motion to dissolve or modify the TRO described above. This comports with the recommendation to retain the 2-day notice period in Rule 65(b).

18 U.S.C. § 1963(d)(2): A no-notice TRO to preserve the availability of property for RICO forfeiture "shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown * * *." This again appears to be a statute that does not set a 10-day limit on the extension.

21 U.S.C. § 853(e)(2): Another no-notice TRO to preserve property "when an information or indictment has not yet been filed with respect to the property." Again, there is a 10-day limit, subject to extension for good cause without setting a time limit on the extension.

29 U.S.C. § 107: Prohibits no-notice TROs. After hearing testimony in open court a TRO "shall be effective for no longer than five days and shall become void at the expiration of said five days." This is the Norris-LaGuardia Act, predating Civil Rule 6(a). Whatever may have been made of the 5-day period after the advent of Rule 6(a), there is no reason to suggest amendment. Remember that present Rule 65((e) provides: "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee * * *."

29 U.S.C. § 160(*l*): On petition by the NLRB to restrain specified unfair labor practices, a TRO — the statute is poorly drafted, but seems to be limited to a no-notice TRO — "shall be effective for no longer than five days and will become void at the expiration of such period * * *." Again, there is little reason to argue that Congress should extend this period.

29 U.S.C. § 662(b): On petition by "the Secretary" (apparently of Labor) to restrain practices in a place of employment that may cause death or serious physical harm, "[t]he proceeding shall be as provided by Rule 65 * * * except that no restraining order issued without notice shall be effective for longer than five days." This conscious decision to depart from Rule 65 speaks volumes.

30 U.S.C. § 818(b): A temporary restraining order to protect miners "shall be issued in accordance with rule 65 * * *, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry." Like 29 U.S.C. § 662(b) above, though it is 7 days rather than 5.

46 U.S.C. App. § 1710(b): In connection with an investigation, the "Commission," or a person who has filed a complaint with the Commission, may win a TRO after notice "for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint." This period is likely to run far longer than 10 days after the TRO issues. Still, it might be subject to present Rule 6(a).

III. Odd Illustrations

The following statutes provide illustrations of some of the more unusual questions that would arise from application of present Rule 6(a) to a statutory time period. They do not include the many statutes in the spreadsheet that probably are outside present Rule 6(a) because they apply to situations that do not — at least not yet — involve a civil action or proceeding in a district court.

Ambiguous Relations Among Rules: 2 U.S.C. § 922(e) provides for direct appeal to the Supreme Court "by a notice of appeal filed within 10 days after such order is entered." Supreme Court Rule 18.1 directs that a notice of appeal be filed in the district court "within the time provided by law after entry of the judgment sought to be reviewed." Is Rule 6(a) included within "the time provided by law"? If yes, the Rule 6(a) change apparently will make a difference. We will need advice from a Supreme Court practitioner — or perhaps the Clerk. (The times for appealing most district-court decisions to the Supreme Court are established by 28 U.S.C. § 2101. All are 30 days or longer.)

Hybrid: Related Provisions Tied and (probably) Not Tied to Court Proceedings: 10 U.S.C. § 7726(c): This draws from a related statute that requires that proceedings be stayed when the Secretary of the Navy certifies that prosecution of the suit would tend to endanger the security of Navy operations in time of war. 7726(b) requires the Secretary to hold a secret meeting with a claimant or party within 10 days after service of a notice that the stay harms the person giving notice. Because this provision is directed to the Secretary's act, not a court act, it probably falls outside Rule 6(a). But 7726(c) requires the Secretary to file a new certificate with the court within 10 days after the "hearing" [evidently meaning the secret meeting]. This one presumably falls within Rule 6(a). If those guesses are right, the result is that seemingly identical 10-day provisions in successive subsections of the same statute have different meanings if Rule 6(a) is applied to the court-related action.

Could Not Have Contemplated Use of Rule 6(a): 12 U.S.C. § 3405(3) requires notice to the customer of an administrative subpoena or summons to obtain financial records. The government may obtain the records if "ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer" and the customer has not challenged the demand within that period. It seems apparent that the drafters believed that the 10-day period was shorter than the 14-day period. But under Rule 6(a) it is never shorter, and is often longer. (12 U.S.C. § 3407(3) is similar.)

Bizarre Possibilities: 15 U.S.C. § 6606(c)(4) — part of the Y2K Act — establishes a presumption that a notice is received 7 days after it is sent. A presumption that it is received not 7 but 9, 11, or some other number of days later according to application of Rule 6(a) is simply bizarre.

Impossible Directions: 15 U.S.C. 1116(d)(10)(A), directs the court to hold a hearing on the date set in the order of seizure, which "shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued * * *." All those who have the true spirit of Rule 6(a) will recognize that in some circumstances this could be an impossible direction to follow — if it is set at 10 days, the period can run beyond the 15th day with the right combination of intervening days. If on December 22 you set a hearing "10 days from today," Rule 6(a) would set it at January 9, more than 15 days from December 22. So you have to be wary of Rule 6(a) in entering the order: if inclined to set the hearing at 10 days, check the calendar to make sure the period will not run beyond 15 days. Or reinterpret the statute in conjunction with rule 6(a): Even if the court on December 22 says "ten days from today," that should be construed to set the date on January 2, a date certain that does not require calculation.

Inscrutable Applications — A Statutory "Week": 46 U.S.C. § 10706 directs the master or owner of a vessel to deliver money, property, or wages due a seaman who dies in the United States to a district court "within one week of the seaman's death." If death occurs at sea, the week runs from the vessel's arrival at the first port of call after the death — then delivery is to be made either to a district court or to a consular office. Rule 6(a) might apply when delivery is to a district court — although the statute says "week," that is a period less than 11 days. It is more difficult to apply Rule 6(a) when delivery is to a consular office. For that matter, looking only to the face of this section it is not clear whether the consular office in a foreign port is a United States consular office or an office of the seaman's country.

Random Examples of Time-Statute Issues

These notes provide illustrations of the challenges confronting any thorough-going effort to evaluate statutory time periods that relate to civil actions. They are culled from the September Civil Rules Agenda book chart of statutes that set time periods of ten days or less. The selection is not entirely random, but it gives no more than a taste of some of the issues to confront.

"Yellow Flag on West": The number of entries that reflect a yellow flag illustrates one perennial concern. Even if we could achieve a complete list of statutes today, it will change tomorrow. A comprehensive statute-by-statute solution is not in reach, either by statutory amendment or by rulemaking.

Variety — A General Rule Approach: Present Rule 6(a) applies without differentiation to all statutes that in one way or another come within reach of rules that apply to civil actions and proceedings in the district courts. We could duplicate that by carrying forward a general rule that continues to exclude intermediate Saturdays, etc., in calculating statutory time periods less than 11 days. But, although still incomplete, this formidable list should give pause. The present rule reaches an enormous variety of statutes and an equal or greater number of situations.

Full context: supplying the full statutory context for all of these provisions would produce a bulky document. The first page, 158 in the agenda book, is an example: we know that the statute deals with a situation in which there are more than 100 vacancies in representation of the States in the House of Representatives. We know that the statute sets a 2-day period to file an action challenging the declaration of the Speaker and directs that a final and nonreviewable decision be made within 3 days. But to figure out what that means would require at least a look at the whole statutory structure.

This example is valuable in another way. We can safely assume that there is no practical experience to fill in the picture. One person's speculation is as good as anyone else's speculation. But many of the statutes govern situations that have lots of real-world experience, both with litigation and with the underlying circumstances that give rise to litigation. Understanding the full context of experience for each statute will be difficult, perhaps impossible in the time available for committee inquiry.

Rules Integration: 2 U.S.C. § 922(e), p. 159, provides 10 days to file a notice of appeal from the district court to the Supreme Court. The Appellate Rules presumably do not apply — the courts of appeals are not involved. No Civil Rule addresses time calculation, apart from Rule 6(a) as it now is. Supreme Court Rule 18.1 says that "the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended." Does anyone care to guess whether Civil Rule 6(a) now governs by excluding the intermediate Saturdays, etc.?

Periods Outside Court Proceedings: Some of these time provisions manifestly do not apply to court proceedings. 7 U.S.C. § 136h(d)(3), p. 161, for example, allows the "Administrator" to shorten the period of notice provided to the submitter before disclosing information from 30 days to "not less than 10 days." A court might be called on to enforce the 10-day floor, but this statute does not govern court proceedings. We have nothing to say about such matters. But some statutes may combine such provisions with time periods that do apply to courts.

Ambiguous Whether Tied to Court Proceedings: 10 U.S.C. § 7666(a), p. 162, governs sales of prize property. The marshal "shall give notice to the naval prize commissioner at least five days before the sale." Does this fall within Rule 6(a) because it is part of the prize proceedings? Or not, because

the marshal is notifying the prize commissioner — something may turn on whether the prize commissioner is always a party to a prize proceeding. Recent history is not likely to provide much guidance.

Hybrid: Related Provisions Tied and (probably) Not Tied to Court Proceedings: 10 U.S.C. § 7726(c), p. 163: This draws from a related statute that requires that proceedings be stayed when the Secretary of the Navy certifies that prosecution of the suit would tend to endanger the security of Navy operations in time of war. 7726(b) requires the Secretary to hold a secret meeting with a claimant or party within 10 days after service of a notice that the stay harms the person giving notice. Because this provision is directed to the Secretary's act, not a court act, it probably falls outside Rule 6(a). But 7726(c) requires the Secretary to file a new certificate with the court within 10 days after the "hearing" [evidently meaning the secret meeting]. This one presumably falls within Rule 6(a). If those guesses are right, the result is that seemingly identical 10-day provisions in successive subsections of the same statute have different meanings.

Impossible Directions: 15 U.S.C. 1116(d)(10)(A), p. 170, directs the court to hold a hearing on the date set in the order of seizure, which "shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued * * *." All those who have the true spirit of Rule 6(a) will recognize that in some circumstances this could be an impossible direction to follow — if it is set at 10 days, the period can run beyond the 15th day with the right combination of intervening days. So you have to be wary of Rule 6(a) in entering the order: if inclined to set the hearing at 10 days, check the calendar to make sure the period will not run beyond 15 days. Or reinterpret the statute in conjunction with rule 6(a), as suggested again below: The court on January 10 sets the day as January 20. That becomes a fixed date, conforming to the statute; it is not a period that has to be calculated under Rule 6(a).

Hard Choices

The statutes identified below are those that jumped from the page on a first rapid reading. No doubt there are many more.

9 U.S.C. § 4, p. 162: part of the Federal Arbitration Act. On a petition to compel arbitration, "[f]ive days' notice in writing of such application shall be served upon the party in default." [Default? Of what, honoring the agreement to arbitrate?] Service is to be made in the manner provided by the Federal Rules of Civil Procedure.

15 U.S.C. § 2310(c)(1): This statute seems to contemplate issuance of a temporary restraining order before a complaint is filed: it directs that the order be dissolved if a complaint under section 45 of Title 15 is not filed within a period to be set by the court, no more than 10 days. The answer may be that the proceeding for the TRO is initiated by filing a complaint in a proceeding solely for temporary relief pending initiation of another proceeding; then, at least, we have a civil action "commenced" under Rule 3 so that Rule 6(a) can apply. But that leaves the question whether this is the sort of 10-day period to be addressed by Rule 6(a) or a successor.

16 U.S.C. § 539m-5(c)(2)(B): The statute somehow addresses Forest Service management that conflicts with traditional or cultural Pueblo uses. If a dispute requires immediate resolution to avoid imminent harm, the party identifying the conflict shall notify the other party and seek to resolve the dispute within 3 days. If the parties are unable to resolve the dispute within 3 days, either may bring an action for immediate relief in D.N.M. Should this 3-day period be stretched as it often would be by Rule 6(a)?

18 U.S.C. § 983(j)(3), p. 176; 1514(a)(2)(C), p. 177: These statutes, both relating to civil forfeiture, provide for a temporary restraining order to expire not more than 10 days after entered, etc. If Rule 65(b) stays at 10 days, there is no direct problem. But if we were to think of a separate rule to carry forward the "less-than-11-days" rule for statutory time periods, the result would be to create an incongruity. The point is that any Rule provision would have to be carefully crafted.

18 U.S.C. § 2518, p 178: An order to intercept a wire communication may not last more than 30 days; the 30-day period begins to run on the earlier of the first day of interception or "ten days after the order is entered." Is there any reason at all to exclude intermediate Saturdays, etc.?

18 U.S.C. § 2518, p. 178: This one likely is not a day-counting problem if the Template carries forward. It authorizes an emergency interception of wire communications if an application for an order approving the interception is made within 48-hours. The present rules, and Rule 6(a), speak only of days. The Template gives a natural meaning, but still carries the time forward if the final hour falls on a Saturday, etc. So we have a different problem — applying the time-calculation rules to define the conclusion, not the duration, of the period.

24 U.S.C. § 326(a), p. 180: Another nifty one. This statute governs requests for release of a hospitalized patient. "[I]n no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings." The first nifty feature is that Sundays and legal holidays [not defined] are excluded, but not Saturdays: does Rule 6(a) now supersede? And of course the question remains whether this 5-day period should be measured by Rule 6(a).

28 U.S.C. § 144: An affidavit of personal bias or prejudice of a judge "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard." Do district courts still have terms, cf. § 452 (existence or expiration of a "session" means nothing)? Given some uncertainty about backward-looking periods, and the sensitivity of the topic, is this fit food for Rule control?

28 U.S.C. § 636: 10 days to object to magistrate judge's report and recommendations. This one is familiar, and probably the single most likely candidate to be superseded by rule.

28 U.S.C. § 754: A receiver for property situated in different districts has 10 days after appointment to file copies of the complaint and the order of appointment in each district in which property is located. That's not much time for what could be a really complex undertaking.

28 U.S.C. §§ 1292(b), 1453(c)(1): These are the 10-day and 7-day time periods to petition for permission to take an interlocutory appeal.

28 U.S.C.A. § 1605(b)(2): 10-days to notify a foreign state in an admiralty proceeding to enforce a lien on the state's vessel.

28 U.S.C. § 1715(b): CAFA sets a 10-day period to give notice of a proposed class-action settlement to state and federal officials.

28 U.S.C. § 1867(c): 7 days to stay proceedings for substantial failure to comply with provisions for selecting the petit jury, measured from the time the party discovered or could have discovered the

grounds by exercising due diligence. This is a pretty vague trigger for a 7-day period; whether there is any point in compounding it by excluding intermediate Saturdays, etc., seems a fair question.

28 U.S.C. § 2001(b): Notice published "at least ten days before confirmation" of a private sale. This is another example: If the court sets 10 days, the period is longer than if it sets 11 days. And it illustrates another question. The statute could easily be read not as a period to be calculated, but as a rule for setting a specific date: If on January 10 the court sets January 20, it has complied with the statute and Rule 6(a) is not involved because there is no "period" to measure.

28 U.S.C. § 2107(c): The Appellate Rules Committee is already focused on this one. The statute was amended to incorporate the 7-day period adopted in Appellate Rule 4, and a time when the Appellate Rules extended all periods less than 7 days. So the "days-are-days" approach applied until the Appellate Rules adopted the less-than-11-days approach for the sake of conforming to the Civil Rules.

28 U.S.C. § 2243: Rule 4 of the Section 2254 Rules supersedes the statute now; although it is put gently, the 1976 original Committee Note makes that clear.

28 U.S.C. § 2284(b)(2): in a three-judge district court action against a state, at least 5 days notice of hearing shall be given by registered or certified mail to the Governor and attorney general.

28 U.S.C. §§ 3101(d)(2), 3202(d): Both of these require action "within 5 days * * * or as soon thereafter as possible." Is this enough of a limit to worry about? 28 U.S.C. § 3205(c)(5), (7), and (9) are 10 days "or as soon thereafter as is praticable."

29 U.S.C. § 107: Limits a temporary restraining order "in any case involving or growing out of a labor dispute." The maximum duration is 5 days. Happily enough, present Rule 65(e) says: "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee * * *." Presumably Rule 6(a) does not apply now. But "affecting employer and employee" may be ambiguous for some other labor statutes.

29 U.S.C. §§ 160(l), 662(b): (The apparent 5-day limits on some unfair labor practice orders and dangerous conditions in a place of employment are not captured in the spread sheet. Likely Rule 65(e) takes these statutes outside Rule 6(a); see 29 U.S.C. § 107 above.)

30 U.S.C. § 818(b): A no-notice TRO in an action for protection afforded to miners shall be issued in accordance with Rule 65, except that the time limit is 7 days. The invocation of Rule 65 may not undo Rule 65(e), assuming that working conditions are matters that affect employer and employee. In any event, this one, in common with the more purely labor-relations provisions, is very sensitive.

45 U.S.C. § 159: The period for 10 days to file a "petition to impeach the award" of a board of arbitration seems no more sensitive than many other 10-day provisions not noted here. But "Fifth" provides that "final judgment" shall be entered after 10 days from the district court's decision "unless during said 10 days either party shall appeal therefrom to the court of appeals." How this relates to Appellate Rule 4 is a mystery on its face, but probably not a Civil Rules question.

46 USC App § 1710(h): Two separate provisions for a temporary restraining order "for a period not to exceed 10 days" after the Commission has, respectively, issued an order disposing of an investigation or disposing of a complaint. How does Rule 6(a) apply — can it apply at all — to a period that almost inevitably must be more than 10 days?

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Length - Unit	Length - Number	Comments
2	386	(c)	(c) Order and time of taking testimony The order in which the parties may take testimony shall be as follows: (1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired. (2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired. (3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.	Time for litigant to act			Y		Day	10	this provision is included only for completeness, because of its relation to sections 388 and 394. even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394.
2	388	(b)	(a) Issuance Upon application of any party, a subpena for attendance at a deposition shall be issued by: (1) a judge or clerk of the United States district court for the district in which the place of examination is located; ... (b) Time, method, and proof of service Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.	Notice to litigants or other entities			Y		[Business day]	3	Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved.

2	394	(a)	(a) Method of computing time In computing any period of time prescribed or allowed by this chapter or by the rules or any order of the committee, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. For the purposes of this chapter, "legal holiday" shall mean New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.	Computation method			Y				
15	78eee	(b)(1)	Upon receipt of an application by SIPC under subsection (a)(3) of this section, the court shall forthwith issue a protective decree if the debtor consents thereto, if the debtor fails to contest such application, or if the court finds that such debtor-- [* * *] Unless the debtor consents to the issuance of a protective decree, the application shall be heard three business days after the date on which it is filed, or at such other time as the court shall determine, taking into consideration the urgency which the circumstances require.	Time for court to act			Y		Business day	3	

18	2704	(a)	(a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.	Time for third party to act				Y	Business day	2	
18	3142	(d)	(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.--If the judicial officer determines that-- (1) such person-- (A) is, and was at the time the offense was committed, on-- (i) release pending trial for a felony under Federal, State, or local law; (ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or (iii) probation or parole for any offense under Federal, State, or local law; or (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and (2) such person may flee or pose a danger to any other person or the community; such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the	Limit on detention				Y	[Business day]	10	

18	3142	(f)	(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community-- * * * The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, s	Limit on continuance				Y	[Business day]	3, 5	). Pub.L. 104-132, § 729, added "(not including any intermediate Saturday, Sunday, or legal holiday)" following "five days" and following "three days".
18	3612	(d) & (e)	(d) Notification of delinquency.--Within ten working days after a fine or restitution is determined to be delinquent as provided in section 3572(h), the Attorney General shall notify the person whose fine or restitution is delinquent, to inform the person of the delinquency. (e) Notification of default.--Within ten working days after a fine or restitution is determined to be in default as provided in section 3572(i), the Attorney General shall notify the person defaulting to inform the person that the fine or restitution is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.	Time for government to act				Y	Working day	10	

20	7711	(b)	(b) Judicial review of Secretarial action (1) In general A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 30 working days (as determined by the local educational agency or State) after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. The clerk of the court shall promptly transmit a copy of the petition to the Secretary. The Secretary shall then file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of Title 28.	Time to seek review of agency action	Y				Working day as determined by local agency or state	30	
24	326	(a)	(a) Request; determination of right to retain; retention after request If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings.	Limit on detention			Y?		Hours, excluding Sundays & holidays	48	

29	1342	(b)	(b) Appointment of trustee (1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.	Time for court to act			Y		Business day	3	
29	1342	(d)	(d) Powers of trustee (1)(A) A trustee appointed under subsection (b) of this section shall have the power-- * * * If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.	Time for trustee to act			Y		Business day	3	

30	1734		(a) Action for royalty, interest, or civil penalty; limitations; notice of suit * * * (1) A State may commence a civil action under this section against any person to recover any royalty, interest, or civil penalty which the State believes is due, based upon credible evidence, with respect to any oil and gas lease on Federal lands located within the State. (2)(A) No action may be commenced under paragraph (1) prior to 90 days after the State has given notice in writing to the Secretary of the payment required. * * * (B) If, within the 90-day period specified in subparagraph (A), the Secretary issues a demand for the payment concerned, no action may be commenced under paragraph (1) with respect to such payment during a 45-day period after issuance of such demand. * * * (C) If the Secretary refers the case to the Attorney General of the United States within the 45-day period referred to in subparagraph (B) or within 10 business days after the expiration of such 45-day period, no action may be commenced under paragraph (1) if the Attorney General,	Time for governme nt to act			Y		Business day	10	
37	CFR 1.304		(a)(1) The time for filing the notice of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is two months from the date of the decision of the Board of Patent Appeals and Interferences. * * * (b) The times specified in this section in days are calendar days. The times specified herein in months are calendar months except that one day shall be added to any two-month period which includes February 28. If the last day of the time specified for appeal or commencing a civil action falls on a Saturday, Sunday or Federal holiday in the District of Columbia, the time is extended to the next day which is neither a Saturday, Sunday nor a Federal holiday.	Time to seek review of agency action	Y				Calendar months, but extra day if includes February	2	

42	16913	(b)	(b) Initial registration The sex offender shall initially register-- (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment. (c) Keeping the registration current A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.	Time for litigant to act				Y	Business day	3	
42	16921	(c)	(b) Program notification Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following: * * * (c) Frequency Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days.	Time for governme nt to act				Y?	Business day	5	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
2	8	(b)(4)(B)(i)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy.	Time to seek judicial review			Y			Day	2	yellow flag on Westlaw	
2	8	(b)(4)(B)(iii)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy.	Time for court to act			Y			Day	3	yellow flag on Westlaw	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
2	386	(c)	(c) Order and time of taking testimony The order in which the parties may take testimony shall be as follows: (1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired. (2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired. (3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.	Time for litigant to act			Y			Day	10		even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394.
2	388	(b)	(a) Issuance Upon application of any party, a subpena for attendance at a deposition shall be issued by: (1) a judge or clerk of the United States district court for the district in which the place of examination is located; ... (b) Time, method, and proof of service Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.	Notice to litigants or other entities			Y			Day	3		Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
2	922	(e)	(b) Appeal to Supreme Court Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court. * * * (e) Timing of relief No order of any court granting declaratory or injunctive relief from the order of the President issued under section 904 of this title, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action.	Timing of relief			Y			Day	10	Section 922(e) refers to Section 904, which is a part of the Gramm-Rudman-Hollings Act that I thought might have been repealed; RA checked this and reports it has not been repealed.	922(b), re time limit for filing NOA, is presumably not governed directly by the Civil Rules?
7	18	(f)	(e) Review Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located * * * (f) Automatic bar from trading and suspension for noncompliance; effect of appeal Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all registered entities and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: Provided, That if an appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.	Effective date of consequences after judicial review of agency action	Y		Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
7	2023	(a)(17)	(13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. *** (17) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.	Notice to litigants or other entities			Y			Day	10		
7	136h	(d)(3)	(d) Limitations *** (3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent, until thirty days after the submitter has been furnished such notice. Where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that-- (A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or (B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in the public proceeding does not outweigh the interests in preserving the confidentiality of the information.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
7	499g	(d)	(c) Appeal from reparation order; proceedings Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: Provided, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. *** (d) Suspension of license for failure to obey reparation order or appeal Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: Provided, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.	Effective date of consequences after judicial review of agency action			Y			Day	10		
7	499j		Any order of the Secretary under this chapter other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.										
10	950d	(d)	(a) Interlocutory appeal.--(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that-- (A) terminates proceedings of the military commission with respect to a charge or specification; (B) excludes evidence that is substantial proof of a fact material in the proceeding; or (C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title or section 949j(c) of this title. (2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification. (b) Notice of appeal.--The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling. (c) Appeal.--An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law. (d) Appeal from adverse ruling.--The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.	Time to take appeal from court	Y					Day	10	what rules apply in Court of Military Commission Review?	Enacted by Pub.L. 109-366, § 3(a)(1), Oct. 17, 2006, 120 Stat. 2620. I assume that other provisions in this act which concern practice before the military commission or in the Court of Military Commission Review, because I assume none of the Enabling Act sets of rules applies in those proceedings. See 10 USC 950c(b)(3) (waiver of right of review in CMCR) & 10 USC 950d(b) (appeal by US to CMCR).

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
10	2663	(g)	"(f) ADVANCE NOTICE OF USE OF CONDEMNATION.--(1) Before commencing any legal proceeding to acquire any interest in land under subsection (a), including acquisition for temporary use, by condemnation, eminent domain, or seizure, the Secretary of the military department concerned shall-- "(A) pursue, to the maximum extent practicable, all other available options for the acquisition or use of the land ...; and "(B) submit to the congressional defense committees a report containing--[details omitted] "(2) The Secretary concerned may have proceedings brought in the name of the United States to acquire the land after the end of the 21-day period beginning on the date on which the report is received by the committees or, if over sooner, the end of the 14-day period beginning on the date on which a copy of the report is provided in an electronic medium pursuant to section 480 of this title. "(g) EXCEPTION TO ADVANCE NOTICE REQUIREMENT.--If the Secretary of a military department determines that the use of condemnation, eminent domain, or seizure to acquire an interest in land is required under subsection (a) to satisfy a requirement vital to national security, and that any delay would be detrimental to national security or the protection of health, safety, or the environment, the Secretary may have proceedings brought in the name of the United States to acquire the land in advance of submitting the report required by subsection (f)(1)(B). However, the Secretary shall submit the report not later than seven days after commencement of the legal proceedings with respect to the land."	Notice to litigants or other entities			Y			Day	7		Available at 120 Stat 2083, 2474. Not yet available in USC database, presumably b/c PL 109-364 was passed 10/17/06. Seems like a borderline provision b/c the 7-day requirement concerns a report within a framework for congressional oversight of the decision to initiate condemnation proceedings.
10	7666	(a)	(a) If a sale of prize property is ordered by the court, the marshal shall-- (1) prepare and circulate full catalogues and schedules of the property to be sold and return a copy of each to the court; (2) advertise the sale fully and conspicuously by posters and in newspapers ordered by the court; (3) give notice to the naval prize commissioner at least five days before the sale; and (4) keep the goods open for inspection for at least three days before the sale.	Notice to litigants or other entities			Y			Day	3	yellow flag on Westlaw -- apparently due to proposed legislation	see also 5-day notice provision

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
10	7726	(c)	(a) A claimant or party who considers himself adversely affected by a stay under this chapter may serve a written notice on the Secretary of the Navy at Washington, D.C., requesting him to reconsider the stay previously issued and to issue a new certificate. The notice shall identify the stay by means of an attached copy of the certificate of the Secretary or a sufficient description of the stay. The notice may not contain any recital of the facts or circumstances involved. (b) Within ten days after receiving notice under this section, the Secretary or his designee shall hold a secret meeting at which the claimant or party, or his representative, may present any facts and arguments he thinks material. (c) Within ten days after a hearing under this section, the Secretary shall file with the court that ordered the stay a new certificate stating whether the stay is then to be terminated or for what period the stay is to continue in effect. If the Secretary fails to file a new certificate, the court, upon application by the claimant or party, shall issue an order directing the Secretary to file a new certificate within a specified time.	Time for government to act			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	10 USC 7722(a) provides: "Whenever in time of war the Secretary of the Navy certifies to a court, or to a judge of a court, in which a suit described in section 7721 of this title is pending, that the prosecution of the suit would tend to endanger the security of naval operations in the war, or would tend to interfere with those operations, all further proceedings in the suit shall be stayed."
11	109	(h)(3)	(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency *** an individual or group briefing *** that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis. *** (3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that-- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court. ***	Time for bankruptcy participant to act		Y				Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	322	(a)	(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.	Time for bankruptcy participant to act		Y				Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
11	332	(a)	(a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.	Time for bankruptcy participant to act		Y				Day	5		
11	342	(e)(2)	(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor. (2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.	Time for bankruptcy participant to act		Y				Day	5		
11	521	(e)(2)(A)	(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor. (2)(A) The debtor shall provide-- (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and (ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.	Time for bankruptcy participant to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	521	(e)(3)	(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan-- (A) at a reasonable cost; and (B) not later than 5 days after such request is filed.	Time for court to act		Y				Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
11	521	(i)(2)	(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition. (2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request. (3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing. (4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.	Presumptive time for court to act		Y				Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	704	(b)(1)	(b)(1) With respect to a debtor who is an individual in a case under this chapter-- (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and (B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.	Time for court to act		Y				Day	5		
11	749	(b)	(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is-- (1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or (2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Y				Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
11	764	(b)	(b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is-- (1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or (2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Y				Day	5		
11	1113	(d)(1)	(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.	Presumptive time for court to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	1114	(k)(1)	(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.	Presumptive time for court to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	1116		In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall-- (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief-- (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;	Time for bankruptcy participant to act		Y				Day	7		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
11	1308	(a)	(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.	Time for bankruptcy participant to act		Y				Day	1	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1708	(c)(6)	(6) Cease-and-desist orders (A) Whenever the Secretary, upon request of the Mortgagee Review Board, determines that there is reasonable cause to believe that a mortgagee is violating, has violated, or is about to violate, a law, rule or regulation or any condition imposed in writing by the Secretary or the Board, and that such violation could result in significant cost to the Federal Government or the public, the Secretary may issue a temporary order requiring the mortgagee to cease and desist from any such violation * * * (B) Within 10 days after the mortgagee has been served with a temporary cease-and-desist order, the mortgagee may apply to the United States district court for the judicial district in which the home office of the mortgagee is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting of suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the mortgagee, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(f)(2)	(f) Temporary cease and desist order; injunctive procedure (1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices * * * is likely to cause insolvency or significant dissipation of assets or earnings of the credit union, or is likely to weaken the condition of the credit union or otherwise prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or such party to cease and desist * * * (2) Within ten days after the credit union concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the credit union or such party may apply to the United States district court for the judicial district in which the home office of the credit union is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the credit union or such party under paragraph (1) of subsection (e) of this section, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	1786	(g)(6)	(6) Within ten days after any director, officer, committee member, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured credit union under paragraph (3) of this subsection, such director, officer, committee member, or other person may apply to the United States district court for the judicial district in which the principal office of the credit union is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, committee member, or other person under paragraph (1) or (2) of this subsection, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(h)(3)	(3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1787	(a)(1)(B)	(B) Not later than 10 days after the date on which the Board closes a credit union for liquidation pursuant to paragraph (1), or accepts appointment as liquidating agent pursuant to subsection (b) of this section, such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be prohibited from continuing such liquidation. Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	1817	(j)(5)	(5) Any person whose proposed acquisition is disapproved after agency hearings under this subsection may obtain review by the United States court of appeals for the circuit in which the home office of the bank [FN2] to be acquired is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within ten days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The appropriate Federal banking agency shall promptly certify and file in such court the record upon which the disapproval was based. The findings of the appropriate Federal banking agency shall be set aside if found to be arbitrary or capricious or if found to violate procedures established by this subsection.	Time to seek review of agency action	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(a)(8)(D)	(8) Temporary suspension of insurance (A) In general If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution. *** (C) Effective period of temporary order Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3). (D) Judicial review Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	1818	(c)(2)	(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(f)	(f) Stay of suspension and/or prohibition of institution-affiliated party Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	2262	(b)	(b) Within ten days after the institution concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution has been served with a temporary cease and desist order, the institution or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the institution or such director, officer, employee, agent, or other person under section 2261 of this title, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	2264	(e)	(e) Stay of suspension or prohibition Within ten days after any director, officer, or other person has been suspended from office or prohibited from participation in the conduct of the affairs of a System institution under subsection (c) of this section, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for a stay of either such suspension or prohibition, or both, pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subsection (a) or (b) of this section, and such court shall have jurisdiction to stay either such suspension or prohibition, or both.	Time to seek review of agency action			Y			Day	10		
12	3405	(2) & (3)	A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if-- (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice * * *: "Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *. "2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts: "3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to . "4. Be prepared to come to court and present your position in further detail. "5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer."; and (3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			challenge provisions of section 3410 of this title have been complied with.										
12	3407	(2) & (3)	A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if-- (1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice *** : "Records or information concerning your transactions which are held by the financial institution named in the attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own ***. "2. File the motion and statement by mailing or delivering them to the clerk of the Court. "3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to . "4. Be prepared to come to court and present your position in further detail. "5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and (3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.										
12	3408	(4)(A) & (B)	A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if-- (1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought; (2) the request is authorized by regulations promulgated by the head of the agency or department; (3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and (4)(A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: "Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: "If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *. "2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts: "3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to . "4. Be prepared to come to court and present your position in further detail. "5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and (B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.										
12	3410	(a)	(a) Filing of motion to quash or application to enjoin; proper court; contents Within ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. * * * Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure. (b) Filing of response; additional proceedings If the court finds that the customer has complied with subsection (a) of this section, it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.	Time to make a motion or other filing			Y			Day	10	also note "seven calendar days" in (b)	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	3414	(b)(3)	(b)(1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of-- (A) physical injury to any person; (B) serious property damage; or (C) flight to avoid prosecution. (2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority. (3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title.	Time for government to act				Y		Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
12	4623	(a)	(a) Jurisdiction (1) Filing of petition An enterprise that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside. (2) Place for filing A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit.	Time to seek review of agency action	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	4632	(d)	(d) Judicial review An enterprise, executive officer, or director that has been served with a temporary order pursuant to this section may apply to the United States District Court for the District of Columbia within 10 days after such service for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the enterprise, executive officer, or director under section 4631(a) or (b) of this title. Such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
12	1833a	(g)(3)	(a) In general Whoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section. *** (g) Administrative subpoenas (1) In general For the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section, the Attorney General may-- *** (C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. *** (2) Procedures applicable The same procedures and limitations as are provided with respect to civil investigative demands in subsections (g), (h), and (j) of section 1968 of Title 18 apply with respect to a subpoena issued under this subsection. ***. Failure to comply with an order of the court to enforce such subpoena shall be punishable as contempt. (3) Limitation In the case of a subpoena for which the return date is less than 5 days after the date of service, no person shall be found in contempt for failure to comply by the return date if such person files a petition under paragraph (2) not later than 5 days after the date of service.	Time to make a motion or other filing			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
15	16	(g)	(g) Filing of written or oral communications with the district court Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	650	(g)(3)(C)	(C) Judicial review of suspension prior to hearing Not later than 10 days after a management official is suspended or prohibited from participation under subparagraph (A), the management official may apply to an appropriate district court for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under paragraph (2).	Time to seek review of agency action			Y			Day	10		
15	1116	(d)(10)(A)	(10)(A) The court shall hold a hearing, unless waived by all the parties, on the date set by the court in the order of seizure. That date shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued, unless the applicant for the order shows good cause for another date or unless the party against whom such order is directed consents to another date for such hearing. At such hearing the party obtaining the order shall have the burden to prove that the facts supporting findings of fact and conclusions of law necessary to support such order are still in effect. If that party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.	Presumptive time for court to act			Y			Day	10		
15	1116	(d)(5)(C)	(5) An order under this subsection shall set forth-- * * * (C) the time period, which shall end not later than seven days after the date on which such order is issued, during which the seizure is to be made;	Time for government to act			Y			Day	7		
15	1118		In any action arising under this chapter, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) of this title, or a willful violation under section 1125(c) of this title, shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of section 1125(a) of this title or a willful violation under section 1125(c) of this title, the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed. The party seeking an order under this section for destruction of articles seized under section 1116(d) of this title shall give ten days' notice to the United States attorney for the judicial district in which such order is sought (unless good cause is shown for lesser notice) and such United States attorney may, if such destruction may affect evidence of an offense against the United States, seek a hearing on such destruction or participate in any hearing otherwise to be held with respect to such destruction.	Notice to litigants or other entities			Y	Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	2310	(c)(1)	(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. * * *	TRO time limit			Y			Day	10		
15	2619	(b)(2)	(b) Limitation No civil action may be commenced-- * * * (2) under subsection (a)(2) of this section before the expiration of 60 days after the plaintiff has given notice to the Administrator of the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 2606 of this title, before the expiration of ten days after such notification.	Prerequisite for suit			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	6606	(c)(4)	(a) In general Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about-- (1) the manifestations of any material defect alleged to have caused harm or loss; (2) the harm or loss allegedly suffered by the prospective plaintiff; (3) how the prospective plaintiff would like the prospective defendant to remedy the problem; (4) the basis upon which the prospective plaintiff seeks that remedy; and (5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff. * * * (c) Response to notice (1) In general Within 30 days after receipt of the notice specified in subsection (a) of this section, each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff. * * * (4) Presumptive time of receipt For purposes of paragraph (1), a notice under subsection (a) of this section is presumed to be received 7 days after it was sent.	Prerequisite for suit			Y			Day	7	presumably not many of these suits will be brought in the future	
15	687e	(c)(3)	(3) Judicial review Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	687e	(c)(3)	(3) Judicial review Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action			Y			Day	10		
15	77h-1	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	78u-3	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action			Y			Day	10		
15	80a-9	(f)(4)(B)	(B) Judicial review Within-- (i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
15	80b-3	(k)(4)	(B) Judicial review Within-- (i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
16	4307	(c)(2)	(c) Collection If any person fails to pay an assessment of a civil penalty-- (1) within 30 days after the order was issued under subsection (a) of this section, or (2) if the order is appealed within such 30-day period, within 10 days after court has entered a final judgment in favor of the Secretary under subsection (b) of this section, the Secretary shall notify the Attorney General and the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of penalty assessed (plus costs, attorney's fees, and interest at currently prevailing rates from the date the order was issued or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.	Time for government to act			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
16	539b	(b)(5)	(b) Approved plan for mining operations; requirements; review; modification; suspension of activities Because of the large scale of contemplated mining operations and the proximity of such operations to important fishery resources, with respect to mining operations in the Quartz Hill area of the Tongass National Forest, the regulations of the Secretary shall, pursuant to this subsection, include a requirement that all mining operations involving significant surface disturbance shall be in accordance with an approved plan of operations. * * * * * * (5) upon a finding by the Secretary that a mining activity conducted as a part of a mining operation exists which constitutes a threat of irreparable harm to anadromous fish, or other foodfish populations or their habitat, and that immediate correction is required to prevent such harm, he may require such activity to be suspended for not to exceed seven days, provided the activity may be resumed at the end of said seven-day period unless otherwise required by a United States district court.	Time for government to act			Y			Day	7		
16	539m-5	(c)(2)(B)	(c) Disputes involving forest service management and Pueblo traditional uses (1) In general In a case in which the management of the Area by the Secretary conflicts with a traditional or cultural use, if the conflict does not pertain to a new use subject to the process specified in subsection (a)(2) of this section, the process for dispute resolution specified in this subsection shall apply. (2) Dispute resolution process (A) In general * * * (B) Disputes requiring immediate resolution In the case of a conflict that requires immediate resolution to avoid imminent, substantial, and irreparable harm-- (i) the party identifying the conflict shall notify the other party and seek to resolve the dispute within 3 days of the date of notification; and (ii) if the parties are unable to resolve the dispute within 3 days-- (I) either party may bring a civil action for immediate relief in the United States District Court for the District of New Mexico; and (II) the procedural requirements specified in subparagraph (A) shall not apply.	Prerequisite for suit			Y			Day	3		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
17	411	(b)	(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner-- (1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.	Notice to litigants or other entities			Y			Hour	48	yellow flag on Westlaw -- apparently due to proposed legislation	See also 37 CFR § 201.22(e)(1), 17 U.S.C.A. foll. § 702
17	1321	(b)(2)(B)	(b) Review of refusal to register.--(1) Subject to paragraph (2), the owner of a design may seek judicial review of a final refusal of the Administrator to register the design under this chapter by bringing a civil action, and may in the same action, if the court adjudges the design subject to protection under this chapter, enforce the rights in that design under this chapter. (2) The owner of a design may seek judicial review under this section if-- (A) the owner has previously duly filed and prosecuted to final refusal an application in proper form for registration of the design; (B) the owner causes a copy of the complaint in the action to be delivered to the Administrator within 10 days after the commencement of the action; and (C) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this chapter. (c) Administrator as party to action.--The Administrator may, at the Administrator's option, become a party to the action with respect to the issue of registrability of the design claim by entering an appearance within 60 days after being served with the complaint, but the failure of the Administrator to become a party shall not deprive the court of jurisdiction to determine that issue.	Notice to litigants or other entities			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	983	(i)(3)	(i) Restraining orders; protective orders.-- (3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit			Y	Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
18	1467	(c)	(c) Protective orders.-- * * * (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit				Y		Day	10	provision deleted by July 27, 2006 amendment to Section 1467	I'm keeping this in the spreadsheet so as to make clear that the relevant provision no longer exists (it was included in a prior version of the spreadsheet).

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	1514	(a)(2)(C)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title. (2) * * * (C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party.	TRO time limit			Y	Y		Day	10		
18	1514	(a)(2)(E)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title. (2) * * * (E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	Notice to litigants or other entities			Y	Y		Day	2		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	1963	(d)(2)	(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section-- *** (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.	TRO time limit				Y		Day	10		
18	2339B	(f)(5)(B)(ii)	(5) Interlocutory appeal.-- (A) [authorizes interlocutory appeals regarding District Court orders:] (i) authorizing the disclosure of classified information; (ii) imposing sanctions for nondisclosure of classified information; or (iii) refusing a protective order sought by the United States to prevent the disclosure of classified information. (B) Expedited consideration.-- (i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals. (ii) Appeals prior to trial.--If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.	Time to take appeal from court	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	2339B	(f)(5)(B)(ii)	(5) Interlocutory appeal.-- (A) [authorizes interlocutory appeals regarding District Court orders:] (i) authorizing the disclosure of classified information; (ii) imposing sanctions for nondisclosure of classified information; or (iii) refusing a protective order sought by the United States to prevent the disclosure of classified information. (B) Expedited consideration.-- (i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals. *** (iii) Appeals during trial.--If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- (I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial; *** (III) shall render its decision not later than 4 days after argument on appeal; and (IV) may dispense with the issuance of a written opinion in rendering its decision.	Time for court to act	Y					Day	4		
18	2518		(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.	Notice to litigants or other entities				Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	2518		(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. * * * * * * (5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.	Time for government to act			Y	Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	2518		(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that-- (a) an emergency situation exists that involves-- (i) immediate danger of death or serious physical injury to any person, (ii) conspiratorial activities threatening the national security interest, or (iii) conspiratorial activities characteristic of organized crime, that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and (b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.	Time for government to act			Y	Y		Hour	48		
18	2704	(a)	(a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order. (2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705(a).	Time for government to act			Y	Y		Day	3	also note period of 'two business days'	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	3060	(b)	(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate judge pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it. (b) The date for the preliminary examination shall be fixed by the judge or magistrate judge at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than-- (1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or (2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.	Time for court to act				Y		Day	10		
18	3125		(a) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that-- (1) an emergency situation exists that involves-- (A) immediate danger of death or serious bodily injury to any person; (B) conspiratorial activities characteristic of organized crime; (C) an immediate threat to a national security interest; or (D) an ongoing attack on a protected computer (as defined in section 1030) that constitutes a crime punishable by a term of imprisonment greater than one year; that requires the installation and use of a pen register or a trap and trace device before an order authorizing such installation and use can, with due diligence, be obtained, and (2) there are grounds upon which an order could be entered under this chapter to authorize such installation and use; may have installed and use a pen register or trap and trace device if, within forty-eight hours after the installation has occurred, or begins to occur, an order approving the installation or use is issued in accordance with section 3123 of this title. (b) In the absence of an authorizing order, such use shall immediately terminate when the information sought is obtained, when the application for the order is denied or when forty-eight hours have lapsed since the installation of the pen register or trap and trace device, whichever is earlier. (c) The knowing installation or use by any investigative or law enforcement officer of a pen register or trap and trace device pursuant to subsection (a) without application for the authorizing order within forty-	Time for government to act				Y		Hour	48		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			eight hours of the installation shall constitute a violation of this chapter.										
18	3161	(h)	(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-- *** (H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;	Time for government to act				Y		Day	10		
18	3432		A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.	Notice to litigants or other entities				Y		Day	3	"three entire days"	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	3486	(a)(9)	(a) Authorization.--(1)(A) In any investigation relating of-- (i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General; or (ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, [FN1] if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury, may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B). *** (9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.	Notice to litigants or other entities				Y		Hour	24	yellow flag on Westlaw -- apparently due to proposed legislation	
18	3492	(a)	(a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the authentication requirements of the Federal Rules of Evidence are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of record, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatories, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time.	Notice to litigants or other entities				Y		Day	5	see also 10-day limit	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	3501	(c)	(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.	Time for government to act				Y		Hour	6	red flag on WL - has this portion been invalidated? RA's answer: No.	1 Fed. Prac. & Proc. Crim.3d § 72 seems to indicate that Dickerson v. U.S., 530 U.S. 428 (2000), invalidated 3501(b) but not 3501(c). RA agrees: 3501(c) addresses the McNabb-Mallory rule, which is a separate rule from the one involved in the Miranda and Dickerson decisions. 3501(c) appears to be consistent with the Supreme Court holding in Mallory, rather than a legislative attempt to override the decision, and appears to still be valid.
18	3509	(b)(1)(A)	(b) Alternatives to live in-court testimony.-- (1) Child's live testimony by 2-way closed circuit television.-- (A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.	Time to make a motion or other filing				Y		Day	5	Yellow flag on WL, evidently due to to (1) the holding in US v. Bordeaux, 400 F.3d 548 (8th Cir. 2005), that the statute was unconstitutional as applied in the particular case b/c court failed to apply the Craig test; and/or (2) pending legislation.	RA checked and agrees that Section 3509's framework still applies, modified by the requirements set forth in Maryland v. Craig. Craig permits "denial of [face-to-face] confrontation" only where "necessary to further an important public policy" and "where the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. at 850.
18	3552	(d)	(d) Disclosure of presentence reports.--The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.	Notice to litigants or other entities				Y		Day	10		See also USSG, § 6A1.2 ("At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them")

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	3612	(b)	(b) Information to be included in judgment; judgment to be transmitted to Attorney General.--(1) A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include-- * * * (2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General.	Notice to litigants or other entities				Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
18	3664	(d)(5)	(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.	Time for government to act				Y		Day	10		
18	3771	(d)	(d) Enforcement and limitations.-- * * * (5) Limitation on relief.--In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if-- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.	Time to make a motion or other filing	Y			Y		Day	10	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	3771	(d)(3)	(d) Enforcement and limitations.-- (1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter. (2) Multiple crime victims.-- * * * (3) Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	Time for court to act	Y					Hour	72	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way.
18	3771	(d)(3)	(d) Enforcement and limitations.-- (1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter. (2) Multiple crime victims.-- * * * (3) Motion for relief and writ of mandamus.-- * * * The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	TRO time limit				Y		Day	5	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	RA checked and agrees: Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
18	4114	(a)	(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days.	Notice to litigants or other entities				Y		Day	10		
18	4244	(a)	(a) Motion to determine present mental condition of convicted defendant.--A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.	Time to make a motion or other filing				Y		Day	10		
18	2252A	(c)	(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that-- (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or (2) the alleged child pornography was not produced using any actual minor or minors. No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2),	Notice to litigants or other entities				Y		Day	10	red flag on WL - has this portion been invalidated? Apparently not , but need to double-check. July 27, 2006 legislation amended subsection (b) but does not appear to directly affect functioning of (c). RA checked and agrees: July 27, 2006 amendments amended (b) and added subsection (g), but do not appear to have affected (c).	Williams, 444 F.3d 1286, 1309 (11th Cir 2006) found "the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional". Other negative cases in Keycite do not appear to render subsection c nugatory. RA checked and agrees: I looked through the key cite cases and could not find any cases that invalidate (c).

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			(3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.										
19	1516	(f)	(f) * * * If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.	Notice to litigants or other entities	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
19	1516a	(c)(1)	(c) Liquidation of entries (1) Liquidation in accordance with determination Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.	Notice to litigants or other entities	Y					Day	10		
19	1516a	(e)	(e) Liquidation in accordance with final decision If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit-- (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.	Notice to litigants or other entities	Y					Day	10		See also Section 1516a(g)(4)(H): "Notwithstanding any other provision of law, any final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under subparagraph (A) may be issued by a single Justice of the Supreme Court."

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
21	853	(e)(2)	(e) Protective orders (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section-- *** (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit			Y	Y		Day	10	yellow flag on WL -- probably because of proposed legislation. RA: The proposed legislation does not appear to affect subsection (e). I did not see any decisions in key cite that would negate (e)(2). Because there were so many key cite cases, I also looked at 13 Fed. Proc., L. Ed. § 35:790 to be sure that I had not missed anything, and it does not indicate there are any constitutional problems with (e)(2).	
21	880	(d)(3)	(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.	Time for government to act			Y	Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
24	326	(a)	(a) Request; determination of right to retain; retention after request If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings.	Time for government to act			Y			Hour	48	provision explicitly provides for exclusion of Sundays (but not Saturdays) & holidays	
26	5311		It shall be lawful for any internal revenue officer to detain any container containing, or supposed to contain, distilled spirits, wines, or beer, when he has reason to believe that the tax imposed by law on such distilled spirits, wines, or beer has not been paid or determined as required by law, or that such container is being removed in violation of law; and every such container may be held by him at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than 72 hours without process of law or intervention of the officer to whom such detention is to be reported.	Time for government to act			Y	Y		Hour	72	not clear whether this period would be governed by either the Civil or Criminal Rules	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
26	6861	(g)	(g) Abatement if jeopardy does not exist.--The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.	Time for government to act			Y					need to check how this provision works	RA reports, based on 35 Am. Jur. 2d Federal Tax Enforcement § 341, that under (g) "the Secretary may abate a jeopardy assessment if he or she finds that jeopardy does not exist AND either of the following: 1) a decision of the Tax Court with respect to the deficiency has not been rendered OR 2) if no petition is filed with the Tax Court for a re-determination of a deficiency, after the expiration of the period for filing such a petition. In the event that an abatement under (g) occurs, the period of limitation for making of assessments and levy or collecting a deficiency through court proceedings is the same as if no assessment (and then abatement) had been made in the first place, except that the running of the period is suspended between the date of the jeopardy assessment and ten days after the date of the abatement."
26	7429	(b)	(b) Judicial review.-- (1) Proceedings permitted.--*** the taxpayer may bring a civil action against the United States for a determination under this subsection in the court with jurisdiction determined under paragraph (2). (2) Jurisdiction for determination.-- (A) In general.--Except as provided in subparagraph (B), the district courts of the United States shall have exclusive jurisdiction over any civil action for a determination under this subsection. (B) Tax Court.--*** (3) Determination by court.--*** If the court determines that proper service was not made on the United States or on the Secretary, as may be appropriate, within 5 days after the date of the commencement of the proceeding, then the running of the 20-day period set forth in the preceding sentence shall not begin before the day on which proper service was made on the United States or on the Secretary, as may be appropriate.	Notice to litigants or other entities			Y			Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
26	7482	(a)(2)(A)	(2) Interlocutory orders.-- (A) In general.--When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.	Time to take appeal from court	Y					Day	10		
26	7609		(a) Notice.-- (1) In general.--If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons. (2) Sufficiency of notice.--Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence. * * * (b) Right to intervene; right to proceeding to quash.-- * * * (2) Proceeding to quash.-- (A) In general.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons. * * *	Notice to litigants or other entities			Y			Day	3		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			(h) Jurisdiction of district court; etc.-- (1) Jurisdiction.--The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.										
27	207		The District Courts of the United States, and the United States court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. The Secretary of the Treasury is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of $500 for each offense, to be collected by the Secretary and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation, that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation.	Notice to litigants or other entities			Y	Y		Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	144		Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.	Time to make a motion or other filing		Y	Y	Y		Day	10		
28	158	note	"(4) Filing of petition with attachment.--A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158(d)(2) shall-- "(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and "(B) have attached a copy of such certification."	Time to take appeal from court	Y					Day	10		temporary provision that will lapse if/when FRAP rule on point takes effect

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	636	(b)	(b)(1) Notwithstanding any provision of law to the contrary-- (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except [lists exceptions]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [FN1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement. (C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.	Time to take appeal from court			Y	Y		Day	10	yellow flag on WL -- perhaps due to proposed legislation, or to negative caselaw re (prior version of?) 636(c)	RA states: "The yellow flag is probably due to U.S. v. Johnston, 258 F.3d 361, in which the Fifth Circuit held (c)(1) to be unconstitutional. However, the concerns in Johnston regarding the constitutionality of delegations in (c) do not appear to apply to the delegations in (b).... the delegations in (b) involve only civil trials, do not permit magistrates to review an Art III judge's decisions, and gives authority for Art III judges to review all decisions and recommendations of the magistrate. Subsection (b) only delegates to a magistrate judge the power to make pre-trial decisions and hold evidentiary hearings to make recommendations of findings of fact. Those recommendations of findings of fact are reviewed under a de novo standard."
28	754		A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title. Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	1292	(b)	(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	see also 1292(d)(1) & (2) re Court of International Trade and Court of Federal Claims
28	1292	(d)	(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
28	1292	(d)	(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	1453	(c)(1)	(c) Review of remand orders.-- (1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order. (2) Time period for judgment.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3). (3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time; or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days. (4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.	Time to take appeal from court	Y					Day	7	"less" or "more"? See 9th Cir opinion	
28	1453	(c)(3)	(c) Review of remand orders.-- (1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order. * * * (3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time; or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days. (4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.	Time for court to act	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	1605	(b)(2)	(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That-- (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and (2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.	Notice to litigants or other entities			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
28	1715	(b)	(b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement ***	Notice to litigants or other entities			Y			Day	10		
28	1867	(a)	(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.	Time to make a motion or other filing				Y		Day	7		
28	1867	(b)	(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.	Time to make a motion or other filing				Y		Day	7		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	1867	(c)	(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.	Time to make a motion or other filing			Y			Day	7		
28	2001	(b)	(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.	Notice to litigants or other entities			Y			Day	10		
28	2107	(c)	(c) * * * In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	Time to take appeal from court	Y		Y			Day	7		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	2112	(a)	(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. * * * If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply: (1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted. * * * (3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.	Time to seek review of agency action	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Presumptive time for court to act			Y			Day	5	what rules apply?	
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Time for government to act			Y			Day	3	what rules apply?	
28	2284	(b)(2)	(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding. (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.	Notice to litigants or other entities			Y			Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	2349	(b)	(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.	Notice to litigants or other entities	Y					Day	5	also 60 day period	
28	3007	(b)	(a) Authority to sell.--If at any time during any action or proceeding under this chapter the court determines on its own initiative or upon motion of any party, that any seized or detained personal property is likely to perish, waste, or be destroyed, or otherwise substantially depreciate in value during the pendency of the proceeding, the court shall order a commercially reasonable sale of such property. (b) Deposit of sale proceeds.--Within 5 days after such sale, the proceeds shall be deposited with the clerk of the court, accompanied by a statement in writing and signed by the United States marshal, to be filed in the action or proceeding, stating the time and place of sale, the name of the purchaser, the amount received, and an itemized account of expenses. (c) Presumption.--For purposes of liability on the part of the United States, there shall be a presumption that the price paid at a sale under subsection (a) is the fair market value of the property or portion.	Time for government to act			Y			Day	5		re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	3101	(d)(2)	(a) Application.--(1) The United States may, in a proceeding in conjunction with the complaint or at any time after the filing of a civil action on a claim for a debt, make application under oath to a court to issue any prejudgment remedy. *** [(d)](2) By requesting, at any time before judgment on the claim for a debt, the court to hold a hearing, the debtor may move to quash the order granting such remedy. The court shall hold a hearing on such motion as soon as practicable, or, if requested by the debtor, within 5 days after receiving the request for a hearing or as soon thereafter as possible.	Presumptive time for court to act			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure
28	3102	(e)(1)	(e) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of attachment shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the levy.	Time for government to act			Y			Day	5		re federal debt collection procedure
28	3105	(f)(1)	(f) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of sequestration shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the execution.	Time for government to act			Y			Day	5		re federal debt collection procedure
28	3202	(d)	(d) Hearing.--By requesting, within 20 days after receiving the notice described in section 3202(b), the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited-- (1) to the probable validity of any claim of exemption by the judgment debtor; (2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and (3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to-- (A) the probable validity of the claim for the debt which is merged in the judgment; and (B) the existence of good cause for setting aside such judgment.	Presumptive time for court to act			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	3203	(d)	(d) Levy of execution.-- (1) In general.--Levy on property pursuant to a writ of execution issued under this section shall be made in the same manner as levy on property is made pursuant to a writ of attachment issued under section 3102(d). * * * (3) Records of United States marshal.-- * * * (C) The United States marshal shall make a written return to the court on each writ of execution stating concisely what is done pursuant to the writ and shall deliver a copy to counsel for the United States who requests the writ. The writ shall be returned not more than-- (i) 90 days after the date of issuance if levy is not made; or (ii) 10 days after the date of sale of property on which levy is made.	Time for government to act			Y			Day	10	also note 90 day period	re federal debt collection procedure
28	3203	(g)	(g) Execution sale.-- (1) General procedures.--An execution sale under this section shall be conducted in a commercially reasonable manner-- (A) Sale of real property.-- (i) In general.--(I) Except as provided in clause (ii), real property, or any interest therein, shall be sold, after the expiration of the 90-day period beginning on the date of levy under subsection (d), for cash at public auction at the courthouse of the county, parish, or city in which the greater part of the property is located or on the premises or some parcel thereof. (II) The court may order the sale of any real property after the expiration of the 30-day period beginning on the date of levy under subsection (d) if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during the 90-day period beginning on the date of levy. (III) The time and place of sale of real property, or any interest therein, under execution shall be advertised by the United States marshal, by publication of notice, once a week for at least 3 weeks prior to the sale, in at least one newspaper of general circulation in the county or parish where the property is located. The first publication shall appear not less than 25 days preceding the day of sale. The notice shall contain a statement of the authority by which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, sufficient to identify the property (such as a street address for urban property and the survey identification and location for rural property), but it shall not be necessary for the notice to contain field notes. Such property shall be open for inspection and appraisal, subject to the judgment debtor's reasonable objections, for a reasonable period before the day of sale. (IV) The United States marshal shall serve written notice of public sale by personal delivery, or certified or registered mail, to each person whom the marshal has reasonable cause to believe, after a title search is conducted by the United States, has an interest in property under execution, including lienholders, co-owners, and tenants, at least 25 days	Notice to litigants or other entities			Y			Day	10	also note other time periods	re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			before the day of sale, to the last known address of each such person. *** (B) Sale of personal property.-- *** (ii)(I) Except as provided in subclause (II), personal property, or any interest therein, shall be sold after the expiration of the 30-day period beginning on the date of levy under subsection (d). (II) The court may order the sale of any personal property before the expiration of such 30-day period if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during such 30-day period. (iii) Notice of the time and place of the sale of personal property shall be given by the United States marshal by posting notice thereof for not less than 10 days successively immediately before the day of sale at the courthouse of any county, parish, or city, and at the place where the sale is to be made. ***										
28	3205	(c)(2)	(c) Procedures applicable to writ.-- (1) Court determination.--If the court determines that the requirements of this section are satisfied, the court shall issue an appropriate writ of garnishment. (2) Form of writ.--The writ shall state-- (A) The nature and amount of the debt, and any cost and interest owed with respect to the debt. (B) The name and address of the garnishee. (C) The name and address of counsel for the United States. (D) The last known address of the judgment debtor. (E) That the garnishee shall answer the writ within 10 days of service of the writ. (F) That the garnishee shall withhold and retain any property in which the debtor has a substantial nonexempt interest and for which the garnishee is or may become indebted to the judgment debtor pending further order of the court.	Time to make a motion or other filing			Y			Day	10		re federal debt collection procedure
28	3205	(c)(5)	(5) Objections to answer.--Within 20 days after receipt of the answer, the judgment debtor or the United States may file a written objection to the answer and request a hearing. The party objecting shall state the grounds for the objection and bear the burden of proving such grounds. A copy of the objection and request for a hearing shall be served on the garnishee and all other parties. The court shall hold a hearing within 10 days after the date the request is received by the court, or as soon thereafter as is practicable, and give notice of the hearing date to all the parties.	Presumptive time for court to act			Y			Day	10	see also 20 day period	re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	3205	(c)(7)	(7) Disposition order.--After the garnishee files an answer and if no hearing is requested within the required time period, the court shall promptly enter an order directing the garnishee as to the disposition of the judgment debtor's nonexempt interest in such property. If a hearing is timely requested, the order shall be entered within 5 days after the hearing, or as soon thereafter as is practicable.	Presumptive time for court to act			Y			Day	5		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Presumptive time for court to act			Y			Day	10		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Time for government to act			Y			Day	10		re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Time to make a motion or other filing			Y			Day	10		re federal debt collection procedure
29	107		No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect-- *** *** Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. ***	TRO time limit			Y			Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
29	160	(l)	Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.	TRO time limit			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
29	662	(b)	(a) Petition by Secretary to restrain imminent dangers; scope of order The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. (b) Appropriate injunctive relief or temporary restraining order pending outcome of enforcement proceeding; applicability of Rule 65 of Federal Rules of Civil Procedure Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this chapter. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.	TRO time limit			Y			Day	5		
29	2937	(a)	(1) Petition With respect to any final order by the Secretary under section 2936 of this title by which the Secretary awards, declines to award, or only conditionally awards, financial assistance under his [FN1] chapter, or any final order of the Secretary under section 2936 of this title with respect to a corrective action or sanction imposed under section 2934 of this title, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days after the date of issuance of such final order. (2) Action on petition The clerk of the court shall transmit a copy of the review petition to the Secretary who shall file the record on which the final order was entered as provided in section 2112 of Title 28. The filing of a review petition shall not stay the order of the Secretary, unless the court orders a stay. Petitions filed under this subsection shall be heard expeditiously, if possible within 10 days after the date of filing of a reply to the petition.	Presumptive time for court to act	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
30	40		All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.	Notice to litigants or other entities			Y			Day	10		
30	818	(b)	(b) Jurisdiction; relief; findings of Commission or Secretary In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.	TRO time limit			Y			Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
30	1734	(c)(2)	(2) Any rent, royalty, or interest recovered by a State under subsection (a) of this section shall be deposited in the Treasury of the United States in the same manner, and subject to the same requirements, as are applicable in the case of any rent, royalty, or interest collected by an officer or employee of the United States, except that such amounts shall be deposited in the Treasury not later than 10 days after receipt by the State.	Time for government to act			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
38	7292	(b)(1)	(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.	Time to take appeal from court	Y					Day	10		
42	1971	(e)	(d) Jurisdiction; exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions *** An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. *** The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings ***. Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The	Time for court to act			Y			Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	RA checked and states that "There does not appear to be any relevant negative treatment of § 1971."

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.										
42	1971	(e)	(d) Jurisdiction; exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions *** An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. *** The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings ***. Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of	Time for government to act			Y			Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	RA checked and states that "There does not appear to be any relevant negative treatment of § 1971."

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
			exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.										
43	1062		It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.	Time to make a motion or other filing			Y			Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award; judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal; record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.	Time to make a motion or other filing	Y		Y			Day	10		
45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award; judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal; record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.	Time to take appeal from court	Y		Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
46	10706		When a seaman dies in the United States and is entitled at death to claim money, property, or wages from the master or owner of a vessel on which the seaman served, the master or owner shall deliver the money, property, and wages to a district court of the United States within one week of the seaman's death. If the seaman's death occurs at sea, such money, property, or wages shall be delivered to a district court or a consular officer within one week of the vessel's arrival at the first port call after the seaman's death.				Y			Week	1		
46	41306	(c)	"§ 41306. Injunctive relief sought by complainants "(a) IN GENERAL.--After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part. "(b) VENUE.--The action must be brought in the judicial district in which-- "(1) the Commission has brought a civil action against the defendant under section 41307(a) of this title; or "(2) the defendant resides or transacts business, if the Commission has not brought such an action. "(c) REMEDIES BY COURT.--After notice to the defendant, and a showing that the standards for granting injunctive relief by courts of equity are met, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint.	TRO time limit			Y			Day	10		Can be found at 120 Stat 1485, 1546. Does not yet appear in Westlaw's USC database -- presumably because the relevant Public Law -- PL 109-304 -- was passed 10/6/06
46	41307	(a)	"§ 41307. Injunctive relief sought by the Commission "(a) GENERAL VIOLATIONS.--In connection with an investigation under section 41301 or 41302 of this title, the Federal Maritime Commission may bring a civil action to enjoin conduct in violation of this part. The action must be brought in the district court of the United States for any judicial district in which the defendant resides or transacts business. After notice to the defendant, and a showing that the standards for granting injunctive relief by courts of equity are met, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation.	TRO time limit			Y			Day	10		can be found at 120 Stat 1485, 1547. Does not yet appear in Westlaw's USC database -- presumably because the relevant Public Law -- PL 109-304 -- was passed 10/6/06

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
47	402	(d)	(d) Notice to interested parties; filing of record Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.	Notice to litigants or other entities	Y					Day	5		
49	32707	(c)	(c) Service and impoundment of property.--(1) A warrant issued under this section must be served and proof of service filed not later than 10 days after its issuance date. The judge or magistrate may allow additional time in the warrant if the Secretary of Transportation demonstrates a need for additional time. Proof of service must be filed promptly with a written inventory of the property impounded under the warrant. The inventory shall be made in the presence of the individual serving the warrant and the individual from whose possession or premises the property was impounded, or if that individual is not present, a credible individual except the individual making the inventory. The individual serving the warrant shall verify the inventory. On request, the judge or magistrate shall send a copy of the inventory to the individual from whose possession or premises the property was impounded and to the applicant for the warrant.	Time for government to act			Y			Day	10		RA checked and states that "This is definitely not a criminal procedure. It appears to be primarily administrative, but some of the enforcement mechanisms are civil. Under § 32706, the Secretary of Transportation is authorized to "conduct inspections or investigations, impound vehicles, require dealers or distributors of motor vehicles to keep records, and conduct hearings relating to compliance with odometer laws and regulations." (7A Am. Jur. 2d Automobiles and Highway Traffic § 221) An inspection or impoundment may be carried out for the purpose of conducting such inspections, but only after a warrant is obtained through the procedures given in §32707. All of this appears to be administrative in nature. However, under § 32706, the Sec of Transportation can enforce compliance with a court order to obey the Secretary's subpoena or order through civil action (failure to comply can be punished as contempt of court)."

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
50	1801	(h)	(h) "Minimization procedures", with respect to electronic surveillance, means-- * * * (4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.					Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1805	(c)(3)	(3) Special directions for certain orders An order approving an electronic surveillance under this section in circumstances where the nature and location of each of the facilities or places at which the surveillance will be directed is unknown shall direct the applicant to provide notice to the court within ten days after the date on which surveillance begins to be directed at any new facility or place, unless the court finds good cause to justify a longer period of up to 60 days, of-- (A) the nature and location of each new facility or place at which the electronic surveillance is directed; (B) the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place at which the electronic surveillance is directed is or was being used, or is about to be used, by the target of the surveillance; (C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and (D) the total number of electronic surveillances that have been or are being conducted under the authority of the order.	Time for government to act				Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
50	1805	(f)	(f) Emergency orders Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that-- (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists; he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.	Time to make a motion or other filing				Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1821	(4)(D)	(4) "Minimization procedures" with respect to physical search, means-- *** (D) notwithstanding subparagraphs (A), (B), and (C), with respect to any physical search approved pursuant to section 1822(a) of this title, procedures that require that no information, material, or property of a United States person shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1824 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.					Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
50	1824	(e)	(e) Emergency orders (1)(A) Notwithstanding any other provision of this subchapter, whenever the Attorney General reasonably makes the determination specified in subparagraph (B), the Attorney General may authorize the execution of an emergency physical search if-- (i) a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or the Attorney General's designee at the time of such authorization that the decision has been made to execute an emergency search, and (ii) an application in accordance with this subchapter is made to that judge as soon as practicable but not more than 72 hours after the Attorney General authorizes such search. (B) The determination referred to in subparagraph (A) is a determination that-- (i) an emergency situation exists with respect to the execution of a physical search to obtain foreign intelligence information before an order authorizing such search can with due diligence be obtained, and (ii) the factual basis for issuance of an order under this subchapter to approve such a search exists. (2) If the Attorney General authorizes an emergency search under paragraph (1), the Attorney General shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. (3) In the absence of a judicial order approving such a physical search, the search shall terminate the earlier of-- (A) the date on which the information sought is obtained; (B) the date on which the application for the order is denied; or (C) the expiration of 72 hours from the time of authorization by the Attorney General.	Time to make a motion or other filing				Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1843	(a)	(a) Requirements for authorization Notwithstanding any other provision of this subchapter, when the Attorney General makes a determination described in subsection (b) of this section, the Attorney General may authorize the installation and use of a pen register or trap and trace device on an emergency basis to gather foreign intelligence information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution if-- (1) a judge referred to in section 1842(b) of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to install and use the pen register or trap and trace device, as the case may be, on an emergency basis; and (2) an application in accordance with section 1842 of this title is made to such judge as soon as practicable, but not more than 48 hours, after the Attorney General authorizes the installation and use of the pen register or trap and trace device, as the case may be, under this section.	Time to make a motion or other filing				Y		Hour	48		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
50	1843	(c)	(c) Effect of absence of order (1) In the absence of an order applied for under subsection (a)(2) of this section approving the installation and use of a pen register or trap and trace device authorized under this section, the installation and use of the pen register or trap and trace device, as the case may be, shall terminate at the earlier of-- (A) when the information sought is obtained; (B) when the application for the order is denied under section 1842 of this title; or (C) 48 hours after the time of the authorization by the Attorney General.	Time for government to act				Y		Hour	48		
50	1861	(f)(2)	(f)(1) In this subsection-- (A) the term "production order" means an order to produce any tangible thing under this section; and (B) the term "nondisclosure order" means an order imposed under subsection (d) of this section. (2)(A)(i) A person receiving a production order may challenge the legality of that order by filing a petition with the pool established by section 1803(e)(1) of this title. Not less than 1 year after the date of the issuance of the production order, the recipient of a production order may challenge the nondisclosure order imposed in connection with such production order by filing a petition to modify or set aside such nondisclosure order, consistent with the requirements of subparagraph (C), with the pool established by section 1803(e)(1) of this title. (ii) The presiding judge shall immediately assign a petition under clause (i) to 1 of the judges serving in the pool established by section 1803(e)(1) of this title. Not later than 72 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the petition. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the production order or nondisclosure order. If the assigned judge determines the petition is not frivolous, the assigned judge shall promptly consider the petition in accordance with the procedures established under section 1803(e)(2) of this title. (iii) The assigned judge shall promptly provide a written statement for the record of the reasons for any determination under this subsection. Upon the request of the Government, any order setting aside a nondisclosure order shall be stayed pending review pursuant to paragraph (3).	Time for court to act						Hour	72	do Criminal Rules apply? See 50 USC 1803(f)(1). Yellow flag on westlaw -- apparently due to proposed legislation	RA states: "According to the Foreign Intelligence Surveillance Court Rules of Procedure (Effective February 17, 2006), Rule 1: "Issues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure." Agree that yellow flag is due to proposed legislation."

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
46 App	1710	(h)	(h) Injunction (1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business. (2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.	TRO time limit			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
CIPA	7		(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information. (b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.	Time for court to act	Y			Y		Day	4	see also 10 day limit.	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length - Unit	Length - Number	Issues	Comments
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RULE 81(E) DEFINITION OF 'STATE" — TERRITORIES ET AL.?

Rule 81(e) defines the word "state" for purposes of the Civil Rules to "include[], if appropriate, the District of Columbia." Style Rule 81(d)(2) is "includes, where appropriate, the District of Columbia."

The proposal for consideration would amend Style Rule 81(d)(2) to read something like this as to the first sentence:

(d) Law Applicable.

(1) ***State Law.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) ~~***District of Columbia***~~ ***State Defined.*** The term "state" includes, where appropriate, the District of Columbia and any commonwealth, territory, [or possession][1] of the United States.

That revision is straight-forward in text, and may not involve serious problems in context. The immediate occasion for considering this question arises from the Time-Computation Project, as noted below. Revision of even this first sentence also raises broader questions arising from all the other occasions on which the Civil Rules adopt state law. Some of these questions may turn on concerns specific to a particular commonwealth, possession, or territory. Intimate familiarity with several bodies of law would be necessary to determine whether such concerns make it inappropriate to adopt definitions without exceptions. Simple expansion of the present rule may be safe, however, because it qualifies the definition by the prudent and open-ended "where appropriate."[2]

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[1] It is unclear whether "possession" should be included. The most obvious places to include are Commonwealths (Puerto Rico and the Northern Mariana Islands) or Territories (Guam, the Virgin Islands). [There is no apparent reason to fear that the states styled also as "Commonwealths" have been excluded all these years.] Just what might be included in "possession" — and whether any possession has a court that should be included — remains unresolved for the moment.

[2] The draft in text may cut the corners too close by omitting the "where appropriate" qualifier from (A) and (B). Inserting it might seem to change the present rule with respect to the District of Columbia. Literally that is not so. "When these rules provide for *state* law to apply" should incorporate the definition of District of Columbia as a state only where appropriate. But that is fine

Revision of the first sentence naturally suggests consideration of the second sentence. This sentence presents an unpleasant question.

Present Rule 81(e) provides: "When the term 'statute of the United States'is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia."

This provision is revised in Style Rule 82(d)(2) to read: "When these rules provide for state law to apply, in the District Court for the District of Columbia: * * * (B) the term 'federal statute' includes any Act of Congress that applies locally to the District." Assuming that the Style Project did not mean to change the meaning of present Rule 81(e), there is a serious miscue. "Federal statute" needs to be separated from the definition of "state." That can be done easily enough, as illustrated below. The question that remains is whether definition of the term "federal statute" should be expanded to include commonwealth and territorial law.

The separation could be:

> **(2)** ***State Defined.*** The term "state" includes, where appropriate, the District of Columbia and any commonwealth, territory[, or possession] of the United States. {When these rules provide for state law to apply, the law applied in the District, commonwealth, territory[, or possession] applies.}[3]
>
> **(3)** ***District of Columbia.*** The term "federal statute" includes any Act of Congress that applies locally in the District of Columbia [or in any commonwealth, territory{,or possession} of the United States].

The separation clearly focuses the question whether any Act of Congress that applies locally in a commonwealth, territory, or possession should be treated as a "federal statute" for Civil Rules purposes. No thought has yet been given to that issue.

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reading. Somewhat more cumbersome drafting could distinguish the District from commonwealths and territories. In turn, however, that effort would imply a reading of the present rule that may not be fair.

[3] Although it is in the Style Rule, this second sentence seems redundant. Whenever another Rule invokes "state" law, the Rule 81(d)(2) definition of "state" does the job. Of course this sentence is not redundant if it impliedly repeals the "where appropriate" limit in the first sentence — it flat-out declares that state law applies. But the implicit contradiction of the first sentence seems worse than mere redundancy.

Time-Computation Project

The Time-Computation Project raises a question, noted at the conclusion of the September Minutes, whether the definition should extend to include a commonwealth, territory, or other possession. The question arises because the template proposes to carry forward the provision in present Civil Rule 6(a) that for time-computation purposes includes in the definition of "legal holiday" a day declared a holiday by the state where the district court is located. The conclusion has been that it is better to integrate federal practice with state practice so that practitioners do not have to remember that a state-court holiday may not be a federal-court holiday. This purpose seems to apply equally in a commonwealth or territory.

One approach might be to revise Rule 6(a) to include days declared holidays by the commonwealth or territory where the district court is located. There are several possible disadvantages in that approach. It would be a temporary provision, requiring prompt amendment, if there is good reason to amend Rule 81(e) to include commonwealths, territories, and perhaps possessions in the definition of "state" for general purposes. It also might imply, by negative inference, that a commonwealth or territory is not a "state" for other rule provisions. And addressing the immediate question might discourage further work on a question that may deserve present attention.

General Reliance on State Law

Many Civil Rules incorporate state law. Rule 4 pervasively relies on state law not only for service of process but also to establish long-arm jurisdiction. Rule 4.1 is similar, providing for service of process other than a summons "anywhere within the territorial limits of the state in which the district court is located." Rule 17(b) invokes state law for some matters of capacity. Rule 45(b)(2) authorizes service of a subpoena anywhere within the state when authorized by state law. Rule 62(f) looks to state law to stay execution in any state in which a judgment is a lien on the property of the judgment debtor. Rule 64(a) invokes state law for prejudgment remedies. Rule 69 relies on state law for the practice and procedure on execution. Rule 71A(k) [Style Rule 71.1(k)] provides that in actions exercising the power of eminent domain under state law, state provisions for jury trial are followed. No doubt this list is incomplete.

For all of these matters, there are at least two reasons to adopt the same approach in a commonwealth, territory, or perhaps possession. The Civil Rule relies on local practice rather than provide greater detail; there will be gaps if local practice is not incorporated. And the reasons for incorporating local practice may reflect several concerns: there is little need for national uniformity; it is better to integrate federal practice on these points with state practice, either to achieve local

uniformity or to honor strong local policies; and drafting uniform national rules could be very difficult.

Without attempting to unravel what it may mean in the context of the Criminal Rules, it may be useful to consider Criminal Rule 1(b)(9): "The following definitions apply to these rules * * * (9) 'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." (This, without even the safety valve of Civil Rule 81's "where appropriate.")

Enabling Act Questions

The question posed by territories was considered during the Style Project, particularly in wrestling with Rule 4. Rule 4(d) on waiver of service, for example, refers to "a defendant located within the United States," and to a defendant "addressed outside any judicial district of the United States." Rule 4(e) addresses service "in any judicial district of the United States," while Rule 4(f) is captioned as service "in a foreign country" but addresses service "in a place not within any judicial district of the United States." These and like phrases were carried forward for fear that any variation might change the meaning. The research performed by the Administrative Office staff, however, provided information that bears on the present question.

"Style 35," a November 11, 2002, memorandum by Jeffrey Hennemuth, shows that as used in the Constitution, "United States" includes a non-state territory that has been "incorporated" into the United States, but not any territory or possession that has not been incorporated into the United States. No present entity is treated as an "incorporated" territory — not the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Territory of Guam, the Territory of the Virgin Islands, American Samoa, nor "a few small islands here and there." Other uses are variable.

More directly pertinent is the status of the non-Article III "district" courts in Guam, the Virgin Islands, and the Northern Mariana Islands. Although they "share the same federal jurisdiction and are subject to many of the same legal and administrative rules as their Article III counterparts," they are not "United States District Courts." "[N]o statute of which I am aware describes their geographic areas of jurisdiction as 'judicial districts.'"

28 U.S.C. § 2072(a), the Rules Enabling Act, establishes Supreme Court authority to adopt procedure rules for "the United States district courts." The memorandum refers to *Mookini v. U.S.*, 1938, 303 U.S. 201, 58 S.Ct. 543. The Criminal Appeals Rules at issue were adopted under an enabling act that authorized adoption of rules for proceedings after criminal convictions "in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal

Zone, and Virgin Islands * * *." The Rules, however, were limited to "District Courts of the United States and in the Supreme Court of the District of Columbia." The limit was deliberate — the Attorney General suggested that there was not yet sufficient experience to warrant adopting rules for the territorial courts. The Court explained the drafting:

> The term "District Courts of the United States," as used in the rules, without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under article 3 of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a "District Court of the United States.

Chapter 5 of Title 28, "District Courts," begins with § 132(a), providing for a district court in each judicial district, "known as the United States District Court" for the district. Section 133 enumerates the districts; the list includes Puerto Rico, but not Guam, the Northern Mariana Islands, or the Virgin Islands. Section 451 defines "district court of the United States" for all of Title 28: it "mean[s] the courts constituted by chapter 5 of this title."

On a straight reading, the Rules Enabling Act does not authorize the Supreme Court to adopt rules of procedure for the territorial courts. The rules apply instead because they are incorporated in the territorial organic acts. The incorporations are dynamic — as an Enabling Act Rule is "promulgated and made effective," it is incorporated in territorial court practice. 48 U.S.C. §§ 1424-4 (Guam); 1416(b) (Virgin Islands); 1821(c) (Northern Mariana Islands).

It takes the appropriate pair of statutes to accomplish the job, but the conclusion seems clear enough. Since Congress has incorporated the Civil Rules into territorial court practice, it is proper to define by rule the extent to which the Rules absorb territorial law in a manner similar to the absorption of state law in the 50 states and the District of Columbia. (Puerto Rico is for the present left outside the Rule 81 definition, but apparently falls directly within § 2072(a) as a district court of the United States.)

UNITED STATES DISTRICT COURT
District of Arizona

David G. Campbell
United States District Judge

MEMORANDUM

DATE: March 26, 2007

TO: Advisory Committee on the Federal Rules of Civil Procedure

FROM: David G. Campbell

RE: Discovery Subcommittee report and discussion at the April 19-20, 2007 meeting

The Discovery Subcommittee will provide a report of our recent activities at the Advisory Committee meeting to be held on April 19-20, 2007, followed by a discussion of the Advisory Committee. This memo will explain the issues to be discussed and the materials included in the agenda book.

Our subcommittee has been considering four issues related to expert discovery: (1) whether attorney-expert communications should be shielded from discovery; (2) whether draft expert reports should be shielded from discovery; (3) whether employees who provide expert opinions at trial should be required to produce expert reports under Rule 26(a)(2)(B); and (4) whether treating physicians should be required to produce expert reports. These issues were discussed at the Advisory Committee meeting last September.

The subcommittee has taken several additional steps since September:

- We held a mini-conference in Phoenix on January 13, 2007. A number of attorneys from around the country were invited to attend and share their thoughts. Rick Marcus prepared a summary of the conference that is included in the agenda book.

- New Jersey state court rules generally prohibit the discovery of attorney-expert communications and draft expert reports. We thought it would be helpful to get the views of lawyers who have practiced under this rule and the federal system. As a result, a second mini-conference has been scheduled for April 18, 2007 in New York City. A number of New Jersey attorneys have agreed to attend. The introductory letter to participants is included in the agenda book. We will report on the results of this mini-conference during the Brooklyn meeting of the Advisory Committee.

- Rick Marcus has produced several helpful memoranda, some of which were included in the September meeting materials. The agenda book for this meeting includes a memorandum prepared by Rick on December 11, 2006. It addresses various amendment possibilities.

The subcommittee is not yet prepared to make a recommendation on whether the expert disclosure rules should be amended. We have, however, made progress in our thinking on these issues. Here is a summary:

1. Attorney-Expert Communications.

This is the topic of the April 18 meeting with New Jersey lawyers and an issue on which we are still undecided. As you know, the ABA has proposed that attorney-expert communications generally be immunized from discovery. There is much to commend the ABA's view. Many if not most attorney-expert communications are classic work product (the lawyer's and party's efforts to develop their case); the current rule deprives a party of valuable work product opportunities with its leading expert, such as the chance to test hypotheses and receive candid evaluations of the case; the current rule generally makes litigation more costly by creating incentives to retain a second set of consulting experts and by spawning side litigation into attorney-expert communications and draft reports; and the side litigation is rarely worth the cost – few cases are truly influenced by discovery into attorney-expert communications or expert drafts. On the other hand, most would agree that a jury should know whether the lawyer or the expert is testifying; the ABA approach may increase lawyer testifying by removing an important restraint; and there is a question as to whether the ABA approach would solve all of the problems to which it is addressed. Our views on these matters will be better informed after the meeting with New Jersey lawyers. We expect to make a recommendation on this subject at the Advisory Committee's Fall meeting.

2. Discovery of Draft Expert Reports.

This issue is closely linked to the discoverability of attorney-expert communications. It would be fair to say, nonetheless, that the subcommittee tentatively favors making draft expert reports generally non-discoverable. This view may be influenced by our meeting with New Jersey lawyers and further deliberations. In the meantime, Rick has sketched out some of the possible approaches to limiting the discovery of draft reports. This discussion is found in a memorandum titled "Rule 26(a)(2) Issues" included in the agenda book.

3 & 4. Employee Experts and Treating Physicians.

The subcommittee generally believes that additional disclosures should be made with respect to treating physicians and employee experts, but not the full expert reports required of traditionally retained experts. Our discussions with various lawyers have persuaded us that requiring treating physicians to prepare expert reports would significantly reduce the number of treating physicians willing to testify at trial. We have preliminarily concluded that the problem of physicians rendering opinions that were never disclosed during discovery can be addressed by requiring lawyers to identify the topics on which treating physicians will testify. These attorney disclosures can be made at the same time as the Rule 26(a)(2)(A) disclosures already required. Opposing counsel would then be on notice of opinions to be provided by treating physicians and could explore them more fully in depositions, if necessary. We believe the same approach can be taken for employee experts who are not required to provide expert reports. (The only employee experts who must provide reports under Rule 26(a)(2)(B) are those whose jobs regularly include the giving of expert testimony.) Rick's memo on Rule 26(a)(2) issues, included in the agenda book, contains a more complete discussion of these matters.

When we meet in Brooklyn, the Discovery Subcommittee would appreciate your thoughts on our preliminary approach to treating physicians and employee experts. We would also appreciate your thoughts on possible approaches to the draft expert report issue. Although we have reached no preliminary conclusion on the discoverability of attorney-expert communications, we will be prepared to report on what we have learned from New Jersey lawyers. If time permits, a Committee discussion of this topic would also be helpful.

DGC/nvj

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

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JERRY E. SMITH
EVIDENCE RULES

TO: Advisory Committee on Civil Rules

FROM: Judge David G. Campbell, Subcommittee on Rule 26

RE: Issues Regarding Civil Rule 26(a)(2)

Rule 26(a)(2) Issues
April 19-20, 2007, meeting

This memorandum is designed to introduce issues for possible discussion during the Committee's April 19-20, 2007, meeting. Although the Discovery Subcommittee does not have any present proposals to put before the full Committee, its review of issues relating to Rule 26(a)(2) has progressed substantially since the September 2006 meeting of the full Committee — including two mini-conferences — and some interim ideas appear ripe for discussion by the full Committee.

By way of background, four issues have crystallized since the full Committee's last meeting: (1) disclosure regarding testimony by treating physicians and other unaffiliated expert witnesses; (2) the exemption from the report requirement for employees who do not regularly provide expert testimony; (3) disclosure or discovery of draft expert witness reports; and (4) protection against discovery regarding communications between an attorney and an expert witness. More detailed discussion of these issues is contained in a Dec. 11, 2006, memorandum prepared for participants in the Jan. 13, 2007, mini-conference in Phoenix, which should be included in these agenda materials. Also included in these agenda materials should be the notes of the Phoenix mini-conference, which provide further elaboration.

The Jan. 13 Phoenix mini-conference has led the Subcommittee to refine its ideas about possible ways of dealing with reported difficulties arising under the current rule, and also to conclude that one of the issues that initially brought this rule to the attention of the Committee

may not warrant serious consideration of any specific amendment proposals. This memorandum briefly introduces the issues that seem ripe for current discussion.

Treating Doctors and Employee Expert Witnesses

Although the Committee's initial discussion of Rule 26(a)(2) practice was prompted by concerns about the exemption for employee witnesses who do not regularly provide expert testimony, much commentary from the bar indicates that there is little concern with this issue. Lawyers say they would never choose an in-house expert just to avoid providing an expert report; they will always try to get the best expert. So concern about strategic designation of in-house experts to avoid providing reports has abated. But at the same time, commentary from the bar also indicates that there is considerable concern about the absence of any disclosure of the opinions to be proffered by treating doctors, and sometimes other unaffiliated witnesses who are not specially retained as expert witnesses but will offer evidence under Fed. R. Evid. 702.

The background for this concern is that it often happens that treating physicians (and sometimes other unaffiliated witnesses) will offer testimony at trial that should be handled under Fed. R. Evid. 702, but unless these witnesses are considered to be "specially retained" in connection with the litigation there is no requirement for any disclosure before trial of what those opinions will be or even of the subjects on which opinion testimony will be offered. Although in the case of treating doctors the other side usually will have obtained the witness's medical records during discovery, those records may not include any notations about topics on which the doctor will offer opinions.

One recurrent reaction to such a situation is that the other side objects to this opinion testimony, arguing that any such additional opinions must have been developed at counsel's behest, and therefore that the doctor was "specially retained" with regard to this testimony, making Rule 26(a)(2)(B)'s report requirement applicable to these opinions. Under Rule 37(c)(1), therefore, the opposing party will urge the court to exclude the opinion testimony. This objection is often made during trial or on the eve of trial, putting the court and the proponent on the horns of a dilemma -- either the doctor's testimony is forbidden or limited, or the opposing party is left to meet the opinion testimony without any prior disclosure about it.

Whether such opinion testimony routinely comes as a surprise to the opposing party may be debated. The opposing party almost certainly had an opportunity to take the doctor's

deposition. If the doctor's deposition was taken, there may be have been full questioning about all opinions the doctor had developed, thus revealing these "hidden" opinions; it may be that in such cases the opposing party routinely knows what is coming. But it may sometimes be that the questioning at the deposition does not cover all such topics, perhaps in part because there has been no prior indication that the doctor has opinions on certain subjects. Moreover, the opposing party may have concluded that it was unnecessary to take the doctor's deposition because the medical records appeared to be full enough, particularly in a case not involving a large potential recovery. In such situations, the opposing party may be entirely unprepared to meet opinions not reflected in those records. Furthermore, whether the doctor is deposed or not, if the doctor offers opinions at trial that were not reflected in the medical records or the doctor's deposition testimony, that development fortifies the argument that the additional opinions were developed in anticipation of litigation, making the report requirement applicable to them. As the Dec. 11, 2006, memorandum included with these agenda materials shows, courts have grappled with those issues, sometimes probing deeply into the genesis of doctors' opinions to determine whether the report requirement applied to them.

The discussion item for this meeting does not focus on the report requirement. Instead, the new idea that the Subcommittee brings forward for discussion is to address this concern by introducing attorney disclosure with regard to these witnesses rather than attempting to use a requirement that they prepare reports on pain of exclusion of some or all of their testimony. For purposes of discussion only, such a change might be made as follows:

Rule 26. Duty to Disclose: General Provisions Governing Discovery

(a) Required Disclosures

* * * * *

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

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present

evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Disclosure regarding witnesses not required to provide a written report.* For any witness disclosed under Rule 26(a)(2)(A) who is not required to provide a report under Rule 26(a)(2)(B), the disclosure under Rule 26(a)(2)(A) must also state the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705, the substance of the facts and opinions to which the witness is expected to testify, and a summary of the grounds for each opinion.

(D~~C~~) *Time to Disclose Expert Testimony.*

* * * * *

This disclosure requirement is modeled on the inquiry by interrogatory that was authorized under Rule 26(b)(4)(A) before the 1993 amendment introduced the report requirement, but unlike the pre-1993 situation it would not depend on sending an interrogatory. Instead, it would be required at the same time that other expert witness disclosure is required. It would not require that the expert witness personally prepare or sign the disclosure, however. In this way, the severe problem that could arise with obtaining such a report from a treating physician or other unaffiliated expert witness would be avoided.

The same treatment would apply to employees of a party who are not subject to the report requirement because they do not regularly provide expert testimony. Although it might often not be too difficult for the employer to obtain such a report from an employee, that would present

difficulties in some cases. And this disclosure would provide considerably more information to the other side than is currently required as to such witnesses. Accordingly, it might be sufficient to alert the opposing party about what it must prepare to meet at trial and inform its decision whether to take the witness's deposition, thus ameliorating the difficulties originally advanced to justify requiring reports from such employees. As a result, the Subcommittee is not presently inclined to pursue a rule change to impose a report requirement on employee witnesses, although such a requirement would probably not present significant drafting difficulties. For an example of amendment language that could make this change, see the Dec. 11, 2006, memorandum in these agenda materials.

One question is whether this disclosure is really sufficient. It is surely less complete than the disclosure required with regard to witnesses who must provide reports. An alternative therefore would be to require that attorney disclosure with regard to such witnesses be as complete as an expert witness report must be. Whether such completeness is really needed for such witnesses could be debated. Unless they have been specially retained (and therefore are subject to the report requirement), it is unlikely that they have undertaken the sort of elaborate analyses of the matter in suit that would seem the strongest justification for an elaborate disclosure requirement. And with at least some such witnesses -- treating physicians seem an important example -- an elaborate disclosure requirement might produce some of the bad effects feared from a report requirement by prompting the witness not to cooperate. There is no subpoena to require an unwilling witness to prepare a report or assist an attorney who is preparing an expert witness disclosure. As one of the participants in the Phoenix mini-conference observed, there is considerable tension between the legal profession and the medical profession. The patient's lawyer may encounter resistance in obtaining detailed information for disclosure from the patient's doctor. Moreover, the major concern with a treating doctor may be to make it clear to the other side that the doctor will be testifying to something not contained in the medical records; it may well be that the limited disclosure provided above would serve this purpose.

As an alternative to imposing the full panoply of requirements of the expert report on this attorney disclosure, some of those requirements might be added to the more limited proposal above. Whether those additions would prove genuinely helpful is unclear, however, and the current thinking is therefore to advance the above approach for discussion.

One concern with pursuing this approach might be that it could undermine the report requirement. Attorneys who formerly would have obtained a Rule 26(b)(2)(B) report might instead proffer attorney disclosure, contending that such disclosure is all that should be required. There seems to be considerable support for the idea that, in general, a report from the expert witness is better than attorney disclosure for the other side. The report is "in the expert's words," and is likely to be more complete. Making a rule change that reduces the frequency of expert reports would therefore seem counterproductive. Yet the disclosure "option" under the above approach exists only if the witness is not required to prepare a report under the current rule. Given the likelihood that attorneys currently may be tempted to interpret the report requirement narrowly to avoid having to obtain reports, it may be that the attorney disclosure "option" would not significantly increase efforts to avoid the report requirement. Moreover, the temptation to argue that a report is not required may well be stronger under the current rule, for under the approach suggested above there is still a disclosure requirement even if the report is not required, but presently the attorney need provide nothing if the report requirement does not apply.

Another issue that any of these ideas raises is that Rule 26(b)(4)(A) now says that a party has a right to take the deposition of an expert witness. In a number of cases the witnesses subject to this disclosure requirement are likely to have been deposed due to their involvement in the events in litigation before the time expert witness disclosure comes due. Because another party may then seek to take the deposition of the witness with regard to the opinions to be offered, there could be disputes about Rule 30(a)'s prohibition on a second deposition of a witness who has already been deposed in the case. But this issue is, in a sense, already in the rules. Rule 26(a)(2)(A) now says that all witnesses who will provide testimony under Fed. R. Evid. 702 must be disclosed,[1] and Rule 26(a)(4)(A) now says that a party may depose any person so identified, which must be after the identification takes place. Presumably this issue could be addressed in a Committee Note. Some counsel might decide to identify such witnesses as expert witnesses "early" before their "fact" depositions are initially taken (and before the due date under Rule

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[1] One issue not addressed by the approach outlined here is that reportedly some attorneys have failed to recognize that Rule 26(a)(2)(A) requires expert witness disclosure regarding "hybrid" fact/expert witnesses. Some say that less careful attorneys often overlook this requirement, perhaps in part because they don't begin their intense trial preparation until after the date for Rule 26(a)(2)(A) disclosure has passed, and therefore don't realize that certain witnesses will be offering testimony covered by Fed. R. Evid. 702 until it is too late to disclose them. If a rule change like the one described above were proposed, Committee Note language could emphasize the need to identify all witnesses who will provide testimony under Rule 702 as required by Rule 26(a)(2)(A), but it is debatable whether such a Committee Note will alter that behavior of attorneys who currently don't comply with the identification requirement already in the rules.

26(a)(2)(A) or the court's Rule 16 order for identification of expert witnesses) to foreclose such second depositions, but unless full expert witness disclosure is then made such a maneuver would seem ineffective. And there might often be a considerable downside to making such early disclosure.

Draft reports

Although this issue is closely related to the question of insulating communications between the attorney and the expert witness that the Subcommittee still has under consideration, it may be useful for the full Committee to discuss the Subcommittee's current thinking about how the issue might be addressed in a possible proposed amendment. Reflecting the ongoing consideration of alternative approaches to the problem, the following offers alternative drafting ideas:

Rule 26. Duty to Disclose: General Provision Governing Discovery

(a) Required Disclosures

* * * * *

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

* * * * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. [Disclosure or discovery of any preliminary or draft report prepared by the witness is not permitted.] {Disclosure or discovery of any preliminary or draft report prepared by the witness may be ordered only upon a showing of exceptional circumstances.} The report must contain:

* * * * *

The objective of these rule-change ideas is to prevent discovery or disclosure regarding draft expert reports. We are told that extensive, expensive, and time-consuming discovery about draft reports is commonplace, and that it has produced a "clandestine" atmosphere in which

experts use a variety of strategies to avoid producing drafts so that there cannot later be discovery of those drafts.

Simply inserting the word "final" might be sufficient to change this situation if accompanied with a strong Committee Note. The Subcommittee's current thinking, however, is that it would not suffice. One question for discussion is whether, together with the addition of something like one of the alternative additional sentences, an amendment would be adequate to curtail the current practice that prompts the rule-change idea.

The bracketed sentence provides very forceful protection against discovery of draft reports under any circumstances. This limitation on the power of the court to order discovery may be too strong. In this regard, consider the hypothetical possibility that the lawyer actually wrote the report and told the expert to sign it, or rewrote the expert's "draft" to change it entirely. Perhaps there is no absolute solution to these issues, but they seem pertinent to the question whether (and how) to proceed down this line.

There has been at least one case presenting a variant of this sort of problem, decided in federal court in New Jersey before Rule 26(a)(2) was adopted in 1993. In Occulto v. Amadar of New Jersey, Inc., 125 F.R.D. 611 (D.N.J. 1989), a personal injury action, one of plaintiff's medical experts produced his entire file, which included a draft report that was verbatim the same as the report the expert officially submitted, but without the doctor's letterhead and bearing the following notation on top: "Please have retyped on your own stationery. Thank you." It appears that counsel for plaintiff did not screen the materials in the file before they were turned over to defendant during the deposition. When defendant sought to probe into this matter, plaintiff's lawyer falsely denied drafting the report, but later a work product objection was raised. The court held that although the document was work product there was a sufficient justification for discovery, in part because the document had already been disclosed. Judge Simandle noted that "this same result would not obtain for tactics or advice contained in a letter from counsel to the expert," (id. at 616), but found the circumstances remarkable (id. at 615-16):

> One searches in vain for precedent discussing the situation where an attorney has completely drafted the expert's opinion letter, to which the expert then signed his name, and denied doing so upon the record of the expert's deposition. Notwithstanding [plaintiff counsel's] allegation that this is his normal practice, I have not become aware of another case in which the attorney has done so in a verbatim self-addressed expert report.

> A party receiving an adversary's expert's signed report has a right to rely upon the document for what it purports to be -- the expert's considered analysis of facts and statement of opinions applying the expert's special education, training, and experience. Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Rule 702, Fed.R.Ev. They do not participate as the alter-ego for the attorney who will be trying the case.

One hopes that this example is exceptional, and therefore perhaps not the stuff to justify rulemaking.[2] But if one wants to provide an opportunity for an opposing party to unearth such behavior, an absolute prohibition on court-ordered discovery may be too strong.

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[2] Lest it seem unique, mention should be made of Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001), which involved discovery about the role of a consulting expert organization named AGE in preparation of the report submitted by a Dr. Feldstein, who was the expert witness. Eventually, the court ordered restoration of backup electronic media by Deloitte & Touche to obtain communications between AGE and Dr. Feldstein:

> Fragments of e-mails that were recovered by Deloitte & Touche evidence that Dr. Feldstein's report was written in some part by AGE. For instance, one fragment of an e-mail from Dr. Feldstein to Malinik of AGE read:
>
> > This is very rough. Just to get started. Feel free to totally change it in any way you think best. In a report these points may have to be dropped, changed, expanded, the format changed, etc. I have no concern with it being changed.
>
> Deloitte & Touche also recovered a message from Malinik to Dr. Feldstein asking him to review an AGE draft of Dr. Feldstein's report that contained the remarkable directive to the supposed author: "PLEASE DO NOT WORK ON THE END OF YOUR REPORT YET BECAUSE WE ARE DOING SO."

Id. at 290.

> The judge also observed as follows:
>
> > The analysis of prejudice requires us to remember that the pertinent rules of evidence, the underlying philosophy behind allowing experts to testify, as well as the interests of justice, mandate that a testifying expert give his own opinion, arrived at by a reliable mode of analysis and that the opinion is not driven by a desire to reach a particular outcome, but by the principled application of "reliable principles and methods" to "sufficient facts or data." Fed. R. Evid. 702. Further, it is important to recall that, notwithstanding the contrary views of some litigation consultants and lawyers, it is specifically not an expert's position to advocate for a party, lest the witness ceases to be an expert whose testimony is valuable because he or she is not an advocate and becomes, instead, just another legal practitioner for the client.

Id. at 290.

In the same vein, the bracketed language may raise issues about the scope of questioning during the expert witness's deposition. At what point can questioning about how the expert witness reached the conclusions presented in the report be objected to on the ground that it is really an effort to obtain forbidden discovery about draft reports? One reaction might be that questioning probing assertions made in, or the assumptions underlying, the expert's final report could not be objected to on this ground, but that questions entirely divorced from what is in the final report and solely seeking details about what was in prior iterations but not included in the final report are off limits. It is possible, however, that a limitation of this sort could intrude more deeply into the deposition process and be used to cut off deposition questioning that should be allowed. All seem to agree that appropriate inquiry into the basis and background for opinions the expert witness will offer should not be impeded. Committee Note language could address these issues. For the present, the question is whether this strong form of protection is advisable.

To a significant extent, this discussion raises issues about the extent to which one regards the lawyer's active participation in the formulation of the views in the report as inappropriate. That issue lies at the heart of the question whether the "collaboration" between the lawyer and the expert witness should be insulated from scrutiny, and the Subcommittee continues to consider that more general issue.

The alternative provision in braces is designed to provide a safety valve that would cover exceptional circumstances in which a draft report should become discoverable. The "exceptional circumstances" language is drawn from Rule 26(b)(4)(B), which deals with discovery from retained experts who will not be testifying.[3] Discovery under that rule is very rare, so this provision may erect a very formidable barrier to discovery of draft reports while permitting the court to order discovery where the facts cry out for discovery. But a good argument can be made that borrowing this standard would lead to discovery more frequently. Under Rule 26(b)(4)(B), one is dealing with somebody who will not be offering testimony; in this rule, the argument will be that this witness will be asking the jury to accept her testimony as her own, and that only revelation of the prior drafts and the role of counsel in that drafting process will put the full picture before the jury. So it is possible that introducing this flexibility into the rule could sometimes seem to produce a slippery slope toward discovery.

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[3] Similar "exceptional circumstances" language now appears in new Rule 37(f), added on Dec. 1, 2006, and dealing with sanctions for loss of electronically stored information.

One way of looking at this slippery slope issue is to consider what a Committee Note could say constitutes "exceptional circumstances." In other contexts in which the term is used in the discovery rules, the rules are rather opaque on what would satisfy the standard. Perhaps the New Jersey case described above would be an illustration.

Another issue is whether the language in braces would impede proper deposition questioning. Arguably it might be seen as less intrusive than the language in brackets, but it only permits discovery about draft reports if the court so orders due to exceptional circumstances. Until there is such an order, there could be objections that deposition questioning about the basis or genesis of items in a final report really constitute forbidden discovery concerning a draft report. The same issues that are discussed above in regard to the bracketed language seem to apply to the language in braces.

Additionally, some mention of preservation seems important. We have been told that some courts order that all drafts be preserved.[4] If there is a possibility that discovery of drafts will later be ordered due to exceptional circumstances, there may be an argument for ordering preservation. The court's power to order discovery could be undermined by destruction of the drafts. But it would seem quite odd for a court to conclude that there is a sufficient likelihood of "exceptional circumstances" so as to warrant the frequent entry of such a preservation order. Nonetheless, the possibility that a court might later order discovery -- even under an exceptional circumstances standard -- might prompt parties to continue to adhere to the sort of "clandestine environment" that we have been told permeates preparation of expert reports under the current rule. In addition, the possibility of an order for preservation of drafts can raise the ticklish issue

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[4] Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001), discussed in a footnote above, illustrates the connection between discoverability and preservation. In that case, plaintiff had sought discovery the court found to encompass draft reports. It then observed as follows:

> [T]he basic precepts of the Federal Rules of Civil Procedure relating to the work of testifying experts requires, on this record, the retention and production of draft reports and the correspondence reviewed by the testifying expert. That is obvious from the text of Fed. R. Civ. P. 26(a)(2), which governs mandatory disclosure obligations respecting testifying experts, requires that the testifying expert must file a report which contains, inter alia, "a complete statement of all opinions to be expressed and the basis and reasons therefor, [and] the data or other information *considered* by the witness in forming the opinions."

Id. at 282 (emphasis in original). But the circumstances in that case included a directive from the court informing defendant that such materials should be discoverable. The court found defendant responsible for spoliation.

what exactly is a "draft." In an era of preparation of materials on computers, one might make an argument that a new "draft" comes into being with each keystroke or deletion.

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

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JERRY E. SMITH
EVIDENCE RULES

March 23, 2007

TO: Advisory Committee on Civil Rules

FROM: Judge David G. Campbell, Chair, Subcommittee on Rule 26

RE: April 18, 2007 Meeting on Expert Disclosure Issues

Dear Participant:

Thanks very much for agreeing to participate in our April 18, 2007 meeting on expert disclosure issues. The meeting is being organized by a discovery subcommittee of the Advisory Committee on the Federal Rules of Civil Procedure. This letter will provide information about the meeting, the participants, the topics to be discussed, and the enclosed materials.

A. The Meeting.

The meeting will be held on Wednesday, April 18, 2007, in the Charles L. Brieant Conference Center (Room 850) of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York. The meeting will start at 1:00 p.m. and end by 5:00 p.m.

B. Participants.

The meeting will include a diverse and knowledgeable group:

3. Daniel C. Girard of Girard Gibbs, LLP in San Francisco, a member of the Advisory Committee;

4. Anton R Valukas of Jenner & Block, LLP in Chicago, a member of the Advisory Committee;

5. Professor Edward H. Cooper of the University of Michigan Law School, Reporter for the Advisory Committee;

6. Professor Richard L. Marcus of Hastings College of Law, Special Reporter for the Advisory Committee;

7. Professor Daniel J. Capra of the Fordham University Law School, Reporter for the Advisory Committee on the Federal Rules of Evidence;

8. John Rabiej of the Administrative Office of the U.S. Courts;

9. James H. Martin Assistant Attorney General of the New Jersey Attorney General's Office;

10. Bill Buckman of the William H. Buckman Law Firm in Morristown, New Jersey;

11. Marina Corodemus of Corodemus & Corodemus in Iselin, New Jersey;

12. Douglas Eakeley of Lowenstein Sandler in Roseland, New Jersey;

13. David Field of Lowenstein Sandler in Roseland, New Jersey;

14. Jeff Greenbaum of Sills, Cummis, Epstein & Gross in Newark, New Jersey;

15. John Zen Jackson of Kalison, McBride, Jackson & Murphy in Warren, New Jersey;

16. Alan Medvin of Medvin & Elberg in Newark, New Jersey;

17. Gary Potters of Potters & Della Pietra LLP in Fairfield, New Jersey;

18. Ellen Relkin of Weitz & Luxenberg in New York;

19. Ezra Rosenberg of Dechert, LLP in Princeton, New Jersey;

20. Chris Seeger of Seeger Weiss in New York;

21. Richard J. Williams, Jr. of McElroy, Deutsch, Mulvaney & Carpenter, LLP in Morristown, New Jersey.

This is a large group, but we intend to conduct the meeting in a way that allows every participant to express his or her views on the issues under discussion.

C. Issues.

The purpose of the April 18 meeting will be to discuss several specific issues related to expert disclosure and discovery. These issues have been brought to the Advisory Committee's attention from a variety of sources. The issues have been discussed by the Advisory Committee and deemed worthy of further investigation, but no decision has been made about whether changes should be made to the Federal Rules of Civil Procedure. The subcommittee will take the views expressed at the April meeting into account in considering whether to recommend that the Advisory Committee consider formal amendments to the rules. Proposed amendments, if any, will of course follow the usual committee and public comment processes.

We would like the April discussion to focus on two general issues and several specific questions. We look for an open discussion by all participants. Please recognize the need to keep comments relatively focused and brief in order to permit all to express their views.

1. Should attorney-expert communications be shielded from discovery under the Federal Rules of Civil Procedure?

The 1993 Advisory Committee Note to Rule 26 of the Federal Rules of Civil Procedure suggests that communications between attorneys and their retained testifying experts are discoverable. After more than a decade of experience with this approach, some feel that discovery into attorney-expert communications consumes a substantial amount of litigation resources while rarely yielding helpful information, and that the availability of such discovery results in artificial and expensive procedures such as the retaining of a second group of consulting experts. The competing view asserts that the origins of an expert's opinion and the influence that a lawyer had on that opinion are highly relevant to a jury's evaluation of the opinion. The ABA House of Delegates recently proposed that attorney-expert communications be shielded from discovery.

2. Should draft expert reports be shielded from discovery?

Cases often include attempted discovery of draft expert reports. We understand that some even include attempts to find deleted drafts in the expert's electronic storage media. Perhaps because drafts generally are discoverable, many experts do not create or retain them. Some practitioners, including the ABA, have proposed that draft expert reports be shielded from discovery. This view suggests that discovery of draft reports results in artificial procedures and expensive litigation that rarely provides helpful information. Others believe that the evolution of an expert's opinion is highly relevant to a jury's assessment of that opinion.

- Some feel that the federal rule, with all of its imperfections, exerts a restraining influence on those lawyers who would be tempted to dictate their experts' opinions. Have New Jersey lawyers noticed the absence of that restraining influence in their state practice? Have they seen more abuses in the use of expert witnesses?

- If you could modify the New Jersey approach, what changes would you make?

D. Materials.

The email accompanying this letter includes several documents to provide background for the discussion. Please do not feel obligated to read all of these; we provide them only for potentially helpful background. You will note that the documents address two issues not included in the foregoing list – the disclosure requirements for treating physicians and employee experts under the federal rules. We would of course welcome any thoughts you have on these issues, but we do not plan to spend time on them at the meeting.

1. Excerpt from Minutes, September, 2006 Meeting, Advisory Committee on Civil Rules. The minutes were prepared by Professor Cooper to reflect the Advisory Committee's discussion of the issues now being investigated by the subcommittee. Because the discussion covered a broad range of relevant viewpoints, we thought the notes might be helpful.

2. Minutes from a January 13, 2007 mini-conference held by the subcommittee on expert issues. This meeting included a variety of practitioners from around the country.

3. A memorandum prepared by Professor Marcus entitled "Rule 26(a)(2) Issues." This memo was prepared for the Advisory Committee's September meeting and provides a helpful discussion of the history of expert disclosures and some of the issues that have arisen since the 1993 amendments to the Federal Rules.

4. The resolution adopted by the ABA House of Delegates at its meeting on August 7-8, 2006, and a supporting Report of the Federal Practice Task Force of the ABA. These documents set forth the ABA's proposal that expert-attorney communications and expert report drafts be shielded from discovery.

5. An August 3, 2000 letter from Gregory K. Arenson to Peter G. McCabe enclosing a Report on Expert Witness Disclosure and "Core" Work Product, dated June 22, 2000. The report was prepared by the Committee on Federal Procedure of the New York State Bar Association. We understand that a majority of the members of the New York Committee have since revised their views and now favor an approach like the ABA's, but we have included this document because it provides a contrasting view to the ABA's.

Thank you very much for agreeing to participate in the April 18 meeting. We look forward to learning from your experience.

Sincerely,

David G. Campbell

Judge David G. Campbell
Subcommittee Chair

DGC/nvj

MEMORANDUM

To: **Participants in Jan. 13, 2007, discussion of discovery and disclosure regarding expert witnesses**

From: **Rick Marcus, Special Reporter, Advisory Committee on Civil Rules**

Date: **December 11, 2006**

Re: **Possible rule amendment ideas offered to provide concreteness for Jan. 13 discussion**

This memorandum is designed to provide ideas about some possible specific rule amendment approaches that might be pursued if it seems advisable to proceed toward amending the rules to address concerns raised about Rule 26(a)(2). These ideas are provided here in hopes that they may provide concreteness that would be of value as background for the January, 13, 2007, meeting being held by the Discovery Subcommittee of the Advisory Committee on Civil Rules. **Neither the Advisory Committee nor its Discovery Subcommittee has made any decision whether to proceed with any proposal for a rule amendment, or considered the specific content of any such possible proposed amendment.**

As Judge Campbell's letter of invitation to the meeting says, the Jan. 13 discussion will focus on the policy concerns raised by four main issues. This memorandum therefore presents the issues in the same order: (1) Insulating attorney-expert interaction; (2) Draft expert reports; (3) Treating physicians; and (4) Eliminating the exemption from the report requirement for a party's regular employees.

It seems worthwhile also to mention that the amendment ideas sketched here are presented as possible amendments to the restyled rules now pending for approval before the Supreme Court. Although it cannot be said whether these amendments will ultimately be adopted, if they are adopted they probably will go into effect on Dec. 1, 2007, long before any amendments could be made to Rule 26(a)(2).

(1) Insulating attorney-expert interaction

The purpose of this section is to identify some ways in which protection of attorney-expert communications might be afforded by a rule change. The ABA has urged rule changes on this point.[1] The approaches of three states to these issues have been brought to our attention, and can provide a starting point. Perhaps the most pertinent is the New Jersey approach, which is tied to a variation of what was previously in Rule 26(b)(4)(A).[2] The Texas provisions take yet

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[1] The Sedona Conference Working Group on the Role of Economics in Antitrust adopted recommendations in February, 2006, including Principle II-4, which is: "An economic expert's opinion, including the factual and experiential basis on which that opinion is based, should be fully disclosed." The Comment accompanying this Principle includes the following:

> The information reviewed by the economist in reaching the opinion should also be disclosed. Specifically disclosed should be the models that the economist used and the reasons for using those models, and the source of the data or other information put into those models, in enough detail to enable the adversary to duplicate the calculations and probe the analysis. Where necessary to an understanding of the models and methods employed by the economic expert, there should also be disclosure of relevant economic literature on which the expert is specifically relying. The expert's understanding of or assumptions concerning the facts and the effect of those understandings or assumptions on the opinion expressed should also be specifically disclosed. Moreover, the facts relied on by the expert should be disclosed, as well as the sources for those facts. When data is relied upon, the expert should either produce it, or provide references to available sources from which to obtain it.

[2] Specifically, New Jersey Rule 4:10-2 contains provisions analogous to Civil Rule 26(b)(1) [Rule 4:10-2(a)], 26(b)(3) [Rule 4:10-2(c)], and 26(b)(4) [Rule 4:10-2(d)]. Rule 4:10-2(d)(1) resembles Rule 26(b)(4)(A) before its 1993 amendment, and provides (emphasis added):

> A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to R. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by R. 4:17(a), the furnishing of a copy of that person's report. *Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e) [described below], all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule [comparable to Rule 26(b)(3)].*

Rule 4:17-4(e) permits a party by interrogatory to request a copy of the report and provides the following directives about what the report must contain:

another approach, which does not seem to provide the sort of protection that the ABA resolution endorses or that New Jersey affords.[3] Massachusetts appears to have retained provisions more analogous in content -- as well as form -- to the pre-1993 provisions in Rule 26(b)(4).[4]

> The report shall contain a complete statement of that person's opinions and the basis therefor; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation.

Thus, the New Jersey setup does not have any disclosure requirement, and inserts the protection regarding interaction between the expert and the attorney into its analogue to Rule 26(a)(4).

[3] Tex. R. Civ. P. 192.3 contains the general scope of discovery provisions. Rule 192.3(e) provides as follows (emphasis added to subsection (6)):

> *Testifying and consulting experts.* -- The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions that have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:
>
> (1) the expert's name, address, and telephone number;
>
> (2) the subject matter on which the expert will testify;
>
> (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
>
> (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
>
> (5) any bias of the witness;
>
> (6) *all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by or for the expert in anticipation of a testifying expert's testimony*;
>
> (7) the expert's current resume and a bibliography.

As the italicized language above suggests, this provision appears to require fairly broad disclosure.

[4] Thus, Massachusetts Rule 26(b)(4) provides:

> **Trial Preparation. Experts.** Discovery of facts known and opinions held by experts,

A variety of amendment approaches to current Rule 26(a)(2) might, separately or in combination, introduce limitations into the Civil Rules.

(a) Narrowing the language in the report requirement to limit it more clearly to "factual" material, or to protect work product, particularly opinion work product

The starting point for the current controversy about the over-intrusion into lawyer-expert interaction is the report requirement, which was the basis for the strong statement in the 1993 Committee Note about having to disclose whatever is given to the testifying expert, whether or not it is privileged or work product. We have heard that the drafters of the 1993 amendments probably did not foresee that the language they used would be interpreted to include such a wide range of information. Perhaps a satisfactory change could be made to Rule 26(a)(2)(B)(ii):

Rule 26. Duty to Disclose: General Provision Governing Discovery

(a) Required Disclosures

* * *

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

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must

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otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. **(ii)** Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

Alternative 1

(ii) the data or other information considered by the witness in forming them, unless [privileged or] protected under Rule 26(b)(3);

Alternative 2

(ii) the data or other information considered by the witness in forming them, except to the extent that disclosure would reveal the mental impressions, conclusion, opinions, or legal theories of the disclosing party's attorney or other representative concerning the litigation;

Alternative 3

(ii) the factual data ~~or other information~~ considered by the witness in forming them;

Alternative 4

(ii) the data or other information considered by the witness in forming them, but no disclosure or discovery may be had regarding any communications between the expert witness and retaining counsel unless the court finds that such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)};

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Surely there are additional approaches to this set of issues, but this array of alternative amendment starting points will hopefully provide a basis for discussion.

Alternative 1 provides broad protection for all work product provided to the expert witness. But it raises the question how the "data or other information" itself was subject to protection under 26(b)(3), for that protection does not go to facts.

Alternative 2 is an effort to accomplish what is seemingly urged as the strongest reason for making a change -- to protect core work product. It borrows the terminology of Rule 26(b)(3) regarding what that is.

Alternative 3 tries a different approach -- can some reformation of the language of the disclosure rule restore what the Advisory Committee was reportedly thinking about in 1991? Perhaps "or other information" is the invitation to go beyond factual data, and "factual data" is broad enough to capture all that is needed in a disclosure rule. But would opinions, etc., be within "factual data" when an expert witness relied on somebody else's opinion? (Note the careful attention in the Texas rule to a testifying expert who relies on the opinion of a nontestifying expert.)

Finally, Alternative 4 is prompted by the ABA resolution.[5] It offers two alternative standards for intruding into the communications between the lawyer and the expert witness. The Rule 26(b)(3) standard, which is easier to satisfy, appears to be what the New Jersey rule invokes. The Rule 26(b)(4)(B) standard, which is very hard to satisfy, appears to be what the ABA resolution has in mind.

It might be useful to add that, should any of these approaches go forward, it is likely that a Committee Note would say that the Advisory Committee had concluded that the broad sweep of the 1993 provision -- at least as interpreted by the majority of courts -- had proved counterproductive. Discovery about every contact between counsel and the expert witness might provide some benefit. But particularly in an era of e-mail and embedded data this benefit is outweighed by the burdens of such discovery and the surreal atmosphere it introduces for dealings between experts and lawyers. The goal is to permit a fair opportunity for cross-examination, not to create a whole new arena of intricate and costly discovery maneuvering. That maneuvering, moreover, may be so costly that only very rich litigants can play the game to the hilt.

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[5] Alternative 4 does not include something that is in New Jersey Rule 4:10-2(d)(1), which protects "all other communications between counsel and the expert *constituting the collaborative process in preparation of the report*." Although Committee Note language regarding the need to protect this collaboration might well be useful to explain what the amendment is designed to accomplish, the italicized language might seem odd in a rule.

Another point to keep in mind with regard to these approaches is that the general concern about discovery into the interaction between the expert witness and the lawyer goes back before the 1993 adoption of Rule 26(a)(2)(B). Some fifteen years before that amendment, Judge Frankel concluded that Fed. R. Evid. 612(2) authorized discovery into what the lawyer gave the witness, even though seemingly core work product. If one wants to clear the field, therefore, some consideration should probably be given to how the Civil Rules provisions on this topic jibe with the Evidence Rules' provisions. For example, if the civil rules say that discovery may be had only on a very exacting showing, does that trump (or at least inform) a determination whether production should be ordered pursuant to Evidence Rule 612(2) because "it is necessary in the interests of justice"?

There is, of course, a very good argument that Rule 612 is not at all about the situation we are addressing in our discussion because the expert witness is not using the sort of materials the lawyer is likely to provide "to refresh memory for the purpose of testifying," which is what Rule 612 is focused upon. We are talking here mainly of materials the lawyer provides to the potential expert witness to orient her to the issues in the case, long before the expert testifies and often long before a decision whether this person will be identified as a witness is made. Maybe, indeed, it would make sense for Rule 612(2) to apply (in civil cases) only to materials used by the expert witness after she has been identified under Rule 26(a)(2)(A). It could thus well be argued that Evidence Rule 612(2) could easily co-exist with this regime, and that a revision to Rule 26(a)(2) could be pursued without a glance at Rule 612. Given the actual circumstances before 1993, however, it may be unwise to assume that it will. A Committee Note to an amendment to Rule 26(a)(2)(B) could presumably recognize these issues, but it is not at all clear that it could do much about the interpretation to be given to an Evidence Rule.

(b) Changing from "considered by" to "relied upon"

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* * *

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

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information ~~considered by~~ the witness relied upon in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

This change would narrow considerably the intrusion called for under the current rule. As discussed in the agenda materials for the Advisory Committee's September meeting, it also would introduce possible game-playing on what an expert relied upon, which was seemingly on the mind of the Advisory Committee in 1991 when it selected "considered by." Whether this narrowing of the standard would make unnecessary the sorts of changes mentioned in subsection (a) could be debated. If the expert witness says that she relied upon work product materials, should those nonetheless be exempt from disclosure? Should they at least be exempt from disclosure when they constitute core work product, or is that the time when the argument for disclosure is strongest?

(c) Severing the connection between "waiver" and the report requirement

The early consideration of the exemption from the report requirement for regular employees who will give expert testimony raised a point that may not have been considered in 1991. For whatever reason, the opportunity to obtain disclosure (and perhaps discovery) regarding what was "considered by" the expert witness was tied to the report requirement. An interesting question is whether that link has been faithfully adhered to. Presumably deposition

questions of an expert who has prepared a report could inquire into what the expert considered as a way of probing the sufficiency of the report. When an expert is deposed who did not have to prepare a report, do lawyers similarly inquire into what the expert considered in reaching her opinion? Is that inquiry viewed as controlled by the provisions of Rule 26(a)(2)(B)?

To the extent that the Rule 26(b)(2)(B) provisions are taken to govern depositions of expert witnesses who don't have to prepare reports, the proposed ways of dealing with these issues in subsection (a) above may be sufficient. Indeed, Alternative 4 in subsection (a) tries to link the disclosure provision to formal discovery by proclaiming that neither discovery nor disclosure may be had of communications between the lawyer and the expert. But if there is to be a new protection for that interaction, it may be worthwhile considering a provision in Rule 26(b)(4), where it might more logically belong.

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* * *

(b) Discovery Scope and Limits.

* * *

(3) ***Trial Preparation; Experts.***

* * *

(D) *Discovery or disclosure regarding communications between counsel and an expert witness.* A party may obtain discovery or disclosure regarding communications between a person who has been identified as an expert whose opinions may be presented at trial and retaining counsel only if such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)}.

If one wants to create effective protection for communications between testifying experts and counsel, this may be the more direct way of doing so. But creating a new "privilege" is strong medicine, and perhaps another reason for interacting with the Evidence Rules Committee. Because we are discussing a requirement that originated in the Civil Rules in 1993, adjusting it in Rule 26(a)(2) should not produce friction (except, perhaps, due to the Evidence Rule 612(2) issue discussed above), but announcing a more pervasive change like the one suggested for Rule 26(b)(4) could raise different issues. For example, should a similar shield apply to expert

witnesses retained to testify in criminal cases? The Advisory Committee has not given any attention to these sorts of concerns, and it is not clear that they would be a fruitful topic of discussion on Jan. 13. But it would be useful to talk then about whether something like this approach would be desirable enough to justify addressing these other issues.

(2) Draft expert reports

It may be that draft expert reports could be folded into some of the amendment proposals included in section (1) above. The New Jersey approach regards them as covered by its protection of communications and the "collaborative process" between counsel and the expert witness "including all preliminary or draft reports produced during this process." But preliminary or draft reports might be produced by the expert witness all by herself, so it is not clear that they are only a part of the collaboration. And whether or not an amendment is pursued to insulate the communication between the expert witness and the lawyer, there may be considerable grounds for insulating against the quest for all variations in the expert's report as it evolved toward its final state (conceivably without significant involvement of the lawyer, at least if a protection like this one is adopted). Accordingly, the topic has been broken out for separate treatment, as the ABA's resolution seemed to propose.[6]

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[6] The Sedona Conference Working Group on the Role of Economics in Antitrust includes in its February, 2006, proposal Principle II-5: "The process by which an economic opinion is reached can and should be shielded from discovery."

This Comment on this proposal proceeds from the assumption that "[c]urrently each draft of the testifying expert's report and the expert's notes are required to be disclosed. This obligation contrasts markedly with an attorney's review of a claim, where the work product doctrine applies to provide a zone of privacy to the process of reviewing the facts and law relating to the claim. An economist, on the other hand, arguably has no zone of privacy for the process of reviewing the facts and economics relating to the claim."

The Comment urges that discovery of these materials is counterproductive:

> When drafts are discoverable, parties may engage in non-productive strategic behavior because drafts allow adversaries to argue that any differences illustrate that the final expert opinion is faulty, false, or the result of undue attorney influence. Disclosure of drafts fosters unproductive depositions focused on immaterial details. Economists can lessen this strategic behavior by lessening their interaction with others who review the factual or legal issues, with the effect of distancing the economic analysis from the other analyses of the claim. Lawyers can retain non-testifying economists to combine the economic and legal review, without giving rise to disclosure obligations. Testifying economists learn not to keep drafts or not to take notes, even if taking notes or keeping drafts would improve the economic analysis. Testifying economists sometimes rely on

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* * *

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* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written final report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. Disclosure or discovery of any preliminary or draft report prepared by the witness may be ordered only if such disclosure or discovery is warranted by the standards of [Rule 26(b)(3)(A)(ii)] {Rule 26(b)(4)(B)(ii)}. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

The policy questions about whether to prohibit (or at least to significantly limit) disclosure or discovery of draft reports should be the principal focus of the Jan. 13 discussion of this topic, rather than the rulemaking methodology for accomplishing that purpose. But the

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others to draft their report and to combine the economic analysis with the factual analysis.

Parties and the court can and should foster improved economic analysis by avoiding the averse consequences of disclosure of drafts. Not allowing discovery of drafts will permit the expert to develop opinions, without worrying about defending each written word and each idea considered in the course of the work.

choice between the less-rigorous standard for discovery provided in Rule 26(b)(3) and the very demanding "exceptional circumstances" standard of Rule 26(b)(4)(B) here might be important, for it bears on the wisdom of insulating communications between the lawyer and the expert from discovery. How does one obtain information needed to make the showing that would justify discovery? Consider the hypothetical possibility that the lawyer actually wrote the report and told the expert to sign it, or rewrote the expert's "draft" to change it entirely. Perhaps there is no absolute solution to these issues, but they seem pertinent to the question whether (and how) to proceed down this line.

There has been at least one case presenting a variant of this sort of problem, decided in federal court in New Jersey before Rule 26(a)(2) was adopted in 1993. In Occulto v. Amadar of New Jersey, Inc., 125 F.R.D. 611 (D.N.J. 1989), a personal injury action, one of plaintiff's medical experts produced his entire file, which included a draft report that was verbatim the same as the report the expert officially submitted, but without the doctor's letterhead and bearing the following notation on top: "Please have retyped on your own stationery. Thank you." It appears that counsel for plaintiff did not screen the materials in the file before they were turned over to defendant during the deposition. When defendant sought to probe into this matter, plaintiff's lawyer falsely denied drafting the report, but later a work product objection was raised. The court held that although the document was work product there was a sufficient justification for discovery, in part because the document had already been disclosed. Judge Simandle noted that "this same result would not obtain for tactics or advice contained in a letter from counsel to the expert," (id. at 616), but found the circumstances remarkable (id. at 615-16):

> One searches in vain for precedent discussing the situation where an attorney has completely drafted the expert's opinion letter, to which the expert then signed his name, and denied doing so upon the record of the expert's deposition. Notwithstanding [plaintiff counsel's] allegation that this is his normal practice, I have not become aware of another case in which the attorney has done so in a verbatim self-addressed expert report.
>
> A party receiving an adversary's expert's signed report has a right to rely upon the document for what it purports to be -- the expert's considered analysis of facts and statement of opinions applying the expert's special education, training, and experience. Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Rule 702, Fed.R.Ev. They do not participate as the alter-ego for the attorney who will be trying the case.

One hopes that this example is extraordinary, and therefore not the stuff to justify rulemaking. But it raises the question whether such conduct is more common, and whether this possibility cuts against insulating against production of draft reports. In this New Jersey case, the Rule 26(b)(3) standard was found to permit discovery, but that conclusion seems to have been reached only because of the coincidence that the doctor produced the directive from the lawyer in his file. If such directives are more common, they might include an additional instruction -- "Discard this after you have prepared your report."

That possibility offers a segue to another issue that has arisen. The ABA report points out that some courts require that all draft expert reports be retained. Unless there is never a circumstance in which the court can order production, it would seem that preservation may sometimes be in order to ensure that the court can make the determination whether to order discovery. This preservation question somewhat resembles an issue that arose in connection with the recent public comment on the E-Discovery amendments. Those amendments excuse production from sources that are not reasonably accessible, and also include a protection against sanctions for loss of electronically stored information in some circumstances. A number of witnesses in the hearings on those amendment proposals assumed that these two were linked, and that the provision excusing initial production of inaccessible information meant also that there was no limitation on discarding it. In reaction to that possible argument, Committee Note passages were added at two points noting that the two points are not the same; indeed, if the court has authority to order production of "inaccessible" electronically stored information, it is hard to understand why the rules would approve of defeating the exercise of that authority by a party who discards the information. So here, it might be a good idea to include something in a Committee Note saying that the question whether to retain draft reports must be considered separately from the question whether they are initially subject to discovery.

(3) Treating physicians

This section introduces an issue that relates in some ways to the question of the regular employee currently exempted from preparing a report (covered in section (4) below). It must be stressed at the outset that the Discovery Subcommittee has to date spent less time and energy on the issues covered in this section than on the other topics covered in this memorandum. As a result, the caution that the Jan. 13 discussion is entirely preliminary applies with special force to this topic. In the same vein, the discussion of this topic on Jan. 13 can be especially useful because it involves issues the Subcommittee has not extensively discussed before.

The treating physician problem is linked to the regular employee issue because they are both currently shielded under the same exemption in current Rule 26(a)(2)(B) -- the limitation of the report requirement to those "specially employed to provide expert testimony in the case." In section (4), a possible amendment to close that exemption is presented. That amendment possibility makes no change with regard to treating physicians or anyone but regular employees of a party. The Committee Note accompanying Rule 26(a)(2)(B) in 1993 tried to emphasize that treating physicians should not have to prepare reports. A separate problem is whether they have to be identified as testifying experts. They are prime examples of something discussed in somewhat more detail in section (4) below -- actor and viewer witnesses who bring special expertise to bear on their observations that may matter a lot to the resolution of the lawsuit -- so there may be an argument for saying that they usually should be identified under Rule 26(a)(2)(A). But at the same time, it is difficult to believe that when their depositions are taken they are not questioned about diagnosis, prognosis and the like. If that's correct, it would seem that all their opinions might well be fully explored well before the time for expert witness identification arrives unless additional opinions are developed shortly before trial at the behest of counsel. Is it really true that treating doctors are routinely identified under Rule 26(a)(2)(A)?

The report requirement of Rule 26(a)(2)(B) seems a greater sticking point. The abiding problem is that it is not true that treating physicians are exempted from the report requirement with regard to <u>everything</u> they say from the witness stand. If, in return for payment from counsel, they develop extensive additional analysis solely for purposes of trial, it would seem that they should be identified under Rule 26(a)(2)(A) and probably should provide a report -- just like any other testifying experts -- about that trial-preparation work on which they intend to base their testimony.

Some have found the current rule and Committee Note insufficient to deal with the issues presented by treating physicians. It may be useful to provide a significant portion of the court's explanation of these difficulties from Kirkham v. Societe Air France, 236 F.R.D. 9, 10-11 (D.D.C. 2006):

> The 1993 advisory committee note to Rule 26 reiterates that the requirement of a written expert report "applies only to those experts who are retained or specially employed" to provide expert testimony, and concludes that "a treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report." The advisory committee note recognizes the common sense proposition that a treating

physician has a relationship with the patient that is typically separate from the case, based on his care and treatment of the patient, and thus he should not be deemed "retained" solely on that relationship. It also recognizes that a treating physician will, like a fact witness, have personal knowledge based on his care and treatment, and to the extent fact testimony is being provided, it should not be subject to the requirement of a written report.

Although the language of the rule and the advisory committee note would, at first glance, appear straightforward, the application of the written report requirement to treating physicians who provide expert testimony is unclear because, in practice, the testimony of treating physicians often departs from its traditional scope -- the physician's personal observations, diagnosis, and treatment of a plaintiff -- and addresses causation and predictions about the permanency of a plaintiff's injuries, matters that cross the line into classic expert testimony. Thus, there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B).

The primary area of disagreement among the decisions cited above is whether a treating physician may offer opinion testimony on causation, prognosis, and permanency, even if she bases her opinions solely on the information she obtained from her treatment of plaintiff (and her own expert training).

The judge opined that the "majority" view is that opinions on causation and prognosis are encompassed within the ordinary care of the patient, but that there is a minority view saying that opinions about causation (particularly as pertinent to legal liability) go beyond the provision of medical services. See id. at 11, n.3; compare Fed. R. Evid. 803(4) (limiting the hearsay exception for statements for purposes of medical treatment or diagnosis to those "reasonably pertinent to diagnosis or treatment"). To resolve the issues in that case, the judge directed that the plaintiff provide more information.[7]

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[7] The judge directed that plaintiff provide information in response to the following questions with regard to each doctor (id. at 13):

> Is he receiving compensation, or does he expect to receive compensation, for time spent preparing for testimony and/or providing testimony?
>
> When did he commence treatment of plaintiff?

The Advisory Committee has not spent significant time addressing these issues, except to recognize that they exist. There may be a serious question about what the dividing line between treating physician testimony exempt from the report requirement and that which triggers the requirement should be in individual cases. If we could provide guidance on that point, it would seem helpful. But even if a correct determination of the handling of individual cases can be agreed upon in some general way, it may be difficult to devise rule language that would improve on what is in the current rule -- "retained or specially employed to provide expert testimony in the case." Some possibilities that come to mind are:

> A treating physician must provide a report with regard to any facts or opinions developed in anticipation of litigation or for the trial of the action.
>
> A treating physician must provide a report with regard to any facts or opinions developed in response to a request from [retaining][8] counsel.
>
> A treating physician need not provide a report unless the physician has [developed facts or opinions in anticipation of litigation or for the trial of the action] {developed any facts or opinions in response to a request from [retaining] counsel}.

Alternatively or additionally, it might be desirable to amplify the disclosure requirements with regard to treating physicians by amending Rule 26(a)(2)(A):

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> Has he prepared an opinion at the request of counsel or in connection with the litigation?
>
> Did he review the medical records of another care provider or information supplied by counsel in order to prepare this opinion?
>
> Is his opinion based solely on information learned from his actual treatment and care of plaintiff?

[8] Would this word be useful? It's designed to make it clear that this requirement would not apply were opposing counsel to ask the doctor to make diagnostic or prognostic observations. But presumably that would occur in a deposition, and the diagnostic or prognostic observations of the witness would be immediately "disclosed."

* * *

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

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. For a treating physician, this disclosure must include a statement whether the physician has developed any facts or opinions [in anticipation of litigation or for the trial of the action] {in response to a request from [retaining] counsel}.

This approach may be overkill. But it might be desirable to state clearly that a treating physician ordinarily should be identified under Rule 26(a)(2)(A). We have heard that the failure to make such a designation has on occasion caused problems. Would an amendment to make this point clearly be worthwhile? Is there really any question that these witnesses will draw on expertise for part of their testimony? Beyond that, this approach could elicit the sort of details one would like to have to determine whether a report should be required; perhaps the failure of the other side to demand one in light of what's disclosed would suffice to foreclose objection to later testimony about the subjects disclosed, and excluding testimony that was developed for litigation rather than for treatment would seem much easier to justify than would be the case if, under the current rule, the problem simply arises at (or just before) trial with regard to expert insights that flow from the treatment relationship.

As the tentative nature of the introduction to this section of the memorandum tries to emphasize, this is a topic to which the Advisory Committee has not yet given substantial attention. Accordingly, the discussion above is intended solely as a stimulus for discussion, and not as a suggestion that any amendment to deal with treating physicians would be desirable.

At the same time, it is worth noting that -- either with or without such an amendment to address treating physicians in the text of the rule -- it is likely that some observations about treating physician testimony could be made in a Committee Note addressing an amendment along the lines sketched out in section (4) of this memorandum. The question then, however, would be what such a discussion should say, and whether it would be sufficient to put the point in a Committee Note.

(4) Eliminating the exemption from
the report requirement for regular employees

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General Provision Governing Discovery**

(a) Required Disclosures

* * *

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

* * *

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is a party's employee or has been ~~one~~ retained or specially employed to provide expert testimony in the case ~~or one whose duties as the party's employee regularly involve giving expert testimony~~. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Possible Committee Note[9]

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[9] The fact this presentation treats this discussion as a possible Committee Note is not intended to suggest that this amendment proposal should go forward. There are significant questions about whether such a change would be desirable. Instead, the thought is that presenting the issues as a Committee Note could put the arguments for making the change, leaving participants in the Jan. 13 discussion to assess the factual premises and whether those arguments support making the change indicated.

Rule 26(a)(2) is amended to remove the exemption from preparing a written report formerly provided for employees of a party whose duties do not regularly involve the giving of expert testimony. The Committee concluded that this exemption imposed unwarranted burdens on other parties, because they would not be able to use such reports to prepare to meet the testimony of these expert witnesses.[10] The exemption might even prompt parties to designate their own employees as expert witnesses in order to deny other parties the use of such a report in their trial preparation.[11] To the extent the exemption was justified because some experts -- such as treating physicians -- might resist providing written reports, that concern does not apply to a party's ordinary employees. Thus, the exemption threatened to undermine the basic purpose of the report requirement, as some courts recognized. See Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd., 177 F.R.D. 459, 461 (D. Minn. 1998) ("This Court joins in finding that requiring testifying experts to submit written reports is entirely consistent with the spirit of Rule 26(a)(2)(B). It is not only likely that such reports will serve to streamline or even eliminate the necessity for deposition testimony, but they will undoubtedly serve to minimize the element of surprise."); Duluth Lighthouse for the Blind v. C.G. Bretting Manuf. Co., 199 F.R.D. 320, 325 (D. Minn. 2000) ("[I]t is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or artful dodging").

Although Rule 26(b)(4)(A) directs that the deposition of an expert rule may not occur until after the report is provided, that rule should not delay the deposition of an employee who is an actor or viewer witness. It may happen that an employee who was an actor or viewer has special expertise that permits him or her to interpret or explain these events in ways that ordinary witnesses would not be able or permitted to do. That explanatory information may be admissible as lay opinion under Fed. R. Evid. 701, but in some instances it would be admissible only under Fed. R. Evid. 702, and therefore subject to the provisions of Rule 26(a)(2). Counsel must be alert to the need to identify such persons as expert witnesses under Rule 26(b)(2)(A) at the time such

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[10] How serious is this deprivation? Before 1993, there was no written report requirement for any expert witnesses, and the only assured discovery was an interrogatory inquiring somewhat generally about the opinions that would be offered. After those interrogatory answers were provided, parties could seek a deposition by agreement or court order. Whether they were then much better off than those now taking the deposition of an employee expert who has not provided a report is not clear. Is it crucial that the party have a report before the deposition?

[11] Is this concern a significant one?

designations are due even if they have already been identified as fact witnesses.[12] Rule 26(a)(2) ordinarily does not require that expert witnesses be identified until after other discovery has been undertaken, and the possibility that there might such a designation later should not delay the deposition of a witness concerning what he or she observed.[13] Similarly, if a person whose deposition has been completed with regard to actor/viewer knowledge is later identified as an expert witness as well, it is expected that the parties will be flexible about resumption of the deposition of that person despite the provisions of Rule 30(a)(2)(A)(ii). If they are unable to reach agreement, the court can resolve the matter, considering among other things the extent to which the report provided under Rule 26(a)(2)(B) differs from or adds to what the witness already said in deposition.[14]

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[12] This admonition is included on the theory that it is desirable to make this point clear to lawyers. As noted below, it relates also to the question how the timing and multiple deposition problems should be handled with such witnesses.

[13] Is there any argument for trying to devise an amendment to Rule 26(b)(4)(A) to address this point? This issue seems straightforward enough since Rule 26(b)(4)(A) says that its timing postponement requirement applies only after a witness has been identified as an expert witness for trial, so something in a Committee Note to a Rule 26(a)(2) amendment could suffice to make the point that the postponement requirement does not bear on the timing of a deposition of a witness who might later be designated under Rule 26(a)(2)(A). It might also be a challenge to devise an amendment to Rule 26(b)(4)(A) that would be suitable. Presumably the delay problem could only arise if a party designated an actor/viewer witness as an expert witness before the actor/viewer deposition occurred. Should the deposition then go forward nonetheless as to actor/viewer topics, and before the report is prepared? If so, the interrogating lawyer might spend a lot of time trying to tie the witness down about opinions. If not, it could be that such a designation as an expert witness might be used as a delaying tactic to prevent the taking of the depositions of certain actors or viewers. But one would think that the need to prepare a report would deter such tactics to delay a deposition. Would it be desirable to amend Rule 26(b)(4)(A) to deal with these issues?

On the possibility of amending Rule 26(b)(4)(A), another consideration is that the rule does not explicitly authorize the court to direct that a deposition proceed after the witness is identified as an expert and before the report is provided, so an amendment could make it clear the court may do so. It seems doubtful, however, that a court would conclude that it is entirely powerless to deal with strategic behavior if it perceives that to be going on. Is there any reason to consider an amendment to Rule 26(b)(4)(A) for this reason?

[14] Should an amendment to Rule 30(a)(2)(A)(ii) be considered to address this problem? At first blush, it seems that amending Rule 30(a)(2) would be difficult because there would be no overarching rule on when resumption of the deposition is warranted. The range of circumstances is potentially quite large. In some instances, the Rule 26(a)(2)(A) designation may be a protective measure to foreclose any argument that certain testimony should be excluded because it can only come in under Rule 702 and might be excluded under Rule 37(c)(1) if the witness were not identified. It may be that the testimony is exactly what the witness said during the deposition. Insisting on a second deposition in such a case would be unwarranted. On the other

[The above discussion does not address a serious concern that has arisen in connection with consideration of this possible amendment -- the expanded importance of the "waiver" provisions of Rule 26(a)(2)(B) regarding any material "considered by" the expert witness in reaching the opinions in question. That concern is addressed in section (1) of this memorandum. If an amendment like the ones discussed in section (1) were made, the Committee Note regarding the amendment proposed in this section could mention that this potential problem should be solved by the section (1) amendment. This point would be particularly pertinent if an amendment addressing the waiver topic were to decouple the report requirement and the waiver consequence. The question for discussion on Jan. 13 is, in part, whether the amendment proposed in this section is generally attractive but should be shelved unless the problem addressed in section (1) can be solved be some appropriate amendment.]

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hand, it may be that the witness's deposition testimony has nothing to do with the expert testimony. For example, if a high-ranking engineer for GM saw a car crash and was deposed about what she saw in the resulting suit against GM, that might have nothing to do with her later proposed expert testimony about why the steering design was proper. It would be very difficult for rule language to be helpful on such matters.

Mini-Conference
Rule 26(a)(2)
Scottsdale, AZ
Jan. 13, 2007

These notes describe the discussions during the Mini-Conference held by the Discovery Subcommittee of the Advisory Committee on Civil Rules regarding Rule 26(a)(2) in Scottsdale, Arizona, on Jan. 13, 2007. Members of the Discovery Subcommittee present included Judge David Campbell (Chair), Chilton Varner, Daniel Girard and Anton Valukas, as well as Prof. Richard Marcus (Special Reporter). Also present from the Advisory Committee were Judge Lee Rosenthal, Theodore Hirt, and Prof. Edward Cooper (Reporter). Present from the Standing Committee were Judge David Levi (Chair) and Judge Mark Kravitz, as well as Prof. Daniel Capra (Reporter of the Advisory Committee on Evidence Rules). Representing the Administrative Office were John Rabiej and Jeffrey Barr. Invited participants in the conference included Thomas Allman, Gregory Arenson, William Jones, Jocelyn Larkin, Patricia Refo (from the ABA Section of Litigation), Andrew Scherffius, Theodore Schmidt, Ronald Welch (from the American College of Trial Lawyers), and Kenneth Withers. Also present as observers were Alfred Cortese and Dena Connolly (associate in Daniel Girard's office)

Judge Rosenthal welcomed all the participants, noting that their contributions will be important to a full evaluation of the important issues presented by today's topic. Judge Campbell then introduced the four topics for discussion by pointing out that no decisions have been made by either the Discovery Subcommittee or the Advisory Committee about whether to proceed with serious consideration of any rule changes. Instead, the main focus of the conference was on two basic sorts of questions. The first question was whether the issues identified presented real problems that might justify serious consideration of a rule amendment. The second -- and presently less significant -- question was about what sort of rule change might be most useful if a rule change should be considered. This conference should not be preoccupied with drafting issues. Because the discussion was preliminary, all participants were invited to pass along further ideas that occurred to them after the conference. Indeed, after the formal completion of the conference there would be a chance during a working lunch to pursue the discussion further.

(1) Treating physicians

The first topic was the proper treatment of treating physicians and similar witnesses. The treating physician issues were introduced as a feature of a more general situation in which a fact witness brings to bear expertise that would permit testimony covered by Fed. R. Evid. 702. Treating physicians present this profile because their testimony is often critical to establish the impact of an event on a party and draws upon their training and experience as doctors. Though they are often critical witnesses, they may often resist that role and be unwilling to prepare written reports, particularly with the detail required by Rule 26(a)(2)(B). The 1993 amendment that added the expert report requirement was intended to exempt treating physicians from having to prepare reports; the Committee Note says so. Ordinarily, one would expect that a treating physician is not required to provide a report under the rule because he or she is not "retained or specially employed to provide expert testimony in the case." Instead, such a witness usually would have a preexisting relationship with the patient, or at least one independent of the litigation.

Nonetheless, because the treating physician would normally offer some testimony that would go beyond Fed. R. Evid. 701, it would be expected that such a person should be identified as an expert witness under Rule 26(a)(2)(A). And beyond that, it may be that some of the opinions the physician witness would offer would result from the litigation as well as the treatment, for at least some aspects of the testimony may often be focused on matters brought up by the lawyer that the doctor would not consider important (or as important) in the absence of

litigation. And it may be in some cases that treating physicians are actually commissioned by the lawyer to perform additional testing or analyses primarily or solely for purposes of litigation, muddying the waters on whether the report requirements of Rule 26(a)(2)(B) have been triggered at least with regard to such additional work-ups.

Against this background, the problem of compliance with Rule 26(a)(2) can come up in the guise of a Rule 37(c)(1) motion to preclude testimony on the eve of trial or during trial, with the other side arguing that the doctor may not testify at all because not identified as an expert witness pursuant to Rule 26(a)(2)(A), or may not testify on certain subjects because no written report was provided. By that time, it may be difficult (perhaps impossible) to repair the oversight, and the adverse consequences for the proponent's case may be very large if preclusion is granted. Whether there has been significant prejudice in the absence of compliance with Rule 26(a)(2) may often be debatable, and the possibility of honest, possibly ignorant, mistake considerable. Reported decisions involving treating physicians have recognized that they do not have to provide reports, but also that the question whether some have crossed the line into providing the lawyer special additional services that make a report necessary may be debatable and may have resulted in discord in the case law.

Moreover, it was emphasized, this sort of issue may arise with regard to other expert witnesses. For example, a wastewater treatment officer may have examined a wastewater treatment facility to at a critical point in the past, and be called now to testify about its condition then. Like the treating doctor, this witness's testimony would depend upon expertise, but obtaining a report might be extremely difficult.

A district judge opened the discussion by reporting that he has experienced the difficulties presented mainly with regard to treating physicians, but not other sorts of witnesses, although experience suggests that they could arise in other contexts as well. A fact witness with scientific knowledge, for example, presents such problems. He has faced motions to preclude in such cases. This experience has mainly been in excessive force, civil rights, and employment cases, not medical malpractice cases. This can arise at the simplest level when the plaintiff's lawyer questions the doctor about the treatment received by the plaintiff and asks "And how much longer will it take to finish the treatment?" At that point, there is an objection. Similarly, when the question of causation comes up the objection may be made. There, the treating doctor may not have given attention while acting in the treatment capacity to the causal agent unless that is important to the nature of the treatment for the patient.

In these situations, there is some confusion resulting from the existing Committee Note. In this judge's view, "There is always disclosure. The other side knows this is coming." Often the defendant knows what the doctor will testify to. Nonetheless, it seems that more clarity would be desirable so that lawyers know what they need to do. There is also a policy issue because of the burdens imposed by the report requirement and the likely resistance of treating doctors to providing such a report. It may be that the solution would be to insist that the lawyer provide full disclosure. Perhaps it is sufficient for such disclosure to identify the doctor and specify that the doctor will provide testimony on causation and future damages. But that may not be sufficient. In cases involving smaller claims, defendants often don't take the deposition of the treating doctor and only have the doctor's notes. Defense counsel are seeing the doctor for the first time at trial. Under these circumstances, the argument that there is prejudice gains some strength.

A plaintiff's lawyer whose practice is in personal injury representation emphasized that the doctor is not controlled by the plaintiff. Imposing a report requirement would "shut down a lot of cases." Certainly the lawyer can provide disclosure by listing the doctor as a witness and

providing a broad explanation of the topics that the doctor will address in testimony. If that is not done, exclusion makes sense. But putting a report requirement on top of that disclosure requirement makes it almost impossible for the plaintiff to proceed. "Let this one lie as a sleeping dog." It's only a problem if there is no disclosure.

Another plaintiff's lawyer reported that this is not a problem in his area. In state courts in Arizona, you have to put in full disclosure, but you don't have to do expert disclosure on a treating doctor. Requiring more would impose real difficulties. The tensions between the legal profession and the medical profession are considerable. "If I have to go to the doctor to do a report, I have a problem." Moreover, what could matter more than the opinion of the treating doctor? You have to disclose, but requiring more is a bad idea.

A defense lawyer said that he had never seen this problem come up in federal court. "Keeping the treating doctor out of court is a disgrace." The doctor is reluctant to participate anyway, and adding a report requirement would be an additional obstacle. As the rule now reads, however, the court may limit or exclude the testimony of this doctor even though it's about something that everybody knows about before trial. Therefore, it would be important to eliminate the report requirement for the treating doctor. It was pointed out that the question who is a treating doctor may be uncertain in some instances. In a different context, for example, there is no distinction between treating doctors and doctors whose role is limited to litigation preparation -- Fed. R. Evid. 803(4) provides a hearsay exception for statements to doctors for purposes of treatment or diagnosis. Would it be proper to exempt the doctor the plaintiff consulted solely for purposes of providing expert testimony from the report requirement? In this sort of situation, the report requirement would be appropriate. But it should not apply to a true treating doctor. There may be uncertainty about whether the doctor is a true treating doctor; one way of approaching that question is to ask whether the patient was referred to the doctor by the lawyer, and who is paying the doctor. This could be a problem area.

A judge asked whether the suggestion was that all the plaintiff attorney needs to do is to list the doctor as an expert and say the doctor would address "treatment and causation" -- almost a "check these boxes" solution. Is this sufficient?

A plaintiff lawyer responded that this should suffice. Defendant can go forward with a deposition. What would a report requirement accomplish? It becomes pro forma, almost a sort of piling on.

A defense lawyer questioned that conclusion. From his experience, you don't really get what you need with a checkoff. Fuller disclosure is essential to avoid excessive discovery. "If all the disclosure says is 'causation,' I have no choice but to take a deposition." But if there is fuller disclosure, that deposition can be avoided. This lawyer has extensive experience in medical malpractice cases, and is familiar with many doctors who testify. With full disclosure he can often proceed to trial without the need for a deposition. All he needs is full disclosure, and he can decide what to do as defense counsel. But sketchy disclosure will not do the job. He added that these rules are not needed for good lawyers; they will make full disclosure in any event because they recognize that they reap a benefit from putting their cards on the table and avoiding the risk of possible exclusion of evidence. But bad lawyers can't be relied upon to do so unless they are required to do so.

It was noted that there are already a lot of disclosure provisions that the lawyer must satisfy. Rule 26(a)(1) requires that people a party may use to support its case be identified and the topics be specified; Rule 26(a)(3) requires that all trial witnesses be identified and some information be provided about their testimony, and Rule 26(a)(2)(A) provides additionally that

all expert witnesses be identified well in advance of trial. All these disclosures are done by lawyers. Should the disclosure with regard to the content of the expert's testimony be provided by the lawyer, not by the expert's own report?

A lawyer observed that it is not a problem if the attorney (rather than the doctor) has to provide the report. If the attorney does it, it should be a full report and satisfy the disclosure objective.

Another lawyer reacted that this would be a like a return to the pre-1993 practice that relied on interrogatory answers drafted by the lawyer to advise the other side of the nature of the expected testimony. This prompted the observation that Rule 26(a)(2) could be rewritten to make this an affirmative obligation of the lawyer rather than dependent upon service of an interrogatory. A lawyer reiterated that this is not a problem with good lawyers. They will make full disclosure. Another lawyer said that there were two issues -- (1) a report, and (2) disclosure. If the attorney can do no. 2 adequately, the fact that the doctor can't be persuaded to do no. 1 should not be important.

The discussion shifted to the nature of the report or disclosure requirement. It was asked how detailed this disclosure should be. Would it really be sufficient only to say "causation," or should there be more? Shouldn't there be something more detailed? A response was that in state courts in Arizona the solution was a very broad definition -- sufficient to put the opposing party on reasonable notice of the testimony of the witness. Another Arizona lawyer agreed that there is not a problem in state court. Indeed, the federal courts in Arizona had long operated under a similar approach. "Judge Bilby required more." It was asked whether this Arizona approach was limited to treating doctors, or a broader categories, to which the answer was that it applied to all expert witnesses.

This prompted the comment that the federal rule makes a distinction between those experts who are specially retained and others. If the witness is not specially retained, is the idea that the attorney should be required to provide detailed disclosure? This suggestion prompted the response from another lawyer that such a requirement would make sense. "The lawyer should know what the witness will say."

Under the federal approach, then, that would leave the problem of determining when a doctor is specially retained. Not all doctors are, but some may be. One suggestion was to focus on whether the doctor is being paid by a lawyer, or charging fees calibrated by litigation rather than medical treatment standards. Another suggestion was to focus on whether the witness has nonexpert information. In Arizona state courts, they look to whether people have relevant factual knowledge.

This discussion prompted the response that it lumps together people with different circumstances. For example, regular employees may or may not have relevant factual knowledge, but the employer can certainly get a report from them much more readily than the patient can get one from a doctor. That prompted the counter that there's an expense factor. Having a lawyer provide detailed information is expensive all by itself; getting a full report from the employee may be more expensive yet. That prompted the reaction that it can be more expensive yet if the party has to go out and get an outside expert.

Another district judge observed that this discussion overlooks the reality with in-house witnesses (and perhaps some other fact witnesses) that some lawyers may not do the sort of intensive case preparation six months before trial that would be needed to provide a detailed disclosure, or even to recognize that some fact witnesses would partly provide testimony that

could fall within the purview of Fed. R. Evid. 702. "I never looked at him as an expert before, and for that reason did not disclose him pursuant to Rule 26(a)(2)(A)." It's different if the lawyer goes out and hires a person to provide expert testimony. Then the lawyer is aware from the start of the pending need to identify this person as an expert.

A lawyer responded that the issue here is preclusion, and therefore whether there will be real prejudice in the absence of identification and a report. One response to this was that relying on disclosure will require earlier preparation by the lawyer to comply with the disclosure requirement. Another lawyer observed that in most federal-court cases the lawyer knows the case. With employee witnesses, in particular, the lawyer will know what they are going to say and prepare the needed report. The other side can then decide how to proceed. A judge observed that the court should not preclude unless there's prejudice. Another lawyer proposed that it may be sufficient to affirmatively require disclosure by the lawyer.

A plaintiff lawyer reiterated that he did not understand why this problem arises. Under the pre-1993 rule, everybody pretty much understood that you had to provide full disclosure, and it's not necessary to put the report requirement on top of that. "I will overdisclose. I'm going to put it all in there." That should be true also with the in-house person.

This discussion prompted the observation that the suggestion seemed to be to abandon the expert report requirement added in 1993. Was that really a waste of time? Had practice before then been sufficient so that adding the report requirement was piling on? Would substituting a disclosure requirement mimicking the pre-1993 interrogatory suffice? This goes well beyond the issues initially presented for discussion, and might indicate that the entire expert report idea was unfortunate and should be rethought. Is there no value in having the expert, rather than the attorney, signing onto the report?

An attorney reacted by saying that having the report can be important. In a recent case, the other side had designated the chief financial officer of the corporation to offer an opinion on valuation of the company. Because this officer did not often testify for the company, the report requirement did not apply, and that had created difficulties. In particular, it had created difficulties during the deposition of this witness when privilege objections were repeatedly interposed where they likely would not have been available had a report been required. Moreover, even putting these concerns aside, a disclosure provision would have to ensure that the disclosure is really complete before it could substitute for the expert report.

A plaintiff employment lawyer emphasized that there are differences between outside experts and in-house witnesses. The jury understands that the in-house witness is biased, whether an expert or not. With in-house experts we have rarely had a surprise. But with outsiders the report requirement is more important.

Exemption from report requirement for in-house expert

Judge Campbell noted that the discussion had shifted to the exemption for in-house experts from the report requirement. This is an issue on which the courts seem sometimes to resist the exemption provided in the rule and direct preparation of reports even though the employee is not one who regularly gives expert testimony.

The problem was introduced as illustrated by extremes. At one extreme is the situation in which an employer selects an in-house expert entirely unfamiliar with the events in suit rather than choosing an outsider, thereby avoiding the need to provide an expert report while relying on

somebody who may seem to play exactly the same role. At the other end of the spectrum is the employee witness with intimate knowledge of the facts in suit who also has pertinent expertise. Such people may abound; often employees are hired for their expertise, and even if not they may acquire expertise on the job. The drill press operator, for example, develops an expertise in the operation of the drill press.

The rule requires in-house experts to provide reports only if they regularly give expert testimony. The drill press operator would not have to do so, and the chief financial officer mentioned above would not either. Some companies may have employees whose duties include regularly testifying. Automobile companies are often mentioned as having in-house experts who do so. The current rule appears to require reports from such people. But it has been urged that the exemption for regular employees who don't regularly provide expert testimony is a serious gap in the rule's requirements, and that it may promote designation of in-house witnesses to elude the report requirement. Whether that has happened is not clear, as is the extent to which the absence of a report seriously compromises the ability of the other side to examine the expert witness.

A lawyer opened the discussion with the question why the report was important. "With the deposition of the employee, what more do you need?" Another lawyer responded that the report requirement makes the expert witness think through in detail what the testimony will be; it provides good discipline. That prompted the question why this wouldn't be accomplished with attorney disclosure rather than an expert report. The reaction to that question was that "I've never seen a similarly detailed attorney disclosure." In addition, these reports are often critical in Daubert hearings. An attorney disclosure would not do the job as well. Another lawyer agreed on the value of the report -- "It's in the words of the expert. They are stuck with those words. This is very useful. I need to know what they are going to say. I see these 100-page reports. They are useful." But a report from a drill-press operator would not serve a similar purpose.

This discussion prompted the response that the distinction in the rule is not between the drill-press operator and the chief financial officer, but between a specially retained expert and an in-house expert who does not usually offer expert testimony. The reaction to that point was the employee situation is not different from the outside expert when they are giving parallel types of testimony.

It was asked why the exemption was provided in the first place. There was no certain answer to this question. A search of the Advisory Committee's minutes of meetings and agenda materials of the 1991-93 period did not reveal a full answer. It may be that in part the concern was with employees like the drill-press operator. In addition, the concern might be with the privilege issues that would arise if somebody like the chief financial officer were designated an expert witness on valuation and the "waiver" consequences of the designation would be dire if the report requirement applied.

Another lawyer observed that there is another negative aspect to the report requirement. It enables the expert to charge a lot of money for the report. From the perspective of a corporate general counsel (which this lawyer was for a decade), this may look like an extremely large charge for a signature; an MIT or a Harvard professor knows that the signature is needed and can insist on doing a "thorough" job preparing the report, leading to a high fee for it. At the same time, it can be true that the fact the expert will sign the report and must defend it may mean that very careful and thorough work is necessary.

This discussion prompted the question whether there is really much difference between the in-house and the outside expert. Is this an issue that is affected by the range of potential in-

house experts? With some in-house experts, it may be perfectly sensible to expect a 100-page report. Consider, for example, an antitrust case in which the witness will testify about pricing issues. Is "specially retained" the right distinction to use?

A lawyer who represents plaintiffs in antitrust cases raised the question how the government approaches this question in antitrust cases, where it may rely on in-house experts. A government lawyer responded that he had little experience with such issues. "I haven't had to do this since before 1993." He recalled a case in which an agency faced a challenge to one of its programs. The question is whether the personnel who testified in defense of the program had to do reports; he is not certain. But it is likely that the employees will not be happy about having to do reports. They don't get paid any more to do reports, which is troublesome from the perspective of counsel.

A judge re-raised a point make earlier: These rules don't only operate in big cases, where full-bore preparation is warranted. Not every case involves something like a challenge to a whole governmental program. In smaller cases, "lawyers are stumbling around." Whenever we add a requirement in the rules, 50% of the lawyers in these cases won't follow the new requirement and we'll see exclusion motions.

A plaintiff's lawyer offered another governmental example from his experience -- air traffic controllers. Most states still have the old lawyer disclosure rather than expert reports. Maybe the way to go would be a hybrid -- start with lawyer disclosure and permit the receiving party to move to require a report. That sort of rule will deal with the problem in the drill press case, but in the Ford Explorer case under such a rule I'll always move for a report of the in-house guy who testifies 100 times a year. This suggestion prompted the question, however, of what the criteria would be for deciding whether to order a report. If we cannot explain how to decide that question, should we make it this important?

Returning to the basic question of whether in-house experts are different, another lawyer said "I've not had a situation where after the deposition of a senior in-house scientist a lawyer said 'I need a report.'" By the time that witness's deposition is taken, the plaintiff has all the documents and all of the information from the company. It is different with an outsider; you don't know where that expert has looked or what she bases her opinion on.

A discussion ensued on whether there is really any requirement for in-house preparation of reports under the current rule. Some reported cases favor such treatment. One participant who had tried to persuade a judge to order such a report found that the judge would not. And the question what the general treatment of the issue by judges might be raises impossible research questions. When a judge reads the rule and follows the exemption, that is not likely to result in a decision being sent in to West for publication, or even a memorandum opinion. Judging general judicial behavior from the fact that there are some reported cases saying the in-house experts should prepare reports is hazardous.

A defense lawyer agreed with the judge's assertion that these problems won't arise in big-ticket cases. He noted that in the 1980s in Arizona there was an effort to create a two-track system, with complex cases the only ones with the full panoply of procedures and fewer procedural features for simpler cases. But nobody could come up with an adequate definition of complex cases. Turning to the problem of in-house experts, this lawyer offered a distinction between two situations. One is that when an employee is proffered by a party as an expert there should be disclosure of the expert's opinions. Second, there is a different situation when the adverse party wants to compel its adversary's in-house experts to opine on topics relevant to the suit. Then, it may obtain very effective evidence to use against the employer. Regarding the in-

house expert proffered by the employer, it makes sense to require disclosure. But so far as a report is concerned, maybe that should await further direction from the court; why not cover that question in a status conference, with the issue whether a report will be required to abide that event?

Another lawyer said that he was not sure how he felt about the value of a report as such. Cases don't turn on these reports. Depositions are taken. The nature of the deposition will change if there is no report in advance, but it will nonetheless be possible to do a satisfactory job of getting ready for trial. But if there is a value to having a report, he sees no reason for an exemption for in-house experts. Getting the report should not be a major burden. And avoiding that burden would not prompt him to choose an in-house rather than an outside expert. "I would never select an expert to avoid a report requirement. I'll pick the best witness, without regard to having to prepare a report."

Another lawyer chimed in agreement: "I've never seen a situation in which an in-house expert was picked to avoid a report requirement."

Then a plaintiff's lawyer observed that "I've never seen a case that turned on whether there was a report."

This observation prompted another lawyer to observe that the report is valuable. "I need the report; that makes the expert put it in his own words." Moreover, without a report requirement a small plaintiff might be at a disadvantage. Without a detailed report, it may be that larger litigants will designate more experts. The report requirement may be a deterrent to over-designation and in any event the other side can make informed decisions about whether to take a deposition; even if it does not it should be able to use the report at trial.

A plaintiff lawyer offered the view that with an employee witness, he doesn't need disclosure, but that the outside expert is different.

One judge suggested that the solution would be to require attorney disclosures instead of an expert report. In many instances, this may substitute for the report. Another judge responded that he had a different reaction -- in 80% of the cases the attorney will say "I want a report." The response to this was that the presumption should be that there is no report. "Don't invite motions." Reports should be the rare event, not the norm. A lawyer observed that "If you write a rule to permit application to the court, there will be an application in every case, and the courts will grant them." He added that he had not seen this as a problem. "This just adds one more thing. Why can't disclosure cover what we need?" This prompted another judge to observe that the present rule says that parties can request reports where the rule does not require them, but that this judge had never seen such a motion. That prompted the judge who made the proposal to substitute disclosures to suggest that lawyers would not do that; instead they would move to preclude later to keep the witness off the stand.

A concluding remark was that the rule does not reflect practice as presently written. This prompted a lawyer who had been on another rules committee to observe that this sort of situation is a problem from the perspective of rulemaking.

Protection for attorney-expert communications

The introduction to this issue noted that the 1993 amendments require the disclosure of all "data or other information considered by" the expert in forming the opinions to be expressed, accompanied by a Committee Note that broadly stated that anything shared with the expert would

have to be included, whether or not privileged. There has been a difference among courts on whether this prescription applies to core work product, but it seems that the great majority of cases hold that it does. The remaining uncertainty may be a reason for further rulemaking, but the greater concern may be that the 1993 decision has produced bad results. It is possible that the rulemakers then did not contemplate such a broad incursion into attorney-expert communications. It may be that the expectation was that disclosure would be limited to hard data, and not the strategic interaction that lawyers would like to have with their experts. Reportedly, lawyers have responded to this situation by engaging two sets of experts -- one to testify and another to consult -- and kept the two sets hermetically sealed from one another. How frequently is this "doubling up" undertaken? How important is it that lawyers feel constrained in their interactions with testifying experts?

The ABA has reached the conclusion that the disadvantages of the current regime outweigh the value of disclosure. Its view is that the consequence is to create a "clandestine environment" that serves no purpose, and to prompt behavior by experts that ensures that no drafts or records of their thinking or interactions with attorneys come into existence. Accordingly, the ABA recommends a rule change to insulate attorney-expert communications, but also to assure adequate inquiry into the basis of the expert's decisionmaking process. Already, stipulations by lawyers to deal with the intrusiveness of this form of discovery are common, and in the ABA's view the negative consequences of discovery outweigh the positive results. Indeed, it may be that the principal impact of the rule is on unsophisticated or impecunious litigants who do not employ a second set of expert consultants. At the same time, there is an enduring concern about the extent to which lawyers who hire experts may have a very great ability to shape or alter the experts' opinions, so that the trier of fact should know whether those opinions originated with the expert or the lawyer.

An introductory perspective was offered by a judge: If we close off disclosure of communications between the expert and the lawyer, isn't this just going to be lawyer disclosure? Indeed, the idea of the report by the expert might be to get the expert's separate words. With communications between the expert and the witness protected, will it be certain whether all one gets is the attorneys' version?

A lawyer opened the discussion by saying that he supported the ABA resolution. He called other attorneys and also e-mailed attorneys in his firm, asking whether they were as troubled as he was about the actuality of expert preparation under the current rules. He found that almost all were equally troubled. The current situation is "a charade." By definition, you will only call as a witness an expert who will support your case; that is a given. But you can't talk freely to that person, so you have to hire another expert to consult with about the things you can't discuss with the testifying expert. That's why it is common to stipulate around the rule; good lawyers try to get away from the fallacy in the rules. You have to find a way around the rules; that's why things become clandestine. In any event, this is not the stuff for a successful cross-examination; awareness of the attorney-expert communications that would occur otherwise is not significant. This practice is simply contrary to the truth-seeking process.

Another lawyer disagreed. He started at a theoretical point regarding the purpose of an expert in the trial process. In essence, the party who hires the expert is buying testimony. This does not fit with the standard jury instruction that what a lawyer says is not evidence; only what the witnesses say is evidence. But absent disclosure the lawyer will be able to speak through the hired witness and the jury will not know this is happening. For example, just last month this lawyer had cross-examined an economics expert in an antitrust case. From disclosure, he knew that the other side had not told the expert that defendants had tried to merge; this withheld fact formed an important part of the cross-examination. Without disclosure, such effective cross-

examination might not have been available. The ABA's position is that there is a "collaborative" relationship between the hiring lawyer and the expert that should be protected. That's not right; witnesses are not advocates, they are witnesses. We use nontestifying consulting experts all the time. We have to maintain the lawyer/witness distinction.

A representative of the Sedona Conference reported on the work done by the Sedona Working Group Addressing the Role of Economics in Antitrust, which had 33 members from diverse backgrounds. This group met over an 18-month period to draft commentary on these issues. Although the focus of the report was antitrust, discovery was a major concern of one chapter. The economists on the panel were the first to raise the issues surrounding discovery. The report appears at 7 Sedona Conf. J. 69-145(2006). The economists related the "artificial steps" they had to take to cloak their drafts and communications with work product protection, which they said were wasteful and counterproductive. Inquiry into prior drafts, in particular, drove up the cost of litigation. Starting from this, the working group ended up with Principle II-5: "The process by which an economic opinion is reached can and should be shielded from discovery." One striking consequence of the current system is the extent to which it permits the wealthier party to engage in "murder by discovery." Where the parties have roughly equal resources, the lawyers can and do limit expert discovery to avoid mutual destruction. But if there is a disparity, there is a temptation to try to bleed the opposing party to death by dramatically increasing expert witness discovery costs. With the Sedona Working Group, a consensus developed that the only ones who benefitted from the current arrangement were those attorneys who pursue endless cross-examination that contributes little or nothing to the outcome of the case. The resulting testimony confirmed what everyone knew already: Yes, the experts were being paid. Yes, they communicated with counsel. Yes, there were drafts of their reports. And yes, they polished them in many ways before submitting the finals. The Working Group conclusion quoted above was published in Spring, 2005, during the "public comment" period. Although there were comments on many topics, not one commentator object to this principle.

Another lawyer commented that the most important part is that attorneys are really uncomfortable. The rules should not discriminate on the grounds of resources, but this rule does. Also, it is a trap for the unwary, and leads to litigation down rabbit holes. The ABA position (which she was representing) is that communications should be shielded, but not the facts or data on which the expert relied. For example, if the lawyer gives the expert a narrative -- "Here's what you should assume" -- that should be discoverable. But right now lawyers spend lots of time and money "trying to be cute" to avoid disclosure. One method is a webcast during which the expert's report appears on the lawyer's screen and the expert and lawyer go through it line by line but nothing is printed. Indeed, you probably can't craft a definition of "draft" in this day of electronic composition. The process of reaching an opinion is an iterative process. What counts ultimately is the expert's ability to persuade the trier of fact. No matter how much help the lawyer gives, it is the expert who must take the stand and justify the conclusions.

A plaintiff's lawyer disagreed, saying that collaboration is not benevolent. Creating protection gives cover to the honest lawyer and expert to camouflage what is going on; it will be too tempting not to do so. And having the expert write the report is important. Lawyers write better than many experts. Lawyers will offer to do the work for them. "I represent individual plaintiffs, and I don't accept the argument that the wealthy get an advantage under the current situation." The process by which the expert gets to the conclusions matters, and it is valuable to me to learn how it happened. The "waste of time" argument is a make-weight. There is a seven-hour time limit for depositions, and I'm not going to spend my time on things that don't matter. Sometimes, I'll stipulate to forgo drafts. But often a lawyer will make changes to the drafts, and I want those zingers. Moreover, usually I have one or two experts, and the other side has five or six. If you close this down, I can't learn enough without hiring my own. Finally, I doubt that one

can preserve what the ABA says can be preserved -- access to the information on which the conclusion is based -- without so eroding the protection that's sought as to undermine the rest.

Another plaintiff's lawyer took a different view. He had tried to think of an analogy from the legal professions, and it occurred to him that it would arise if an appellate court required that lawyers produce all drafts of their briefs so that the court could determine the reasoning process by which the lawyers arrived at the ultimate arguments in their briefs. This regime, he predicted, would lead to intellectual dishonesty. The same sort of intellectual dishonesty pervades lawyer/expert interactions under the present regime. Therefore, this lawyer supports the ABA proposal. Under that approach, all the legitimate inquiries about the basis for the expert's opinion can be explored but that lawyer's opinion work product is off limits. If the lawyer does something like telling the expert that she only need read four pages of the deposition, that should be discoverable. In any event, that instruction will set up the expert to be discredited before the jury. It's hard to see how such an expert could withstand Daubert attacks.

An academic participant reported that he heard the same thing from attorneys. Lawyers contract around this sort of senseless regime, as they do to deal with the problem of inadvertent disclosure. In addition, he noted that at some level this may be a problem of substantive law.

Another academic participant observed that the relationship with privilege issues may raise questions about the extent of the rulemaking power. If one achieves a waiver of privilege by clandestine rulemaking, that could be questionable. At the same time, there is no explanation why the intrusion into privilege is controlled by whether there is a report requirement. The basic question should be how the rules of privilege should operate as constraints on inquiry about the conclusions reached by the expert, and that issue does not look significantly different for experts who have to prepare a report and those who do not.

A former corporate general counsel reported that he assumed that in-house position around the time the 1993 amendments went into effect. He was "appalled" at having to hire two sets of experts. He could confirm from dealing with outside counsel that such conduct was endemic. We should not take away the choice of full and candid discussion with the expert trial witness, thereby requiring retention of a shadow band of experts.

A practicing lawyer reported that his method is to provide his expert witnesses with an extensive written set of assumptions, and then to attach his assumption sheet to the expert's report. In his view, the goal should be to identify a bright line test. The current rule does not contain one because the present rule is interpreted differently in different courts, perhaps by different judges. The rule should be changed so it is clear. He has seen at least three different tests that would do the job:

(1) The ABA test -- no discovery;

(2) A full discovery test, like the one proposed in the 2000 report of the New York State Bar Association Committee. This test, in the speaker's view, doubles expert expense and results in extra litigation.

(3) The Greg Joseph test, limiting disclosure to "hard data" such as documents and other palpable things provided to the expert. Under this test, conversations between the lawyer and the expert, and notes prepared by the expert are not discoverable.

Although the speaker would not favor test no. 2, all three tests have good features. Any is better than an uncertain situation, as exists under the current rule.

A plaintiff lawyer suggested that the Georgia state court rule be considered as well. Under that rule, attorney privileges with experts are preserved, but on motion the court is required to look at the documents in camera and reach a sensible conclusion about whether to order disclosure.

A proponent of the full-disclosure approach disagreed with the assertion that the rule is ambiguous now. He had been involved in preparing the 2000 report urging full discovery. His research indicates that since that report was completed there have been 23 decisions, of which 21 say disclosure is required. The only decisions that are out of step are from the Middle District of Pennsylvania, and are based on a pre-1993 Third Circuit case that is dubious authority given the addition of Rule 26(a)(2). The basic point is that the expert witness is not a "collaborator." Lawyers engage in all these things in order to turn these witnesses into advocates. But why agree that this is the expert's role? That's the heart of the dispute. And its not a new dispute. In 11 Harv. L. Rev. at 169, an 1897 article, one finds reference to an 1856 English case emphasizing that the expert witness is not an advocate, because becoming an advocate makes that witness less a witness.

Another lawyer countered with the experience that she's never seen an expert who used a report written by an attorney survive at trial. An academic added that such an expert could not survive a Daubert hearing either.

The lawyer urging full disclosure responded that he had experience with an opposing expert his side believed was simply parroting the opposing lawyer's preferred views. The litigation resulted in several trips to the appellate court, and eventually the judge appointed a neutral expert who rebuffed the opposing expert's conclusions.

Another lawyer urged that any rule should ensure that all data are freely discoverable. That should open up all that is needed for the sort of challenge and cross-examination that is sought by those who endorse full disclosure. But at the same time we must recognize that the parties appoint experts to help them win their cases. They are not "neutral." In this setting, the rules should not require bizarre behavior.

Another plaintiff's lawyer observed that the basic question has to do with the nature of the inquiry. Before 1993, on the West Coast depositions of experts were common. If one tried then to dwell on the interactions between counsel and the expert there would be an objection. But if the question about how an expert decided what to assume about a given item came up through questioning about the opinion, probing into the contributions of counsel to the expert's assumptions would be allowed. After 1993, however, there was a deterioration. Lawyers began asking gratuitous questions probing lawyer/expert communications as a topic all by itself. E-Discovery has added to this temptation. In a sense, there are no "drafts." The problem is that gratuitous forays or fishing expeditions have become commonplace. Perhaps the way to go is to make sure that the inquiry is limited to topics naturally entailed in an inquiry about the expert's conclusions.

A judge asked the proponents of full disclosure how much of their position depended on skepticism about the rulemakers' ability to identify in a rule where to draw the line between that which should be disclosed and that which need not be disclosed. Is there only a problem about the ability of rule language to ensure that the things that should be disclosed will be? And in that connection, what would be the result of replacing "considered by" with "relied upon" in the rule to circumscribe the scope of what must be disclosed?

A plaintiff's lawyer who endorsed the full-disclosure approach responded that she would be delighted if opposing lawyers would give her what's appropriate. But she expects that most lawyers will use "privilege" to foreclose important avenues of inquiry. This is a pretty subtle area. For example, exchanges of e-mail will include blends of information that should be disclosed with other information that is not required to be disclosed, and that may result in withholding of the entire exchange. "Privilege will shut the door." In addition, although in fully litigated matters it may be that the expert who signs onto the opinion written by counsel will be found out, the reality is that many cases will settle before even an expert deposition is taken. Under those circumstances, the lawyer will "take a run at it" and put words in the expert's mouth, or over her signature.

A judge responded that this comment got at the most troubling problem. Although he agreed about the problems with the current system, it seemed that it might also have a restraining effect. Would moving away from the current regime create a world in which attorneys write reports too often, and there is too limited an ability to demonstrate that's what's occurred?

Another plaintiff's lawyer responded that there would be abuses, but that he still comes down on the side of protecting true work product. There are two things he wants to ask his expert that he feels he cannot ask today: (1) Here's what I think happened; what do you think?, and (2) Here's what defendant says happened; what do you think? I should get to ask those questions without having to disclose.

Another lawyer said that unscrupulous people will be unscrupulous anyhow. Disclosure rules won't help with them. The expert should be evaluated in the crucible of trial. That's the measuring rod we use. And the full-disclosure regime distorts that operation of that tool in some instances. For example, suppose the expert overlooked something early on, and the attorney can easily resolve this confusion. Why should this early and correctable oversight become an "aha" moment? The current regime puts an emphasis on something that is not important.

Another attorney noted that Daubert is a weapon against an unscrupulous expert.

Another attorney reacted to the example of the expert who initially misapprehended some circumstances, prompting the attorney to say "Oh, that's your concern. Look at these five documents." The five documents should be discoverable, but not the interchange showing that the expert did not initially appreciate the point they made. That is the Greg Joseph position. Another attorney said that he recalled the value of asking experts to change their assumptions in making a regression analysis, and another agreed that "That's the sort of case evaluation I want to do." In a sense, the attorney educates the expert. This prompted the further observation from another participant that the expert educates the attorneys too; do we want to interfere with those communications?

Yet another attorney drew on the example of consulting experts. Will a rule change invite bad behavior? Bad people do bad things now. And those who obey the rules are put in a box. I can sit down with my consulting economist and explore all the issues raised by the case. But I can't do that with a testifying expert because I'll be going into strategy. I need to be able to exchange views. If the expert says "You can't go forward on that theory," I need to know that. But why should the fact I had this conversation, which has no bearing on the ultimate conclusions of the expert and only is an educational session for me, become discoverable?

A judge observed that it is always attractive to pursue bright lines, but that it is often very hard to draw them. For example, the ABA proposal may not really yield bright lines. The distinction between "basic data" and "mental impressions" may often be debatable. How do you

draw those lines? And the ABA also says that in "exceptional circumstances" access should be allowed even though normally refused. How much certainty can that offer? How does one offer a bright line on what are "exceptional circumstances"?

A lawyer involved in the development of the ABA report explained that the proposal borrowed a standard for disclosure on grounds of need from Rule 26(b)(3) or 26(b)(4). The ABA is not a drafting body, and there may be a better way to do this. She also agreed that there will be disputes about where the line should fall in given cases, but that she can live with a case-specific fight.

A plaintiff's attorney who favored full disclosure noted that the present use of "considered" is clearly broader than "relied upon." Shifting to "relied upon" will mean there is much less to fight about.

Another plaintiff's attorney responded to the question about bright lines by noting that after the Daubert decision in 1993 the application of the new rule had to be worked out. It took some time, but it was done by decisional law. The same thing can be done with a new standard in Rule 26(a)(2). If this is important, there will be disputes on how it should be applied. But they will be worked out.

An academic opined that, particularly with respect to issues of privilege, it seems unpersuasive to say that it should not be addressed because it's hard to draft. And a Committee Note can provide extensive guidance on how the rule should be applied, offering particulars. Don't refuse protection because it may be hard to draft the exact perimeter of protection. A judge responded that an uncertain privilege may be tantamount to no protection at all.

Another lawyer pointed out that this is work product, not a formal privilege. The basic idea is to protect the mental impressions of the attorney. In essence, there is a carve-out regarding interactions with the expert for those mental impressions of the lawyer. The other side should not be able to ask any witness "Tell me every question [opposing counsel] asked you as you discussed this case. There always has to be a carve-out for mental impressions.

A defense attorney concluded: "What's wrong with relying on information from an attorney?"

Shielding draft reports

The final topic was whether discovery and disclosure of draft reports. This topic had been touched upon in relation to previous discussions. With E-discovery, there is almost no limit on the level of detail with which one could mine the development of an expert opinion. One issue is whether the lawyer really wrote the opinion and simply had the expert affix a signature to the lawyer's work product. Another concern is that the clandestine atmosphere is worsened by the prospect that draft opinions will be discoverable. That leads to varied strategies designed to ensure there never are any drafts. If the expert will stand or fall based on the final opinion, drafts seem relatively unimportant. But if the attorney made very large changes (perhaps 180 degree changes), producing drafts could provide value.

A proponent of full disclosure of attorney-expert communications said that if he can get that information, he doesn't need to have drafts. Another attorney noted that, before 1993, she never got anything but a final report, and that she was never at a disadvantage as a result.

Another attorney raised the question what is a "draft." The expert can call up the lawyer on the phone and "talk through" the expert's ideas. Is that somehow a "draft"? Is a draft involved if the expert can use a "webcast" to cause her current working thoughts to appear also on the lawyer's screen so that they can review the ideas line by line? It is better to have a bright line rule, and recognize the there is no need to preserve any "drafts."

This suggestion prompted the observation that, so long as the judge retains power to order production of backup or draft material in some instances, the question whether disclosure or discovery is initially mandatory may be different from the question whether some such draft material should be preserved. The same sort of issue surfaced with regard to "inaccessible" material in the E-Discovery rulemaking effort -- the fact certain material may be inaccessible does not necessarily mean that there is no need to preserve it.

A judge asked whether there was anyone present who favored making drafts discoverable. One attorney responded that he did not feel that way. The only case in which he was aware that it might matter was the New Jersey federal court case in the materials where the lawyer sent the expert a full opinion with directions to retype it on the expert's letterhead. Another lawyer said that she sometimes stipulates to "no drafts" discovery, but that this depends on the nature of the case. In one recent case, she got some very useful information from drafts. Nonetheless, she was not urging full exchange of all electronically stored information related to preparation of a report. "I've never heard of exchange of metadata."

The same judge asked a follow-up question: Is the likelihood of utility in some cases sufficient to justify a regime that produces the current game-playing. The attorney who had found such drafts useful on occasion said that she did not feel strongly, but believed it was important for the rules to say that the expert, not the attorneys, should write the reports. Other attorneys urged a bright-line rule that there be no preservation requirement. "We stipulate out because the current rule is unworkable; conform the rule to reality." Another full-disclosure advocate agreed that there should not be an obligation to preserve drafts "so long as I can ask whether the attorney drafted the initial report."

The same judge followed up again: If the lawyer writes the draft, is the draft then discoverable? A plaintiff's lawyer who favors narrowing disclosure responded that it would be discoverable, and that certainly the lawyer would have a copy of the draft. the fact of assistance should be discoverable. But the expert need not retain a draft. Another lawyer proposed that the line should be drawn between data and facts. If the lawyer writes "No, assume the light was green," that should be discoverable. Compare a situation in which the lawyer sends along more information and writes "See enclosures." That communication should not be discoverable.

That colloquy prompted yet another judicial follow-up: What if the lawyer says "Take this out of the report; it hurts our case" or "Take this out, it's wrong." The first response was an attorney who reiterated that there's nothing wrong with attorney involvement in the preparation of the report. The response to that was "Yes, but I need to know it. You can't do it without knowing what was changed. For example, what if the lawyer tells the expert to take out two charts?" Another lawyer agreed that the focus should be on what was left out or not included. A judge summarized that there will be cases in which free access will provide helpful information. But the question is whether that possible benefit in some cases justifies the current contorted practices in many cases. Another plaintiff's lawyer agreed that balancing costs and benefits can be very difficult, but the examination of the expert will be very different if access to this sort of information is cut off.

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At this point, the formal conference ended and some participants had to leave. Others remained and there was follow-up conversation about some of the issues during lunch.

One question was how the "exceptional circumstances" standard that the ABA suggested could be used to regulate discovery in this area would work. An initial reaction from one involved in the ABA drafting was that it was not certain what such circumstances were. Another attorney suggested that "If I have a similar case against the same lawyer, and the expert report in that case looks the same as one in another case handled by that lawyer" there may be circumstances justifying further discovery.

Another issue re-raised was preservation of drafts. One suggestion was that so long as a deposition can pursue the question of drafts the problem of preservation won't go away. That prompted the observation that a rule change might not put an end to the charade if there was any possibility of discovery. But where do you draw the line, asked another.

One response to these concerns was that actually experts think they should preserve their work. Indeed, there must be a lot of electronically stored information out there about that work, whether or not it is a "draft." Engineering firms, for example, dedicate a hard drive to a given case. This hard drive is segregated from all others and always will be under the "cloud" of the litigation. In addition, there may be discovery of data from Case no. 2 that is pertinent to the opinion expressed in Case no. 1.

Another lawyer predicted that if one eliminated the need to produce drafts, that would put an end to webcasts. Another lawyer added that if the standard for ordering discovery is demanding enough, I will be o.k. The focus should be on genuine spoliation. Don't make the result depend on whether the "draft" was printed or the subject of a webcast. Lawyer input will exist in all cases. Yet another lawyer noted that there's nothing wrong with the attorney helping. As a judge noted, lawyer assistance is not limited to the example of the auto mechanic that is described in the Committee Note to the 1993 amendment.

The closing comment was from an experienced litigator: "Good ethical lawyers feel unduly constrained by this."

MEMORANDUM

TO: Honorable Lee Rosenthal, Chair & Members
Civil Rules Advisory Committee
cc: Professor Edward Cooper, John Rabiej, Esquire

FROM: Judge Michael M. Baylson, Chair, Rule 56 Subcommittee

DATE: March 30, 2007

RE: Rule 56

On behalf of our subcommittee,[1] I submit our report on proposed revisions to Rule 56 concerning summary judgment. We are tremendously indebted to our Reporter, Professor Cooper, for his outstanding diligence in sharpening our discussions, preparing numerous drafts of the proposed revisions, committee notes, and other attachments.

This subcommittee was formed approximately one year ago, and promptly undertook to determine what provisions of Rule 56 warranted revision. For some years, many attorneys and judges have noted that actual summary judgment practice is not in accord with the provisions of Rule 56. In addition, many district courts, and individual judges in districts with or without a local rule, have adopted varied practice rules governing summary judgment motions. As a result, there was considerable sentiment within the Advisory Committee to draft revisions to the current rule which would provide for national uniformity, reflecting best practices, with allowance for judicial discretion in individual cases. Over the past year, our subcommittee has reviewed a large number of local rules, received comments from many judges and attorneys, and is making

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[1]The members of the subcommittee are Judge Paul Kelly, Judge Vaughn Walker, Judge C. Christopher Hagy, Chief Justice Randall Shepard, Ted Hirt, Esquire, Bob Heim, Esquire and Anton Valukas, Esquire.

recommendations for adoption of revisions to Rule 56.

In several respects, we propose a "default" rule, allowing a district court, or an individual judge, to adopt a different procedure, appropriate for a specific case.

The subcommittee started its work by reviewing initial revisions prepared by Professor Cooper. We frequently consulted the 1992 proposed revision, but have departed from it substantially. We have specifically refrained from addressing any substantive Rule 56 principles.

On January 30, 2007, we convened a "mini-conference" of experienced litigators with significant Rule 56 experience to review our then current drafts, for a full day, in the Moynihan Courthouse in New York City, followed by a several hour subcommittee meeting where we digested and analyzed the comments of the attendees.

The attached draft, which has been approved as to most provisions by unanimous vote, and in all respects by a majority of the subcommittee, represents both intense drafting work by Professor Cooper and a considerable consensus by the subcommittee, after several rounds of conference calls. Brackets designate those words or phrases about which we have had substantial discussions over the past year.

We respectfully suggest the Advisory Committee first focus on the general policy of promoting national uniformity, with default provisions allowing for individual case management orders, and then the specific draft proposals.

The following salient points should be noted:

1. Subparagraph (a), "Time for Motion and Response," was previously approved by the full Committee at the April 2006 meeting as part of the "timing project," including the bracketed language. However, many attendees at the conference suggested that the only sensible

default time limit for a motion for summary judgment should be thirty (30) days after the close of all discovery. The subcommittee agreed. Accordingly, we are submitting this issue for reconsideration by the full Advisory Committee.

2. The subcommittee unanimously recommends that the last sentence of subparagraph (b) be eliminated as redundant and possibly confusing.

3. Subparagraph (c), "Motion, Response and Reply" - The subcommittee is in favor of the default procedure requiring successive statements of undisputed facts, a response and a reply, all of which require the record references as set forth in subparagraph (c)(4)(A). As a result of discussions at the conference, the subcommittee recommends the statement of facts be limited to "those specific material facts. . . ." – requiring movants to limit the statements accordingly.

Many attendees at the conference, and many judges who have used this approach on a daily basis, recommend it as beneficial in revising and deciding the great majority of summary judgment motions, because it allows the judge to focus quickly on those specific material facts which are in dispute. These judges believe that whatever extra time it may take practitioners to prepare the factual statements and responses, it is worthwhile because it dramatically cuts down on the amount of time the judge and law clerks must take to ascertain what specific material factual disputes exist.

Some attendees at the conference were strongly opposed to the approach, citing "war stories" about 100-plus pages of "undisputed" facts, most of which were not material or otherwise relevant, and other abuses of the proposed procedure. This procedure may not aid the judge in reviewing and analyzing a summary judgment motion in every case. However, the

subcommittee nonetheless recommends the procedure as a default rule, which allows the judge to alter or dispense with the rule in a case in which it will be burdensome or otherwise not helpful, on motion of any party, or sua sponte.

The subcommittee respects Judge Walker's articulate opposition to this approach, attached as Exhibit 11, which supports comments by several practitioners at the conference. The subcommittee considered Judge Walker's objections; however, Judge Walker cast the only dissenting vote.

4. Subparagraph (c)(8) reflects a unanimous subcommittee vote that the court should be entitled to grant summary judgment to the movant if the response does not comply with the rule's requirements. The bracketed additional phrase, "if the motion and supporting materials show that the movant is entitled to summary judgment," would not allow summary judgment to be granted unless the court reviewed the movant's papers and found the motion substantively meritorious. Please read the Reporter's Note (Ex. 8) on the various alternatives which the Advisory Committee should consider regarding this proposal.

5. Subparagraph (g), "Partial Summary Judgment," was approved unanimously by the subcommittee and has been added because of the large number of cases in which only partial summary judgment is granted. The subcommittee recommends eliminating provision (g)(2), entitled "Establishing Liability," (which exists in the current rule) as redundant and unnecessary.

6. Subparagraph (h), "Affidavit or Declaration Submitted in Bad Faith," is recommended by the subcommittee for continuation with one change, substituting "may" for style version "must." The staff of the Federal Judicial Center is in the process of gathering empirical data which may shed light on how often this provision is invoked. The subcommittee

voted to retain this provision as part of Rule 56, because it may have a prophylactic effect on practitioners in reminding them and their clients of the importance of accuracy in submitted materials, and also because the procedure set forth is much simpler than Rule 11.

7. Although our subcommittee was also charged with reviewing proposed changes to Rule 12(e), we are not making any recommendations on Rule 12(e) at this time. The attendees at our conference were virtually unanimous in opposing any changes to Rule 12(e) coupled with revisions to Rule 56, as these rules address conceptually different issues. Rule 56 deals with a motion at the conclusion of discovery, whereas Rule 12(e) is concerned with initial pleadings. In addition, the subcommittee believes that Rule 12(e) requires a different kind of focus, perhaps more empirical work, as restrictions on "notice pleading" are likely to be highly controversial.

All of these topics are open for discussion before the full Advisory Committee.

The following documents are attached:

1. Clean copy of proposed Rule 56.
2. Black-lined comparison of the proposed revisions with the current "style" version of Rule 56.
3. Proposed Committee Note.
4. Reporter's discussion questions footnoted.
5. Committee Note, over and underline version.
6. Minutes of January 30, 2007 "mini-conference."
7. Minutes of subcommittee meeting following "mini-conference."
8. Note on proposed subparagraph (c)(8).
9. Report on the proposal to revise Rule 56 in 1992.

10. Memorandum on local court rules concerning Rule 56 from Jeff Barr and James Ishida.

11. Judge Walker's opposition to subparagraph 56(c).

Rule 56: Clean Copy

Rule 56. Summary Judgment

(a) Time for Motion and Response. Unless a different time is set by an order in the case or by local rule:

(1) a party may move for summary judgment on an issue or on all or part of a claim or defense at any time until {the earlier of} 30 days after the close of all discovery {or 60 [120?] days before the date set for trial};

(2) a party opposing the motion must file a response[, and may file a crossmotion,] within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(3) the movant may file a reply within 14 days after the response is served.

(b) Affidavits or Declarations. A party may support or oppose a motion for summary judgment with an affidavit or declaration that is made on personal knowledge, sets out facts that would be admissible in evidence, and shows that the affiant or declarant is

competent to testify on the matters stated. [If an affidavit or declaration refers to material that is not already on file, a sworn or certified copy must be attached to or served with the affidavit or declaration.]

(c) Motion, Response, and Reply. Unless the court orders otherwise:

(1) The motion must:

(A) describe the claims, defenses, or issues as to which summary judgment is sought; and

(B) state in separately numbered paragraphs only those specific material facts that are not genuinely in dispute and are relied upon to support summary judgment.

(2) A response

(A) must, by correspondingly numbered paragraphs, state what material facts are in dispute;

(B) may state additional facts that preclude summary judgment; and

(C) may state that the facts asserted by the movant do not support judgment as a matter of law.

(3) The movant may reply by stating [in the form required for a response] that any additional fact stated in the response is in dispute.

(4) A statement[, qualification,] or [denial of fact]{dispute as to a fact} must be supported by:

(A) citations to particular parts of depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, or

(B) a showing that

(i) the materials cited to support the fact do not establish the absence of a genuine dispute, or

(ii) no material can be cited to support the fact.

(5) A party must attach to a motion, response, or reply the pertinent parts of any cited materials that have not been filed.

(6) The court may permit a party to supplement the materials supporting a motion, response, or reply.

(7) A party must submit its contentions as to the controlling law or the facts in a separate memorandum filed with the motion, response, or reply or at a time the court directs.

(8) The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c) [if the motion and supporting materials show that the movant is entitled to summary judgment]. The court is not required to — but may — consider materials [of record] outside those called to its attention under Rule 56(c)(1)-(6).

(d) **Court Action.** The court may:

(1) grant or deny summary judgment in whole or in part; or

(2) after giving notice and a reasonable time for responses in the form prescribed by Rule 56(c)(2)-(7):

(A) grant summary judgment for a nonmovant;

(B) grant or deny a motion for summary judgment on grounds not raised by the motion or response; or

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

(e) **Judgment Granted.** Summary judgment should be granted if evidence that would be admissible at trial shows that there is no genuine dispute as to any material fact and that a party is entitled to judgment as a matter of law. An order or memorandum granting summary judgment should state the reasons for the judgment.

(f) When Affidavits or Declarations Are Unavailable. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, and describes the facts it intends to support, the court may:

(1) deny the motion;

(2) allow time to take discovery or secure affidavits or declarations; or

(3) issue any other just order.

(g) Partial Summary Judgment.

(1) Granting on Claim, Defense, or Issue; Establishing Facts. If summary judgment is not granted on the whole action, the court may:

(A) grant partial summary judgment on a claim, defense, or issue,

(B) enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute, treating a

fact so identified as established in the action, or

(C) identify material facts that are genuinely in dispute.

[**(2) Establishing Liability.** An interlocutory summary judgment may be granted on liability alone, even if the amount of damages is genuinely disputed.]

[**(h) Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.]

Rule 56: Comparison to Style Rule 56

Rule 56. Summary Judgment

(a) ~~By a Claiming Party~~ Time for Motion and Response. ~~A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after: (1) 20 days have passed from commencement of the action; or (2) the opposing party serves a motion for summary judgment.~~

~~**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.~~

Unless a different time is set by an order in the case or by local rule:

(1) a party may move for summary judgment on an issue or on all or part of a claim or defense at any time until {the earlier of} 30 days after the close of

all discovery {or 60 [120?] days before the date set for trial};

(2) a party opposing the motion must file a response[, and may file a crossmotion,] within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(3) the movant may file a reply within 14 days after the response is served.

(be) Affidavits; ~~Further Testimony~~ or Declarations. ~~**(1)**~~ ~~***In General.***~~ ~~A supporting or opposing~~ A party may support or oppose a motion for summary judgment with an affidavit or declaration ~~must be~~ that is made on personal knowledge, sets out facts that would be admissible in evidence, and shows that the affiant or declarant is competent to testify on the matters stated. [If ~~a paper or part of a paper is referred to in~~ an affidavit, or declaration refers to material that is not already on file, a sworn or certified copy must be attached to or served with the affidavit or declaration. ~~The court may permit~~

~~an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.~~]

(c) ~~**Serving the Motion; Proceedings**~~ **Motion, Response, and Reply.**

~~The motion must be served at least 10 days before the date set for the hearing. An opposing party may serve opposing affidavits before the hearing day.~~[1]

Unless the court orders otherwise:

(1) The motion must:

(A) describe the claims, defenses, or issues as to which summary judgment is sought; and

(B) state in separately numbered paragraphs only those specific material facts that are not genuinely in dispute and are relied upon to support summary judgment.

(2) A response

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[1] The balance of former subdivision (c), stating the standard for summary judgment, is shown with subdivision (e) below.

(A) must, by correspondingly numbered paragraphs, state what material facts are in dispute;

(B) may state additional facts that preclude summary judgment; and

(C) may state that the facts asserted by the movant do not support judgment as a matter of law.

(3) The movant may reply by stating [in the form required for a response] that any additional fact stated in the response is in dispute.

(4) A statement[, qualification,] or [denial of fact]{dispute as to a fact} must be supported by:

(A) citations to particular parts of depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, or

(B) a showing that

(i) the materials cited to support the fact do not establish the absence of a genuine dispute, or

(ii) no material can be cited to support the fact.

(5) A party must attach to a motion, response, or reply the pertinent parts of any cited materials that have not been filed.

(6) The court may permit a party to supplement the materials supporting a motion, response, or reply.

(7) A party must submit its contentions as to the controlling law or the facts in a separate memorandum filed with the motion, response, or reply or at a time the court directs.

(8) The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c) [if the motion and supporting materials show that the

movant is entitled to summary judgment]. The court is not required to — but may — consider materials [of record] outside those called to its attention under Rule 56(c)(1)-(6).

(d) Court Action. The court may:

(1) grant or deny summary judgment in whole or in part; or

(2) after giving notice and a reasonable time for responses in the form prescribed by Rule 56(c)(2)-(7):

(A) grant summary judgment for a nonmovant;

(B) grant or deny a motion for summary judgment on grounds not raised by the motion or response; or

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

(e) Judgment Granted. ~~The~~ Summary judgment ~~sought~~ should be ~~rendered~~ granted if ~~the pleadings, the~~

~~discovery and disclosure materials on file, and any affidavits~~ evidence that would be admissible at trial shows that there is no genuine ~~issue~~ dispute as to any material fact and that ~~the movant~~ a party is entitled to judgment as a matter of law. An order or memorandum granting summary judgment should state the reasons for the judgment.

~~(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.~~

(f) When Affidavits or Declarations Are Unavailable. If a ~~party opposing the motion~~ nonmovant shows by

affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, and describes the facts it intends to support, the court may:

(1) deny the motion;

(2) ~~order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken~~ allow time to take discovery or secure affidavits or declarations; or

(3) issue any other just order.

(gd) ~~**Case Not Fully Adjudicated on the Motion**~~ **Partial Summary Judgment.**

(1) **Granting on Claim, Defense, or Issue; Establishing Facts.** If summary judgment is not ~~rendered~~ granted on the whole action, the court ~~should, to the extent possible, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings~~

~~and evidence before it and by interrogating the attorneys.~~ may:

(A) grant partial summary judgment on a claim, defense, or issue,

(B) ~~It should then issue~~ enter an order ~~specifying~~ stating ~~what~~ any material facts — including an items of damages or other relief — that ~~are~~ is not genuinely ~~at issue~~ in dispute. ~~The facts so specified must be~~ treateding a fact so identified as established in the action, or

(C) identify material facts that are genuinely in dispute.

[**(2) Establishing Liability.** An interlocutory summary judgment may be ~~rendered~~ granted on liability alone, even if ~~there is a genuine issue on~~ the amount of damages is genuinely disputed.]

[**(hg) Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the

court ~~must~~ may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.]

Clean Committee Note

Committee Note

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

The practice and procedures implementing Rule 56 have grown away from the rule text. Many districts have adopted local rules amplifying, and at times modifying or even contradicting, what Rule 56 seems to say. These local rules have generated many of the ideas incorporated in these amendments. [Not surprisingly, some local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.]

Subdivision (a). The timing provisions in former subdivisions (a) and (c) are consolidated and substantially revised in new subdivision (a). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at {the earlier of} 30 days after the close of all discovery {or 60 days before the date set for trial}.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling order directions tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing. Scheduling order directions may be particularly important when discovery is planned in stages — including separation of expert-witness discovery from other discovery — that may correspond to separate occasions for considering summary judgment.

Local rules also may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

The time set for filing a crossmotion becomes important only when the time limit for making a motion has expired. A motion by one party does not of itself trigger any time limit for motions by other parties, which are governed by the "any time" permission in (a)(1).

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Subdivision (b). Subdivision (b) carries forward the provisions of former subdivision (e)(1). The former reference to a "paper" is changed to "material" to ensure that all methods of preserving and communicating information are covered. Common sense should be used in applying the "sworn or certified copy" requirement to tangible things. Sworn images or descriptions may be all that can practicably be provided.

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

Subdivision (c). Subdivision (c) is new. It establishes a uniform procedure for summary-judgment motions synthesized from the common elements found in many local rules.

The subdivision (c) procedure is designed to fit the practical needs of most cases. Some cases will benefit from different procedures ordered by the court. The parties may be able to agree on an order that meets their needs and the court's needs, or the court may play a role in shaping the order under Rule 16.

The motion must describe the claims, defenses, or issues as to which summary judgment is sought. This requirement is expressed in terms that anticipate the "partial summary judgment" provisions in subdivision (g). A motion may address discrete parts of an action without seeking disposition of the entire action.

The movant must take care to honor the direction to state only specific material facts that are not genuinely in dispute. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have metastasized to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts.

The response must indicate what material facts are in dispute. A response that a material fact is not in dispute may be made only for purposes of the motion. The response thus should address the substance of the asserted fact without quibbling over niceties of expression.

The motion also must recite the specific facts relied upon to support summary judgment and cite the particular pages and paragraphs of the materials that support the facts. Materials that have not been earlier filed must be attached to the motion. See subdivision (c)(5). A local rule or order in the case may direct that the materials be gathered in an appendix, or a party may voluntarily submit an

appendix. Direction to a specific location in an appendix satisfies the citation requirement.

Meeting the citation requirement may be difficult when the movant does not have the trial burden and asserts the negative proposition that the nonmovant does not have sufficient evidence to carry the trial burden. In some cases the nonmovant's responses to discovery requests, or stipulations, or other pretrial concessions, may be available for citation. In other cases the movant may be able to cite to materials that directly negate an element that the nonmovant must prove. But in still other cases no more may be possible than a simple assertion that nothing in the pretrial development of the case shows information that, if put in a form admissible at trial, could carry the trial burden.

A response must respond to the facts asserted in the motion and recite any additional facts defeating summary judgment. The citation of supporting materials must follow the same procedures that apply to the motion. But [as subdivision (c)(4)(B)(i) recognizes], a nonmovant who does not have the trial burden on an issue is not required to point to evidence that supports its position. It suffices instead to respond that the materials cited by the movant do not show that the fact is established beyond genuine dispute. No matter who has the trial burden, the nonmovant also may state that even if the movant has established the asserted facts the facts do not support judgment as a matter of law.

Subdivision (c)(3) recognizes that the movant may reply to the response. The time to reply is governed by subdivision (a)(3). The procedures that apply to a response also apply to a reply.

A party who wishes to supplement the materials used and cited to support a motion, response, or reply may do so with the court's permission under subdivision (c)(6).

Subdivision (c)(7) directs that contentions as to the controlling law or the evidence respecting the facts must be made in a separate memorandum.

Subdivision (c)(8) resolves a question that has been answered differently by different local rules. The court may not grant a motion for summary judgment simply because a nonmovant has failed to respond at all or has responded in a manner that does not comply with subdivision (c)(2) and (4). Instead the court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment burden. Subdivision (c)(8) further provides that on any summary-judgment motion, whether or not there is a proper response, the court need not examine materials outside those called to its attention under subdivision (c)(1) through (6). At the same time the court may, if it wishes, consider materials in the record that the parties have not cited, and also may request the parties to supplement the materials in the record.

Subdivision (d). Subdivision (d) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time for responses the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

Subdivision (e). Subdivision (e) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute". [Words are added to express the requirement that although the summary judgment materials need not themselves be in a form admissible at trial, summary-judgment should be granted only on the basis of evidence that would be admissible at trial. There is no change in the rule that a court has discretion to deny summary judgment if information not admissible at trial shows a prospect that a nonmovant may be able to find sufficient admissible evidence in time for trial.]

[The reference to a genuine "issue" is changed to "dispute" to avoid any risk that other uses of "issue" to refer to a component of the case might cause confusion. The reference to "any material fact" is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for

vicarious liability, the character of the driver's conduct is not material as to this defendant, even though it would be material to a claim against the driver.]

Subdivision (e) also adds a new direction that an order granting a final summary judgment should state the reasons for the judgment. This statement is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But the statement should address the dispositive facts and underlying law in a way that supports the decision whether to appeal and the argument and decision of the appeal.

Subdivision (e) is satisfied by identifying the general reasons that support the judgment. At the same time the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver's negligence.

Subdivision (f). Subdivision (f) carries forward without substantial change the provisions of former subdivision (f). [It adds an explicit direction that a nonmovant who seeks relief from an inability to present essential facts to justify its opposition must describe the facts it intends to support. The level of detail in the description should fit the circumstances. In some cases it may be appropriate to sketch a direction of inquiry without attempting to describe facts not yet known, or to state a need to depose a person who has given an affidavit or declaration.]

A party who seeks relief under subdivision (e) ordinarily should seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (g). "Partial summary judgment" is a term often used despite its absence from the text of former Rule 56. It is a convenient description of well-established practices. A summary-judgment

motion may be limited to part of an action, including parts of what would be regarded for other purposes as a single claim, defense, or even "issue." And a motion that seeks to dispose of an entire action may fail to accomplish that purpose but succeed in showing that one or more material facts is not genuinely in dispute. Former subdivision (d) supported the practice of establishing such facts for the action. This practice is carried forward in a form that better conforms to common practice. The frequent use of summary judgment to dispose of some claims, defenses, or issues is recognized. The court's discretion to determine whether partial summary judgment is useful is more clearly identified. If it is readily apparent that summary judgment cannot be granted the court may properly decide that the cost of determining whether some potential disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from entering partial summary judgment on that fact. The court has discretion to conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event. [Exercise of this discretion may be affected by the nature of the matters that are involved. The polices that underlie official-immunity doctrines, for example, may make it important to grant partial summary judgment for a defendant as to claims for individual liability even though closely related matters must be tried on essentially the same claims made against the same defendant in an official capacity.]

Subdivision (g) also expressly recognizes that when the court denies summary judgment on the whole action it may identify facts that are genuinely in dispute. The specification may help to focus the parties in ways similar to the guidance that can be achieved through Rule 16 procedures. In some cases the guidance may be important because the denial is appealable. Official-immunity cases provide the most common example. The appeal does not extend to reviewing the determination that there are one or more genuine disputes of material fact. Instead the court of appeals addresses the questions of law presented when all of the facts left open for trial are resolved in favor

of the plaintiff. A statement by the district court of the facts open for trial can advance the argument and decision of the appeal.

The court need not embody its identification of disputed facts in an order.

[Subdivision (h). Subdivision (h) carries forward former subdivision (g) with one change. Sanctions are made discretionary, not mandatory, reflecting the apparent experience that courts seldom invoke the independent Rule 56 authority to impose sanctions.]

{Bad-faith Affidavits or Declarations. Former subdivision (g) provided mandatory sanctions, including contempt sanctions, for submitting an affidavit under Rule 56 in bad faith or solely for delay. It is deleted. There is little evidence that the nominally mandatory character of subdivision (g) sanctions has been observed in practice. Sanctions remain available under Rule 11 and under the statutes that govern false statements under oath. Sanctions also may be available under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying proceedings. A court also might consider whether sanctions can be imposed as a matter of inherent power, an issue not addressed by Rule 56.}

Discussion Questions Footnoted

Rule 56. Summary Judgment

(a) Time for Motion and Response. Unless a different time is set by an order in the case or by local rule:

(1) a party may move for summary judgment on an issue or on all or part of a claim or defense at any time until {the earlier of} 30 days after the close of

all discovery[2] {or 60 [120?] days before the date set for trial};

(2) a party opposing the motion must file a response[, and may file a crossmotion,][3] within 21 days after

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[2] At the September meeting the Advisory Committee approved the version shown in text, setting alternative cutoffs after the close of discovery and before the date set for trial. Guided by discussion at the January miniconference, the Subcommittee recommends that the cutoff be set at 30 days after the close of all discovery. Two problems appeared with setting a cutoff tied to the trial date. The more important was that many judges do not set trial dates; one alternative is to set a "docket-call" date. A different problem was that a motion 60 days before trial is followed by 21 days to respond and 14 days to reply — the motion would be submitted 25 days before trial. That is not much time, and is likely to lead to many trial postponements. Setting a longer period before trial, however, could mean that the motion must be made before discovery is completed.

One Subcommittee member preferred to set the cutoff at 60 days before the date set for trial.

This time provision is only a default. It is anticipated that in most cases the time for summary judgment will be set by local rule or by case-management order. The Subcommittee continues to believe that there is a place for a default rule, particularly in simpler cases. But an alternative might be to say nothing about deadlines; the present rule sets start lines, but no deadlines.

[3] The Subcommittee divided on whether to add this reference to crossmotions.

The argument for allowing a crossmotion after the time set for an initial motion was advanced by some participants in the miniconference. They urged that a party with a legitimate motion may prefer not to make the motion because of the cost and delay —

the motion is served or a responsive pleading is due, whichever is later[4]; and

(3) the movant may file a reply within 14 days after the response is served.

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balancing the uncertain probability of success against the sure cost and delay, it would be better to go straight to trial. But the calculation changes if another party makes a summary-judgment motion. The situation is much the same as with crossappeals, and should be treated in the same way: you prefer that there be no appeal, but have an added period to file a separate appeal after another party has appealed.

The argument against providing extra time for a crossmotion is that it may invite knee-jerk crossmotions; a legitimate motion "should be filed on or before the date set for dispositive motions to be filed." A motion should be filed only if it is meritorious without considering what your adversary has done. To suggest that a retaliatory motion is good practice sends a wrong message. "If a party doesn't think enough of its motion to file it unless its opponent files a like motion then I do not want to consider it."

The crossmotion time question arises from the adoption of a time deadline. If the first motion is made before the cutoff, a crossmotion may be made within whatever time remains before the cutoff.

[4] The provision setting response time by the time for a responsive pleading is new. It addresses the timing problem that arises if a motion for summary judgment is served at the outset of the action, perhaps with the complaint. In most cases the defendant may have 20 days to answer the complaint and be required to respond to the motion for summary judgment one day later. In some cases — most commonly when the government is a defendant — the time to respond to summary judgment might fall several weeks before the answer is due.

(b) Affidavits or Declarations. A party may support or oppose a motion for summary judgment with an affidavit or declaration that is made on personal knowledge, sets out facts that would be admissible in evidence, and shows that the affiant or declarant is competent to testify on the matters stated. [If an affidavit or declaration refers to material that is not already on file, a sworn or certified copy must be attached to or served with the affidavit or declaration.][5]

(c) Motion, Response, and Reply.[6] Unless the court orders otherwise:

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[5] This sentence is adapted from the second sentence of Style Rule 56(e)(1). The present rule and Style Rule refer only to a paper or part of a paper referred to in the affidavit. The 1992 proposed revision sought to generalize this to include anything referred to, whether a paper or other source of information. The Subcommittee believes that the sentence is redundant. The first sentence requires a showing that the facts would be admissible in evidence. Not only does the second sentence add nothing; it may add some confusion. A "sworn or certified copy" may not be the only way to establish the admissibility of materials referred to in an affidavit.

[6] Judge Walker raises fundamental questions about the value of the specific statement, response, and reply. His full message is appended, and should provide the foundation for further deliberation.

(1) The motion[7] must:

(A) describe the claims, defenses, or issues as to which summary judgment is sought; and

(B) state in separately numbered paragraphs only those specific material facts that are not genuinely in dispute and are relied upon to support summary judgment.

(2) A response[8]

(A) must, by correspondingly numbered paragraphs, state what material facts are in dispute;

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[7] Extensive discussion at the miniconference and in Subcommittee exchanges addressed the question whether Rule 56 should call for two documents or three. Those who want three documents prefer that the "motion" be very brief — in effect little more than the (1)(A) description of the claims, defenses, or issues as to which summary judgment is sought. The statement of undisputed facts would be a separate document. The third document would be the separate memorandum of contentions (brief) described in (c)(7). The question may turn on individual work habits.

[8] The response could be two or three documents, just as the motion.

(B) may state additional facts that preclude summary judgment; and

(C) may state that the facts asserted by the movant do not support judgment as a matter of law.

(3) The movant may[9] reply by stating [in the form required for a response][10] that any additional fact stated in the response is in dispute.

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[9] Do we want to require a response to additional facts that the nonmovant asserts exist beyond genuine dispute? That would make a better focused record, but also extends a point-counterpoint process that already is susceptible to misuse. It also might be confusing, since the response may rely on additional facts that the response concedes are disputed. A defendant, for example, might assert that the plaintiff released the defendant, acknowledging that the plaintiff disputes the fact or validity of the release.

If we want to require a response, this could be

(3) The movant must reply in the form required for a response to any additional fact stated in the response that the movant disputes or that the movant asserts is negated beyond genuine dispute.

[10] Earlier drafts expressly applied to a reply the formal requirements for a response. We may want to restore that provision.

(4) A statement[, qualification,[11]] or [denial of fact]{dispute as to a fact}[12] must be supported by:

(A) citations to particular parts of depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, or

(B) a showing that

(i) the materials cited to support the fact do not establish the absence of a genuine dispute, or

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[11] "Qualification" reflects the prospect that a party may wish to admit part of a "fact" and deny the rest. A defendant, for example, might respond to the "fact" that he was driving the automobile by conceding that he was behind the wheel but asserting that the automobile was parked. There is some concern, however, that a party might seize on this to say "I do not know enough to admit or deny," without invoking the procedure to defer proceedings for further discovery or investigation.

[12] "dispute" is the operative term throughout the rule. Although "denial" seems natural, it may be better to allow a party to dispute a fact without having to deny it.

(ii) no material can be cited to support the fact.

(5) A party must attach to a motion, response, or reply the pertinent parts of any cited materials that have not been filed.

(6) The court may permit a party to supplement the materials supporting a motion, response, or reply.

(7) A party must submit its contentions as to the controlling law or the facts in a separate memorandum filed with the motion, response, or reply or at a time the court directs.

(8) The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c)[13] [if[14]

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[13] Prior drafts referred specifically to 56(c)(2). But (3), (4), (5), (6), and perhaps (7) also bear on this. Rather than enumerate everything after (1), this general reference to (c) seems adequate.

[14] A separate Note addresses the question whether this approach should be changed to provide that a failure to respond properly is a "deemed admission" that allows the court to grant summary judgment without considering the merits of the motion. This topic has been

the motion and supporting materials show that the movant is entitled to summary judgment].[15] The court is not required to — but may — consider materials [of record][16] outside those called to its attention under Rule 56(c)(1)-(6).

(d) Court Action. The court may:

(1) grant or deny summary judgment in whole or in part; or

(2) after giving notice and a reasonable time for responses in the form prescribed by Rule 56(c)(2)-(7):

(A) grant summary judgment for a nonmovant;

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hotly debated and will command careful discussion.

[15] This phrase implicitly cross-refers to the summary-judgment standard described in what is to become subdivision (e). The Subcommittee thinks that is better than either verbatim repetition or paraphrase.

[16] Adding "of record" presents an important issue. Should a court be free to go outside the materials on file — for example, to ask that deposition transcripts be filed? Or should it be confined entirely to materials the parties have chosen to file within the limits of Rule 5(d)?

(B) grant or deny a motion for summary judgment on grounds not raised by the motion or response; or

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

(e)[17] **Judgment Granted.** Summary judgment should be granted if evidence that would be admissible at trial shows that there is no genuine dispute as to any material fact and that a party is entitled to judgment as a matter of law. An order or memorandum granting summary judgment should state the reasons for the judgment.

(f) **When Affidavits or Declarations Are Unavailable.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

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[17] **The Subcommittee voted to transpose the provisions that had appeared as (e) and (f) in earlier drafts. Transposition retains (f) as the designation of the "further discovery or investigation" provision. It also comes closer to the sequence of the present rule, which states the standard in subdivision (c) before addressing smaller problems.**

justify its opposition, and describes the facts it intends to support, the court may:

(1) deny the motion;

(2) allow time to take discovery or secure affidavits or declarations; or

(3) issue any other just order.

(g) Partial Summary Judgment.

(1) Granting on Claim, Defense, or Issue; Establishing Facts. If summary judgment is not granted on the whole action, the court may:

(A) grant partial summary judgment on a claim, defense, or issue,

(B) enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute, treating a fact so identified as established in the action, or

(C) identify material[18] facts that are genuinely in dispute.

[(2) **Establishing Liability.** An interlocutory summary judgment may be granted on liability alone, even if the amount of damages is genuinely disputed.][19]

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[18] The Subcommittee voted to add "material" after brief discussion. This parallels the general summary-judgment formula. But it might operate as a point of needless constraint: if the court thinks it useful to identify a fact that remains in dispute in order to focus the parties on further preparing that fact, why worry about the fact's position in the hierarchy of decision?

[19] This paragraph carries over from present Rule 56(c), as revised in Style Rule 56(d)(2). It simply restates a proposition already embodied in the rule. But it may be desirable to retain it for purposes of continuity and to emphasize a point that otherwise might generate some argument.

[**(h) Affidavit or Declaration Submitted in Bad Faith.**[20] If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.]

Committee Note

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment questions. The standard for granting summary judgment remains unchanged. The language of subdivision (f) continues to require that there be no genuine dispute as to any material fact and that a party be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases. [The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*,

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[20] The Subcommittee has debated at length the value of retaining this subdivision. The general view is that it has not been much used; the FJC study may shed some light on this proposition. Sparing use, however, may obscure a positive effect in deterring the "sham" affidavits that still seem to appear with some frequency. This provision is not subject to the many limits deliberately engineered into Rule 11. And it provides a remedy — contempt — not found in Rule 11. Retaining this independent sanction provision also may provide some reassurance that the core of Rule 56 is being carried forward even as its procedures are changed.

{1986,} 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, {1986,} 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, {1986}, 475 U.S. 574.[21]

The practice and procedures implementing Rule 56 have grown away from the rule text. Many districts have adopted local rules amplifying, and at times modifying or even contradicting, what Rule 56 seems to say. These local rules have generated many of the ideas incorporated in these amendments. [Not surprisingly, some local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.][22]

Subdivision (a). The timing provisions in former subdivisions (a) and (c) are consolidated and substantially revised in new subdivision (a). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at {the earlier of} 30 days after the close of all discovery {or 60 days before the date set for trial}.

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[21] This sentence was retained by the Subcommittee to provide reassurance that amended Rule 56 does not change present summary-judgment standards. Further explanation of the standards was thought unwise.

[22] This sort of advice to local rules committees seems unusual. But it may be useful not only because of the welter of local rules but also because there may be a continuing temptation to adopt new local rules. The Committee Note may be a useful place to offer advice because of the prospect that the urge to adopt local rules will rise again after any initial cleansing.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling order directions tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing. Scheduling order directions may be particularly important when discovery is planned in stages — including separation of expert-witness discovery from other discovery — that may correspond to separate occasions for considering summary judgment.

Local rules also may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

The time set for filing a crossmotion becomes important only when the time limit for making a motion has expired. A motion by one party does not of itself trigger any time limit for motions by other parties, which are governed by the "any time" permission in (a)(1).[23]

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Subdivision (b). Subdivision (b) carries forward the provisions of former subdivision (e)(1).[24] The former reference to a "paper" is

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[23] This paragraph likely will disappear if the reference to crossmotions is deleted from the rule text. It also would be possible to insert a substitute statement that a crossmotion is governed by the time to make an initial motion — it is appropriate if time remains, but otherwise requires court permission or a local rule.

[24] We could add here a statement that "personal knowledge" may be satisfied by an affidavit or declaration executed by a person who

changed to "material" to ensure that all methods of preserving and communicating information are covered. Common sense should be used in applying the "sworn or certified copy" requirement to tangible things.[25] Sworn images or descriptions may be all that can practicably be provided.

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

Subdivision (c). Subdivision (c) is new. It establishes a uniform procedure for summary-judgment motions synthesized from the common elements found in many local rules.

The subdivision (c) procedure is designed to fit the practical needs of most cases. Some cases will benefit from different procedures ordered by the court. The parties may be able to agree on an order that meets their needs and the court's needs, or the court may play a role in shaping the order under Rule 16.

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conveys institutional knowledge, in a manner analogous to deposition testimony under Rule 30(b)(6). The objection is that this is the sort of gratuitous advice a Note should not offer on the proper interpretation of current rule language.

One suggestion is to add — probably as a separate paragraph? — a reference to "other competent knowledge." Perhaps something like this: "The requirement of personal knowledge is satisfied if the affiant or declarant is competent to testify to a matter of institutional knowledge."

It has also been suggested, however, that the Note should not explain "personal knowledge": the Note is not the place for gratuitous advice.

[25] Remember the question raised in the rule text: if we delete the second sentence of (b)(2), this Note paragraph will be revised to explain the deletion.

The motion must describe the claims, defenses, or issues as to which summary judgment is sought. This requirement is expressed in terms that anticipate the "partial summary judgment" provisions in subdivision (g). A motion may address discrete parts of an action without seeking disposition of the entire action.[26]

The movant must take care to honor the direction to state only specific material facts that are not genuinely in dispute. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have metastasized to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts.

The response must indicate what material facts are in dispute. A response that a material fact is not in dispute may be made only for purposes of the motion. The response thus should address the substance of the asserted fact without quibbling over niceties of expression.

The motion also must recite the specific facts relied upon to support summary judgment and cite the particular pages and paragraphs of the materials that support the facts. Materials that have not been earlier filed must be attached to the motion. See subdivision (c)(5). A local rule or order in the case may direct that the materials be gathered in an appendix, or a party may voluntarily submit an appendix. Direction to a specific location in an appendix satisfies the citation requirement.

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[26] Earlier drafts required that the motion specify the judgment sought. That has been deleted for two reasons. The very description of the claims, defenses, or issues as to which summary judgment is sought should suffice. More importantly, the motion may not seek an order that qualifies as a "judgment" in Rule-speak. The often pesky Rule 54(a) defines a judgment to include any order or decree that can be appealed. A "partial summary judgment" often is not appealable.

Meeting the citation requirement may be difficult when the movant does not have the trial burden and asserts the negative proposition that the nonmovant does not have sufficient evidence to carry the trial burden. In some cases the nonmovant's responses to discovery requests, or stipulations, or other pretrial concessions, may be available for citation. In other cases the movant may be able to cite to materials that directly negate an element that the nonmovant must prove. But in still other cases no more may be possible than a simple assertion that nothing in the pretrial development of the case shows information that, if put in a form admissible at trial, could carry the trial burden.

A response must respond to the facts asserted in the motion and recite any additional facts defeating summary judgment. The citation of supporting materials must follow the same procedures that apply to the motion. But [as subdivision (c)(4)(B)(i) recognizes], a nonmovant who does not have the trial burden on an issue is not required to point to evidence that supports its position. It suffices instead to respond that the materials cited by the movant do not show that the fact is established beyond genuine dispute. No matter who has the trial burden, the nonmovant also may state that even if the movant has established the asserted facts the facts do not support judgment as a matter of law.

Subdivision (c)(3) recognizes that the movant may reply to the response. The time to reply is governed by subdivision (a)(3). The procedures that apply to a response also apply to a reply.[27]

A party who wishes to supplement the materials used and cited to support a motion, response, or reply may do so with the court's permission under subdivision (c)(6).

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[27] If we do not expressly invoke the response procedure in the text of (c)(3), this sentence probably should be deleted.

Subdivision (c)(7) directs that contentions as to the controlling law or the evidence respecting the facts must be made in a separate memorandum.

Subdivision (c)(8) resolves a question that has been answered differently by different local rules. The court may not grant a motion for summary judgment simply because a nonmovant has failed to respond at all or has responded in a manner that does not comply with subdivision (c)(2) and (4). Instead the court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment burden. Subdivision (c)(8) further provides that on any summary-judgment motion, whether or not there is a proper response, the court need not examine materials outside those called to its attention under subdivision (c)(1) through (6). At the same time the court may, if it wishes, consider materials in the record that the parties have not cited, and also may request the parties to supplement the materials in the record.[28]

Subdivision (d). Subdivision (d) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time for responses the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

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[28] It seems easy enough to say that the court may consider materials in the record that the parties have not cited. Probably that is all we should say. But that leaves a question: suppose the court's inquiry is incomplete? No problem if the court finds information that leads it to deny summary judgment, apart from a lost opportunity that is properly charged to the movant. If the court finds uncited information that seems to support summary judgment, overlooking still other information that defeats summary judgment, it may not seem quite as fair to lay blame at the nonmovant's door. The provisions for notice and opportunity to respond probably are enough.

Subdivision (e). Subdivision (e) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute". [Words are added to express the requirement that although the summary judgment materials need not themselves be in a form admissible at trial, summary-judgment should be granted only on the basis of evidence that would be admissible at trial. There is no change in the rule that a court has discretion to deny summary judgment if information not admissible at trial shows a prospect that a nonmovant may be able to find sufficient admissible evidence in time for trial.]

[The reference to a genuine "issue" is changed to "dispute" to avoid any risk that other uses of "issue" to refer to a component of the case might cause confusion. The reference to "any material fact" is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for vicarious liability, the character of the driver's conduct is not material as to this defendant, even though it would be material to a claim against the driver.]

Subdivision (e) also adds a new direction that an order granting a final summary judgment should state the reasons for the judgment. This statement is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But the statement should address the dispositive facts and underlying law in a way that supports the decision whether to appeal and the argument and decision of the appeal.

Subdivision (e) is satisfied by identifying the general reasons that support the judgment. At the same time the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver's negligence.

Subdivision (f). Subdivision (f) carries forward without substantial change the provisions of former subdivision (f). [It adds an explicit direction that a nonmovant who seeks relief from an inability to present essential facts to justify its opposition must describe the facts it intends to support. The level of detail in the description should fit the circumstances. In some cases it may be appropriate to sketch a direction of inquiry without attempting to describe facts not yet known, or to state a need to depose a person who has given an affidavit or declaration.]

A party who seeks relief under subdivision (e) ordinarily should seek an order deferring the time to respond to the summary-judgment motion.[29]

Subdivision (g). "Partial summary judgment" is a term often used despite its absence from the text of former Rule 56. It is a convenient description of well-established practices. A summary-judgment motion may be limited to part of an action, including parts of what would be regarded for other purposes as a single claim, defense, or even "issue." And a motion that seeks to dispose of an entire action may fail to accomplish that purpose but succeed in showing that one or more material facts is not genuinely in dispute. Former subdivision (d) supported the practice of establishing such facts for

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[29] This relatively brief statement addresses a potentially complicated problem. The Subcommittee recognized competing concerns. Nothing in the rule says that a Rule 56(f) request to defer consideration of the motion defers the time to respond. At least some courts seem to believe that a response is due on time whether or not the request has been ruled on. That approach can reduce the value of the request for more time. On the other hand it does not seem wise to add to the rule text a provision specifying that the request must be made by motion and that the motion suspends the time to respond. That could be a recipe inviting more Rule 56(f) motions for suspect purposes. Practice pointers in a Committee Note generally are disfavored, and may not do much. But this may be the most we can do.

the action. This practice is carried forward in a form that better conforms to common practice. The frequent use of summary judgment to dispose of some claims, defenses, or issues is recognized. The court's discretion to determine whether partial summary judgment is useful is more clearly identified. If it is readily apparent that summary judgment cannot be granted the court may properly decide that the cost of determining whether some potential disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from entering partial summary judgment on that fact. The court has discretion to conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event. [Exercise of this discretion may be affected by the nature of the matters that are involved. The polices that underlie official-immunity doctrines, for example, may make it important to grant partial summary judgment for a defendant as to claims for individual liability even though closely related matters must be tried on essentially the same claims made against the same defendant in an official capacity.]

Subdivision (g) also expressly recognizes that when the court denies summary judgment on the whole action it may identify facts that are genuinely in dispute. The specification may help to focus the parties in ways similar to the guidance that can be achieved through Rule 16 procedures. In some cases the guidance may be important because the denial is appealable. Official-immunity cases provide the most common example. The appeal does not extend to reviewing the determination that there are one or more genuine disputes of material fact. Instead the court of appeals addresses the questions of law presented when all of the facts left open for trial are resolved in favor of the plaintiff. A statement by the district court of the facts open for trial can advance the argument and decision of the appeal.

The court need not embody its identification of disputed facts in an order.

[Subdivision (h). Subdivision (h) carries forward former subdivision (g) with one change. Sanctions are made discretionary, not mandatory, reflecting the apparent experience that courts seldom invoke the independent Rule 56 authority to impose sanctions.]

{Bad-faith Affidavits or Declarations. Former subdivision (g) provided mandatory sanctions, including contempt sanctions, for submitting an affidavit under Rule 56 in bad faith or solely for delay. It is deleted. There is little evidence that the nominally mandatory character of subdivision (g) sanctions has been observed in practice. Sanctions remain available under Rule 11 and under the statutes that govern false statements under oath. Sanctions also may be available under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying proceedings. A court also might consider whether sanctions can be imposed as a matter of inherent power, an issue not addressed by Rule 56.}

Committee Note: Over- and Underline Version

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment questions. The standard for granting summary judgment remains unchanged. The language of subdivision (f) continues to require that there be no genuine dispute as to any material fact and that a party be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases. [The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, {1986,} 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, {1986,} 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, {1986}, 475 U.S. 574. ~~[Those decisions confirm that the summary-judgment standard is the same as the standard for judgment as a matter of law at trial; that a party that does not have the trial burdens on an issue can win summary judgment by showing that the party that has the trial burdens does not have evidence sufficient to carry the burdens; that the standard varies with the standard of persuasion that will govern at trial; and that the range of permissible inference is affected by the tests of the applicable substantive law.]~~

The practice and procedures implementing Rule 56 have grown away from the rule text. Many districts have adopted local rules amplifying, and at times modifying or even contradicting, what Rule 56 seems to say. These local rules have generated many of the ideas incorporated in these amendments. [Not surprisingly, some local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.]

Subdivision (a). The timing provisions in former subdivisions (a) and (c) are consolidated and substantially revised [in new subdivision (a)].

The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at {the earlier of} 30 days after the close of all discovery {or 60 days before the date set for trial}.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling order directions tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing. Scheduling order directions may be particularly important when discovery is planned in stages — including separation of expert-witness discovery from other discovery — that may correspond to separate occasions for considering summary judgment.

Local rules also may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

The time set for filing a crossmotion becomes important only when the time limit for making a motion has expired. A motion by one party does not of itself trigger any time limit for motions by other parties, which are governed by the "any time" permission in (a)(1).

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Subdivision (b). Subdivision (b) carries forward the provisions of former subdivision (e)(1).[30] The former reference to a "paper" is changed to "material" to ensure that all methods of preserving and communicating information are covered. Common sense should be used in applying the "sworn or certified copy" requirement to tangible things.[31] Sworn images or descriptions may be all that can practicably be provided.

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

Subdivision (c). Subdivision (c) is new. It establishes a uniform procedure for summary-judgment motions synthesized from the common elements found in many local rules.

The subdivision (c) procedure is designed to fit the practical needs of most cases. Some cases will benefit from different

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[30] We could add here a statement that "personal knowledge" may be satisfied by an affidavit or declaration executed by a person who conveys institutional knowledge, in a manner analogous to deposition testimony under Rule 30(b)(6). The objection is that this is the sort of gratuitous advice a Note should not offer on the proper interpretation of current rule language.

One suggestion is to add — probably as a separate paragraph? — a reference to "other competent knowledge." Perhaps something like this: "The requirement of personal knowledge is satisfied if the affiant or declarant is competent to testify to a matter of institutional knowledge."

It has also been suggested, however, that the Note should not explain "personal knowledge": the Note is not the place for gratuitous advice.

[31] Remember the question raised in the rule text: if we delete the second sentence of (b)(2), this Note paragraph will disappear.

procedures ordered by the court. The parties may be able to agree on an order that meets their needs and the court's needs, or the court may play a role in shaping the order under Rule 16.

The motion must describe the claims, defenses, or issues as to which summary judgment is sought. This requirement is expressed in terms that anticipate the "partial summary judgment" provisions in subdivision (g). A motion may address discrete parts of an action without seeking disposition of the entire action. [**Note**: earlier drafts required that the motion specify the judgment sought. That has been deleted for two reasons. The very description of the claims, defenses, or issues as to which summary judgment is sought should suffice. More importantly, the motion may not seek an order that qualifies as a "judgment" in Rule-speak. The often pesky Rule 54(a) defines a judgment to include any order or decree that can be appealed. A "partial summary judgment" often is not appealable.]

The movant must take care to honor the direction to state only specific material facts that are not genuinely in dispute. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have metastasized to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts. ~~[It may help to identify the facts in terms that could properly be made the subject of a Rule 49 verdict or of jury instructions. Some local rules address this practice in terms that help to focus the motion: "facts * * * that are essential for the court to decide only the motion for summary judgment — not the entire case" (D.Ore. LR 56.1); "facts which are absolutely necessary for the court to determine the limited issues presented in the motion for summary judgment (and no others)" (D.Hawai'i LR 56.1 — which also imposes a 1,500 word limit). If a motion unnecessarily addresses too many marginal facts the nonmovant may ask the court to dismiss the motion or to direct that~~

~~the motion be pared down to facts necessary to decide the motion, or the court may take such action on its own.~~][32]

The response must indicate what material facts are in dispute. A response that a material fact is not in dispute may be made only for purposes of the motion. The response thus should address the substance of the asserted fact without quibbling over niceties of expression.

The motion also must recite the specific facts relied upon to support summary judgment and cite the particular pages and paragraphs of the materials that support the facts. Materials that have not been earlier filed must be attached to the motion. See subdivision (c)(5). A local rule or order in the case may direct that the materials be gathered in an appendix, or a party may voluntarily submit an appendix. Direction to a specific location in an appendix satisfies the citation requirement.

Meeting the citation requirement may be difficult when the movant does not have the trial burden and asserts the negative proposition that the nonmovant does not have sufficient evidence to carry the trial burden. In some cases the nonmovant's responses to discovery requests, or stipulations, or other pretrial concessions, may be available for citation. In other cases the movant may be able to cite to materials that directly negate an element that the nonmovant must prove. But in still other cases no more may be possible than a simple assertion that nothing in the pretrial development of the case

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[32] The Subcommittee voted to delete the overlined material. It is retained only to illustrate a problem described by several participants in the miniconference. The statement of undisputed facts may run through hundreds of facts, most of them matters of minute detail, generating pettifogging responses. This problem is one source of the suggestion that Rule 56(c) should not require a statement of undisputed facts. It is indeed difficult to describe the kind of sensible behavior that can make it useful to require a statement of undisputed facts.

shows information that, if put in a form admissible at trial, could carry the trial burden. ~~The determination whether the movant has carried the summary-judgment burden in such cases is not made easier by the subdivision (c)(1)(C) description of the procedure for presenting the question.~~

A response must ~~specify any summary judgment that the responding party agrees is warranted. It also must~~ respond to the facts asserted in the motion and recite any additional facts defeating summary judgment. The citation of supporting materials must follow the same procedures that apply to the motion. But [as subdivision (c)(4)(B)(i) recognizes], a nonmovant who does not have the trial burden on an issue is not required to point to evidence that supports its position. It suffices instead to respond that the materials cited by the movant do not show that the fact is established beyond genuine ~~issue~~ dispute. No matter who has the trial burden, the nonmovant also may state that even if the movant has established the asserted facts the facts do not support judgment as a matter of law.

Subdivision (c)(3) recognizes that the movant may reply to the response. The time to reply is governed by subdivision (a)(3). The procedures that apply to a response also apply to a reply.[33]

A party who wishes to supplement the materials used and cited to support a motion, response, or reply may do so with the court's permission under subdivision (c)(6).

Subdivision (c)(7) directs that contentions as to the controlling law or the evidence respecting the facts must be made in a separate memorandum.

Subdivision (c)(8) resolves a question that has been answered differently by different local rules. The court may not grant a motion for summary judgment simply because a nonmovant has failed to

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[33] If we do not expressly invoke the response procedure in the text of (c)(3), this sentence probably should be deleted.

respond at all or has responded in a manner that does not comply with subdivision (c)(2) and (4). Instead the court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment burden. Subdivision (c)(8) further provides that on any summary-judgment motion, whether or not there is a proper response, the court need not examine materials outside those called to its attention under subdivision (c)(1) through (6). At the same time the court may, if it wishes, consider materials in the record that the parties have not cited, and also may request the parties to supplement the materials in the record.

Subdivision (d). Subdivision (d) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time for responses the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

Subdivision (e). Subdivision (e) carries forward ~~without change~~ the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute". [Words are added to express the requirement that although the summary judgment materials need not themselves be in a form admissible at trial, summary-judgment should be granted only on the basis of evidence that would be admissible at trial. There is no change in the rule that a court has discretion to deny summary judgment if information not admissible at trial shows a prospect that a nonmovant may be able to find sufficient admissible evidence in time for trial.]

[The reference to a genuine "issue" is changed to "dispute" to avoid any risk that other uses of "issue" to refer to a component of the case might cause confusion. The reference to "any material fact" is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for vicarious liability, the character of the driver's conduct is not material

as to this defendant, even though it would be material to a claim against the driver.]

Subdivision (e) also adds a new direction that an order granting a final summary judgment should ~~identify material facts that are not genuinely [at issue][in dispute] and that require judgment as a matter of law~~ state the reasons for the judgment. This ~~identification~~ statement is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But ~~identification of the facts that are not genuinely at issue will~~ the statement should address the dispositive facts and underlying law in a way that supports ~~inform~~ the decision whether to appeal and the argument and decision of the appeal. ~~[For the same reasons the court also should separately state its conclusions of law.]~~

Subdivision (e) is satisfied by ~~specifying facts that suffice to~~ identifying the general reasons that support the judgment. ~~If the court concludes that there is no evidence to support the claim that the defendant drove the car that collided with the plaintiff's car, for example, there is no need to determine whether there is any genuine issue as to the actual driver's negligence, the plaintiff's negligence, causation, injury, or other matters that would arise if there were a genuine issue whether the defendant drove the car.~~ At the same time the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that ~~in addition~~ not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver's negligence.

Subdivision (f). Subdivision (f) carries forward without substantial change the provisions of former subdivision (f). [It adds an explicit direction that a nonmovant who seeks relief from an inability to present essential facts to justify its opposition must describe the facts it intends to support. The level of detail in the description should fit the circumstances. In some cases it may be appropriate to sketch a direction of inquiry without attempting to describe facts not yet

known, or to state a need to depose a person who has given an affidavit or declaration.]

A party who seeks relief under subdivision (e) ordinarily should seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (g). "Partial summary judgment" is a term often used despite its absence from the text of former Rule 56. It is a convenient description of well-established practices. A summary-judgment motion may be limited to part of an action, including parts of what would be regarded for other purposes as a single claim, defense, or even "issue." And a motion that seeks to dispose of an entire action may fail to accomplish that purpose but succeed in showing that one or more material facts is not genuinely in dispute. Former subdivision (d) supported the practice of establishing such facts for the action. This practice is carried forward in a form that better conforms to common practice. The frequent use of summary judgment to dispose of some claims, defenses, or issues is recognized. The court's discretion to determine whether partial summary judgment is useful is more clearly identified. If it is readily apparent that summary judgment cannot be granted the court may properly decide that the cost of determining whether some potential disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from entering partial summary judgment on that fact. The court has discretion to conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event. [Exercise of this discretion may be affected by the nature of the matters that are involved. The polices that underlie official-immunity doctrines, for example, may make it important to grant partial summary judgment for a defendant as to claims for individual liability even though closely related matters must be tried on essentially the same claims made against the same defendant in an official capacity.]

Subdivision (g) also expressly recognizes that when the court denies summary judgment on the whole action it may identify facts that are genuinely in dispute. The specification may help to focus the parties in ways similar to the guidance that can be achieved through Rule 16 procedures. In some cases the guidance may be important because the denial is appealable. Official-immunity cases provide the most common example. The appeal does not extend to reviewing the determination that there are one or more genuine disputes of material fact. Instead the court of appeals addresses the questions of law presented when all of the facts left open for trial are resolved in favor of the plaintiff. A statement by the district court of the facts open for trial can advance the argument and decision of the appeal.

The court need not embody its identification of disputed facts in an order.

[Subdivision (h). Subdivision (h) carries forward former subdivision (g) with one change. Sanctions are made discretionary, not mandatory, reflecting the apparent experience that courts seldom invoke the independent Rule 56 authority to impose sanctions.]

{Bad-faith Affidavits or Declarations. Former subdivision (g) provided mandatory sanctions, including contempt sanctions, for submitting an affidavit under Rule 56 in bad faith or solely for delay. It is deleted. There is little evidence that the nominally mandatory character of subdivision (g) sanctions has been observed in practice. Sanctions remain available under Rule 11 and under the statutes that govern false statements under oath. Sanctions also may be available under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying proceedings. A court also might consider whether sanctions can be imposed as a matter of inherent power, an issue not addressed by Rule 56.}

NOTES: RULE 56 MINICONFERENCE

The Rule 56 Subcommittee held a miniconference at the new United States Courthouse in Manhattan on January 28, 2007. Committee members present included Hon. Lee H. Rosenthal, Committee Chair; Hon. Michael M. Baylson, Subcommittee Chair; Hon. C. Christopher Hagy; Robert C. Heim, Esq.; Ted Hirt, Esq. (for the Department of Justice); Hon. Randall T. Shepard; and Hon. Vaughn R. Walker. Anton R. Valukas, Esq., participated by telephone. Former Committee members Sheila L. Birnbaum, Esq., and Hon. Shira Ann Scheindlin were among the invited participants. Edward H.Cooper, Reporter, and Richard L. Marcus, Special Reporter, were present. Joe Cecil represented the Federal Judicial Center. Administrative Office Representatives included Peter G. McCabe, John K. Rabiej, James N. Ishida, and Jeffrey N. Barr.

The invited participants who attended, in addition to the former Committee members, included Alice W. Ballard, Allen D. Black, Edward J. Brunet, Edward D. Buckley, Richard B. Drubel, Muriel Goode-Trufant, Jeffrey J. Greenbaum, Gregory P. Joseph, Peter F. Langrock, Frank C. Morris, George F. Pappas, David Rudovsky, and Alan N. Salpeter. Alfred W. Cortese, Jr., and Sol Schreiber were observers.

Chief Judge Kimba Wood welcomed the participants to Manhattan and to the courthouse.

Judge Rosenthal expressed the Subcommittee's appreciation for being invited to use the court facilities. And she expressed thanks to all the participants for taking the time to come to appraise the current Rule 56 draft in light of their experiences with summary judgment. She noted that the "miniconference" format has been very helpful in the past in helping to move the Committee beyond the limits of its own members' experience. Richly experienced and thoughtful lawyers are able to appraise the implications a draft proposal may have and to advance the drafting process. This sort of help is an important part of the process in moving toward a proposal that is worthy of the intense scrutiny that follows on publication. This group of participants includes lawyers from a variety of practice backgrounds, including areas that involve frequent use of summary-judgment motions. They include both those who frequently represent plaintiffs and those who frequently represent defendants. This blend of perspectives will be important.

The practice backgrounds of the participants were briefly identified. Many of them observed that they had seen an increase in the frequency of summary-judgment motions; several said that at least one summary-judgment motion had been made in every case they had been involved with in the last ten years. This was often coupled with the remark that the motions usually fail — with at least one observation that this experience generally seems to have involved complex litigation. Judge Baylson built on these remarks to open the initial discussion. The group's experience shows that Rule 56 motions are more common now than at the time the participants entered practice. And they are more likely to be granted; thirty years ago orders granting the motions were seldom encountered.

Pappas observed that Rule 56 "as to be made better and has to work better." He often engages in patent litigation involving high technology products that have a market life cycle of 18 or 20 months. There should be procedures for prompt disposition, including trial while the dispute still has meaning.

Salpeter noted that in the large-scale commercial litigation he encounters, a few Rule 56 motions are won and many are lost.

Ballard said that she has been faced by a summary-judgment motion in every case she has litigated in the last ten years. The cases involve plaintiff job rights — dismissal, pension rights, False Claims Act.

Black suggested that this is another case of the rules process focusing on a practice that "ain't broke."

Scheindlin said that Rule 56 is a big part of a judge's job. "The papers come in boxes."

Lawyers should screen the motions more carefully; a Rule 56 motion should not become a matter of reflex.

Joseph agreed that Rule 56 motions are made in every case that is not dismissed, without adequate thought or careful presentation.

Rudovsky emphasized the frequency and importance of Rule 56 motions in civil rights cases.

Morris said that in defending employment cases careful use of Rule 56 is met with some success.

Brunet found that Rule 56 practice is very helpful in inducing settlements.

Goode-Trufant noted that her department has an average of 1,200 cases pending. Summary judgment is important, particularly in defending police conduct cases.

Buckley said that his job in pursuing employment claims is "to get past Rule 56." There are too many motions, and the motions are too voluminous.

Birnbaum observed that she had just won a summary-judgment motion in a multi-class class action. Rule 56 can be used successfully even in complex litigation.

Valukas sounded a common theme by observing that one side or the other had moved for summary judgment in every case he has litigated in the last ten years.

Judge Rosenthal explained that the current study was given added urgency when "the Style Project hit Rule 56." Close scrutiny of the Rule 56 text showed a great distance between "Rule 56 in practice and what Rule 56 says." Enough time has passed since rejection of the 1992 revisions to see whether improvements can be made.

Discussion then turned to the specific details of the current draft, generally proceeding subdivision-by-subdivision.

Draft 56(a): Timing

Judge Baylson noted that the draft of Rule 56(a) has been approved by the Advisory Committee as part of the time-computation project. But it has not yet been recommended to the Standing Committee, and it remains open for full discussion.

Subdivision (a) allows a summary-judgment motion at any time "until the earlier of 30 days after the close of discovery or 60 days before the date set for trial." This would depart from present Rule 56 in two directions. First, there is no waiting period — a plaintiff, for example, could serve a Rule 56 motion with the complaint. Second, there is a cut-off. Both departures, however, are designed as "default" provisions. Subdivision (a) begins: "Unless a different time is set by local rule or by an order in the case." It is anticipated that scheduling orders will set times in most cases, geared to the anticipated needs of each particular case. And room is left for adoption of local rules that might, for example, respond to special needs arising from more comprehensive local rules for particular types of litigation.

The first question was whether "the close of discovery" means the close of all discovery. The intent is to refer to the close of all discovery, recognizing that the needs of specific cases can be met by orders that, for example, stage discovery on specific issues and direct that summary-judgment motions be integrated with the completion of a defined discovery stage. It was suggested that "all" be added to the rule text: "after the close of all discovery.

Turning to paragraph (a)(2), it was suggested that the 21 days allowed to respond is too brief; it should be made 30 days. A second participant agreed that 21 days to respond to a long statement of uncontested facts "is very tight." And a third noted that he always has needed more time than 21 days; 30 days seems a minimum.

The cut-off at 60 days before trial was then questioned. It was noted that under Rule 26(a)(2) the presumptive time to disclose expert trial-witness reports is 90 days before the trial date, with an additional 30 days to disclose rebuttal expert witness reports. The result would be that the summary-judgment motion must be made on the same day as the rebuttal reports are filed. Even if the rule adheres to a 21-day response period, adding those 21 days and the 14 days allowed by (a)(3) to reply means that the motion will be submitted 25 days before trial. That is very short. Of course, this concern arises only in the "mythical district" that does not govern these questions by a scheduling order.

A judge asked whether these problems can be addressed by agreement among counsel, working through the provision that allows the timing requirements to be altered by order in the case. The response was that it doesn't work, particularly for the cut-off for the motion itself. It would be better to have a deadline that requires the matter — motion, response, and reply — to be submitted for decision at least 90 days before trial.

In the same vein, another judge observed that for the "mythical" case without a scheduling order, a procedure that contemplates submission for decision 25 days before trial will require that the trial date be pushed back. This judge usually sets the time by order at the close of fact discovery, before expert disclosure and discovery even begin. Another participant suggested the Committee Note should make it clear that the deadline is geared to the close of fact discovery because the motion and ruling may avoid or change the need for expensive expert discovery. But another participant observed that he needs to have expert discovery before summary judgment; in his civil rights practice, expert testimony commonly goes to the merits, not just to damages. Still another participant noted that the period should extend after the close of all discovery, noting that it is a deadline — a motion can always be made earlier.

A practitioner noted that when a motion is served close to trial, the lawyers still have to prepare for trial. A different practitioner noted that it is often difficult to know when discovery has concluded, and that often enough it is clear that discovery is continuing beyond the time set at 60 days before trial.

Turning to an omission from the draft, it was urged that there should be a provision for cross-motions. The calculation can be much like the dilemma involved with the decision whether to appeal. A party may believe that there is a plausible basis for a summary-judgment motion, but also believe that on balance it is better to proceed as promptly as possible toward trial. Proceeding toward trial saves the expense of a summary-judgment motion, which can be high, and advances the powerful effect an impending trial has in encouraging settlement. If another party is going to defeat these objectives by moving for summary judgment, on the other hand, the responding party should be free to respond with a cross-motion even though the time set for an initial motion has run. The provision could look for inspiration to the provisions for crossappeals, which involve similar concerns. The opportunity to invite the court to grant summary judgment for the nonmovant is not an adequate substitute. But another participant objected that a rule provision would encourage crossmotions that otherwise would not — and should not — be made.

A different omission was noted. It would be useful to include a statement that there is no right for a nonmovant to file a "sur-reply" to address the movant's reply to the nonmovant's response.

These complications led to the question whether it is useful to have a default time provision. Why not rely on scheduling orders for all cases? The draft does not reflect a judgment that the default time periods are desirable for all cases, setting a presumptive model for case-specific orders. Instead, it reflects concern that there may not be a scheduling order in every case — Rule 16(b) makes an exception for categories of cases exempted by local rule. And there are local rules. But the question persists: has anyone identified problems that arise from the lack of any deadlines in present Rule 56?

Discussion returned to the event that should measure the deadline. Support was urged for setting it to run from the close of discovery. An experienced lawyer usually knows pretty early in the case whether there are grounds for a serious summary-judgment motion. The rule should protect against motions delayed until a time that will require that the trial date be deferred. "It's pure hell preparing for trial." The motion should be made well before trial, and can be if there is serious support.

The contrary suggestion was made: instead of alternative deadlines, (a)(1) should set the deadline at a specified time before trial. One possibility would be "no later than 90 days before trial," remembering that the court can order otherwise. But a judge responded that even 90 days is a close thing: "I have a 60-day list to decide motions, and often it's a close thing." That pushes the decision back to 30 days before trial. A different protest was that a national rule cannot be written on the assumption that every case has a "date set for trial." Some cases do not.

This discussion led to a quite different suggestion. Building from the observation that Rule 56 motions often involved "boxes of papers" the judge must wade through, it was suggested that Rule 56 should look for inspiration to practice in SDNY. A motion could be made only after a prescreening conference with the judge. The conference could be initiated by a 2-page letter brief identifying a small number of "big issues" and stating why it is proper to consider them on summary judgment. The result of the conference would be an order identifying the issues that can be addressed by the motion.

Draft 56(b): Affidavits or Declarations

The first questions asked whether it is necessary to supplement the traditional reference to "affidavits" by adding "or declaration." 28 U.S.C. § 1746 is clear — a rule that requires an affidavit is satisfied by submitting a statement made under penalty of perjury. And it is not clear that "declaration" refers to § 1746 — although that is the intent, there is no single word that really does the job. New York practice uses "affirmation" to describe the substitute for a sworn statement, but that may be even more obscure in a federal rule. But if "declaration" is used in subdivision (b), care should be taken to ensure consistent usage throughout the rule.

Discussion turned to the second sentence, which revises Style Rule 56: "~~If a paper or part of a paper is~~ Other evidence referred to in an affidavit or declaration ~~a sworn or certified copy must be attached to or served with the affidavit~~ must be served with it in a form admissible at trial unless the evidence is already on file [with the court]." The changes began with concern that an affidavit may rely on electronically stored information, better referred to as "evidence" than as a paper. Then "form admissible at trial" was substituted for a sworn or certified copy, with the thought that admissible form should suffice without the present need to supply a sworn or certified copy. Disputes as to authenticity could be resolved if they actually arise. But the rule can be read to say that the evidence attached to the affidavit or declaration must be presented in a way that would overcome all trial objections to admissibility. It would be better to refer to "a form that can be made admissible at trial." (This view was seconded later in the discussion. A variation also was suggested: "a form that would be admissible at trial.") It was also observed that the draft seems to assume that anything on file with the court is in a form admissible at trial, which may not be the case. These observations were supplemented by noting that many traditional summary-judgment materials are not in a form admissible at trial. Affidavits are prominent examples. Deposition transcripts may or may not be admissible at trial. An instrument attached to a pleading may not be sworn or certified. For that matter, documents produced in discovery may present problems arising from custody of the documents. So the Celotex decision on remand to the court of appeals led to a ruling that summary judgment can be opposed by material that simply shows information that can be put in admissible form, or likely can be put in admissible form.

A related twist was the suggestion that this second sentence seems to invoke the Rules of Evidence for all Rule 56 materials. But that issue really is presented by draft subdivision (f).

Subdivision (b) addresses only the form of materials referred to in an affidavit and not already on file. It has that in common with present Rule 56(e)(1). Something should be done somewhere to make clear the proposition that summary judgment can be granted only on the basis of information admissible at trial — that is different from denying summary judgment on the basis of information that is not yet in admissible form. Perhaps the tag line for subdivision (b) should be changed to "summary-judgment evidence."

This observation was complicated by referring to a practice common in some federal courts. A summary judgment motion often is supported by an "affidavit" of counsel that warrants the authenticity of the supporting materials — "this is an accurate excerpt from the deposition of Witness 1," "this document was produced by the plaintiff in response to a Rule 34 request," and so on. So drafting subdivision (b) to cover only "evidence" referred to in an "affidavit" does not narrow it. Another practitioner retorted that this practice is peculiar to SDNY; it is not followed in most districts. A judge said that the SDNY practice is useful because it organizes the presentation and ensures that the summary-judgment "exhibits" are in a form admissible at trial. But it was responded that the organizing function is better performed by the statement of uncontested facts required by subdivision (c).

A different question asked whether supporting materials always need be attached to an affidavit. Suppose the affidavit describes the contents of "five pounds of telephone records," or extensive accounts.

Quite a different question was raised by asking whether a reference to admissibility invites Evidence Rule 403 rulings at the summary-judgment stage. It was suggested that "this happens now, particularly with expert witness affidavits."

Draft 56(c): Detailed Procedure

Statement of Undisputed Facts. Draft Rule 56(c) provides a far more detailed statement of summary-judgment procedure than present Rule 56 provides, built around a detailed statement of "specific facts that are not genuinely at issue." The statement must be supported by specific references to materials supporting the facts. This procedure is adapted from a large number of local district rules that, in various terms, impose similar requirements.

The first observation was that the draft makes all of this detail "part of the motion. It is extraordinarily expensive." And once the detailed "150-page" motion is made, the nonmovant "denies everything." The denials are as lengthy as the motion. Often the denials do not address the understood merits of the stated facts but instead address quibbles about the precise forms of stating the facts. This captious response behavior is driven in part by fears on consequences outside the immediate litigation. The rule should allow the parties to opt out of the detailed statement by agreement. Most parties think they get nothing out of it.

But, it was protested, this procedure has become very common because it makes things easier for the judge. That in turn makes possible prompter and better-informed rulings. The parties do get something out of it.

A rejoinder suggested that this requirement for a detailed and supported statement of specific facts "is a bad idea. The Committee should lead in the opposite direction," away from an accumulation of undesirable local rules. Professor Burbank, who was required by his teaching schedule to miss this meeting, has put it well. The proposals have at least five undesirable effects. (1) Practice will be more burdensome and expensive. (2) 90% of what is required is busy work. Without these requirements, the parties will do a pretty good job of identifying what is at issue. (3) Adding cumbersome requirements makes Rule 56 ever more a tool of delay and oppression of the weak. (4) There will be a further erosion of jury trial. (5) All of this will facilitate the continuing movement away from trial and toward trial by affidavit without cross-examination or any of the other benefits of a "real trial."

The perspective of plaintiff employment-law practice was offered by arguing that the proposal "retreats from Celotex." Under present practice a party can move by stating that there is a piece missing from the nonmovant's case, a piece that cannot be proved. The nonmovant can respond that this piece indeed can be proved. Employment cases commonly turn on intent. Findings of intent depend on how the facts are put together. If a movant has the first right to order the facts, and subdivision (c)(2) requires the nonmovant to respond by accepting the movant's fact framework, the nonmovant is put at a disadvantage. It is a big disadvantage.

A somewhat different criticism was that Rule 56 motions should be brought to a quick focus. "Long statements are a waste. They go in no particular order." It is wrong to introduce motion requirements by directing that the motion be "without argument"; it always is an argument. A separate memorandum of law should not be required. The facts should be organized in the way the case is organized, not as draft (c)(1)(C) suggests. The motion in a fraud action, for example, should be organized in the way the case is organized. The focus should be on the elements of the claim or defense, pointing to supporting materials. The response would enable the judge to see whether anything is missing. Ordinarily "the paragraphs will line up" by the elements of the claim. If clarification is needed, the court can hold a hearing.

The suggestion for organization by the elements of claim or defense was met by a counter-suggestion that focus should be on the "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles.

An alternative suggestion was that often a motion is best organized by a "chronology." Whatever the order, "there has to be a story." The movant tells the story. The response, organized around the numbered paragraphs of the motion, is orderly. It should be "like a complaint and answer."

A theme familiar to many procedure discussions emerged with the thought that something like the draft (c)(1) procedures can be useful in simple cases with no more than a few disputed facts. But in complicated cases it is "busy work." The story is told in the brief, not in the motion. The motion does not help the judge.

This view was supported, speaking from practice in civil rights cases, by urging that the motion should be focused on "material" facts. Local rules similar to draft (c)(1) help to focus the parties and court.

A judge reported similar experiences. The statement should be limited to "material" facts. Then it can be very helpful in small cases. But in big cases the statement generates collateral disputes. "The movant's stated fact 135 is really two propositions; I cannot respond until you make them state them separately." The statement can be an exercise in futility in such cases.

Another lawyer suggested that the detailed statement by the defendant helps him, representing a plaintiff, to get organized for trial. "I want to tell my story in my own statement of facts." But a pro se litigant cannot make that happen. Indeed there are unsophisticated lawyers who cannot. There should be an escape clause.

Still another practitioner said that "Rule 56 is an organization of facts. We need to allow the responding party to marshall the facts to tell its story. 'Without argument' means nothing. It's all argument."

The burden argument was embroidered by noting that the debates about summary judgment will be stimulated by the pending publication of two articles. One argues that summary judgment is unconstitutional. The second, agreeing with that argument, adds that it also is inefficient and unfair. Academic criticism of any draft that is seen as facilitating summary judgment will be intense. And the academic protests will spur protests by broader segments of the bar.

Further criticism was that more than 90% of summary-judgment motions are denied because they should not have been made. The motions are too long, and so are the responses. The court cannot wade through the morass. But there is a helpful practice in pretrial hearings to construe patent claims that may be useful more generally. After discovery every word in the claim that requires interpretation is listed separately in a chart. Each party addresses separately its position and supporting evidence as to each word. Judges find this very useful. The same thing could be done for each disputed fact under Rule 56. But it was asked whether "spreadsheet presentation" will work generally in all cases.

Drawing back, participants were reminded that draft (c)(1) is based on a great number of local rules. Many courts have found something like this useful. The practice avoids the risk that motion and response will be ships passing in the night. But it may not be needed for small cases, and it may present difficulties in the large cases. The difficulties may be augmented when practice wings out of control on excesses of adversary zeal. And it does seem important to allow the nonmovant to find a way to tell its own story without being bound to the movant's chosen frame.

Returning to the fray, a practitioner observed that there are a lot of false denials, based on the asserted ambiguity of the words used in stating an "uncontested" fact. It might help to call for a statement of what facts a movant thinks are established beyond dispute, and a response that identifies facts that are in dispute.

After an interval devoted to other questions, the problems of statement and counter-statement were resumed. The response provision in (c)(2)(A)(ii) might be modified to call, not for "additional facts" precluding summary judgment, but for "any additional facts or inferences from facts." Both in (c)(1)(C) and in (c)(2)(A)(ii), it might be better to omit the lengthy — and probably incomplete — itemization of various types of supporting materials such as depositions, documents, and the like. Instead the required reference could be to "particular evidence supporting" the facts or response. Or the bracketed itemization could be deleted, referring only to the supporting "materials."

Others were worried about "materials," and suggested "evidence." But it should not be "evidence admissible at trial." A judge observed that it has become common to make evidence motions on summary judgment, arguing the admissibility at trial of evidence relied upon to support or oppose summary judgment. This theme was carried further by observing that the problem of admissibility appears throughout the draft. One complication is that a lawyer may deliberately refrain from objecting at trial — evidence ruled out of consideration on a Rule 56 motion might well come in at trial even though it would have been excluded on objection. But at least Rule 403 rulings are not being sought on summary judgment.

The "evidence" question was attacked from a different angle. "Evidence" is not "fact." There is a risk that references to "evidence" and to "fact" in Rule 56 will cause confusion. What will decide the motion is the determination whether facts are genuinely disputed, not what evidence is.

A different perspective was taken in observing that it is difficult to frame a statement of undisputed facts that observes the line between "fact" and "inference." A response denying a statement that "intent" is not disputed, for example, may be treated as an "argumentative" response. These questions may be addressed in the argument called for in draft subdivision (c)(6), but they are hard to address in the statement and response form.

The inference problem was illustrated by another example. A common civil rights claim is that prison officials have shown deliberate indifference to a prisoner's medical needs. The facts

susceptible of direct testimony may be clear, but the inference is not. The prisoner should be able to respond to an official's statement that the lack of deliberate indifference is undisputed by saying that the official is simply missing the issue.

One suggestion was that the nonmovant can respond by identifying the facts that should be considered in determining the range of reasonable inferences and by describing the permissible inferences favoring the nonmovant. This suggestion was followed up by suggesting that the inference arguments can be addressed in the argument memorandum described by draft (c)(6), and need not be addressed also in the motion. But it was responded that "the mind doesn't work that way. You want the judge to see the inference issue when she reads" the statement of facts. This perspective suggests that Rule 56 should recognize the nonmovant's right to provide an independent statement of facts, not simply a response that initially tracks the movant's statement item-by-item.

Another practitioner thought that this is what generally happens. The first step is the motion identifying facts and record support for them. Then briefs are filed — often the briefs gloss over the evidentiary support. "This works when properly done." It helps to approach the question by asking what are the elements of the claim.

Discussion of inferences led to the observation that the draft uses "issue" in two different senses. It carries forward the current rule's reference — adopted in Style Rule 56 — to any "genuine issue" of material fact. But it also refers to summary judgment on any "issue." "Issue" in this second use seems better than "fact" — we may not want to provide for a motion describing the "claims, defenses, or ~~issues~~ facts" on which summary judgment is sought. "Matters" might be substituted for either "issues" or "facts," but it may be too open-ended. Although the present rule language has been treated as nearly sacred in the Style Project, perhaps the time has come to adopt a more natural contemporary expression. The standard could be expressed as a genuine dispute as to any material fact.

Federal Judicial Center Study. Various assertions having been made about the frequency of orders granting summary judgment, Joe Cecil was asked to report on progress in the Federal Judicial Center study. The study examines cases terminated in 2006. Summary-judgment motions were made in 16 of every 100 cases terminated in the federal courts. That frequency is not as low as might appear, remembering that significant numbers of cases are resolved by default, dismissal on the pleadings, or settlement before it seems plausible to seek summary judgment. There is significant variation in the frequency of motions across different case types. Motions are more frequent in civil rights cases, less frequent in tort cases. Some of the increase in frequency across the entire body of filings is attributable to changes in the composition of the case load toward types of cases that experience more frequent motions.

Across all case types, 60% of the Rule 56 motions are granted in whole or in part. Again, the rate varies across case types.

Ongoing work in the study will examine how long it takes the judge to decide Rule 56 motions. It may be possible to compare disposition time to the time to dispose of Rule 12 motions. It would be nice to be able to compare disposition times in districts that have local rules requiring undisputed-fact statements of the sort required by draft subdivision (c) with times in districts that do not have such local rules, but the comparison might be made unreliable by individual judge practices in districts that do not have local rules.

Three-stage presentation. Discussion cycled around a different question. The draft, drawing from the 1992 proposals, directs that the motion and response be made "without argument." The "argument" is to be made in a separate memorandum. The first suggestion was that there should be three steps: A motion that states in simple terms the undisputable facts that control judgment, matched by a response in equally simple terms; a separate statement that marshals the record materials that support or refute the asserted facts; and an argument.

This discussion was directed next to draft (c)(6), which directs that "a party must submit its contentions as to the controlling law or the facts in a separate memorandum * * *." Why direct that there "must" be a separate memorandum? The result may be wasteful duplication of matters already presented in the motion. The Rule 56 procedure should be streamlined, not made more cumbersome. The memorandum is likely to resemble the statement of uncontested facts before turning to arguments. Some judges prefer to get it all in one document. It would be better to reduce this to a direction to "submit its contentions ~~as to the controlling law or the facts~~ in a separate memorandum."

The next statement was that the brief is the most important document. It provides the opportunity for a party to tell its story. The brief can cite to the statement of facts without lengthy repetition. It can, for example, say "the defendant stabbed the plaintiff three times, see Statement at x - y."

A judge noted that there is strong support for a right to file a brief that recites the facts and argues how the law applies. If the brief is to be a full explanation of the law and facts, is there a need for the discipline provided by a separate statement of facts?

A practitioner urged that the statement of undisputed facts "is organized." It lays out the record. It anchors the advocacy in the brief. A judge added that it reduces the risk that "the ships will pass in the night."

Another judge recognized that draft (c)(1) may need revision, but observed that in most cases the facts are fairly straight-forward. The sequence of statement and brief helps the judge process the case. Many local rules require a statement of undisputed facts, but the terms vary, imposing a burden on the bar. It would be better to have a uniform national practice.

Another judge responded that "you're not going to corral all 94 districts. This rule will metastasize through the local rules." Is it possible to draft a rule that prohibits elaboration or departure by local rules?

A practitioner asked whether the concern about lengthy statements of uncontested facts that are not material to the case could be met by requiring that the facts be organized according to the elements of claim or defense? That would leave the free-form memorandum-brief for the task of addressing fact, inference, and law as an advocacy piece. Another practitioner suggested that greater supervision is needed. It is "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles. (The desire for judicial supervision was addressed directly by urging that a Rule 56 motion should be available only with the court's leave, a proposal noted separately below.) Organization is needed to avoid the burden of stating "every fact, and responding by quibbles."

A judge stated that "you lose the judge real quick if you list a lot of not material facts." The sanction is to deny the motion or, if the failure is in the response, to deem the facts admitted.

A practitioner asked what sanction will be imposed on a party who does not comply with the appropriate procedure? Draft (c)(7) addresses this only in part, stating that the court may grant summary judgment against a party who does not respond or whose response does not comply with (c)(2) requirements only if the motion and supporting materials show there is no genuine issue — that the movant has carried the summary-judgment burden. The draft does not address a motion that fails to comply, assuming that the court may simply refuse to consider the motion. Later discussion renewed the suggestion that the court can deny a motion that is not supported by a proper statement of undisputed facts.

Pre-motion hearing. Earlier discussion tied the undisputable fact statement to an argument for a premotion hearing. If we allow a motion only on leave of court granted after a hearing, with an order that identifies the facts to be addressed by the motion, a requirement that the facts be stated separately and supported by specific references to the record is fine. And it will work to require the nonmovant to respond in that order. But simply limiting the required statement to "material" facts will not resolve the problem. This argument was renewed by a suggestion that the "urge" to require statement and counterstatement of undisputed and disputed facts might be channeled through a pre-motion conference with the court. The problem is that present practice generates too many fact statements that run far too long, supported by boxes of materials. Few motions should be so cumbersome. Most cases will turn on a small number of essential facts. A conference with the judge can focus the motion and response on the truly important facts.

Rule 56 burdens. Quite a different question was raised about the need to frame a rule that addresses the nature of the movant's burden when the nonmovant has the trial burden of production. The draft, in (c)(2)(B)(i), allows a nonmovant to respond with the simple statement that the movant has not carried the Rule 56 burden of showing that there is no genuine issue as to the assertedly undisputed facts. It should be balanced by stating in (c)(1), or somewhere, that a movant who does not have the trial burden does not have to cite to materials that fail to show what the nonmovant has to show. A defendant in an antitrust action, for example, may believe that the plaintiff has no evidence of the claimed conspiracy. The rule should be clear that the defendant need only state that the plaintiff has no evidence.

This question directed the discussion toward the draft provision (c)(2)(B)(i). The 1992 draft attempted to restate the 1986 Supreme Court decisions in rule text, identifying moving burdens that correspond to allocation of the trial burden of proof and a standard that varies with the standard of proof required at trial. There is at least some ground to suspect that the Judicial Conference rejected the 1992 proposal because of dissatisfaction with this effort. This concern has engendered a wariness about further attempts to address the Rule 56 moving burden in rule text. The (c)(2)(B)(i) item was added to offset the seeming command of (c)(2)(A)(ii) that the nonmovant must respond by an item-by-item listing of record sources that refute the movant's statement of undisputed facts. It is clear that when the movant has the trial burden a nonmovant can respond with a simple assertion that the movant's showings have not carried the summary-judgment burden of showing support in record materials that would require judgment as a matter of law if introduced at trial. An alternative provision that speaks directly to the moving burden is included at the end of the draft rule materials. This alternative would distinguish between a movant who has the trial burden and one who does not.

The practitioner who raised the question responded that it is not desirable to refer to only part of the Celotex allocation of the moving burden. As soon as the rule addresses the need to support the motion — as by separately reciting facts and pointing to materials that support or refute them — it becomes necessary to address the complete allocation. "The paradigmatic Rule 56 setting is when the party who has the trial burden has no evidence. You need it both places." (c)(1)(C) should balance (c)(2)(B)(i) — it should state that a movant who does not have the trial burden can carry the summary-judgment burden by "pointing out" that the nonmovant lacks evidence. The Celotex opinion immediately describes the statement that the movant must "show" the absence of evidence as "pointing out" the absence of evidence. A party can "point out" the lack of evidence by stating simply that the nonmovant has none, without having to point to anything specific that negates the nonmovant's position.

This question was expressed in terms of the Celotex setting: How does Celotex "show" that the plaintiff's late husband never was exposed to any Celotex product, at any time or any place? Celotex makes it clear that the movant does not have to make an affirmative showing that negates an element that must be proved by the nonmovant at trial. The movant does not have to "prove" that the light was green; it suffices to show that the nonmovant has no evidence that the light was red.

It is difficult to reconcile this proposition with a rule that directs the movant to cite to particular parts of record materials.

This discussion led to a further exchange about the question whether there is any reason to distinguish between trial burdens and the summary-judgment burden. Summary-judgment practice could be made an image of trial practice by allowing a movant who does not have the trial burden to demand summary judgment without any showing at all. At trial a party who does not have the burden wins judgment as a matter of law unless the party who does have the burden produces sufficient evidence to carry the burden. So it could be done before trial. But the Celotex requirement that the movant "show" the lack of evidence has not meant that. In effect the Court qualified its statement that summary judgment is not "disfavored" by imposing a burden that distinguishes summary judgment from trial. Any attempt to further relax the movant's responsibility raises fundamental questions about the wisdom of relying on predictions of what a trial record will be without having a trial.

The first piece of advice was that the rule should not be complicated by express references to burdens and shifting burdens.

The next observation was that what movants and courts fear is the late-filed affidavit. So in the Celotex case, Celotex twice asked the plaintiff by interrogatory to identify the circumstances of her husband's exposure to any Celotex product. Twice she failed to respond. It was only after Celotex moved for summary judgment that she provided affidavits and other materials that may have shown a prospect that — if reduced to admissible form — she could carry the trial burden of production. But that "fear" may address only a desire to put orderly procedure ahead of a well-informed decision whether there is a prospect of success at trial.

Another practitioner suggested that it may not be necessary to refer to the trial burden. It suffices to allow a response that the movant has failed to show there is no genuine issue. That approach could be built into (c)(2)(A)(ii), leaving it to the nonmovant to decide whether it will suffice to rely on this general assertion or whether it is better to point to record materials that are not described by the movant and that show there is a genuine issue. But it was asked whether it is possible to direct a movant to show a basis in the record for asserting that the nonmovant lacks evidence — doesn't this resolve to "make them prove their case"? There is a "nasty drafting problem" here. "Pointing out" sounds good, but what does the movant point to?

A practitioner responded that this is not a problem. The movant relies on deposition testimony, admissions, or the like, to show there is no evidence to support a necessary element of a claim or defense. Another practitioner elaborated. The movant will depose the witnesses identified in the initial disclosures — those, for example, identified as having information about the plaintiff's exposure to the defendant's asbestos products. Then the defendant moves for summary judgment, showing that none of the deponents has testified to exposure. Another practitioner agreed that this is not a problem. Draft (c)(2)(B)(i) can be discarded.

A judge asked whether explicit Rule 56 text is important as a guide to lawyers who do not have the sophisticated grasp of practice common to participants in this conference? A first response was that it is "a whole lot more efficient" to allow the simple response that the movant has not carried the burden of showing there is no genuine issue. This response should be specifically identified in rule text. Another response was that "this is the distinction between motion and brief" — the brief can point out that the movant has not carried the moving burden.

Yet another response was that the alternative draft provision addressing burdens is accurate and clear, but might be improved in the part that addresses a movant who does not have the trial burden, who can "~~show~~ point out that the nonmovant does not have sufficient evidence to carry its burden at trial." Another practitioner objected that the reference to "sufficient evidence" seems to

invite weighing. It would be better to say "does not have evidence to avoid judgment as a matter of law at trial." This view was supported by yet another practitioner.

Doubts whether Rule 56 should refer to trial burdens were renewed. Will any expression of this complication in the Rule 56 moving burden generate confusion? Will it generate complaints that Rule 56 is being amended to skew the burdens to the disadvantage of some litigants? A practitioner expressed the view that any rule addressing these problems will generate confusion. But another practitioner expressed approval of the (d)(2)(B) alternative draft, thinking it better than the less comprehensive effort in draft (c)(2)(B)(i). Yet a different practitioner returned to the suggestion that the (c)(2)(B)(i) provision should be balanced by adding a parallel statement in (c)(1)(C) that a movant who does not have the trial burden can point out that the nonmovant lacks evidence to carry the trial burden. Still another suggested that these wrinkles would be better addressed in the Committee Note than in rule text.

(c)(3) was discussed briefly. The draft provides that a movant can reply to a response by using the response procedure. It was observed that if the response is an affirmative defense, the movant should be allowed to respond to the affirmative defense in all the ways that a nonmovant is allowed to respond to the initial motion. This discussion was tied to discussion of draft subdivision (c)(5). This provision gives the court discretion to permit a party to supplement the materials supporting a motion, response, or reply. The response to a motion, for example, may point to the need to adduce materials that were omitted from the initial identification of support, or to find and supply new materials. Or the movant may want to add materials to support a reply to the response, particularly if the response raises new issues not included in the motion. A practitioner approved the implicit requirement that a party must obtain the court's leave to supplement the summary-judgment record. This requirement may assuage another concern — that this provision may seem to invite motions to reconsider after summary-judgment is granted or denied.

Admissible evidence. There was an early observation that draft (c)(7) anticipates the summary-judgment standard articulated in draft (f) but does not incorporate the bracketed reference in (f) to "[evidence available for use at trial * * *]." The suggestion was that (c)7) should not refer to admissible evidence.

(c)(7) Draft subdivision (c)(7) provides that even when a nonmovant fails to respond, or responds in a form that does not comply with subdivision (c)(2), the court can grant summary judgment only if the motion and supporting materials show there is no genuine issue of material fact. It also says that the court may — but need not — consider materials outside those called to its attention by motion, response, and reply. An academic participant observed that there are cases that say these things. A practitioner added that the cases are right. But another practitioner thought that if there is no response the court should be authorized to find that a fact asserted by the movant is not contested. A judge pointed out that some local district rules state that failure to respond puts a nonmovant at risk of a "deemed admission." There was no further development of these positions.

Draft 56(d): Court Action

Draft subdivision (d) sets out three propositions established by decisions under present Rule 56. The court may (1) grant summary judgment for a nonmoving party; (2) grant or deny a motion on grounds not raised by motion or response; or (3) raise the possibility of summary judgment on its own.

Discussion began by agreeing that notice should be given before the court grants or denies a motion on grounds not raised by the parties; the brackets around this provision in the draft should be removed.

That notice provision provoked the suggestion that notice also should be required before the court grants summary judgment for a nonmoving party. It might be better, for that matter, to adopt

an explicit cross-motion provision. The nonmovant needs notice it is at risk so it can respond. Another practitioner agreed that notice should be required, comparing the provision that allows the court to deny an unopposed motion.

The question whether Rule 56 should duplicate the Rule 12(b) and 12(c) provisions that require a reasonable opportunity to respond when a pleading motion is converted to a summary-judgment motion was raised and put aside as not necessary.

Further discussion suggested that all of the obvious alternatives should be listed in subdivision (d), particularly if it continues to be tag-lined as "Court action": (1) grant summary judgment in whole or in part; (2) deny summary judgment in whole or in part; (3) grant summary judgment for a nonmovant; * * *.

Draft 56(e): Cannot Present Opposing Facts

Draft 56(e), which parallels present Rule 56(f), includes a provision directing that a party who seeks more time to oppose summary judgment describe the facts it intends to support. This provision is drawn from an "offer of proof" provision in the 1992 proposal. The first practitioner reaction was that something like this is a good idea — the nonmovant should be forced to do more than simply ask for time. Another practitioner, however, asked how specific must be the showing of the facts you do not yet know? A third asked whether it would suffice to say that you want to depose an affiant to find out more about what the full testimony would be?

Another practitioner suggested there may be some disagreement in the cases about the court's authority to grant summary judgment after denying a Rule 56(f) motion for more time.

A different question was asked: should we assume that a motion for more time is sensible only after discovery has closed? A judge responded that the court can reopen discovery, and that in any event the case-management order may anticipate such issues. Another judge further observed that the draft provision that allows a Rule 56 motion at any time will increase the frequency of motions to defer consideration pending further discovery. It is difficult to be more specific in the rule.

A different question asked whether a party requesting more time should be required only to offer "specified reasons," as in the draft, or whether good cause should be required. An academic noted that the case law is not clear. Some courts say that argument in a brief is the substantial equivalent of an affidavit, but it would be better to adhere to the draft, which requires an affidavit or declaration of reasons. A judge responded that "a lawyer's affidavit is an argument."

Finally, a question was raised as to the relationship between the effect of a motion to defer consideration of a Rule 56 motion and the time to respond to the motion. It was said that the First Circuit has ruled that the time to respond can continue to run, and expire, while the court is considering the motion to defer. All participants agreed this was a bad idea. There was no discussion of the question whether a motion to defer consideration should toll the time to respond. Tolling might create an artificial incentive to move for deferral. Perhaps this problem should be left to the initiative of the party seeking to defer consideration — if there is a problem with the time to respond to the motion, the party should address the problem in its motion to defer.

Draft 56(f): Final Grant

Draft subdivision (f) raises several issues. One is whether, and in what detail, a court should be required to explain an order granting summary judgment. Another is whether the rule should add words similar to the draft, authorizing summary judgment if "evidence available for use at trial shows" the absence of a genuine issue.

Trial Evidence: A practitioner observed that "available" for trial presents awkward practical problems. No one can be sure whether a witness will be available at the time of trial, whether by subpoena or otherwise. What we want to describe is evidence that would be admissible at trial. Another practitioner agreed that "available" is too demanding. Perhaps the rule should simply cross-refer to the subdivision (c) requirements for motion, statement of uncontested facts with supporting references, and so on.

Another practitioner protested that requiring evidence admissible at trial is too limiting. A nonmovant should be able to oppose the motion by other forms of showing.

A judge asked whether it would be better to refer to evidence that "may be admissible at trial"? A different judge thought this formulation presents distinctions that may be too subtle for easy administration.

Another practitioner asked whether the reference to available evidence responds to a problem found in practice. The history of this provision traces back to 1992. The Committee then was concerned that present Rule 52(e) requires that supporting and opposing affidavits set forth such facts as would be admissible in evidence, but does not impose a similar admissibility requirement on discovery materials used to support or oppose a motion. Inclusion of this provision in the current draft does not reflect any judgment whether it is needed.

Other practitioners supported "may be admissible." The declarant in an affidavit, for example, may be available at trial.

It was observed that some of the difficulty may lie in the word "evidence." But it may be difficult to substitute some more neutral word, such as "information." An affidavit plainly can be used to support or oppose summary judgment, but ordinarily is not admissible as evidence at trial. The affidavit may suffice even though it points to information that is not itself in admissible form — the affiant, for example, may swear to hearing another person say something. The prospect that this hearsay information might be available in a form admissible at trial may justify denial of summary judgment, at least until there is no reasonable prospect that it can be produced in admissible form. But at some point, why deny summary judgment when the nonmovant cannot show any reasonable prospect that a trial will yield sufficient evidence to avoid judgment as a matter of law?

A different practitioner asked about evidence that may be impeached at trial? The witness who recants at trial? The draft forces the nonmoving party to engage in cross-examination before trial. A judge asked what happens if a party has a "dynamite impeaching document" it wants to use to blow a witness out of the water: must it be revealed on summary judgment? Another judge said it must be, if that is the only way to defeat summary judgment. A practitioner observed that this is a problem only if the document is protected by work-product doctrine; if it is not protected, it is discoverable in any event (even though protected against disclosure, if solely for impeachment, by 26(a)(1) and (3)). Still another judge agreed that if the movant has carried the Rule 56 burden, the nonmovant has to show the impeaching materials to defeat summary judgment. A practitioner agreed; it is not enough simply to say "I will destroy this witness at trial."

Another practitioner observed that he tries some cases without taking depositions. He wants to cross-examine a witness known to be weak at trial.

An academic observed that the discussion of impeachment raises the question of credibility in an unusual setting. Ordinarily credibility is resolved at trial, and at trial is resolved by the trier of fact. But the Supreme Court has provided deliberately considered dictum stating that there is a category of witnesses that must be believed. A jury or judge may be required to believe a witness who is disinterested, uncontradicted (whether by direct or circumstantial contradiction), and unimpeached. In theory, it is only this kind of witness that raises the concern about impeachment

at the summary-judgment stage. When such a witness appears, summary judgment is not defeated by a mere hope that other witnesses or cross-examination at trial will lead to contradiction. Nor will an unsupported hope to impeach defeat summary judgment.

This discussion led a practitioner to recall the fear that practice is evolving away from live trial and toward trial by affidavits. We risk diluting the role of cross-examination if we provide that summary judgment can be defeated only by showing the cross-examination questions, or even conducting the cross-examination, before trial.

Explanation: The second question posed by draft subdivision (f) is how much explanation should be required when the court grants a "final" summary judgment. The draft includes a bracketed provision that the judgment "[should state material facts that are genuinely at issue and that require judgment as a matter of law {and should separately state conclusions of law <on those facts>}]."

The first comment was that this draft looks like a findings requirement. It would be a lot of work, and would provide ammunition for appeal. Present Rule 52(a) expressly says that findings of fact are not required.

The next comment anticipated draft subdivision (g), noting that in some settings appellate courts are calling for findings to support a denial of summary judgment.

A third comment asked whether it would suffice to read the explanation into the record; a judge responded that a separate writing would not be required.

Another practitioner urged that Rule 56 should require "something like this." The court should give "reasons" for granting summary judgment. And why limit the direction to "final" summary judgment? It was observed that the Committee Note defines a "final" summary judgment as one that concludes the action or one that is entered as a partial final judgment under Civil Rule 54(b). As compared to findings on an interlocutory partial summary judgment, or on denying summary judgment, there is a higher obligation to explain an appealable order that is not vulnerable to revision as the case proceeds.

Yet another practitioner observed that an articulated opinion that provides a basis for appeal is necessary to make the system work. It facilitates the appeal. In like vein, support was expressed for the Third Circuit requirement of "an explanation sufficient to permit the parties and this court to understand the legal premise for the court's order."

Two other practitioners suggested some form of the 1992 draft: "recite the law and facts on which the decision is based."

Further discussion suggested that any provision for an explanation should be expressed as "may," not "should." This suggestion was not developed further.

Draft 56(g): Partial Summary Judgment

Subdivision (g) expressly recognizes "partial summary judgment" practice. It ties to the proposition recognized in earlier subdivisions — summary judgment may be appropriate on all or part of a claim or defense. The earlier subdivisions would benefit from further revision to make this still clearer.

It was noted that present Rule 56(d) says that the court "shall if practicable" determine what material facts exist without substantial controversy. This direction is softened in Style Rule 56 to "should." The current draft softens it still further to "may."

A practitioner thought it an improvement to revise the present rule to remind the court of this "useful option." A second practitioner agreed, recommending that the rule choose "may" rather than "should" to express the discretion to resolve facts. Discretion, sensitive to case needs, is important.

He recommended another edit: "an order ~~stating~~ identifying any material fact * * *"; "stating" seems to set the matter too firmly in concrete, when there may be occasions to reconsider as the case develops.

In response to a question, it was agreed that the draft provision that the partial summary judgment fact is "established in the action" means that it is not to be a subject for dispute at trial.

A judge said that the common practice is to grant "partial" summary judgment as to causes of action, not individual issues within a cause of action. It was noted that present Rule 56(a) refers to summary judgment on all or any part of a claim. One practitioner thought the rule text should refer to claims or defenses.

Draft 56(h): Sanctions

The draft sanctions provision in subdivision (h) carries forward present Rule 56(g), but makes sanctions discretionary rather than mandatory. Brief discussion focused on the adequacy of Rule 11 and other sanctions. The Rule 56 sanctions can be more severe; there is no "safe-harbor" provision akin to Rule 11; and misuse of affidavits may present special problems that require special sanctions. Opinion divided evenly on the question whether Rule 56 should continue to include separate sanctions.

Draft Rule 12(e)

The draft materials include several versions of an amended Rule 12(e). The focus on Rule 12(e) has grown out of the overall consideration of notice pleading, discovery, and summary judgment. The Advisory Committee has concluded that it is not yet appropriate to propose general modifications of notice pleading. But the question remains whether pleading can be used more effectively to advance disposition of actions that now are pursued too far into discovery and other pretrial work. Present Rule 12(e) provides for a more definite statement only when a pleading is so unintelligible that a response is not possible. The drafts present the question whether pretrial management can be enhanced by providing a case-specific tool that requires more specific pleading.

A judge opened the discussion by asking whether anyone present had seen a Rule 12(e) motion granted. Another judge responded that the Swierkiewicz decision invites the motions; "we get them." Another judge stated that in some cases, after some discovery, he requires the plaintiff to file a statement of fact contentions — this device is not limited to the initial pleading stage.

A practitioner noted that she had won a few orders granting more definite statements, and that the orders were not limited to immunity cases. A judge commented that it is surprising that there are not more Rule 12(e) motions in immunity cases.

It was noted that preliminary work by the Federal Judicial Center indicates that Rule 12(e) motions "are seldom decided." It is too early to tell, but it seems likely that the pleader responds to the motion by an amended pleading.

A practitioner seconded the observation of an academic who was unable to attend the conference: Rule 12(e) revisions will be politically charged. They are likely to be seen as yet another effort to rein in plaintiffs and to advantage defendants. The Advisory Committee should not take up this question. Another practitioner thought that some version of the draft models would be a useful advance.

Summary Discussion

Judge Baylson invited concluding remarks, stating that the discussion had been extremely helpful. Many useful points were made. The conference will advance the Subcommittee's progress toward proposals for the Advisory Committee meeting in April.

Greenbaum offered five suggestions. (1) If a plaintiff can move for summary judgment with the complaint, the defendant should be allowed at least 21 days after the responsive pleading is due to respond to the motion for summary judgment. (2) It may be desirable to allow counsel to agree on the times for motion, response, and reply, but the rule should require court approval. (3) The rule should address cross-motions, and provide 30 days to respond to a cross-motion. (4) Most importantly, the (c)(1) statement of undisputed facts could be limited to "core or material facts essential to the claim." The Committee Note could observe that in many cases only a few facts will be core or material. (5) The national rule should provide that a supporting brief is filed with all the other materials, and be designed to preempt local rules. Later he added a sixth suggestion: there should be more oral arguments on summary-judgment motions. Judges widely discredit the value of oral argument, inappropriately.

Salpeter said that (1) a separate statement of facts is a good discipline. It is used for a separate brief. "This is not chaos at all. It works. It is a lot of paper. (2) Partial summary judgment is a reality. It should be expressed clearly in the rule. (3) The problem of fact inferences should be addressed in rule text. (4) The court should articulate reasons for granting or denying a motion, "certainly the grant." (5) Cross-motions should be "handled in the rule." It could be a mirror of the rule for first filing.

Drubel argued that together, Celotex and Anderson v. Liberty Lobby show that Rule 56 practice mirrors trial practice on a motion for judgment as a matter of law. A party who does not have the trial burdens on an issue can, at trial, insist that it is entitled to judgment as a matter of law unless the party who does have the trial burden carries the burden. The same should be true on summary judgment: a party who does not have the trial burden should have no more burden on summary judgment than to make a request that it be awarded judgment unless its adversary shows enough evidence to carry the trial burden. This statement prompted an exchange of views. It was suggested that because Rule 56 motions occur before trial, the Rule 56 burden should require the movant to show that the nonmovant does not have a right to jury trial. It was responded that the question can be seen by asking what is it that triggers the obligation to come forward with evidence: trial? Or, usefully, a pretrial motion by the party who does not have he trial burden? A different protest was that Celotex incorporates the Anderson decision for the purpose of invoking the standard of proof required at trial — if the trial burden requires clear and convincing evidence, that standard must be recognized in measuring the sufficiency of the evidence. Celotex still puts the burden on the moving party to show that the nonmovant cannot carry the trial burden. This protest was met head-on: why should we not do before trial as we would do at trial, after adequate opportunity for discovery — it is easier for the party who has the trial burden to show how it will carry the burden than it is for the opposing party to "show" or "point out" that the burden cannot be carried. Another participant agreed that a movant who does not have the trial burden should not be required to "list evidence"; the rule should say so, or else the rule should not say that a party who does not have the trial burden can respond to the motion by stating simply that the movant has not shown that it can carry the trial burden to the point of winning judgment as a matter of law. The rule can say that the movant can point to the absence of facts to support the nonmovant's trial burden. Another participant suggested that the draft helps by identifying the alternatives available for response by the nonmovant.

Further discussion in this vein observed that after discovery, the defendant may know that the plaintiff does not have sufficient evidence. The rule should say that it is enough to point that out. Another practitioner added that the rule should include the alternative draft that spells out the Celotex definition of the Rule 56 moving burdens.

Ballard said that "we should not forget that inferences are evidence." Impeachment — credibility — is evidence. Attacks on testimony are evidence. These things should not be relegated to the briefs. Inference is fact, not argument. "Intent" in an employment case is a fact. We should not rely on a defendant's statements about intent at a deposition; there may be serious credibility problems

that are not reflected in the deposition transcript. Apart from that, the judge should not have to write an opinion in denying summary judgment. But it would be OK to recognize discretion to tell the parties what issues the judge considers open for trial.

Black urged that Rule 56 should preserve the values of trial by jury. The Committee should consider the prospect that requiring a premotion conference will reduce the burdens arising from the identification of "uncontested" facts and designation of record sources. Or the rule might limit the number of facts a party can claim are undisputed. A judge suggested that Rule 16 gives the general authority to direct a pretrial conference before a Rule 56 motion can be made — is it necessary to duplicate this in Rule 56, or to cross-refer to Rule 16? Black responded that it might be better to go further, to eliminate the statement of undisputed facts. The rule could provide that the motion identifies the undisputed facts that entitle the movant to judgment as a matter of law. The first step is notice to the court, with a brief statement of reasons. The next step is the conference with the court to determine how the motion will be presented.

Scheindlin offered these suggestions: (1) the alternative deadline for a Rule 56 motion set by draft subdivision (a) at 60 days before the date set for trial should be deleted. If it is retained, it should be set at a period longer than 60 days. (2) The rule should address the nature of the Rule 56 burden for a party who does not have the trial burden. It remains a puzzle to understand how a movant can point out what isn't there. This party should be allowed to make a one-page motion, without identifying evidence. The nonmovant's response will point to the materials that support its case. The movant's reply will do the heavy work of showing — if it can be done — the inadequacy of the support asserted in the response. (3) The idea that the parties be required to meet before a Rule 56 motion can be made is attractive. A premotion conference is a possible alternative. "I do this in cases that are not pro se." The conference limits the motion, and can be used to set the time for motions — often the time is set after the close of fact discovery. (4) Credibility is a hard issue to deal with when the nonmovant says "I can show the witness is not credible."

Joseph suggested that there is no value in requiring the parties to meet and confer before a Rule 56 motion. A premotion conference can be helpful, but there is no need to provide for it in the Rule. This device should be left for use by judges who can make it work.

Morris (1) agreed that a premotion conference adds expense, and expressed concern that some judges "will never allow the motion to be filed. (2) Rule 56 should address partial summary judgment. (3) A time cut-off 60 days before trial makes no sense. (4) A party who resists a summary-judgment motion by attacking credibility should be required to show a basis for the attack — allowing a motion to be defeated by a bare statement that credibility is an issue would disfavor Rule 56, contrary to the Celotex admonition that summary judgment is not disfavored.

Brunet observed that Charles Clark preferred "simple, brief, succinct rules." Draft subdivision (c) on motion, response, reply, and court responsibilities and powers, is not succinct. The final paragraph of the Celotex opinion celebrates summary judgment. Summary judgment is a tool that weeds out sham cases. We need it. Pleadings do not do the job. The discussion today has not seemed a celebration of summary judgment. On a different front, the draft does not address "sham" affidavits. The second generation of cases addressing self-serving, self-contradicting affidavits allows explanation of the change in position, recognizing authority to rely on the affidavit to defeat summary judgment. The Supreme Court seems to have blessed this approach in the Cleveland dictum. It may be appropriate to leave these problems out of the rule text, but perhaps they could be addressed in the Committee Note.

Goode-Trufant said (1) that practice under SDNY Local Rule 56.1 leads her to strongly approve the statement of uncontested facts. (2) The Local Rule 56.2 requirement that an attorney moving for summary judgment notify a pro se adversary of Rule 56 requirements and consequences is useful. (3) Premotion conferences often are very helpful — often a plaintiff withdraws some claims when

confronted with the law. (4) One SDNY judge requires a joint statement of facts; this practice may avoid the problem arising when the movant frames the facts.

Buckley (1) recognized that intent and motive are particularly unsuited to resolution on summary judgment. Intent, inference, and credibility "often cannot be put down on paper. Only a jury can pin this Jello® to the wall." (2) Rule 56 is a device that may soak up as much time as it saves. Summary judgment is over-used in employment cases; there is an assembly line in some courts. The FJC statistics show that "District A" in the Eleventh Circuit grants summary judgment in 95% of the employment cases — many of these cases are not suitable for summary disposition. "Human rights should not be sacrificed to judicial efficiency." At the same time, partial summary judgments can be useful. (3) Evidence determinations that should be left for trial are being made on Rule 56 motions. (2) The draft (c)(2) provisions for the nonmovant's response are reasonable, but it would be better to have the response provide its own statement of facts that are in dispute and that defeat judgment as a matter of law. That will allow the nonmovant to tell its story.

Langrock (1) noted that summary judgment is used in a variety of circumstances. It is used in small cases, not only the complex cases described by many of the participants. In big cases, it can help formulate positions. (2) "Courts are not for lawyers or judges but for litigants. Ease and efficiency should not stand in the way." (3) Cross-examination is the best way to get at the truth. Summary judgment should be closely guarded lest it defeat the values of cross-examination at trial. (4) Local rules in Vermont require a lawyer to provide a pro se adversary a notice set out in the rule; this might be a useful addition to the national rule.

Judge Rosenthal noted in summation that neither the Subcommittee nor the Advisory Committee have decided what might be recommended for publication as proposed Rule 56 amendments. This meeting was arranged to enable the Committee to draw from the kinds of resources the participants in fact brought to the discussion. "The horse has not left the barn. We know there is a barn, but not what the horse looks like." The Committee will welcome any further suggestions.

Judge Baylson thanked all the participants for taking the time and making the effort to attend, and urged all to continue to offer advice.

Notes: Rule 56 Subcommittee, January 29, 2007

The Rule 56 Subcommittee convened a meeting after the conclusion of the miniconference held on the same day at the new federal courthouse in New York City. Judge Baylson set the agenda of the meeting as discussion of drafting suggestions to consider in light of the conference discussion.

Draft Rule 56(a)

Agreed time: The draft sets default deadlines for summary-judgment motions, but the primary source of deadlines will be scheduling orders or, perhaps, local rules. The parties can agree to request a specific schedule in the scheduling order. Should the rule text refer to the possibility of deadlines set by party agreement? The consensus was that the reference to an order suffices. The Committee Note can point out that the parties can request adoption by order of any agreement on a specific schedule.

Deadline Before Trial: The alternative default deadlines set in (a)(1) were chosen deliberately. But the discussion was persuasive in showing that a deadline 60 days before the case is set for trial does not allow enough time to complete the response and reply and then decide the motion. The result will be that the trial is pushed back. Some judges hate moving trial dates.

Deadline After Discovery: The deadline set after the close of discovery might distinguish the stages of discovery by referring to the close of fact discovery, but completion of expert discovery may be necessary. The simple reference to the "close of discovery" means the "close of *all* discovery. Should that be made explicit in the rule? Discussion noted that discovery can progress in many different paths. Although there may not be a trial date, it still may be easier to set a deadline X days before the trial date. That will forestall motions made on the eve of trial, either for want of timely preparation of the case for summary judgment or for the deliberate purpose of delaying trial.

The default character of these deadlines was emphasized. The question is what is the latest time that is fair if there is no scheduling order or local rule. In thinking of the latest fair time, a discovery reference-point should be the completion of all discovery. If a reference to the trial date is also included, it must be remembered that many courts set the trial date at a docket conference. More importantly, 60 days before trial is not enough. Setting an appropriate interval before trial becomes tangled, particularly when there are complex staged discovery plans. It may be best to look to a deadline measured from the completion of all discovery. In response to a question about what to do if the parties agree on an extension of the discovery deadline, it was urged that the parties should be required to get an order approving the extension. But it was responded that the parties should not be forced to go to court for a management order. A letter agreement is enough.

Further support was expressed for measuring the deadline from the close of all discovery. There is no need to work off the trial date. The rule might read "at any time until 30 days after the discovery deadline." But this may not be enough time if the most important information is gathered at the end of the discovery period. 30 days may not be enough, but the trial judge can work on that. One judge agreed that judge control is enough, noting that he commonly sets the summary-judgment deadline at 14 days after the discovery deadline. Perhaps there is no need to set a default by a precise number of days? But if we want a default, some arbitrary time seems called for.

Discussion returned to the possibility that the default deadline could be set at 120 days before trial. That is the period set by the local rules for the Northern District of Texas, after considerable deliberation. But it was observed that the draft lets the judge set this sort of deadline by order, or a court to do so by local rule.

There was no clear conclusion as to the mode for setting a default deadline. But it was suggested that the default character of any (a)(1) time provisions should be emphasized in the Committee Note, perhaps with the observation that most courts set case-specific deadlines by order.

Time to Respond: It was recognized that often 21 days will not be enough time to respond to the motion. This shows the importance of a scheduling order, but does not determine whether a longer period should be set in rule text.

It seemed to be agreed that 14 days is an appropriate time for a reply to a response.

Discussion turned to the suggestion at the conference that it might be wise to add an (a)(4), stating that there can be no sur-reply. It was observed that an express rule provision might encourage people to file a sur-reply with a motion for leave.

Crossmotion: The sur-reply discussion was tied to the cross-motion question. It was observed that crossmotions are often made in actions that involve a "complete record." Review on an administrative record is a clear example. Insurance coverage disputes are another example. But it may be difficult to draft a rule for crossmotions. And the judge is very likely to work this out in a briefing schedule. For that matter, subdivision (d) recognizes the authority to grant summary judgment for a nonmoving party, or to grant or deny on grounds not raised by the motion or response.

Some support was expressed for adding a crossmotion provision to the response. That would allow 21 days (or 30 days) for both response and crossmotion. Each party need not worry that it must file a motion on the last day for moving, lest the other party file a motion, even when neither party actually wants to incur the expense and delay of summary judgment in a case that does not seem well-suited to summary judgment. Comments in the Committee Note may not be as clearly focused.

It was responded that a party who has a good summary-judgment motion should file it according to the deadline for moving. Strategic crossmotions should not be encouraged.

Response After Early Motion: Footnote 2 of the annotated draft notes the problem that arises then a Rule 56 motion is served at the outset of an action. If the motion is served with the complaint, the response is at best due with the responsive pleading, and often is due before the responsive pleading. Perhaps the rule should be revised to allow a response to the motion 21 days after the time set for any responsive pleading required by the nonmouvant. This might be made a separate subparagraph in (a)(2).

Discussion of the "early motion" question extended to the question whether it is wise to allow a motion at "any time." Perhaps an initial freeze should be carried forward in the model of present Rule 56(a). This discussion was brief; no conclusion was expressed.

Draft Rule 56(b)

Statement of Facts The draft provides that an affidavit must "set[] out facts that would be admissible in evidence." Variations might include "in a form admissible at trial," or "may be admissible in evidence," or "evidence and inferences to be drawn from it.

A first question asked about the affidavit of an expert who relies on non-admissible evidence. The response was that the expert testimony is admissible, so there is no problem.

It was noted that "evidence" is offered to prove "facts." The constant reference to "facts" in Rule 56 "is quite odd." So is the term at the beginning of the second sentence in (b): "Other evidence" referred to in an affidavit. But it was suggested that many will react with suspicion if Rule 56 is amended to delete references to "facts," particularly in stating the standard. "Fact" is the language of judgment as a matter of law.

Support was expressed for "evidence that may be admissible." Motions on admissibility are now being made in conjunction with summary judgment. It can be useful to get pretrial rulings, although the standard perhaps should be more relaxed in the sense that doubts are resolved in favor of admissibility at least for summary-judgment purposes.

A judge noted that she had never encountered a motion to strike a summary-judgment affidavit on Evidence Rule 403 grounds. But it is proper to object on "rank hearsay" grounds, or for lack of personal knowledge.

A special problem was noted: what happens if after executing an affidavit the affiant dies before the Rule 56 motion is decided?

It was observed that it may invite trouble to refer to evidence that "may be" admissible. At least two members responded that "admissible in evidence" would be a good term.

It was objected that "this seems to be getting too complicated." Why not just say that the motion must be supported by things showing there is no genuine issue. We cannot capture in the rule the concept of what can be considered.

A further suggestion was that it would be better to track the language of the Style Project: "facts that would be admissible in evidence," just as draft subdivision (b) does.

Alternative suggestions addressed the second sentence: "Other admissible evidence referred to in the affidavit or declaration must be served with it ~~in a form admissible at trial~~ unless the evidence is already on file." Or "Other evidence of facts that would be admissible at trial referred to in the affidavit or declaration must be served with it * * *."

Draft Rule 56(c)

Draft subdivision (c)(1) requires a statement of specific facts not genuinely in dispute; (c)(2) requires an item-by-item response, as well as addition of new facts said to require trial; (c)(1) and (c)(2) both require detailed identification of supporting materials.

Discussion began as a three-way dialogue among judges.

The first comment was that the conference participants made a strong case that subdivision (c) is too complicated. This judge has found exactly the problems they describe. The motion provides a laundry list of immaterial matters. There is no meeting of the minds on what is in dispute. The interplay of memoranda — briefs — shows what is in dispute without looking to the mechanistic statements.

A response asked whether this problem could be deflected by introducing the requirement with "Unless the court orders otherwise"? That would establish the requirement as a default rule for garden-variety cases, leaving it to the judge to decide how to "keep it simple." The judge could require a premotion conference if that seems useful in a particular case.

The first judge suggested that this approach would be upside down. Why not have a simple approach in Rule 56, leaving it to the judge to order the more complicated approach when a particular case seems to warrant it?

The second judge responded that most judges think that a statement of undisputed facts, and response, make life easier in most cases. The statement and response make sure the parties travel on the same road. It is difficult to unravel a summary-judgment motion without requiring the nonmovant to point to the evidence relied upon to show a genuine issue.

The first judge picked up the conference suggestion that it might be better to require that the motion be organized around the claims and defenses in the case. The draft does not do that. The typical Rule 56 motion points to an element missing from the claim or defense.

A third judge lamented that federal courts have a reputation in some quarters for making parties jump through formal hoops. The specific statement requirement may be seen as front-loading the process, requiring investments that are unnecessary because the case could have been disposed of at lower cost, and perhaps faster, without them. One of the judges in the conference noted the

"pain of collateral sniping whether facts are material or contested." Lawyers are too unwilling to admit anything, in part for fear of impact in later cases. We need to be comfortable that a specific statement requirement is useful before we adopt it. Specific statements are not required in her court, and it is not clear that the practice suffers for the absence. It would be interesting to find out whether the rate of granting motions varies between the many courts with local rules that impose such requirements and other courts. "Clearer and better organization is good. It is better if we can do that without costly, formalistic requirements. The present draft seems too costly, too formalistic."

Yet another judge observed that experience with both regimes shows that a required statement helps. But we should let the nonmovant file its own statement of facts. The draft calls first for a response to each fact asserted in the motion, and then for a statement of additional facts. It would be better to let the nonmovant pull its story out to be more visible. And the movant should be required to reply to the response. It is not an acceptable response or reply to assert a lack of information — my court has a local rule treating this as a deemed admission. Under this practice, the briefs do not repeat the facts.

Another judge recognized that many districts indeed find value in the required detailed statement and response.

Drawing back for a moment, it was agreed that draft (c)(1)(A) and (B) are appropriate. The motion must describe the claims, issues, or defenses as to which summary judgment is sought, and must specify the judgment sought.

Then it was recognized that the Advisory Committee should be presented with a draft that illustrates a specific-statement requirement, whether or not the Subcommittee recommends adoption. Among the alternatives, one would carry forward the draft of (C), adding "material" — "recite in separately numbered paragraphs the specific material facts that are not genuinely in issue * * *." A second would be to provide that the court may require the statement by order in a case; this alternative might include recognition of local rules that require specific statements in categories of cases. This second alternative avoids the risks that inhere in generalizing the experience of some districts and local rules into a national rule. But the local rule alternative in effect allows for opting out of the national rule; experience with local opt-outs under the 1993 initial disclosure provisions illustrates the risks of this approach. A third alternative would be to require the statement unless the court excuses it by order in the case; this would encourage use in the routine cases where it is most likely to be useful. This approach is similar to that taken in Rules 26(a)(1) and (f).

The reference to "specific [material] facts" was said to involve a different concept of "fact" than subdivisions (b) or (e). (b) requires an affidavit or declaration to set out "facts" that would be admissible in evidence (or some similar admissibility requirement), and (e) includes an optional provision directing a party who needs more time to present "facts" to justify opposition to a motion to describe the "facts" it intends to support.

Supporting materials: Draft (c)(1)(C) and(c)(2)(A)(ii) include optional language enumerating categories of materials that can be used to support or oppose the argument that there is no genuine issue of fact. The enumeration raises the familiar "laundry-list" question. It was concluded that the list should be retained in brackets with a recommendation that the Advisory Committee decide whether to keep it in the rule.

Form of Motion, Statement, and Argument The form of motion, statement, and argument were discussed. The rule could provide that the motion is the simple statement of claims, issues, defenses, and requested judgment, present (A) and (B). The statement of facts would be a separate entity, not part of the motion. It was asked whether this would invalidate local rules specifying a different form. One answer was that it would.

Supplemental Materials: The draft (c)(5) provision for permission to supplement materials supporting a motion, response, or reply was approved.

"Argument," "Memorandum," Brief It was quickly agreed that the (c)(6) reference to a "memorandum" should be replaced by "brief." Then it was suggested that the three components should be motion, statement of facts, and brief. The rule should set out what each of these three things must do. Then the rule should address the same three components for a response. This "will have the feel of traditional practice." The reply might be addressed in similar terms. If these steps are built into the first paragraphs, paragraph (6) dan be dropped entirely.

Draft (c)(1) begins: "Without argument, the motion must * * *." It was agreed that "without argument" should be deleted. The provisions for motion, statement, and brief will address the allocation of argument among the supporting procedures.

"At issue" Successive drafts have clung to the traditional reference to "genuine issue as to any material fact." But "issue" in this sense seems antiquated. The thought is better expressed as "dispute." Consistent substitution of "dispute" for "issue" throughout Rule 56 will have the further advantage of avoiding confusion with other references to "issues" as components of a claim or defense. Future drafts will show the change in brackets to facilitate final choice by the Advisory Committee.

Draft 56"(d)" Alternative — Rule 56 Burdens

Discussion of the statement of facts led to discussion of the summary-judgment moving burden. The first suggestion was that the provision for responses, (c)(2)(A)(ii), should be augmented to recognize a response that there are no facts to support the movant's claim. A second suggestion was that the draft should retain, but only as an illustration to support decision by the Advisory Committee, the provision that a response may state that a movant who has the trial burden has failed to establish the absence of a genuine issue.

This discussion led to the draft "alternative" provision that identifies the moving burden. It was noted that this alternative won substantial support during the conference discussion. It might be modified to adopt the position of one conference participant, allowing a movant who does not have the trial burden to "~~show~~ point out that the nonmovant does not have sufficient evidence to carry its burden at trial." But this suggestion was countered by the observation that "show" seems more familiar rule language.

A further question was raised: does showing a lack of "sufficient" information imply weighing of a sort that is inconsistent with the standard for judgment as a matter of law? Or is this the best description — to say only "does not have evidence" might invoke the abandoned "scintilla" test, while the current standard for judgment as a matter of law refers to "no legally sufficient evidentiary basis"?

It was pointed out that some of the comments had suggested that identification of the moving burden could be worked into the separate provisions describing motion and response. A movant could be directed either to cite particular information "supporting" the facts or else to assert that the nonmovant lacks information to support facts the nonmovant must prove to prevail. The response was that it would be better to have a separate subdivision addressing the moving burden, in the form of the draft alternative. Many motions and responses betray total disregard of the effect of trial burdens on summary-judgment burdens. An express provision would educate the less adept lawyers, directing their attention to propositions that will improve the practice.

It was suggested that the draft would be improved by referring only to the "trial burden," not to the burden of production or the burden of persuasion.

Integration of a burden subdivision with the rest of the draft will take some work. It may prove best to place it as subdivision (c), ahead of whatever emerges to define the motion, response, reply, supporting identification of facts, and argument. Further discussion would be helped by drafting that is entirely severable, so that deletion of the burden subdivision would not require adjustment of any other subdivision. But that approach may degrade the drafting of other provisions, and could artificially close off discussion of partial references to the moving burden. Alternative drafts may be necessary.

Draft 56(d): Court Action

Additional Actions It was agreed that a subdivision describing permissible court actions should include the most obvious acts — partial or complete grant or denial. This could be in one paragraph: "(1) grant or deny summary judgment in whole or in part." Or the alternatives could be emphasized by using two paragraphs: "(1) deny summary judgment; (2) grant summary judgment in whole or in part." ((1) could be expanded -- "deny summary judgment in whole or in part," but that may not be necessary if (2)'s recognition of a partial grant implies partial denial.)

Grant for nonmovant Sympathy was expressed for the concern that it may be unfair to grant summary judgment for the nonmovant unless the movant is given notice that it needs to argue against that step. Notice will have an effect similar to inviting a crossmotion by the nonmovant, although the movant is likely to respond even if the nonmovant is not stirred to argue that it should win summary judgment. It was concluded that notice should be required before the court grants summary judgment for a nonmovant, grants or denies a motion on grounds not raised by the motion or response, or considers summary judgment on its own. This approach is likely to be drafted by combining these acts into a single paragraph: After giving notice and a reasonable time to respond, the court may: * * *."

Draft 56(e): Affidavits or Declarations Unavailable

The discussion concluded that no changes need be made in the draft provisions, drawn from present Rule 56(f), addressing a nonmovant who is unable to present facts to justify opposition to summary judgment. The bracketed language requiring a description of the facts the nonmovant intends to support won some support, with the justification that usually the summary-judgment motion is made after discovery so the nonmovant can fairly be asked at least to identify facts it hopes to support. This requirement is not much different from practice under the present rule, which generally requires a showing of the nature of the evidence the nonmovant seeks and an explanation of its bearing on the motion. The nonmovant is required to describe what evidence it hopes to get and where and how it hopes to get it. It was further agreed that there is no need to add a "good cause" requirement. The enumerated alternatives, including "any other just order" — such as granting summary judgment — imply full discretion.

Draft 56(f): Judgment Granted

Disputed Material Fact The draft carries forward the traditional standard looking for "no genuine issue as to any material fact." Earlier discussion agreed that the next drafts would be "no genuine [issue][dispute] as to * * *." It was suggested that practice properly focuses on the absence of support for an essential fact — why refer to "any" material fact? The response was that this part of the rule has built up a strong interpretation. The materiality of a fact is often conditional. The color of the traffic signal is material if the defendant was driving or owned the car that collided with the plaintiff's car. It is not material if the defendant was not the driver or owner. Perhaps the Committee Note could explain this proposition as an explanation of the reasons for changing "issue" to "dispute" without changing the rest of the traditional formula.

Evidence Available The draft turns summary judgment on consideration of "evidence available for use at trial." But summary judgment rests on evidence in the summary-judgment record. It may be

better to revise the expression: "admissible evidence ~~available for use at trial~~ shows * * *."

Explanation: The second sentence in the draft says that an order granting final summary judgment should state the material facts that are not genuinely at issue [disputed] and that require judgment as a matter of law. It includes an optional extension that includes a separate statement of conclusions of law. The greater the detail required or strongly suggested, the greater the resistance these exhortations will encounter. Perhaps a gentler suggestion would be better, drawing from the Third Circuit's "explanation sufficient to permit the parties and this court to understand the legal premise for the court's order." Something like: "should state the reasons [for the order]." This might be addressed in a way that separates the explanation from the order, in a manner similar to Rule 58. "An order or memorandum granting * * * should * * *." The Committee Note might observe that an explanation on the record suffices, just as Rule 52(a) permits findings of fact and conclusions of law to be stated on the record after a hearing.

Draft Rule 56(g): Partial Summary Judgment

A first drafting improvement was made: "if summary judgment is not ~~rendered~~ granted on the whole action * * *." Another suggestion followed: "an order ~~stating~~ identifying any material fact * * *."

Although it is common to refer to partial summary judgment, some concern was expressed that traditional purists might resist this label. If it is partial, in this view it is not a "judgment." But this is a legitimate motion. Rule 56 can be used to dispose of part of a case — an "incomplete," or "partial" disposition is a useful device to control the further progress of the case. This use should be legitimated, whatever the caption. We want to provide both for a motion that does not address the whole case and for an order that does not dispose of the whole case.

Inconclusive discussion followed a suggestion that in practice motions seem to address at least all parts of a claim or defense. It would be rare to find a motion addressing only part of a claim or defense — for example, a motion addressing only definition of the relevant market as part of a larger antitrust claim, arguing that a merger should be assessed in the market for all flexible wrapping materials rather than a narrower market for a specific material. But that does not mean that there is no value in an order that separates out some facts from the broader motion and resolves them. So on a sexual harassment claim, summary judgment may be appropriate as to the claim. Or it may be that the motion establishes there was touching, but does not establish whether a complaint was made. The claim may go forward, but with one or more facts established. The drafting question was left open: is it useful to elaborate this provision by referring separately to claims, defenses, and "issues" or "facts"?

It was pointed out that the draft properly leaves partial summary judgment to the court's discretion. On a retaliation claim, for example, there may seem to be an issue whether the plaintiff engaged in protected activity, but to be no issue whether the defendant knew of it. A judge might prefer to try both issues. Leaving all issues open for trial is particularly attractive if there are enough issues to require trial in any event and if the alternative issues are likely to involve evidence that overlaps the evidence to be presented on the issues that clearly require trial.

There was little discussion of subparagraph (g)(1)(B) that recognizes discretion to identify facts that are genuinely at issue (disputed).

Draft 56(h): Sanctions

Discussion of the decision whether to carry forward present Rule 56(g)'s sanction provisions was inconclusive. Concern was expressed that deletion of this provision might create negative inferences, limiting inherent power or even the authority to penalize false swearing outside the provisions of Rule 11. Rule 56 sanctions do not involve any of the complications of Rule 11 provisions establishing a safe-harbor and limiting the purposes and levels of sanctions. But Rule

56(g) does not seem to be much used. The conclusion was that this question will be better decided if the Federal Judicial Center study is able to shed some light.

NOTE ON RULE 56(C)(8) DRAFT

Draft Rule 56(c)(8) frames the most important conceptual question in the draft. If the bracketed language is included, it would say that even if there is no response — or if the response does not conform to Rule 56(c) requirements — the court must determine whether the movant has carried the summary-judgment burden by examining the materials cited to support the motion.[1] This position can be explained as providing that although a defendant can be defaulted for failure to answer, failure to respond properly to a motion for summary judgment does not justify a default judgment for the movant.

That is not the only respectable position. Far from it. This Note describes a few cases found in random reading, not exhaustive research, that illustrate the diversity of views to be found in the courts of appeals. Local "deemed admitted" rules provide much of the support for treating an inadequate response or no response as admitting facts the motion asserts as undisputed. James Ishida's memorandum describes these rules in detail.

Three alternative approaches can be identified. One, noted above and incorporated in the bracketed language in draft Rule 56(c)(8), requires the court to evaluate the merits of a summary-judgment motion even when there is no response. Evaluation would require first an examination of the materials cited to support the assertions of undisputed fact and then a determination of the legal consequences of whatever facts are found established beyond genuine dispute. The movant's summary-judgment burden is not reduced by the absence of any response.

A second alternative is to accept as undisputed, in the absence of any proper response, any fact the motion asserts to be established beyond genuine dispute; to determine whether there is a genuine dispute as to any fact the nonmovant does properly challenge in the response; and to determine the legal consequences of the melange of facts established in this fashion.

A third alternative would be to grant a motion without further consideration when there is no response. (This approach might seem too drastic when the nonmovant attempts a response but does not manage the proper form. Drafting could become complicated, however, if an attempt were made to allow the court to grant the motion without evaluating the merits after unsuccessful attempts to prod the nonmovant into a proper response.)

The diverging views reflect important competing concerns. Resolving the competition is not easy. But it may be better to reach resolution in Rule 56 text than to leave the question in continuing uncertainty.

If something like the "deemed admitted" approach is adopted, it may be better to keep it simple. It would be possible to build on one of the "deemed admitted" local rules, but it seems better to avoid the common "deemed admitted" phrase. "Deemed" expresses patent fiction. "Considered," the language of the Style Project, is little better. "Admitted" may cause justifiable anxiety, even if coupled with the formula adapted from Rule 36(a): "for purposes of the pending motion only." It is better to describe the fact as "conceded" or "accepted" for purposes of the motion.

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[1] The draft reads:

> **(c)(8)** The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c) [if the motion and supporting materials show that the movant is entitled to summary judgment]. The court is not required to — but may — consider materials [of record] outside those called to its attention under Rule 56(c)(1)-(6).

This approach could be implemented by creating a new paragraph in subdivision (c), perhaps as (c)(5):

> **(c)(5)** Failure to respond in the manner required by Rule 56(c)(2)[2] to a fact asserted to be not genuinely in dispute accepts the fact for purposes of the motion.[3]

The "deemed admitted" approach also could be drafted into the paragraph on the response. As an example:

> **(c)(2)** A response * * *; and
>
> **(D)** [concedes][accepts] for purposes of the motion any fact the motion states as not genuinely in dispute unless the fact is disputed as required by subparagraph (A) with the support required by Rule 56(c)(4).

Under either drafting alternative, the nonmovant, by failing to dispute an asserted fact, accepts the fact for purposes of the motion, but the court still is not excused from the duty to decide the motion on the basis of the disputed and conceded facts.

The third alternative probably would focus directly on (c)(8). One version would simply strip out the language bracketed in the proposed text:

> **(c)(8)** The court may grant summary judgment against a party who fails to respond to the motion or whose response does not comply with Rule 56(c) ~~if the motion and supporting materials show that the movant is entitled to summary judgment~~. The court is not required to — but may — consider materials [of record] outside those called to its attention under Rule 56(c)(1)-(6).

To limit this approach to a complete failure to respond, a few more words would be removed:

> **(c)(8)** The court may grant summary judgment against a party who fails to respond to the motion ~~or whose response does not comply with Rule 56(c)~~ * * *."

The more complex combination of the approach that amounts to default if there is no response and a softer approach to default if there is no proper response might look something like this:

> **(c)(8)** The court may grant summary judgment against a party who fails to respond to the motion or who, after notice that an attempted response does not comply with Rule 56(c), fails to make a proper response. * * *

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[2] This would be (c)(2) and (c)(3) if we write (c)(3) to require the movant to respond to new assertions of undisputed fact in the response.

[3] If we leave to the Committee Note any provision for the effect on the time to respond of a Rule 56(f) motion asserting the need for additional discovery or investigation, it seems better to rely on the Committee Note to address the similar problem that arises when a party fails to respond while the motion is pending.

Duty To Review Unopposed Motion

Several cases reflect the view that the court must determine whether the summary-judgment burden has been carried even if there is no response.

De la Vega v. San Juan Star, Inc., 1st Cir.2004, 377 F.3d 111, 115-116, is clear. The plaintiff did not file a timely response to the defendant's summary-judgment motion. The court of appeals, relying on earlier First Circuit decisions, ruled that summary judgment cannot be granted "'merely for lack of any response by the opposing party.'" Instead, the court must inquire whether the moving party has met the burden of demonstrating undisputed facts that entitle it to summary judgment. Summary judgment "solely as a sanction for * * * failure to file a timely response" conflicts with Rule 56(e). At the same time, the court does not have to accept a late response. It may accept as true all material facts set forth by the movant "'with appropriate record support.'" A similar statement appears in Cordero-Soto v. Island Finance, Inc., 1st Cir.2005, 418 F.3d 114, 118. These cases, however, live in some tension with other First Circuit decisions ruling that the "deemed admitted" provision of a local summary-judgment rule can be invoked to treat as uncontested the movant's statement of undisputed facts when the nonmovant has responded in an amorphous form that does not comply with the local rule's specific-response requirements. See Alsina-Ortiz v. Laboy, 1st Cir. 2005, 400 F.3d 77, 79-81; Mercado-Alicea v. P.R. Tourism Co., 1st Cir.2005, 396 F.3d 47, 50-51.

Vermont Teddy Bear Co. v. 1-800 Beargram Co., C.A.2d, 2004, 373 F.3d 241, 243-245. "[F]ailure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the district court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law." "[T]he district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion."

Cusano v. Klein, 9th Cir.2001, 264 F.3d 936, 950. Quoting itself quoting itself, the court says: "A '"local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, [and] hence impermissible under Rule 83."'"

U.S. v. One Piece of Real Property at 5800 SW 74th Ave., 11th Cir.2004, 363 F.3d 1099. "[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion." "The district court need not sua sponte review all of the evidentiary materials on file at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary materials. * * * At the least, the district court must review all of the evidentiary materials submitted in support of the motion for summary judgment." A footnote observes that S.D.Fla.L.R. 7.5(D) provides that a statement of undisputed facts is "deemed admitted" when not controverted by an opposing statement. But a deemed admission applies only to the extent a statement is supported by specific references to the record. "The district court must * * * review the record and determine if there is, indeed, no genuine issue of material fact." 363 F.3d at 1103 n. 6.

The statements in some of these opinions that Rule 56 requires examination of the motion turn on a close reading of present Rule 56(e). Style Rule 56(e)(2) reads:

> **(2)** ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment *is properly made and supported*, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by

> affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, *if appropriate*, be entered against that party.

This interpretation is that the court must determine whether the motion is "properly supported," so that summary judgment "is appropriate." The 1963 Committee Note explaining the addition of this provision lends some further support. The purpose was specifically to overcome a line of decisions allowing a party to "contest" a fact by simply pointing to the contrary allegation in its own pleading. The Committee addressed a situation in which the nonmovant "does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial." "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule." Most importantly, the next-to-last sentence says: "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Silence as Admission

The Seventh Circuit appears to lead the way in ruling that failure to respond specifically to a statement of undisputed facts as required by local rule, including specific citations to the record, establishes that the facts are uncontested. In Schrott v. Bristol-Myers Squibb Co., 7th Cir.2005, 403 F.3d 940, 944, the plaintiff failed to respond to three paragraphs of the defendant's statement asserting there was no causative link between the defendant's product and the plaintiff's neurological symptoms. "The district court was entitled to take these facts as uncontested, as the local rule provides. * * * By conceding that this essential element of her case could not be proven, Schrott left the court with no option but to grant the defendants' summary judgment motion." N.D.Ill. L.R. 56.1(b) provides that failure to controvert the movant's stated facts is deemed an admission. "We have consistently held that a failure to respond by the nonmovant as mandated by the local rules results in an admission." Smith v. Lamz, 7th Cir.2003, 321 F.3d 680, 683. In Hedrich v. Board of Regents of Univ. of Wis., 7th Cir.2001, 274 F.3d 1174, 1177-1178, the plaintiff did respond to the summary-judgment motion, but not in individually numbered paragraphs with focused citations to the record. Her response "repeatedly offered long strings of factual propositions in single paragraphs that in some cases stretched on for pages. * * * While she literally provided citations, they were not in the form called for by the rule and they did not serve the purpose of the rule. Instead, they tended to be string citations at the end of paragraphs containing numerous factual propositions * * *." "[I]t is common to punish a party's failure to comply with summary judgment rules by ignoring that party's unsupported factual allegations and accepting as true those of the opposing party. * * * [The plaintiff was aware of the local rule, and was reminded by the judge.] Under the circumstances, the sanction of exclusion was within the district court's discretion." (There is no real inconsistency in the statement in Brengettcy v. Horton, 7th Cir.2005, 423 F.3d 679, 681, that although the district court properly adopted the movant's statement of facts when the nonmovant's response did not comply with local rules, "the underlying facts alleged must be taken in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in his favor.")

The Question

Undoubtedly many more decisions could be found. "Deemed admitted" local rules abound. The most fundamental view identifies the question as defining the nature of summary judgment. Judgment can be entered without inquiry into the merits if a defendant fails to answer. So too if a party fails to abide by discovery rules or otherwise "fails to comply with these rules." Whatever may be made of present Rule 56, it is possible to write a rule that treats failure to respond to a summary-

judgment motion as a default that warrants judgment without inquiry into the merits. This approach would "give teeth" to Rule 56 in order to support the clear framing of the issues and presentation of the record that draft Rule 56(c) contemplates. A party who does not care to shoulder its share of the work should not complain when the court refuses to take up the burden.

One source of drafting analogy is Style Rule 8(b)(6): "An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied." It would remain to be decided whether the "deemed admitted" approach should apply to some or all assertions of undisputed facts as to damages or other relief. Some items of damages likely are as suitable for deemed admission as any other fact. Costs of repair, the price of covering for a breach of contract, and many similar matters would qualify. Other items, such a pain and suffering or the loss of enjoyment of life, most likely should not qualify. Attempting to capture the distinctions in a rule may prove too difficult to justify the effort.

This approach may be met by several responses. Rule 56 has teeth even if the nonmovant need not respond. Failure to respond forfeits any right to demand that the court search the record for information that refutes the movant's information, or that the court search out information that supersedes the effect of the movant's information without refuting it, or that the court think of theories that alter the movant's legal arguments.

Another concern arises from the purpose of summary judgment to avoid trial. At trial, a nonmovant who does not have the trial burden of production can insist that the movant produce evidence and persuade even if the nonmovant produces no evidence at all. Why should the nonmovant not be entitled to a similar consideration of the movant's one-sided showing on summary judgment?

The analogy to trial reflects still another concern. Some law professors are beginning to challenge summary judgment head-on, arguing that it violates the Seventh Amendment, is inefficient, and is unfair. Some challenges focus on the perception that summary judgment is used with particular rigor to dispose of claims brought by disadvantaged members of society. Without conceding those arguments, it is appropriate to remember that — even if not disfavored — summary judgment displaces the opportunity for trial on the uncertain assumption that the trial record would faithfully duplicate the summary-judgment record. A litigant capable of mounting a sufficient showing at trial may be at a disadvantage when required to pick apart a pretrial record to make detailed responses and assertions with specific supporting references to the record.

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

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

May 1, 1992

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EDWARD LEAVY
BANKRUPTCY RULES

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed as Attachment A are proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these were approved by the Advisory Committee on Civil Rules on April 15, 1992, for submission to the Standing Committee under rule 5b of the governing procedures. It should be noted that the proposed amendments to Rule 43 have been withdrawn for further study.

Most of the proposed amendments were published in August 1991, accompanied by a solicitation for comments from the bench, bar, and public. Hundreds of written comments were received and reviewed by the Advisory Committee. Public hearings were held in Los Angeles, California, on November 21, 1991, and in Atlanta, Georgia, on February 19 and 20, 1992.

Several of the proposed amendments are ones that were returned by the Supreme Court in December 1991 for further study. These had been published for comment in October 1989; approved by the Advisory Committee, Standing Committee, and Judicial Conference in April, June, and September 1990; and submitted to the Supreme Court in November 1990. The Advisory Committee has reviewed these amendments and made a few changes in the text or Notes.

Finally, there are a few proposed amendments not previously published that, being technical in nature, are recommended for approval under the exception to the requirement for public comment and hearing provided in rule 4d of the governing procedures.

Attachment B is a report identifying and discussing the primary criticisms and suggestions, and explaining the changes made by the Advisory Committee after considering these comments. It also reflects particular aspects of the proposed changes on which there was disagreement among Committee members. There were, however, no requests to submit any "minority reports," and, with the exception of one proposed change (Rule 702 of the Federal Rules of Evidence), the Committee was unanimous in recommending that the proposed amendments be adopted. The report also indicates those proposed technical amendments that are recommended for adoption under rule 4d of the governing procedures without public notice and opportunity for comment.

Professor Carrington, Reporter for the Advisory Committee, will submit a separate report that summarizes the written comments received and the testimony presented at public hearings.

We request that the Standing Committee approve these proposals and transmit them to the Judicial Conference, together with those technical amendments (primarily involving the new title of "Magistrate Judge") that were approved by the Standing Committee in 1991.

In response to the call for self-appraisal under the "sunset" standards, we believe that the work of the Committee is on-going, is needed, and should be allowed to proceed through continuation of the Committee.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary of Standing Committee (with copies for other members)
Style Committee, Standing Committee
Chairmen, other Advisory Committees
Members and Reporter, Advisory Committee on Civil Rules

Attachments:
A--Proposed Amendments
B--Report on Issues and Changes

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

Rule 56. Summary Judgment

(a) ~~**For Claimant**~~*Of Claims, Defenses, and Issues*. ~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~ *The court without a trial may enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, may summarily determine a defense, or may summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of facts not genuinely in dispute. In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based.*

~~(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

(b) Facts Not Genuinely in Dispute. A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

(c) Motion and Proceedings Thereon. ~~The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~ *A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response.*

(1) Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the

particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing those facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be treated as having admitted that fact.

(3) If a motion for summary adjudication or response is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion or response or at such other times as the court may permit or direct.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court ~~at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon~~ *may enter* ~~make~~ an order specifying *the controlling law or the* facts that ~~appear without substantial controversy~~ *are not genuinely in dispute*, including the extent to which liability or the amount of damages

or other relief is not ~~in controversy~~ *a dispute for trial*, and directing such further proceedings in the action as are just. ~~Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~ *Unless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified and by treating the facts so specified as established. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).*

(e) ~~Form of Affidavits; Further Testimony; Defense Required~~*Matters to Be Considered*. ~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

(1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the

extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.

(2) The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

(f) When *Evidence* ~~Affidavits are~~ Unavailable. Should it appear from the affidavits of a party opposing ~~the~~ *a* motion *for summary adjudication* that the party cannot for ~~reasons stated~~ present by affidavit facts essential to justify the party's ~~opposition~~ *good cause shown present materials needed to support that opposition*, the court may ~~refuse the application for judgment or~~ *deny the motion, may permit an offer of proof,* may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(g) ~~Affidavits Made in Bad Faith~~*Conduct of Proceedings*. ~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be~~

~~adjudged guilty of contempt.~~ *The court (1) may specify the period for filing motions for summary adjudication with respect to particular claims, defenses, or issues; (2) may enlarge or shorten the time for responding to motions for summary adjudication, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (3) may on its own initiative direct the parties to show cause within a reasonable period why summary adjudication based on specified facts should not be entered; and (4) may conduct a hearing to consider further arguments, rule on the admissibility of evidence, or receive oral testimony to clarify whether an asserted fact is genuinely in dispute.*

COMMITTEE NOTES

Purpose of Revision. This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome--while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The current caption, "Summary Judgment," is retained. However, the revised rule, like the former rule, also covers decisions that, by resolving only defenses or issues not dispositive of a claim, are more properly viewed as "summary determinations." The text of the revised rule adds language to clarify that it applies to both types of "summary adjudications."

In various parts, the revision (1) eliminates ambiguities and inconsistencies within the rule; (2) expresses a single and consistent standard, as has been developed through case law, for determining when summary adjudication is permitted; (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, with the purpose of eliminating the need for local rules on this subject; and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

Subdivision (a). This subdivision combines the provisions previously contained in subdivisions (a) and (b). It adds third-party claims to the list of claims subject to disposition by summary judgment, but deletes (as surplusage) the specific reference to declaratory judgments. The former provisions allowed motions for "summary judgment" as to "any part" of a claim; the revision permits summary determination of an "issue substantially affecting but not wholly dispositive" of a claim or defense--the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some

significant impact on discovery, trial, or settlement.

The revised language makes clear at the outset of the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is permissible only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances. See 10A Wright, Miller & Kane, Federal Practice and Procedure § 2728 (1983). The purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.

The extent of this discretion to deny summary adjudication is affected by many factors and will vary from case to case. The court has broad discretion to reject summary resolution of non-dispositive issues or defenses that will not significantly affect the scope of discovery, the potential for settlement, or the length and complexity of trial. The court has less discretion when the requested summary judgment would resolve all claims made by or against a party. And there are some situations in which, typically because of substantive policies, the court may have little or no discretion to deny summary adjudication that satisfies the standards of this rule. For example, persons protected by official or qualified immunity are to be relieved from the burdens of trial and pretrial proceedings as soon as such defenses can be fairly established, and a denial of summary judgment in such cases is immediately appealable under current law. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense). Similar policies with respect to certain First Amendment issues may also effectively preclude the court from justifying its denial of summary judgment as an exercise of discretion.

The court is directed to indicate the factual and legal basis if it grants summary judgment or summarily determines a defense or issue. A lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute, on the basis of which summary adjudication is appropriate. An opinion should also be prepared if the court's denial of summary judgment would be immediately appealable, as when denying the qualified immunity defense. The determination that a fact is or is not in genuine dispute is, when reviewed on appeal, treated as a question of law.

Subdivision (b). The standards stated in this subdivision for determining whether a

fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). While no change in these standards is intended by the revision, the rule clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised Rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

Subdivision (c). Revised subdivision (c) provides a structure for presentation and consideration of motions for summary adjudication, and should displace in large part the numerous local rules spawned by deficiencies in the former rule. Adoption of this structure is not intended to create procedural pitfalls to deprive parties of trial with respect to facts in genuine dispute, but rather to provide a framework enabling the courts to discharge more effectively their responsibility in deciding whether such controversies exist.

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing of a motion for summary adjudication may be desirable in many cases. However, if a party will need evidence from other persons in order to show that a fact is in genuine dispute, it should have a reasonable opportunity for discovery respecting those matters before being confronted with a motion for summary judgment or summary determination. It should also have a sufficient time--ordinarily more than the 10 days specified in the prior rule--to marshal and present its evidentiary materials to the court. The times specified in the revised rule for filing motions for summary adjudication and responses to such motions incorporate these principles.

Paragraphs (1) and (2) prescribe a format for motions for summary adjudication and responses thereto. They are to be non-argumentative, for arguments are to be presented in separate memorandums under paragraph (4). They must be specific, particularly with respect to the facts asserted to be not in genuine dispute. They must provide a reference to the specific portions of any evidentiary materials relied upon to support a contention that a fact is or is not in genuine dispute; failure to do so will, under revised subdivision (e), relieve the court of the obligation to consider such materials.

Pertinent portions of evidentiary materials not previously filed or subject to judicial notice must be attached to the motion or response. As under the prior rule, a movant must obtain leave of court to supplement its supporting materials because late filing may prejudice other parties or merit an extension of time for responses. The requirement to obtain leave of court applies only to evidentiary materials, and not to supplemental or reply memorandums and arguments filed under paragraph (4).

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not

previously filed is not directly applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite and, to the extent feasible demonstrate, that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to show in their responses the existence of such evidence.

A response to a motion for summary adjudication--formally recognized for the first time in this revision--can be filed by any party and can take several forms. In multiple-party cases a party similarly situated to the movant may merely wish to adopt the position of the movant in its response. The parties to be adversely affected by the judgment or determination sought in the motion may agree that the asserted facts, or some of them, are true but claim that, because of a different view regarding the controlling law, summary judgment or summary determination in their favor is warranted. Frequently, of course, the parties to be adversely affected by the judgment or determination sought in the motion will oppose the grant of any summary adjudication, either because of a different view of the law or because some of the asserted facts are believed to be false or at least in genuine dispute or because there are additional facts rendering the asserted facts not dispositive of the claim, defense, or issue. Subdivision (c)(2) is written to accommodate any of these possibilities. Of course, a party may also file a separate cross motion for summary adjudication if there are other facts asserted to be not in genuine dispute on the basis of which it is entitled to a favorable judgment or determination as a matter of law.

A party is not required to file a response to a summary adjudication motion. The failure to make a timely response, however, may be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine dispute, the party must file a timely response that indicates the extent of disagreement with the movant's statement of the fact and provides reference to any evidentiary materials supporting its position not cited by the moving party. Failure to do so may result in the fact being deemed admitted for purposes of the pending action. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

The substance of the last sentence of former subdivision (c), relating to partial summary judgments on issues of liability, has been incorporated into the revision of subdivision (d).

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are without genuine dispute and accordingly are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication (or granting of partial summary judgment) is ordinarily an interlocutory order not subject to the law-of-the-case doctrine;

and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of developments in the case or changes of law. The rule is not intended to alter case law that permits immediate appeal of the denial of summary judgment in limited circumstances. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense).

Confusion was caused by the reference in the former provisions to a "hearing on the motion." While oral argument on a motion for summary adjudication is often desirable--and is explicitly authorized in subdivision (g)(4)--the court is not precluded from considering such motions solely on the basis of written submissions.

Subdivision (e). Implementing the principle stated in subdivision (b) that the court should consider (in addition to facts stipulated or admitted) only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary adjudication. Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as during a conference under Rule 16.

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person, with the proviso that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

Independent authentication of documentary evidence is not required--submission of the materials under the rule should be treated as sufficient authentication. Similarly, independent evidence that the materials submitted are accurate copies of the originals is not required. However, if other evidence would be required at trial to establish admissibility--such as the foundation for business records--the party presenting such records should provide the supporting evidence through deposition, interrogatory answers, or affidavits. As permitted under Rule 1006 of the Federal Rules of Evidence, voluminous data should be submitted by means of an affidavit summarizing the data and offering, if not previously provided, access to the underlying data.

Subdivision (e)(2) provides that the court is required to consider only the materials called to its attention by the parties. Subdivisions (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal. The failure of a movant to provide such references would justify denial of the motion.

Subdivision (f). Extensions of time to oppose summary adjudication should be less frequent than under the former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to

comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party shows in its affidavit that it is currently unable to procure supporting materials in a form that would satisfy the requirements of subdivision (e).

Subdivision (g). The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of motions for summary adjudication. At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

Subdivision (g)(2) recognizes the court's power to change the time within which parties may respond to motions for summary judgment or summary determinations. Depending on the circumstances, particularly the extent to which discovery has or has not been afforded or available, the extent to which the facts have been stipulated or admitted, and the imminence of trial, the 30-day period prescribed in subdivision (c) may be lengthened or shortened.

Subdivision (g)(3) permits the court to initiate an inquiry into the appropriateness of summary adjudication. Such an inquiry may be initiated in an order setting a conference under Rule 16 or might arise as a result of discussions during such a conference. In any event, the parties must be afforded a reasonable opportunity to marshal and submit evidentiary materials if they assert facts are in genuine dispute and to present legal arguments bearing on the appropriateness of summary adjudication.

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications. One such purpose would be to hear oral arguments supplementing the written submissions. Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony, as under Rule 43(e), to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

The former provisions of subdivision (g), providing sanctions when "affidavits . . . are presented in bad faith or solely for the purpose of delay," have been eliminated as unnecessary in view of the amendments to Rule 11. The provisions of revised Rule 11 apply not only to affidavits but also to motions, responses, briefs, and other supporting materials submitted under Rule 56. Motions for summary adjudication should not be filed merely to "educate" the court or as a discovery device intended to flush out the evidence of an opposing party.

Relatively non-controversial.

The principal criticism of this proposed amendment involved subdivision (d)(2)(D)(i), authorizing adoption of schedules by which the value of legal services in a district will ordinarily be measured. After further consideration, the Advisory Committee has deleted this language, concluding that inclusion of this explicit authorization may result in more problems than benefits. The Committee's action, however, should not be viewed as implying that district courts lack the authority to adopt such schedules as local rules.

The Advisory Committee is unanimous in recommending adoption of Rule 54, which, except for deletion of subdivision (d)(2)(D)(i), is essentially unchanged from the published draft.

Fed. R. Civ. P. 56. (Draft published August 1991)

Moderately controversial.

While there is substantial support for this revision, many question say that it is unnecessary or unduly complex, and are apprehensive that any change in the rule might diminish the utility of summary judgment procedures. Some oppose the amendment because it incorporates into the rule the principles enunciated in Supreme Court decisions that they believe were wrongly decided.

Timing; offers of proof. The Advisory Committee continues to believe that summary judgment should not be granted against a party before it has had a reasonable opportunity to obtain discovery on matters not within its control and possession which are needed to oppose the motion. The current rule provides that, upon a showing that a party cannot within the prescribed time obtain affidavits justifying its opposition to summary judgment, the court may deny the motion or may allow additional time; the Committee believes that, in such circumstances, the court should also have the option to receive an offer of proof.

Discretion; preclusion of motions. Some object to the language affording the trial court with some discretion not to enter a summary adjudication that might be permitted under the rule. The revision, however, merely brings the language of the rule (currently worded as mandatory) into conformity with court decisions. These decisions recognize the need for some discretion, particularly with respect to issues that are not wholly dispositive of the claims made by or against a party. The Committee Notes have been changed to explain the reasons for, and limitations on, this discretion. The published draft provided in subdivision (g)(1) that the court could preclude Rule 56 motions on particular issues; on further consideration, the Committee has concluded that this language should be deleted.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. While one member would have preferred that the text of the rule indicate that summary judgment is mandatory when warranted, the Committee is unanimous in recommending adoption of the proposed amendment of Rule 56, which, with the exception of the minor change in subdivision (g)(1) explained above, is the same as the published draft. Various clarifying changes have been made in the Committee Notes.

Fed. R. Civ. P. 58. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 58, which is essentially unchanged from the language in the published draft.

ADVISORY COMMITTEE ON THE CIVIL RULES
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May 20, 1992

COMMENTS RECEIVED ON PROPOSED AMENDMENTS PUBLISHED FOR COMMENT IN AUGUST, 1991 AS OF MAY 15, 1992

The following notes summarize reactions of citizens commenting on the drafts published in August, 1991. The purpose of this memorandum is to provide members of the Standing Committee on Rules or others who may be interested with manageable access to the communications received by the Civil Rules Committee, which in total suffice to fill a whole file drawer of standard dimensions.

This is a scan, not a summary, of the contents of that file drawer. Thus, the notes are not comprehensive and do not include many details and arguments set forth in the written comments. With respect to those comments received late in the comment period, and especially those comments received after the period was closed, they are notably cryptic. Much of what is omitted is redundant, but no warranty is provided that all is.

Readers interested in the views of a particular individual or organization should consult the actual communication of the individual or organization in question. Those communications are on file with the Secretary of the Civil Rules Committee at the Administrative Office of the United States Courts.

The proposed drafts that were the subject of the following comments were the subject of revision by the Civil Rules Committee at its April meeting. In a number of instances, changes were made in the proposals that were responsive to some of the following comments.

Not covered by this memorandum are the few comments received on those provisions of Rules 4 and 26 that were published in 1989. Those rules are also before the Standing Committee in 1992, in slightly revised form. Changes were made in light of late comments received from the British and Swiss Embassies and from the Department of Justice.

RULE 56

Alliance for Justice favors summary adjudication of defenses but fears that the revision of (f) may encourage premature summary adjudication. They also oppose (g)(3).

The Admiralty and Maritime Litigation Committee of the ABA opposes the provision guaranteeing an opportunity for discovery on grounds that it will result in costly delays. They compliment the provision authorizing partial dispositions.

The ABA Section on Antitrust opposes making summary judgment discretionary. It favors the requirement that summary judgments be explicated and favors the provisions bearing on partial summary judgment. It would require the district court to explain denials of summary judgments.

Theodore Tetzlaff, Chair, finds this revision unnecessary, especially the assurance of an opportunity for discovery. He also opposes the specificity requirements imposed on moving and responding papers, and urges that the grant of summary judgment should not be permissive.

ABCNY regards this proposal as long and unnecessarily burdensome. It approves the change to 30 days as a response period, but finds the proposal unduly favoring those parties wishing to prolong wasteful discovery. By incorporating some of the case law in the rule, ABCNY fears that courts may infer that other court-made law has been altered, e.g., Anderson v. Liberty Lobby and Matsushita. They are also concerned about the deletion of 56(g) in light of changes made in Rule 11.

The American Civil Liberties Union opposes this revision as unnecessary. It supports the extension of the time for the motion and the repeal of (g).

American Insurance Association favors this revision, but urges that the rule should be strengthened, as by requiring findings and conclusions when a motion is denied. It urges that the burden on the moving party be more narrowly defined and disapproves the expanded definition of admissions set forth in (b). It also opposes offers of proof as a means of opposing summary judgment, and the enlargement in (c) of the time before which a party can move for summary adjudication.

ATLA finds this revision to be unnecessary and likely to create occasions for litigation. They do approve the language of (c), but are especially concerned by (g)(4) as an invitation to misuse.

The Arkansas Bar Association favors this revision.

The Beverly Hills Bar Association supports this revision, but urges that evidence should not be required to be admissible. They suggest a rewording of (f) to correct what it sees an unfair advantage to the party opposing Rule 56 motions.

The California Bar generally supports this revision with qualifications. It opposes an admissibility requirement for evidence consider on the motion and it opposes the revision of (f); it urges the following language:

> Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for good cause shown present materials needed to support that opposition, the court may deny the motion or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. favors this revision as proposed.

The Chicago Bar Association generally supports this revision. It suggests that the comment to (a) should be explicit that what is intended is no change from the present (a) and (b). It suggests that (e) should be clear that "admissions" includes concessions made in pleadings, motions or briefs.

The Chicago Council of Lawyers supports this revision, except insofar as it codifies *Anderson v. Liberty Lobby*, which it believes to have been wrongly decided.

A committee of the Colorado Bar supports this proposal.

The Connecticut Bar committee opposes this revision as an effort to take summary judgment away from the parties to give to the court. It deplores the apparent removal of argument. It opposes the partial summary disposition of issues as excessively vague.

The Department of Justice does not believe that the rewriting of Rule 56 is necessary, but it supports some changes. It is concerned that the rule does not require the court to render summary judgment when appropriate. It argues that the proposed draft is not clear that only disputes on material issues can forestall judgment. It opposes the revision of the timing requirements, particularly to assure opportunity for discovery

A Committee of the DC Bar favors this revision as generally reassuring to present practice. They question whether the factual recitation should be required as part of the motion rather than in a separate instrument. They are also concerned that (g) is not adequately distinguished from a Rule 42 proceeding to determine credibility.

The Federal Bar Association endorses this revision, but suggest that the moving party should have a right of reply.

Fisher & Phillips of Atlanta favor this revision, but question the term "without argument." They also urge that (f) be rewritten.

Kincaid Gianunzio Caudle & Hubert of Oakland CA suggest that Rule 56 should speak to the use of disclosures in Rule 56 proceedings.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association generally favors this revision. They express anxiety that (e) may imply that the moving party must have supporting material; they fear that this might be thought to overrule *Catrett*; they express regret that a paragraph in the 1990 Notes affirming this aspect of *Catrett* was deleted. They also urge that the admissibility requirement is not necessary are helpful. They also question the provision in (f) for offers of proof.

The Mississippi Defense Lawyers Assn opposes the revision insofar as it guarantees an opportunity for discovery.

The National Assn of Independent Insurers favors this revision, but fears that it will not induce judges to use summary judgment more often, as they assert the judges should.

National Assn of Securities and Commercial Law Attorneys opposes this revision.

The New Jersey Bar opposes any effort to restate the trilogy. It also holds that the "reasonable opportunity to discover" is vague and may give rise to delay. It does not believe that the rule needs to be amended.

A committee of the New York County Bar favors this revision, but opposes the provision authorizing the court to preclude motions.

The Orange County Bar Committee singles this revision out as the one having the most desirable effects.

The Philadelphia Bar favors this revision.

The Public Citizen Litigation Group generally approves this revision. They express concern that the Committee Notes may overly qualify the assurance given in the text of an opportunity to use discovery. They suggest that the movant be required to certify that the opposing party has been afforded a reasonable opportunity to discover relevant evidence pertinent to the motion. One purpose would to forestall premature motions which, they suggest, may be fostered by the revision. They suggest a need for more explicit provisions on cross-motions. They also suggest that all the required information should not be in the moving party's motion, which they would keep short. They also suggest that the Notes should be clear that an admission does not go to relevance or materiality. And they suggest that the limitation imposed in (c)(3) may in some cases be improvident. With respect to (c)(2), they suggest retention of the existing requirement that a motion can be defeated by identifying need for further discovery and also suggest that the party resisting the motion be required to identify the triable issues. Perhaps, (c)(4) could be amplified thus: if the party is opposing summary adjudication, it shall identify those issues that need to be tried and explain their relevance to the ultimate determination of the case. Finally, they express concern that the court may become entangled making rulings on admissibility in order to determine a Rule 56 motion, an activity they think premature.

Trial Lawyers for Public Justice oppose this revision as unjust to plaintiffs and unnecessary. They perceive the revision to effect material change in the standard for the grant of summary judgment and to threaten the right to trial by jury.

Washington Trial Lawyers Assn opposes this revision.

Hon. Albert V. Bryan, EDVa, sees no benefit in the change of nomenclature of a partial summary judgment to summary adjudication.

Roy B. Dalton, Esq., of Orlando, regards this revision as unnecessary.

S. Paul Battaglia, Esq. of Syracuse, supports this revision.

Frank, Napolitano & Resnik oppose this revision as too long, and unnecessary.

Keith Gerrard, Esq., Seattle, supports this proposal.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision as increasing the power and discretion of the court.

Laurence R. Jensen of San Jose approves of this revision.

Ernest Lane Esq of Greenville MS opposes this revision as unnecessary.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Paul A. Manion, Esq., of Pittsburgh favors this revision.

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al favors this revision as a material improvement.

Robert S. Rosemurgy, Esq., of Escanaba MI expresses support for this revision.

Professor Maurice Rosenberg finds this revision not necessary and not likely to be significant. He would leave this rule alone.

Christopher C. Skambis, Esq., of Orlando commends this revision.

Paul L. Stritmatter, Esq. of Hoquiam WA opposes this revision as broadly expanding the power of the court to grant summary judgment.

Mssrs. Turner, Klaber, Sommer & Donovan of Pittsburgh find the provisions for partial summary judgment "a very positive change." They are troubled, however, by the provision assuring a reasonable opportunity for discovery. They assert that there are cases in which summary judgment should be considered before the initial disclosures are made.

RULE 58

Alliance for Justice urges that there is no reason to litigate fees while a judgment for the defendant is being appealed. They also question whether the tolling provision can work except by agreement of the parties.

Theodore Tetzlaff, Chair, opposes this revision. He suggests additional revisions of the Appellate Rules.

The American Civil Liberties Union favors the purpose of this revision, but suggests that the time for appeal should normally be stayed, subject to exceptions by certificate under 54(b) or Section 1292(b). Where the fees decision is postponed pending the appeal, they urge the need for an initial fee award, citing 9th circuit decisions.

The Federal Courts Committee of the American College of Trial Lawyers supports the revisions of Rule 58.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Los Angeles County Bar approves this revision.

The Philadelphia Bar opposes this revision.

The Public Citizen Litigation Group fears that this revision will encourage piecemeal fees litigation.

MEMORANDUM TO:	**Judge Michael Baylson**
CC:	**Judge Lee H. Rosenthal, Professor Edward H. Cooper, Peter G. McCabe, John K. Rabiej**
FROM:	**Jeffrey Barr and James Ishida**
DATE:	**March 21, 2007**
RE:	**Survey of District Court Local Summary Judgment Rules**

You had asked us to undertake additional research on summary judgment local rules and practices in the courts. Specifically, you had asked us to identify:

- the district courts that have local rules requiring the: (a) moving party to include a statement of undisputed facts with its motion for summary judgment, and (b) non-moving party to respond to the movant's statement, fact by fact;

- the districts with the above local rules that also have provisions stating that facts not properly disputed are deemed admitted or accepted; and

- the number of judges in districts without such local rules who have similar requirements in their individual standing orders.

We reviewed the local rules of 92[1] district courts posted on the *Federal Rulemaking* web site at http://www.uscourts.gov/rules/distr-localrules.html. We found 56 districts that have local rules requiring the moving party to attach a statement of undisputed facts with its motion for summary judgment.[2] Of the 56 districts, 20 districts require the non-moving party to respond to

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[1]We were unable to access the web sites of the District of the Northern Mariana Islands and Western District of Wisconsin.

[2]Six districts do not require the movant to file a list of undisputed facts in support of its motion for summary judgment — Northern District of California, District of Colorado, Southern District of Illinois, Western District of Tennessee, Eastern District of Washington, and Northern District of West Virginia:

1. Northern District of California LR 56-2(a)(unless required by the assigned judge, no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted);

each of the movant's alleged undisputed facts.[3] The remaining 36 districts[4] do not require the

2. District of Colorado LCivR 56.1(A) (a motion under Fed. R. Civ. P. 56 shall be accompanied by an opening brief. A response brief shall be filed within 20 days after the date of filing of the motion and opening brief, or such other time as the court may order);

3. Southern District of Illinois Local Rule 7.1 (any brief in support of or in opposition to a motion for summary judgment shall contain citation to relevant legal authority and to the record, together with any affidavits or documentary material designated pursuant to Federal Rule of Civil Procedure 56 supporting the party's position. All briefs must contain a short, concise statement of the party's position, together with citations to relevant legal authority and to the record);

4. Western District of Tennessee LR 7.2(d)(2) (on every motion for summary judgment the proponent shall designate in the submit in a separate document affixed to the memorandum each material fact upon which the proponent relies in support of the motion by serial numbering, and shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of each material fact. The opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied shall respond to the proponent's numbered designations);

5. Eastern District of Washington LR 56.1 (any party filing a motion for summary judgment shall set forth separately from the memorandum of law the specific facts relied upon in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to the specific portion of the record where the fact is found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must file with its responsive memorandum a statement in the form prescribed above, setting forth the specific facts which the opposing party asserts establishes a genuine issue of material fact precluding summary judgment. Each fact must explicitly identify any fact(s) asserted by the moving party which the opposing party disputes or clarifies); and

6. Northern District of West Virginia LR Civ P 7.02(a) (motions for summary judgment shall include or be accompanied by a short and plain statement of facts).

[3]District of Arizona, District of Connecticut, Eastern District of California, Middle District of Georgia, Northern District of Georgia, Central District of Illinois, Northern District of Illinois, Northern District of Iowa, Southern District of Iowa, District of Maine, District of Nebraska, Eastern District of New York, Northern District of New York, Southern District of New York, District of Oregon, Middle District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, District of South Dakota, and Middle District of Tennessee.

[4]Southern District of Alabama, Eastern District of Arkansas, Western District of Arkansas, Central District of California, District of the District of Columbia, Northern District of Florida, Southern District of Florida, Southern District of Georgia, District of Hawaii, District of Idaho, Northern District of Indiana, Southern District of Indiana, District of Kansas, Eastern District of Louisiana, Middle District of Louisiana, Western District of Louisiana, District of Massachusetts, Eastern District of Missouri,

non-moving party to address each of the moving party's list of undisputed facts, fact by fact, but do require the non-moving party to provide its own list of disputed facts or respond to the movant's undisputed facts in opposing the motion for summary judgment.[5]

Thirty districts do not have local rules specifically addressing summary judgment practice.[6]

In addition, every one of the 20 districts requiring the movant to submit a list of undisputed facts and non-moving party to respond to each of the movant's undisputed facts has a "deemed admitted" provision in their local rules, except for the Eastern District of California.

We also checked the web sites of the four largest districts[7] without such local rules — the Central District of California, Southern District of Florida, Northern District of Ohio, and Northern District of Texas. (Your staff had polled judges in your district, Pennsylvania Eastern.) We found eight judges[8] in the Central District of California who have issued standing orders posted on the court web site prescribing paragraph-by-paragraph requirements. Your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

Western District of Missouri, District of Montana, District of Nevada, District of New Hampshire, District of New Jersey, District of New Mexico, Western District of New York, Middle District of North Carolina, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, Eastern District of Pennsylvania, Eastern District of Texas, District of Utah, District of Vermont, District of the Virgin Islands, Eastern District of Virginia, and District of Wyoming.

[5]*See* Appendix.

[6]Middle District of Alabama, Northern District of Alabama, District of Alaska, Southern District of California, District of Delaware, Middle District of Florida, District of Guam, Eastern District of Kentucky, Western District of Kentucky, District of Maryland, Eastern District of Michigan, Western District of Michigan, District of Minnesota, Northern District of Mississippi, Southern District of Mississippi, Eastern District of North Carolina, Western District of North Carolina, District of North Dakota, Northern District of Ohio, Southern District of Ohio, District of Rhode Island, District of South Carolina, Eastern District of Tennessee, Northen District of Texas, Southern District of Texas, Western District of Texas, Western District of Virginia, Western District of Washington, Southern District of West Virginia, and Eastern District of Wisconsin.

[7]The districts having the greatest number of civil filings in 2000.

[8]Eight judges out of 60 district and magistrate judges serving in the Central District of California.

A. Districts Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

1. District of Arizona (a party filing a motion for summary judgment must file a statement setting forth each material fact on which the party relies in support of the motion. Each material fact must be set forth in a separately numbered paragraph. Any party opposing a motion for summary judgment must file a statement setting forth for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph. Each statement of facts set forth in the moving party's statement of facts shall be deemed admitted for purposes of the motion if not specifically controverted by a correspondingly numbered paragraph in the opposing party's separate statement of facts).

2. District of Connecticut (a "Local Rule 56(a)1 Statement" must be attached to each summary judgment motion, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in movant's statement and supported by the evidence will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2. The papers opposing a motion for summary judgment must include a "Local Rule 56(a)2 Statement," which states in separately numbered paragraphs and corresponding to the paragraphs contained in the moving party's Local Rule 56(a)1 Statement whether each of the facts asserted by the moving party is admitted or denied).

3. Eastern District of California (each motion for summary judgment must be accompanied by a "Statement of Undisputed Facts" that must enumerate discretely each of the specific material facts relied upon in support of the motion. Any party opposing a motion for summary judgment must reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts that are undisputed and deny those that are disputed).

4. Middle District of Georgia (the movant must attach to the motion a separate and concise statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately. The respondent must attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. A response must be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement must be deemed to have been admitted, unless otherwise inappropriate).

5. Northern District of Georgia (a movant for summary judgment must include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. The respondent must file a response containing individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts. The movant's facts are deemed admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence; (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the rules).

6. Central District of Illinois (a party filing a motion for summary judgment must include in that motion a list of each undisputed material fact that is the basis for the motion. The respondent must file a response to the movant's list of undisputed facts indicating which facts are: (i) undisputed material facts, (ii) disputed material facts, and (iii) immaterial. The respondent may also file any additional facts relevant to its opposition. In addition, Local Rule 7.1(D)(2) requires the non-moving party to file a response to the motion for summary judgment within 21 days after service of the motion. The rule also provides that "[a] failure to respond must be deemed an admission of the motion." In *Foley v. Plumbers & Steamfitters Local No. 149*, 109 F. Supp.2d 963, 966 (C.D.Ill., 2000), the court held that "[f]ailing to submit an appropriate response to a statement of undisputed facts allows the court to assume that the facts stipulated by the moving party exist without controversy." Because the Plaintiff's statement of undisputed facts did not admit or deny any specific allegations and did not support many of the statements, the court found that it did not comply with Local Rule 7.1(D)(2)).

7. Northern District of Illinois (the movant must file with its summary judgment motion a statement of material facts which the moving party contends there is no genuine issue and entitles it to judgment as a matter of law. The non-moving party must file a concise response to the movant's statement of facts that contain: (i) numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed, and (ii) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (iii) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party).

8/9. Northern District of Iowa and Southern District of Iowa (the joint rules of the Northern and Southern Districts of Iowa require the movant to append to its motion a statement of material facts setting forth each material fact that the moving party contends there is no genuine issue to be tried. The non-moving party must file with its opposition papers a response to the statement of material facts in which the resisting party expressly admits, denies, or qualifies each of the moving party's numbered statements of fact. Failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact).

10. District of Maine (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, each set forth in a separately numbered paragraph(s), as to which the moving party contends there is no genuine issue of material fact. A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by the rule, must be deemed admitted unless properly controverted).

11. District of Nebraska (the moving party must set forth in the brief a separate statement of material facts which the moving party contends there is no genuine issue to be tried and that entitle the moving party to judgment as a matter of law. The party opposing a motion must include in its brief a concise response to the moving party's statement of material facts. The response must address each numbered paragraph in the movant's statement. Properly referenced material facts in the movant's statement will be deemed admitted unless controverted by the opposing party's response).

12/13. Eastern and Southern Districts of New York (the joint rules of the Eastern and Southern Districts of New York provide that the movant must attach to the notice of summary judgment motion a separate, short, and concise statement, in numbered paragraphs, of the material facts to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party which is contended there exists a genuine issue to be tried. Each numbered paragraph in the moving party's statement of material facts will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the opposing party's statement).

14. Northern District of New York (a motion for summary judgment must contain a Statement of Material Facts. The Statement of Material Facts must set forth, in numbered paragraphs, each material fact that the moving party contends there exists no genuine issue. The opposing party must file a response to the Statement of Material Facts. The non-movant's response must mirror the movant's Statement of Material Facts by admitting or denying each of the movant's assertions in matching numbered paragraphs. Any facts set forth in the Statement of Material Facts must be deemed admitted unless specifically controverted by the opposing party).

15. District of Oregon (a motion for summary judgment must be accompanied a separately filed concise statement of facts, which articulates the undisputed relevant material facts that are essential for the court to decide the motion for summary judgment. The non-moving party must include a separately filed response to the movant's statement that responds to each numbered paragraph by: (i) accepting or denying each fact contained in the moving party's concise statement; or (ii) articulating opposition to the moving party's contention or interpretation of the undisputed material fact. For purposes of the motion for summary judgment, material facts set forth in the moving party's concise statement, or in the response to the moving party's concise statement, will be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).

16. Middle District of Pennsylvania (a motion for summary judgment must be accompanied by a separate, short, and concise statement of the material facts, in numbered paragraphs, which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts, responding to the numbered paragraphs set forth in the movant's statement, to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted by the non-moving party's statement).

17. Western District of Pennsylvania (a motion for summary judgment must be accompanied by a concise statement of material facts setting forth the facts essential for the court to decide the motion for summary judgment, which the moving party contends are undisputed and material. The facts set forth in any party's Concise Statement must be stated in separately numbered paragraphs. The opposing party must file in opposition a concise statement responding to each numbered paragraph in the moving party's Concise Statement of Material Facts by: (a) admitting or denying whether each fact is undisputed and/or material; (b) setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety (as to whether it

is undisputed or material), with appropriate reference to the record; and (c) setting forth in separately numbered paragraphs any other material facts that are allegedly at issue, and/or that the opposing party asserts are necessary for the court to determine the motion for summary judgment. Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).

18. District of Puerto Rico (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, set forth in numbered paragraphs, which the moving party contends there is no genuine issue of material fact to be tried. A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny, or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, must support each denial or qualification by a record citation as required by this rule. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, must be deemed admitted unless properly controverted).

19. District of South Dakota (the moving party must include with the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact must be presented in a separate, numbered statement and with an appropriate citation to the record in the case. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. The opposition must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party).

20. Middle District of Tennessee (a motion for summary judgment must be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact must be set forth in a separate, numbered paragraph. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either: (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed. Failure to respond to a moving party's

statement of material facts, or a non-moving party's statement of additional facts, within the time periods provided by these local rules shall indicate that the asserted facts are not disputed for purposes of summary judgment).

B. Judges Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

You had also requested — after we identified those district courts which have a local rule mandating a paragraph-by-paragraph statement of undisputed facts by the moving party and a paragraph-by-paragraph response by the opposing party — we examine standing orders or "procedures" issued by individual district judges in the four largest districts that do not have such local rules. You asked that we ascertain how many judges in those four districts have prescribed similar requirements by means of standing order.

In those four districts, we found eight judges — all in the Central District of California — who have issued standing orders prescribing paragraph-by-paragraph requirements.

1. The four-district sample. The four districts we chose in addition to the Eastern District of Pennsylvania — after a quick examination of civil caseload statistics published in *The Judicial Business of the U.S. Courts* — are as follows:

a) Central District of California,[9]

b) Southern District of Florida,[10]

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[9]The Central District of California does require, in Local Rule 56-1, that each moving party file a "Statement of Uncontroverted Facts and Conclusions of Law," and in Local Rule 56-2, that each opposing party file a "Statement of Genuine Issues" setting forth all material facts as to which the opposing party contends there exists a genuine issue necessary to be litigated. But this local rule does not require any paragraph-by-paragraph enumerations or lists. Therefore we thought it appropriate to include the Central District of California among the four courts we examined.

[10]The Southern District of Florida requires in Local Rule 7.5(A) that "[m]otions for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which the movant contends there is no genuine issue to be tried." Local Rule 7.5(B) requires the non-moving party to include in its papers in opposition "a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." For the reason given for the Central District of California, *supra* n. 9, we decided to include the district in our sampling.

c) Northern District of Texas, and

d) Northern District of Ohio.

2. No relevant standing orders in three districts. In three of the four districts — the Southern District of Florida, the Northern District of Texas, and the Northern District of Ohio — we found nothing. That is, we did not find a single standing order or similar provision issued by any individual judge prescribing paragraph-by-paragraph requirements for summary judgment motions and oppositions. Nor did we find any standing orders of the court as a whole addressing this point.

In the Southern District of Florida, we found that only a minority of the district judges have issued, and posted on the court's web site, any individual standing orders or "procedures" at all. But in the Northern District of Texas and the Northern District of Ohio, virtually every district judge has done so. None of these standing orders, again, contain summary judgment provisions of the type the subcommittee is interested in.

3. Eight relevant standing orders in the Central District of California. The Central District of California, however, is another story. Virtually every judge in that district has issued individual standing orders or "procedures." Although the majority of them do not prescribe the requirements the subcommittee is interested in, eight of them do. The eight judges are Judges Percy Anderson, Valerie Baker Fairbank, Gary A. Feess, Dale S. Fischer, Philip S. Gutierrez, Stephen G. Larson, A. Howard Matz, and S. James Otero.

The provisions prescribed by these eight judges — in every case embedded in a larger document headed "standing order" or "scheduling order" — are very similar. Ninety to ninety-five percent of the language is identical in each of the eight provisions, although most judges appear to have added a bit of idiosyncratic language here and there as well.

Here is an example, taken from Judge Otero's "initial standing order":

> **18. Motions – Form and Length:**
>
> * * * * *
>
> b. Statement of Undisputed Facts and Statement of Genuine Issues: The separate statement of undisputed facts shall be prepared in a two-column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially

numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

The opposing party's statement of genuine issues must be in two columns and track the movant's separate statement exactly as prepared. The left hand column must restate the allegedly undisputed fact, and the right hand column must state either that it is undisputed or disputed. The opposing party may dispute all or only a portion of the statement, but if disputing only a portion, it must clearly indicate what part is being disputed, followed by the opposing party's evidence controverting the fact. The court will not wade through a document to determine whether a fact really is in dispute. To demonstrate that a fact is disputed, the opposing party must briefly state why it disputes the moving party's asserted fact, cite to the relevant exhibit or other piece of evidence, and describe what it is in that exhibit or evidence that refutes the asserted fact. No legal argument should be set forth in this document.

The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, which shall follow the format described above for the moving party's separate statement. These additional facts shall continue in sequentially numbered paragraphs and shall set forth in the right hand column the evidence that supports that statement.

* * * * *

4. Eastern District of Pennsylvania. Again, your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

APPENDIX

Districts Not Requiring Fact-by-Fact Response to Movant's Statement of Undisputed Facts

1) Southern District of Alabama Local Rule 7.2(b) (the non-moving party must identify facts in dispute from the movant's list of undisputed facts);

2/3) Eastern District of Arkansas and Western District of Arkansas Local Rule 56.1(b) and (c) (if the non-moving party opposes the motion for summary judgment, it must file, in addition to any response and brief, a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried. All material facts set forth in the statement filed by the moving party will be deemed admitted unless controverted by the statement filed by the non-moving party);

4) Central District of California L.R. 56-2 and 56-3 (any party who opposes the motion must serve and file with the opposing papers a separate document containing a concise "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are controverted by declaration or other written evidence filed in opposition to the motion);

5) District of the District of Columbia LCvR 56.1 (an opposition to a summary judgment motion must be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion);

6) Southern District of Florida Rule 7.5(B) (the papers opposing a motion for summary judgment must include a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);

7) Northern District of Florida Local Rule 56.1 (a motion for summary judgment must be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The party opposing the motion must, in addition to other papers or matters permitted by the rules, file and serve a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);

8) Southern District of Georgia LR 56-1 (the non-moving party must include, in addition to the brief, a separate, short, and concise statement of the material facts as to which it is contended there exists no genuine issue to be tried as well as any conclusions of law. Each statement of material fact must be supported by a citation to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by a statement served by the opposing party);

9) District of Hawaii LR 56.1(b) and (g) (any party who opposes the motion for summary judgment must file and serve with his or her opposing papers a separate document containing a concise statement that: (i) accepts the facts set forth in the moving party's concise statement; or (ii) sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. Material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party);

10) District of Idaho Civil Rule 7.1(c)(2) (the responding party must file a statement of facts which are in dispute not to exceed ten (10) pages in length);

11) Northern District of Indiana L.R. 56.1 (a) and (b) (any party opposing the motion for summary judgment must file and serve a response that includes a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated);

12) Southern District of Indiana Local Rule 56-1(b) and (e) (the non-moving party may file and serve in opposition to the motion a brief that includes a section labeled "Statement of Material Facts in Dispute," which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment. For purposes of deciding the motion for summary judgment, the Court will assume the facts claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted in the opposing party's "Statement of Material Facts in Dispute");

13) District of Kansas Rule 56.1(b) (a memorandum in opposition to a motion for summary judgment must include a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered by paragraph, must refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, must state the number of movant's fact that is disputed. All material facts set forth in the statement of the movant will be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party);

14-16) Eastern, Middle, and Western Districts of Louisiana LR 56.2 (the uniform local rules for the Eastern, Middle, and Western Districts of Louisiana require that papers opposing a motion for summary judgment must include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule);

17) District of Massachusetts Rule 56.1 (any opposition to a motion for summary judgment must include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties);

18) Eastern District of Missouri Local Rule 7-4.01(E) (every memorandum in opposition must include a statement of material facts as to which the party contends a genuine issue exists. All matters set forth in the statement of the movant will be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party);

19) Western District of Missouri Local Rule 56.1(a) (a suggestion in opposition to a motion for summary judgment must begin with a section containing a concise statement of material facts that the non-moving party contends there exists a genuine issue for trial. All facts set forth in the movant's statement will be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party);

20) District of Montana Local Rule 56.1(b) (any party opposing a motion for summary judgment must file a Statement of Genuine Issues setting forth the specific facts, if any, that establish a genuine issue of material fact precluding summary judgment in favor of the moving party. There is no "deemed admitted" provision);

21) District of Nevada Local Rule 56.1 (motions for summary judgment and responses thereto must include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies);

22) District of New Hampshire Local Rule 7.2(b)(2) (a memorandum in opposition to a summary judgment motion must incorporate a short and concise statement of material facts, supported by appropriate record citations, as to which the adverse party contends a genuine dispute exists so as to require a trial. All properly supported material facts set forth in the moving party's factual statement will be deemed admitted unless properly opposed by the adverse party);

23) District of New Jersey Civ. Rule 56.1 (on motions for summary judgment, each side shall furnish a statement that sets forth material facts as to which there exists or does not exist a genuine issue. No "deemed admitted provision);

24) District of New Mexico Local Rule 56.1(b) (a party opposing the motion must file a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. All material facts set forth in the statement of the movant will be deemed admitted unless specifically controverted);

25) Western District of New York Local Rule 56.1 (the papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party);

26) Middle District of North Carolina Local Rules 7.2 and 56.1 (a party requesting summary judgment must set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party must also set out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of those elements. In a responsive brief, the opposing party may set out the statements required by LR7.2(a)(1)-(3) and also set out the elements that the claimant must prove (with citations to supporting authority), and either identify any element as to which evidence is insufficient (and explain why the evidence is insufficient), or point to specific, authenticated facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact, or explain why some rule of law (e.g., an applicable statute of limitations) would defeat the claim. The failure to file a response may cause the court to find that the motion is uncontested);

27) Eastern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the numbered paragraphs of the movant's facts that are disputed. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

28) Northern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section that contains a concise

statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant must be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

29) Western District of Oklahoma Local LCivR 56.1(c) (the brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

30) Eastern District of Pennsylvania LCivR 56.1 (the movant must include a brief in support of the motion for summary judgment that contains a section with a concise statement of material facts that the moving party contends there are no genuine issues of material fact. The respondent's brief must contain a concise statement of material facts which the non-moving party asserts genuine issues of material facts exist);

31) Eastern District of Texas Local Rule CV 56 (a motion for summary judgment must include: (1) a statement of the issues to be decided by the Court; and (2) a "Statement of Undisputed Material Facts." Any response to a motion for summary judgment must include: (1) any response to the statement of issues; and (2) any response to the "Statement of Undisputed Material Facts");

32) District of Utah DUCivR 56-1(c) (a memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56);

33) District of Vermont Local Rule 7.1(c)(2) and (3) (a separate, short and concise statement of disputed material facts must accompany an opposition to a motion for summary judgment or a motion under Fed.R.Civ.P. 12(b)(6) or 12(c) that is converted to a summary judgment motion. All material facts in the movant's statement of undisputed facts are deemed to be admitted unless controverted by the opposing party's statement);

34) District of the Virgin Islands Local Rule 56.1(b) (any party adverse to a motion submitted under this rule may respond by serving a notice of response, opposition, brief, affidavits

and other supporting documentation, accompanied by a separate concise counterstatement of all material facts about which the respondent contends there exist genuine issues necessary to be litigated, which shall include references to the parts of the record relied on to support the response and statement);

35) Eastern District of Virginia Local Civil Rule 56(B) (each brief in support of a motion for summary judgment must include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion); and

36) District of Wyoming Rule 7.1(b)(2)(A) (a party who files a dispositive motion must serve and file with the motion a written brief containing a short, concise statement of the arguments and authorities in support of the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). Affidavits and other supportive papers must be filed together with the motion and brief. Each party opposing the motion shall, within ten (10) days after service of said motion, serve upon all parties a written brief containing a short, concise statement of the argument and authorities in opposition to the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). In the event a motion for summary judgment is filed, the parties shall include in their respective briefs a list of all claimed undisputed and disputed facts, together with a short statement of evidence and any other basis which supports a claim that a fact is disputed or undisputed. Failure of a responding party to serve a response within the ten (10) day time limit may be deemed by the Court in its discretion as a confession of the motion)).

MEMORANDUM TO: **Judge Michael M. Baylson**

FROM: **Judge Vaughn R. Walker**

DATE: **March 7, 2007**

RE: ***Comments on Summary Judgment Proposal***

As the newest member of the advisory committee and our sub-committee, I am hesitant to take a position on the proposed draft that is out of step with what appears to be the view of those with greater experience on these committees. Nonetheless, and notwithstanding Ed Cooper's excellent work encapsulating in the revised draft the discussion at our New York January meeting, I continue to have serious misgivings about the direction our work is taking us.

Most especially, the requirement of specifying disputed and undisputed issues that now appears in subsection (c) of Ed's most recent draft is troubling. Except for Mr Buckley's proposal (presumably tongue in cheek) that judges fill out time sheets for the hours spent on summary judgment motions, he and his correspondent, Mr Black, make some very good points in their e-mails to us. These are re-printed below. We also heard from lawyers in January several thoughtful concerns about the former draft, the basic substance of which remains in Ed's revised draft. I think we should heed these concerns.

First, we seem to be proceeding from the premise that because actual practice has diverged so dramatically from the text of Rule 56 that the rule must be redrafted. As the second paragraph of the proposed committee note states, a great deal of "common law" or, more precisely, procedural gloss has built up over the years on Rule 56. It seems apparent that in most, if not all, districts the actual practice under present Rule 56 is functioning well or at least without apparent deficiencies. Summary judgments are frequently granted and these grants reviewed by the appellate courts. Although I do not have the actual data, it is my impression as a highly interested observer of appellate results, in my circuit at least, that most of these summary judgments are upheld on appeal. This suggests that judges are doing a good job weeding out the cases that pose no material triable issues of fact and letting the cases that deserve a trial go to trial, the very purpose of summary judgment. And this counsels against a redrafting of Rule 56 that gets out in front of actual practice. The need for a redrafted Rule 56 that does more than accommodate existing practice is not very compelling, in my view.

Second, I think we should be very hesitant to impose highly specific procedural steps or limitations on summary judgment practice. The time limits for the motion and response in subparagraph (a) of Ed's revised draft are of questionable value. Local rules and case specific case management orders set these time limits now. I fail to see much to be gained by a default national rule. Although I think there is some utility to a cutoff date after which a summary judgment motion cannot be made, I think judges are perfectly capable of setting appropriate limits to avoid so-called "late hit" motions for summary judgment.

A default rule concerning times is likely to become the presumptive rule. In many cases, 21 days after filing the motion is inadequate to put together a response to a summary judgment motion. Only if the motion is filed before the date for a responsive pleading does the absence of a time limit pose a problem. But note, ironically, although the current draft attempts to fine tune timing, a local rule or court order can abrogate even the rule against an "early strike" motion for summary judgment. Hence, I would stick to the present subparagraphs (a) and (b) or just re-work their substance.

Third, and most obviously problematic of the revisions under consideration, the requirement of separate statements of disputed and undisputed facts in proposed Rule 56(c), I believe, should be eliminated. Such a requirement will often lead to exactly the kind of unhelpful laundry lists of issues that Mr Black describes in his e-mail, below. Such statements are a tremendous burden on counsel to prepare. This alone should give us pause as the very idea of summary judgment is to dispose of those cases that do not merit the expenditure of large quantities of time and effort. If we make getting summary judgment nearly as expensive and difficult as a trial, we will have defeated its whole purpose. Likewise, for the cases in which a summary judgment motion is made (and that is most cases these days) but should be denied, we've just added another layer of cost and burden.

The proposed rule attempts to create reciprocal obligations: an obligation on the moving party to identify undisputed issues and an obligation on the responding party to identify disputed issues. I suggest that this reciprocity is likely to be illusory in practice. Rule 56(c)(8) supposedly empowers a court to grant summary judgment for noncompliance of the responding party. But the proposed committee note states that the non-movant's failure to respond or comply simply shifts the burden to the court to scour the record to ensure the movant has carried the summary judgment burden. We are shifting responsibility from the non-movant's lawyer to the judge. Few judges are likely to grant summary judgment simply because a responding party has failed to engage in a fair identification of the issues. We are, I am afraid, inviting strategic behavior by responding parties in the form of obfuscation by distended listings of claimed disputed issues that are really not in dispute or not material to the case and then saddling the judge with the burden of chasing all the rabbits unleashed by the non-movant down every hole. Conversely, a party can obtain denial of summary judgment by identifying only one disputed issue while remaining silent on a host of other issues. Then, at trial, the responding party can raise those issues that were not addressed on the summary judgment motions, but should have been addressed. Unless the judge anticipates those issues and deals with them in the order denying the summary motion, the motion practice has become a wasteful exercise.

This process of specifying issues can work only if the consequence of a responding party's failure fairly to dispute a claimed undisputed issue or a failure to comply with Rule 56(c)(2) is for that undisputed issue to be deemed an admission at trial. The proposed draft fails to accomplish this and the proposed committee note seems implicitly to reject this, the one tool

that would make issue specification workable (" [T]he court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment [sic] burden"). In the absence of a sanction for failure to play the specification game, the statement of issues requirement simply becomes another loop that the parties must go through to obtain summary judgment, making that useful device more burdensome and expensive.

Hence, I think if we proceed with the separate statements idea, we need to put into the rule the teeth to make it workable. The draft fails to do so. The committee note's exhortation to "focus on a small number of truly dispositive facts," to avoid "marginal facts" and "quibbling over niceties of expressions" is fussiness that will surely fall on deaf ears.

Furthermore, separate statements in my experience have been not only unhelpful, but indeed counter-productive. As litigation proceeds, the disputed issues tend to fall away and the focus of the case narrows. Requiring such statements prompts the parties to dig up matters that have essentially been put to rest and recast them in some new language to create disputes where none exists. The statements typically do not hone in on the key issues on which the case turns. This may be the fault of the lawyers, but they cannot entirely be blamed. The lawyers' responsibilities lie elsewhere from those of the judge. It is the judge's job to shape the case so that it moves toward resolution and that requires teasing out the turning point issues. This is the "case management" function of the judge. In my experience, the turning point issues come out at two points in the litigation. In fairly simple cases, they come out at the Rule 16 conference; this enables the judge with the help and usually agreement of the lawyers to set the discovery, motion and pretrial schedule to focus effort on those issues. In the larger more complicated cases, these issues usually take a bit longer to emerge; they come out in subsequent case management conferences or in consideration of summary judgment motions or sometimes in the discovery process. But in all cases large and small, these issues emerge from a dialogue or interaction between the judge and the parties. A statement of disputed/undisputed issues is no substitute for this dialogue or interaction. A judge simply cannot expect the lawyers to present a menu of issues. The judge has to play a major role in developing that menu.

Granted some judges, you included I gather, have found the specification of issues approach useful. Perhaps, you use it differently from the way that I and others have used it. I wouldn't resist the idea that under your guidance I could learn to use it profitably, but I think it would be a mistake to mandate such a procedure on a nation-wide basis. Possibly, the specification of issues approach should be included in the notes as one possible approach that a court may wish to consider requiring as a matter of local practice. But that is as far as it should proceed, in my view.

As you know, such specifications are required by the California state courts. It is my understanding that there is very widespread dissatisfaction among the bar with this requirement. While I would not predict repeal of the requirement, I would not automatically assume that this

requirement represents the wave of the future. In any event, a process that works in the law and motion departments of master calendar state courts of general jurisdiction, where the judge is confronted with ten, twenty or so motions every morning, should not automatically be adopted by single assignment federal courts.

Fourth, we should not be oblivious to the critical comments that we heard from so many lawyers at our meeting last month in New York. While we shouldn't shrink from a proposal just because some elements of the bar oppose the proposal, many of the comments I thought were telling. We need to recognize that if we put forward a proposal that engenders widespread opposition of the bar, it is highly unlikely that the proposal will be adopted. We'll just repeat the 1992 experience. Rather, I think a more general and modest proposal that does not appear to bend Rule 56 so as to encourage or discourage summary judgments stands a much better chance of eventual adoption. We need to recognize this and make every effort to secure support for what we propose.

Finally, I think our revision of Rule 56 -- and I am not against a revision -- should take a bit different tack. Rather than try to draft a rule that shapes the practice of summary judgment in all 94 districts around the country, I think it would be more useful to draft a revision that accommodates the wide-range of practices that presently exist with, perhaps, a little nudge in the direction of streamlining the process, so that it truly adheres to the command of Rule 1 "to secure the just, speedy and inexpensive determination of every action."

Anyway, thanks for hearing me out. I look forward to working with you and the others to see if we cannot come up with some modifications that we can all get behind.

Best personal regards,

Vaughn

RULE 12(e)

The September minutes reflect the paths by which the study of notice pleading has come to consider the possibility of expanding Rule 12(e) to provide for heightened pleading on a case-specific, court-directed basis. The discussion recognized that it might be useful to sharpen pleading requirements in ways that could support sound disposition of some claims or even some actions without enduring the costly burdens of discovery and summary judgment. But there was great concern that any specific rule would encourage routine motions contributing nothing but still additional cost and delay on the way to the same discovery and later pretrial practice.

The report of the Rule 56 Subcommittee reflects a conclusion that it would be premature to recommend any specific Rule 12(e) amendment now. The Federal Judicial Center has provided a summary of Rule 12(e) practice in 207,342 cases terminated in fiscal year 2006. Motions were made in 2,258 of these cases. Orders were entered on 41% of the motions — often dismissing the motion as moot after settlement or withdrawal of the challenged pleading. 14% of the motions were granted. The attached Memorandum from Joe Cecil and George Cort provides additional details.

Of course current Rule 12(e) practice is only a small part of the question. Rule 12(e) as written is very narrow. Courts generally construe it narrowly. But it may be used in ways that belie its apparent scope. The Supreme Court has suggested that specific, nonconclusory fact allegations may be required through Rule 12(e) when an official-immunity defense is raised, *Crawford-El v. Britton*, 1998, 523 U.S. 574, 597-598. The Court also recognized that the plaintiff might be ordered to reply to the defense, again to achieve greater pleading detail. In another area, the Manual for Complex Litigation includes a Civil RICO Case-Statement Order, 40.54, that exacts exquisite particularity — for example, in requiring that the proponent of a civil RICO claim "state in detail and with specificity * * * the perceived relationship that the predicate acts bear to each other or to some organizing principle that renders them 'ordered' or 'arranged' or 'part of a common plan' * * *."

Such practices illustrate the opportunities for going beyond bare-bones "notice" pleading by case-specific judicial management. The prospect of adopting a pleading rule even partially resembling the Civil RICO case-statement order would be daunting if it were not so illusory. Nor has there been any enthusiasm for attempting to identify specific substantive areas to add to the more general requirements for detailed pleading to be found in Rule 9. What remains is the question whether it would be useful to encourage both litigants and courts to embark on more vigorous attempts to enhance pleading on a case-specific basis by amending Rule 12(e) — or perhaps some combination of pleading rules considered together with Rule 16(c), which states that one of the subject for consideration at pretrial conferences is "the necessity or *desirability* of amendments to the pleadings." That question will remain on the agenda. Any further direction that might be supplied by discussion at this meeting will be welcome.

Report of the Federal Judicial Center on class actions study (materials to be circulated later)

Rule 68: A Progress Report

Rule 68 has provoked regular suggestions for reform. Substantial efforts early in the 1980s and again a decade later in the early 1990s did not result in proposals for amendment. This memorandum discusses whether the time has come to reopen Rule 68.

In *Reiter v. MTA New York City Transit Authority*, 2d Cir. July 20, 2006, Docket No. 04-5420-cv, the Second Circuit recommended to the Standing and Advisory Committees that the Advisory Committee examine the offer-of-judgment provisions of Rule 68 to "address the question of how an offer and judgment should be compared when non-pecuniary relief is involved." This opinion was included in the agenda book for the October 2006 meeting and is included again to preserve the proposal for rule amendment for the Committee's consideration.

The *Reiter* case offers a relatively straightforward illustration of the questions raised by demands for specific relief and offers of judgment. The plaintiff, a high-ranking official in the New York City Transit Authority, won a jury verdict finding that he had been demoted in violation of Title VII in retaliation for filing a charge with the EEOC. His complaint requested both money damages and equitable relief returning him "to his prior position, along with all the benefits of that position." The Rule 68 offer was for $20,001; it said nothing about specific relief. The verdict awarded $140,000 for emotional suffering. The court ordered a remittitur to $10,000, which the plaintiff accepted. The court also granted an injunction restoring the plaintiff to his former position with all of its perquisites, including an office, confidential secretary, and "Hay points" indicating the importance of the position. The parties agreed that a magistrate judge would decide the plaintiff's motion for attorney fees. The magistrate judge concluded that the right to fees terminated at the time the plaintiff rejected the Rule 68 offer because the reinstatement order was "of limited value." The Second Circuit reversed the conclusion that the Rule 68 offer of $20,001 was better than the judgment for $10,000 and reinstatement. It accepted the basic approach taken by the magistrate judge — the question was whether the equitable relief was worth more than the $10,001 difference between the Rule 68 offer and the judgment damages. This question was approached as one of fact, reviewed only for clear error. But the court also noted that the offeror, who "alone determines the provisions of the offer," "bears the burden of showing that the Rule 68 offer was more favorable than the judgment." The court began by observing that "equitable relief lies at the core of Title VII." Then it compared the great importance of the plaintiff's former job to the demotion job. Apparently the pay was the same for both jobs. But in the former job the plaintiff headed a department with a budget that "exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion * * *, he had no staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest departments with ten employees." The court readily concluded that the differences between the jobs made reinstatement more valuable than the $10,001 difference between offer and judgment damages.

The Second Circuit's conclusion is persuasive. The approach, however, is a self-fulfilling demonstration of the difficulty of comparing specific relief to dollars. It is easy to imagine ever finer distinctions between original job and demoted job, blurring the comparison. Beyond that, the opinion seems to imply that the comparison is made by considering broader social values — specific relief is specially valued in Title VII cases "because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct." The comparison might come out differently if the claim were only for breach of contract.

Other specific-relief cases compare Rule 68 offers to judgments in a variety of settings. See 12 Federal Practice & Procedure: Civil 2d, § 3006.1. Comparison of an offer for specific relief with the judgment may be easy. The offer is for a one-year injunction; the judgment is a two-year injunction, clearly more favorable, or a one-year injunction on the same terms, clearly not more favorable. The comparison may be muddled, however, if the offer does not spell out the full terms of the injunction. *Andretti v. Borla Performance Indus., Inc.*, 6th Cir.2005, 426 F.3d 824, 837-838,

is an example. The offer was for an injunction forever barring the defendant from disseminating any advertisement or promotional material containing a specific quotation from the plaintiff. The actual injunction was broader, barring any act to pass off any good or service as authorized or sponsored by the plaintiff. The court, however, concluded that the offer was understood by the plaintiff to embrace all of the terms of the outstanding preliminary injunction that was simply transformed by the judgment into a permanent injunction. It may be wondered whether Rule 68 offers of injunctive or declaratory relief commonly include full decrees, and whether arguments about the framing of an eventual decree should be shaped by the parties' concerns for the Rule 68 consequences.

But what if an offer of a one-year injunction is followed by a two-year injunction that is not [quite] as broad? An offer that the defendant will put five named customers off limits to an employee hired away from the plaintiff is followed by an injunction barring two of those customers and three or four others? Should courts be forced to the work of evaluating these differences?

Yet another complication can arise if an offer for specific relief is followed by self-correction in circumstances that persuade the court to deny specific relief as unnecessary or even moot. The defendant offers to submit to an injunction limiting the activities of the plaintiff's former employee. As the case approaches trial and the defendant views its prospects with alarm, the defendant fires the employee, who goes to work elsewhere. There is no occasion for a "judgment" dealing with this element of the demand for relief or the offer. Surely the practical outcome should be factored into the assessment.

The comparison of specific relief to dollars aggravates the difficulties. The offer in the Second Circuit *Reiter* case provided no specific relief at all. Why should the defendant — who predicted completely wrong in this dimension — be allowed to force the court through the comparison, even by saddling the defendant with the burden of showing that the judgment is not more favorable than the offer?

The question raised by the Second Circuit would arise in many cases if Rule 68 were used extensively. The Federal Judicial Center undertook a study of Rule 68 practice to support the Advisory Committee's most recent undertaking. See John E. Shapard, Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure (FJC 1995). The survey included a question asking what type of relief was sought, anticipating the very question addressed by the Second Circuit: "The problem is illustrated by trying to compare an offer to settle for $100,000 with a judgment awarding reinstatement and back pay of $40,000. The percentage of cases involving exclusively monetary relief varied from 95% in tort cases to 47% in the 'other' category, and the percentage of cases involving 'significant' nonmonetary relief varied from 35% in the 'other' category to 3% in tort cases." Id., p. 24.

The Rule 68 work in the 1990s was stimulated by a proposal to encourage more offers of judgment. The project was abandoned, in part because of the growing complexity of attempts to implement the limited "benefit-of-the-judgment" approach and — at least to some participants — because of growing doubts about the value of Rule 68. One issue is the interpretation of the rule that a successful offer cuts off a prevailing plaintiff's right to statutory attorney fees if the statute refers to the fee award as "costs," but not if the statute does not characterize the award as "costs." Even that specific question will reopen the Enabling Act question that divided the Supreme Court when it adopted this interpretation — it is not at all apparent why a rule that cuts off a statutory fee right does not abridge a "substantive" right. And of course broader questions are nearly unavoidable: why should plaintiffs not be enabled to make Rule 68 offers — is it only because of reluctance to provide sanctions greater than statutory costs, which a prevailing plaintiff ordinarily wins without regard to Rule 68? If some meaningful sanction is created to facilitate a rule that allows plaintiff offers, should a similar sanction be provided so that a judgment for the defendant carries Rule 68 consequences?

Apart from such large questions, the *Reiter* case itself illustrates an interesting wrinkle. The plaintiff's rejection of the $20,001 offer proved an accurate anticipation of the jury verdict for $140,000. The Rule 68 comparison, however, is not to the verdict but to the judgment. Should the plaintiff's decision whether to accept a remittitur to $10,000 be complicated by the Rule 68 consequences — here loss of the right to statutory fees after the offer? For that matter, is it right that Rule 68 sanctions should apply at all in an area as indeterminate as a court's estimate of the maximum reasonable jury award for emotional distress? Remember that the court of appeals found reinstatement clearly worth more than $10,001, the plaintiff faced a retrial if the remittitur were rejected, and acceptance of the remittitur waives the right to appeal the money award. Thorough reconsideration of Rule 68 will involve a great deal of work.

Professors Thomas A. Eaton and Harold S. Lewis, Jr., have completed an invaluable interview survey of practicing lawyers, reflected in part in the Symposium transcript and papers, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 2006, 57 Mercer L. Rev. 717-855. What distinguishes their work from many articles is that it draws from intensive interviews with 64 attorneys selected to represent, in even numbers, plaintiff-side and defense-side practice in employment discrimination and "civil rights" litigation. They picked these practice fields for two reasons. First, Rule 68 is more likely to be used when statutes provide attorney fees for successful plaintiffs — an offer that jeopardizes the right to recover post-offer fees is more likely to be considered seriously. Second, these fields together account for a significant share of the federal civil docket. Each federal circuit was covered by interviewing at least one set of four attorneys. The attorneys were not chosen at random, but instead by seeking leads to those with long and extensive experience in their areas of practice.

The underlying purpose began with the perception that Rule 68 offers are relatively rare even in these fields of practice. The questions pursued were first an effort to understand why Rule 68 is not routinely used and then to learn whether Rule 68 can be amended to encourage greater use. Although greater use might not contribute much by causing a still greater number of potential civil trials to "vanish," it might encourage earlier and therefore less costly disposition by settlement.

As the first of two articles, this one focuses on the reactions of the lawyers to various proposals to amend Rule 68. For present purposes, it suffices to provide a sketch of the proposals:

Change to Offer of Settlement: Many lawyers agreed that defendants are deterred by the need to offer a "judgment." The collateral consequences of being recorded as a judgment loser are important, particularly to individual defendants.

Require Plaintiffs to Disclose Accrued Fees When Asked: Some defense lawyers find it difficult to estimate a reasonable offer because they do not know what is a proper amount for pre-offer fees in a fee-award regime. Many plaintiff lawyers resist disclosure for fear of yielding strategic information — particularly that they are not yet heavily invested and thus by inference are not yet well prepared.

Extend Rule 68 To Award Sanctions When Defendant Wins: One explanation of the paucity of offers is that — particularly in employment cases in many courts — defendants believe, quite realistically, that they are going to win on the merits, often by summary judgment. Being confident that they will win, the rule that Rule 68 sanctions are not available if the plaintiff loses dissuades them from making offers. More offers might be made if the Delta Air Lines decision were reversed.

Incorporate Rule 68 into Early Judicial Interventions and Mediating: There was some support for explicitly requiring discussion of Rule 68 at the Rule 26(f) conference, or in mediation of judicially supervised conferences. The idea is that this would give defense counsel a lever to persuade the defendant that an offer is a good thing.

Address Fee Consequences in Rule: These lawyers were richly experienced. Among them they handled more than 13,000 civil rights or employment discrimination cases in the 5 years before the interviews. Some of them were not aware that Rule 68 can cut off post-offer fee awards. Amending Rule 68 to flag this issue — even to specify which fee statutes carry this effect [!] — would help.

Two-Way Rule: If plaintiffs can make demands under Rule 68, the result might well be more settlements — a defendant's offer is met with a cross-demand, a plaintiff's demand is met with a counter-offer, and so on. Several variations were explored. (1) A two-way "pressure" model would impose sanctions on a party who rejected an offer unless the party beat the offer by some margin — for example, a plaintiff who rejected a $100,000 offer would suffer Rule 68 consequences unless the judgment was at least $125,000. As a two-way rule, the same would hold for defendants. Defendants did not much like this rule. (2) A two-way "cushion" model would deny sanctions if the party rejecting the offer achieved a respectable portion — a plaintiff rejecting a $100,000 offer, for example, would incur Rule 68 sanctions only if the judgment was less than $80,000. Plaintiffs' lawyers liked this. But the survey asked a different question, working on the assumption that there are so few Rule 68 offers now that defendants would make even fewer offers if a plaintiff could avoid sanctions by simply coming close to the rejected offer. This one-way cushion version applied to benefit a defendant who rejects a plaintiff's demand, but not to a plaintiff who rejects an offer. Plaintiffs did not like this. In the end, plaintiffs' civil rights lawyers liked two-way offer rules; defense lawyers' reactions were more complicated. Plaintiffs' employment discrimination lawyers liked the idea.

Separate problems are recognized if sanctions are expanded in a two-way rule. If a plaintiff loses entirely, and is presumptively liable for defense costs, the most likely meaningful sanction is a multiple of costs or defense post-offer fees. If a plaintiff wins entirely and is entitled to costs and statutory fees, the defendant could be made liable for multiple costs or increased fees.

Prior proposals for amending Rule 68 are set out below.

Excerpts from 1992-1994 Rule 68 Drafts

Rule 68(e)(4)

(4)(A) A judgment for a party demanding relief is more favorable than an offer to it:

(I) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served}[expired] — exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(I) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

Committee Note

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary relief specified in the offer. In an action to

enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

The same process is followed, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

This provision was included in a rule that was far more complicated than present Rule 68. The rule authorized offers by claimants as well as defendants, and explicitly authorized successive offers by the same party. It provided attorney-fee sanctions, subject to complicated offsets and limits. But even then, the Committee Note — after providing a dizzying series of illustrations of increasingly complex calculations involving successive offers by both parties — did not address successive offers for specific relief.

The standard of comparison suggested in this draft was simpler than the approach taken by the Second Circuit in the *Reiter* case. If nonmonetary relief is demanded, the judgment is more favorable than the offer if it either includes all of the nonmonetary relief offered or includes substantially all the nonmonetary relief offered and additional relief. The drafting should be improved, but the intended answer for the *Reiter* case is clear: There is no Rule 68 sanction because the offer included no nonmonetary relief, while the judgment awarded monetary relief. There is no occasion to compare the difference between the money judgment and the money offer with the judgment's nonmonetary relief.

Among possible alternatives, the simplest would be a rule that explicitly requires the offeror to prove that the judgment was not more favorable than the offer. The Committee Note could note the difficulties presented by demands, offers, and judgments for specific relief. Other alternatives would expressly authorize one or both of two weighing approaches. Comparison of the offer and judgment for specific relief could be addressed in open-ended terms that direct the court to determine whether the overall effect of the judgment is more favorable than the offer. This comparison could be made without reference to the money elements of offer and judgment. Or the comparison could be complicated by adding a second dimension: if the claimant wins more money than the offer, the court weighs a shortfall in specific relief against the gain in money, while a judgment for less money than the offer would require the court to weigh the money shortfall against the gain in specific relief.

How much complication is appropriate depends on the overall value of Rule 68 offers of judgment. This assessment can be made either in the context of the present rule, otherwise unchanged, or in the quite different context of imagining a thoroughly revised Rule 68. Limited revision of the present rule will not be easy, but it may not be a major undertaking. Thorough reconsideration of Rule 68, however, will be a major undertaking.

Calendar for September 2007 - November 2007 (United States)

September 2007

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October 2007

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November 2007

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Holidays and Observances

Sep 3	Labor Day
Oct 8	Columbus Day
Oct 31	Halloween
Nov 11	Veterans Day
Nov 12	'Veterans Day' observed
Nov 22	Thanksgiving Day

Calendar generated on www.timeanddate.com/calendar

Supplemental materials

The Impact of the Class Action Fairness Act of 2005 on the Federal Courts

Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules

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Federal Judicial Center
April 2007

Contents

Introduction

At the request of the Advisory Committee on Civil Rules (Advisory Committee) (acting in consultation with the chairs of the Judicial Conference committees on the Administration of the Bankruptcy System, Court Administration and Case Management, Judicial Resources, Federal–State Jurisdiction, and Rules of Practice and Procedure), the Federal Judicial Center has undertaken a long-term study of the impact of the Class Action Fairness Act of 2005 (CAFA) (Pub. L. 109-2, 119 Stat. 4 (2005)) on the resources of the federal courts.

The following report presents preliminary data on the number, frequency, and types of class actions filed in or removed to federal district courts between July 1, 2001, through June 30, 2006. We define class action activity to include original federal filings and removed cases in which class action status is sought at any stage of the proceedings. The study includes the eighty-eight districts[1] that use the Case Management/Electronic Case Filing (CM/ECF) system and have created electronic docketing records for cases filed as of July 1, 2001.

This is the third in a series of interim reports to the Advisory Committee. The overall study is designed to examine three phases of class action activity: filing and removal of cases; litigation in the district courts; and appellate review. This report and previous reports have been devoted to the first phase. The next interim report, in the fall of this year, will introduce the second phase by presenting data on class action litigation in the district courts as gleaned from a sample of terminated cases filed before CAFA's effective date. In that phase of the study we will examine the entire litigation process, particularly the nature and source of law for the underlying claims; discovery; pretrial motions practice; class certification activity; and the process of reviewing settlements. That sample of cases will serve as the "before" portion of a "before and after" study of the impact of CAFA on the resources of the federal courts. We expect to present the next update on CAFA filing activity in the spring of 2008.

Caveat

The data presented below differ from data presented in the May 2006 and September 2006 interim reports and are subject to revision in later reports. This report includes data for the entire five-year study period from three district courts not included in the previous report (the Southern District of California, the Southern District of Florida, and the District of New Mexico); the CM/ECF system was recently installed in these districts, making their inclusion in the study possible. Also, in updating our search of

1. There are ninety-four federal district courts. The eighty-eight districts in the study accounted for 98% of the 244,441 civil cases filed in federal district courts between July 1, 2005, and June 30, 2006. The districts not included in the study are Alaska, Guam, Indiana Southern, Northern Mariana Islands, Virgin Islands, and Wisconsin Western.

docket records, we continue to identify cases raising class allegations filed between July 1, 2001, and June 30, 2006, that had not previously evidenced any class action activity. Future analyses may uncover case events that we were unable to detect during this initial examination, such as cases that were consolidated within a district or transferred to another district after our initial examination of the docket records. For further discussion of such potential updates, see "Methods Appendix" *infra.*

Summary of Interim Results

Overall, we find a 46% increase in class action activity in the eighty-eight study districts as a whole in the most recent six-month period for which data is available, January–June 2006, compared to the first six months of the study period, July–December 2001. Much of that increase was in federal question cases, especially labor class actions, and thus not attributable to the effects of CAFA. In the sixteen months since CAFA went into effect on February 18, 2005, however, we find a substantial increase in class action activity based on diversity of citizenship jurisdiction. Given that one of the legislation's primary purposes was to expand the diversity jurisdiction of the federal courts, it is likely that much of this observed increase in diversity removals and, of particular interest, original proceedings in the federal courts is attributable to CAFA.

More specifically, data from the eighty-eight courts show the following:

- Comparing diversity filings and removals in the last calendar year before CAFA's effective date, 2004, with the last twelve months for which data is available, July 2005 through June 2006, we find an increase of 364 diversity cases in the 88 study districts. (For further information, see Figure 3 and accompanying text.)
- Average monthly numbers of diversity class actions increased from a pre-CAFA level of 27.0 cases per month to a post-CAFA level of 53.4 cases per month—or 26.4 additional diversity class action filings and removals per month.[2] (See Figure 3 and accompanying text.)
- The observed increase in diversity cases resulted from both an increase in the number of removals and an even greater increase in the number of original proceedings. In the last twelve months of the study period, original proceedings based on diversity jurisdiction outnumbered removals based on diversity jurisdiction, the reverse of the general pre-CAFA pattern. (See Figure 4 and accompanying text.)
- The increase in diversity class actions in the CAFA period is largely concentrated in cases raising state-law contract and fraud claims. The average number of monthly filings and removals in contract cases has more than doubled after CAFA, and the average number of monthly filings and removals in fraud cases has tripled. (See Figures 1, 2a, and 2c and accompanying text.)

2. All reported differences in average monthly filings and removals, pre- and post-CAFA, are statistically significant at the .05 level or better, unless otherwise noted.

- Tort class actions in the federal courts have not greatly increased in the CAFA period. The average number of monthly filings and removals in property damage cases based on diversity jurisdiction has doubled (to slightly more than four per month) after CAFA, but the average number of monthly filings and removals in personal injury class actions based on diversity jurisdiction was unchanged after CAFA. (See Figures 1 and 2b and accompanying text.)
- In every circuit the district courts as a whole (but not every district) have experienced an increase in diversity class action filings and removals in the CAFA period. In seven of the twelve circuits the number of diversity cases at least doubled. (See Figure 5 and accompanying text.)
- Seventy percent of the study districts experienced an increase in diversity class action filings in the last twelve months of the study period, July 2005 through June 2006, compared to the last full calendar year before CAFA went into effect, 2004. (See Figures 6 and 7 and accompanying text).

Interim results

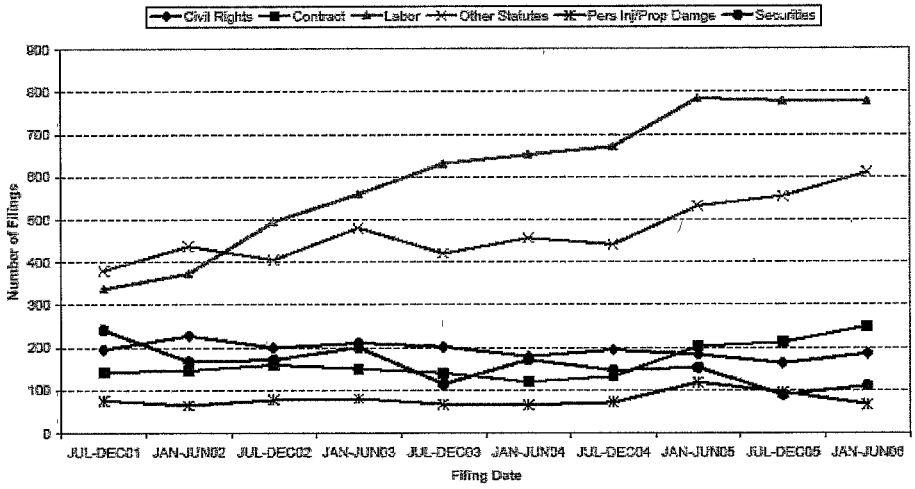
To identify class actions, the research team examined the dockets of hundreds of thousands of cases and detected class action activity in 26,541 cases filed in or removed to the eighty-eight federal district courts included in the study between July 1, 2001, through June 30, 2006. By eliminating reopened cases and adjusting for inter- and intra-district consolidations (a combined total of 9,841 cases), we arrived at a total of 16,700 single-case or lead class actions filed or removed in the study districts during the five-year study period. See "Methods Appendix."

Filing trends

Figures 1 through 4 present data collapsed into six-month time periods. Figure 1 presents data on class action activity in the eighty-eight study districts between July 1, 2001, and June 30, 2006, grouped by nature of suit. The effective date of CAFA, February 18, 2005, is located in the six-month period January–June 2005.

Figure 1 displays class action activity in all nature-of-suit categories. All class actions identified in the study were assigned to one of six categories: (1) Contract; (2) Personal Injury/Property Damage; (3) Other Actions (a catch-all category including federal and state statutory actions and common-law fraud cases); (4) Labor; (5) Securities; and (6) Civil Rights. The groups are based on nature-of-suit classifications identified by the plaintiff's attorney at the time of filing. Similar nature-of-suit classifications were combined; for example, "Insurance-Contract" and "Other Contract" were collapsed into "Contracts."

Figure 1
Class Action Filing and Removal Frequencies for all Natures of Suit
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



Class actions ranged from a low of 1,372 during the first six months of the study period, July–December 2001, to a high of 1,998 during the most recent six-month period, January–June 2006. That difference represents a 46% increase in class action activity during the study period. As Figure 1 makes clear, however, a great deal of that increase in class action activity was in labor cases, and thus was not attributable to CAFA. As discussed below, labor and other nature-of-suit categories composed largely of federal question cases tended to increase steadily throughout the study period. Instead, we expect to observe CAFA's impact in nature-of-suit categories that include a large percentage of diversity cases. In Figure 1, this is seen most clearly in the observed increase in contract class actions in the last three six-month periods. Indeed, in July–December 2005 and January–June 2006, the two complete six-month periods after CAFA's effective date, contract class actions outnumbered both securities and civil rights class actions, a change in the pattern earlier in the study period when securities and civil rights class actions each tended to outnumber contract class actions.

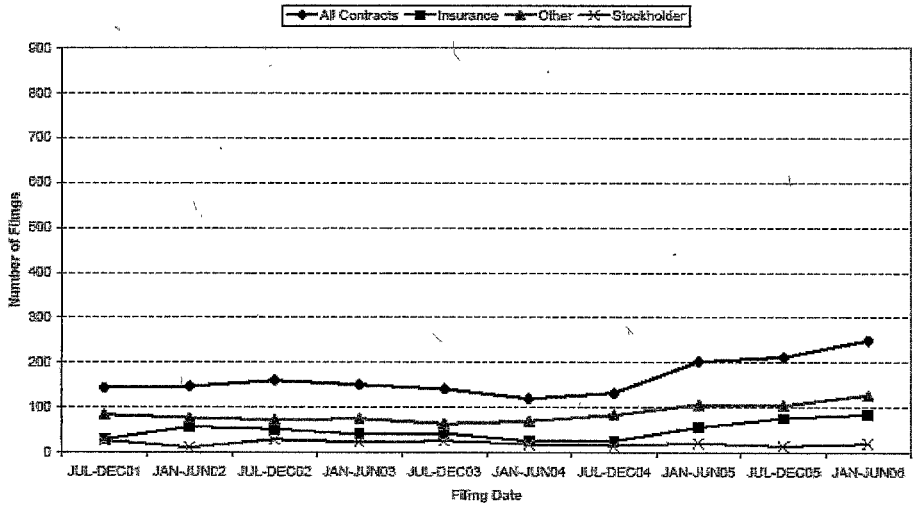
Perhaps what is most striking about Figure 1 is the extent to which labor class actions dominate. Labor cases leveled out just below the 800 mark during the last year of the study. The only other nature-of-suit category that exceeded 300 class ac-

tions in any six-month period covered by the study is the catch-all "Other Actions" category. The other lines in the figure tend to cluster around 100 to 200 class actions per six-month period. It is also worth noting that, once consolidations are taken into account, personal injury and property damage class actions (i.e., tort class actions) typically represent the smallest nature-of-suit category in Figure 1.

The following discussion focuses on each of these categories in turn. Because CAFA is expected to have the largest impact on state-law claims filed in state courts (on behalf of classes with at least minimal diversity of citizenship), the legislation's most significant effects will likely be found in the contract (Figure 2a), tort (Figure 2b), and common-law fraud cases (Figure 2c). The discussion thus begins with these nature-of-suit categories. It then turns briefly to nature-of-suit categories largely based on federal statutory grounds, such as labor (Figure 2d), securities (Figure 2e), and civil rights (Figure 2f).

Contract

Figure 2a
Class Action Filing and Removal Frequencies for Contract Cases in 88 Federal District Courts from July 1, 2001, to June 30, 2006



As seen in Figure 2a, contract cases in general dipped from 159 class actions in July–December 2002 to 119 class actions in January–June of 2004. Contract cases then increased from 132 in July–December 2004 to 202 in the first six months of 2005 (the six-month period that includes CAFA's effective date), then rose to 212 in the next six-month period, and to 249, its highest level in the study period, in Janu-

ary–June 2006. The pattern is similar for both insurance and other contract subcategories. In January–June 2006, both of these subcategories also reached highs: 127 class actions for the other contract subcategory, and 84 for the insurance subcategory. The small number of class actions in the stockholder suits subcategory was relatively constant throughout the study period.

Additional analysis indicates that the increase in the number of contract class actions after CAFA is the result of an increase in cases based on diversity of citizenship. On a monthly basis, the average number of diversity contract class actions increased by sixteen cases, from almost fourteen per month before CAFA to almost thirty per month after CAFA. However, the average number of monthly federal question contract class action cases did not change, remaining a constant 8.5 cases per month before and after CAFA's effective date.

In terms of case origin, there has been a greater increase in original filings in federal court of diversity contract class actions than in removals of such cases from state courts. The average increase of about sixteen cases per month in diversity contract class action cases after CAFA consisted of eleven original federal proceedings and five removals. In other words, plaintiffs after CAFA are increasingly filing diversity contract actions as original proceedings in federal court.

Because Hurricane Katrina occurred during the study period, it was necessary to examine whether insurance litigation following the worst natural disaster in United States history was driving these findings. For that reason, a similar analysis was conducted after excluding all contract cases filed in or removed to the Eastern District of Louisiana (the district in the affected region with the most diversity class action activity overall). Although the average number of monthly contract diversity cases declined slightly as a result, the findings were consistent: the average number of monthly original filings of contract class action cases increased after CAFA by almost ten cases per month, and the average number of monthly removals of contract class action cases increased after CAFA by more than four cases. In sum, most of the increase in diversity contract cases after CAFA was not a product of Hurricane Katrina insurance class actions.

Tort—Personal Injury and Property Damage

Figure 2b
Class Action Filing and Removal Frequencies for Tort Cases
in 88 Federal District Courts
from July 1, 2001, through June 30, 2006

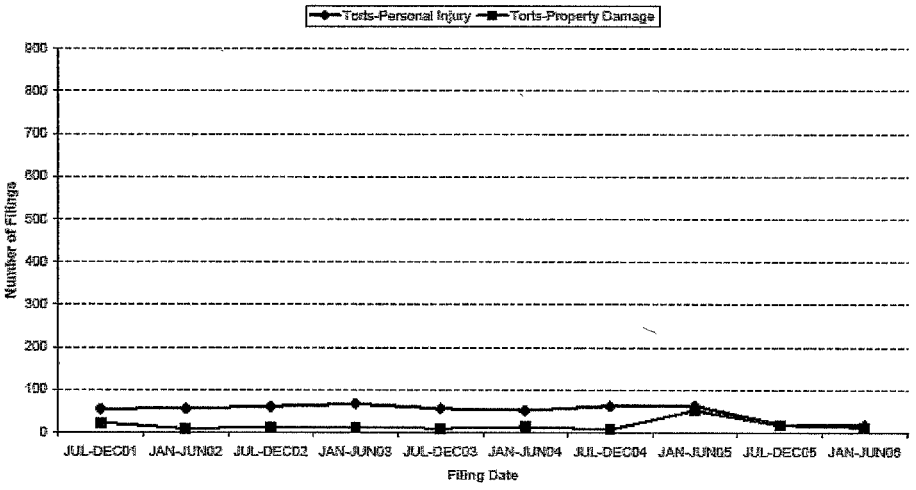


Figure 2b presents the number of class actions in two subcategories of tort cases: property damage and personal injury. The two show markedly different patterns. Property damage cases represented a very small number of cases for most of the study period, accounting for just thirteen class actions in January–June 2004 and seven in July–December 2004. In the first six months of 2005, however, there were fifty-two class actions in property damage cases in the eighty-eight study districts. A substantial portion of those cases, however, were actually filed before CAFA's effective date. But in the next two six-month periods, property damage cases continued to be filed and removed at high levels—thirty-nine cases in July–December 2005 and twenty-six in January–June 2006. The timing of this increase points to CAFA as a likely explanation.

Personal injury cases, on the other hand, actually reached their lowest level in the study period in January–June 2006—forty-one cases, down from sixty-six cases in January–June 2005. The high point for personal injury class action filings and removals was in January–June 2003 when there were sixty-eight personal injury filings and removals. Unlike property damage filings and removals, personal injury filings

and removals have not increased since CAFA's effective date. Such cases face strict limits on class certification in federal courts.

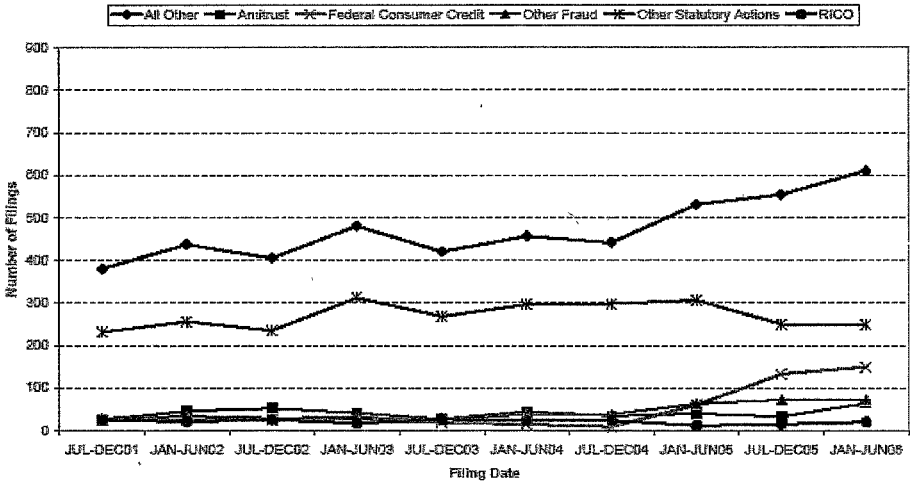
The increase in property damage cases has been driven by an increase in the number of such cases in federal court on the basis of diversity jurisdiction. Analysis of monthly property damage class actions reveals that diversity cases have increased, on average, from 1.7 cases per month before CAFA to 4.2 cases per month after CAFA. Property damage class actions based on federal question jurisdiction are essentially unchanged. The data also show, interestingly, that removals of diversity property damage cases are down slightly after CAFA. This indicates that the additional property damage class actions, after CAFA, were diversity cases filed as original proceedings in federal court.

Monthly personal injury tort class actions remained the same, on average, before and after CAFA. Those based on diversity jurisdiction averaged 6.7 class actions per month before its enactment and 6.8 per month after. It does not appear so far that CAFA has led to an increase in the number of personal injury class actions in federal court. Similarly, personal injury class actions based on federal question jurisdiction averaged 1.9 per month before CAFA and 1.8 after.

Other Actions

The other actions category illustrated in Figure 2c includes two broad sets of cases: federal statutory actions, including antitrust, RICO, Truth in Lending Act, Fair Credit Reporting Act, and Fair Debt Collection Practices Act; and state-law cases, including common-law fraud. Federal statutory actions generally are original actions filed in federal court based on federal question jurisdiction. State-law claims generally are based on diversity of citizenship jurisdiction and include a number of cases initially filed in state court and removed to federal court.

Figure 2c
Class Action Filing and Removal Frequencies for Other Actions
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



As Figure 2c shows, other fraud, federal consumer credit, and antitrust class actions were trending upward at the end of the study period. Of these categories, only the other fraud category contains cases based on diversity of citizenship. Further analysis indicates that other actions based on federal question jurisdiction have increased during the study period, driven almost entirely by an increase in original federal proceedings. This change in the filing of federal question class actions is not likely because of CAFA, which does not directly apply to such cases, but rather the result of other trends affecting federal question cases, trends which we will examine in the next phase of our study. Class action activity in antitrust, federal consumer

credit (including the consumer credit and truth in lending natures of suit)[3] and other federal question nature-of-suit categories, including labor (Figure 2d) has increased, while class action activity in securities (Figure 2e) and civil rights (Figure 2f) cases has declined.

Looking at primarily state-law cases in Figure 2c, diversity class actions in the other actions category have increased in the CAFA period. On average, diversity cases have increased by slightly more than eight cases a month after CAFA, from 4.2 to 12.3. This increase is divided between original proceedings, which have increased, on average, by five cases, from 1.9 to 6.9 per month, and removals, which have increased by an average of over three cases, from 2.3 to 5.4.

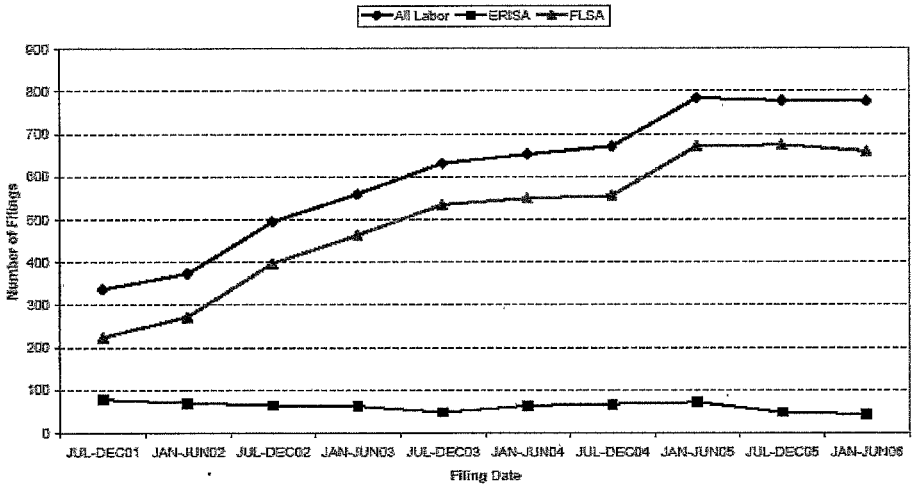
Most of these additional cases are of the other fraud type. The number of such cases filed in or removed to federal court has increased in the CAFA period, including a substantial number of state-law cases. As seen in Figure 2c, 72 other fraud class actions were brought into federal court in the six-month periods of July–December 2005 and January–June 2006. Sixty-three fraud class actions were brought in January–June 2005. These figures all exceed the 38 such cases that were brought in both January–June 2004 and July–December 2004.

Analysis of the monthly other fraud class actions reveals an interesting trend. The average number of diversity other fraud class actions has jumped from 2.3 cases per month before CAFA to 8.4 cases after CAFA. The average number of federal question other fraud class action cases, on the other hand, has remained relatively stable, at approximately three per month. This suggests that CAFA is responsible for the observed increase in other fraud class actions.

3. The apparent increase in federal consumer credit class actions after CAFA may be an artifact of the 2004 addition of a nature-of-suit code that encompasses cases filed under the Fair Credit Reporting Act and the Fair Debt Collection Practices Act.

Labor

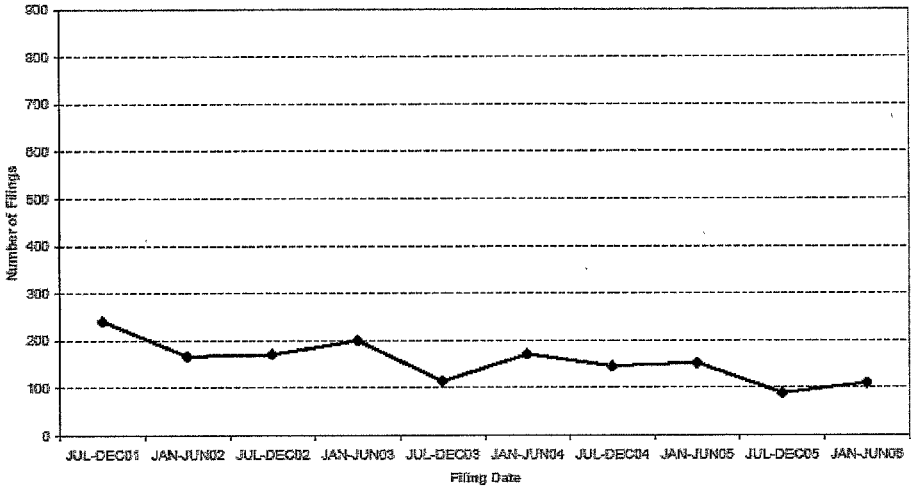
Figure 2d
Class Action Filing and Removal Frequencies for Labor Cases
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



The labor category is composed of cases based on federal law, primarily the Fair Labor Standards Act (FLSA), but also the Employment Retirement Income Security Act (ERISA). Labor is also the largest single category of class actions identified in the study, accounting for fully 36% of class actions in the eighty-eight districts (see Figure 1). Figure 2d shows a clear pattern: labor class actions increased in every six-month period until July–December 2005, at which point the number of cases filed in or removed to federal court leveled off at just under 780 cases in both July–December 2005 and January–June 2006. There is no reason to think that CAFA affected labor cases, as none of the 6,056 labor class actions identified in the study were based on diversity of citizenship.

Securities

Figure 2e
Class Action Filing and Removal Frequencies for Securities Cases in 88 Federal District Courts from July 1, 2001, to June 30, 2006



As seen in Figure 2e, securities cases have fallen from 241 class actions in July–December 2001 to 110 in January–December 2006. Although the number of such cases has not fallen in every succeeding period, the downward trend is clear. In the CAFA period, on average, fewer than twenty securities class action cases were being filed each month in the eighty-eight study districts. As in the labor cases, it is unlikely that CAFA affected securities cases, as these cases are based on federal question jurisdiction rather than diversity jurisdiction.

Civil Rights

Figure 2f
Class Action Filing and Removal Frequencies for Civil Rights Cases
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006

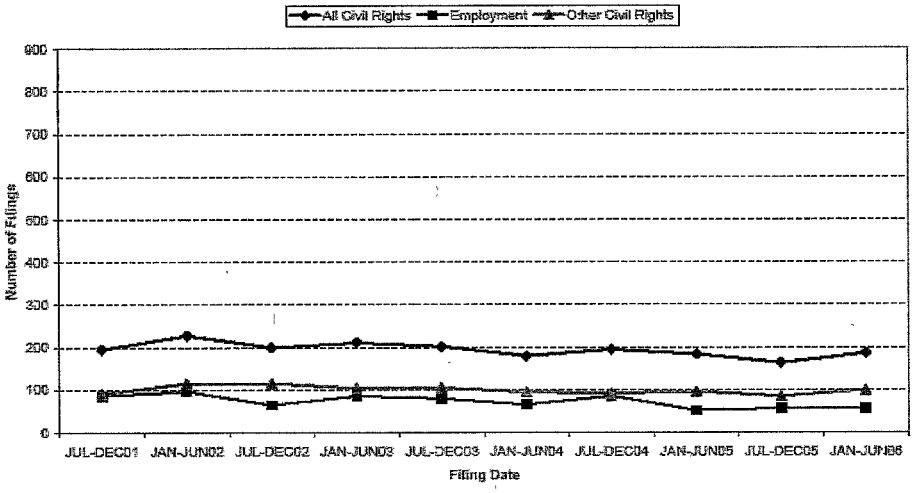


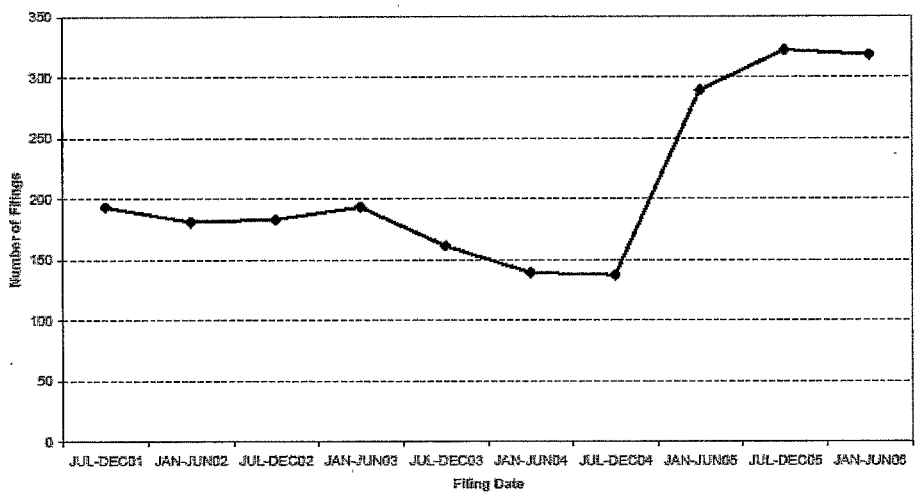
Figure 2f shows that civil rights cases have also been trending downward, declining from a high in the study period of 227 class actions in January–June 2002 to 163 in July–December 2005 and 185 in January–December 2006. As with labor and securities, it is unlikely that CAFA has had any effect on the filing and removal of such cases. Ninety-five percent of these cases are based on federal question jurisdiction.

Basis of federal jurisdiction

Figure 3 presents data on the filing and removal of class actions based on diversity of citizenship jurisdiction. The pattern seen in Figure 3 is clear. Before January–June 2005, the six-month period that includes CAFA's effective date, the number of diversity cases filed in or removed to the eighty-eight study districts had been trending downward, from a high of 193 filings and removals in both July–December 2001 and January–June 2003, to 139 in January–June 2004 and 137 in July–December 2004. Starting with January–June 2005, however, the number of diversity cases filed in or removed to federal court increased to 289—almost 100 cases more than in the previ-

ous high in the study period. The number of diversity cases continued upward to 322 in July–December 2005 and then settled to 318 in January–June 2006.

Figure 3
Diversity Class Action Filings and Removals
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006



Calendar year 2004 experienced the fewest diversity cases during the study period—totaling only 276. In the last twelve months of the study period, the number of diversity class actions was 640, more than double the 2004 figure and 75% greater than the 2002 figure (354). In all, 364 additional diversity cases were filed in or removed to federal court in the last twelve months of the study period compared to calendar year 2004. Given the observed downward trend in diversity cases before CAFA's effective date, it is reasonable to conclude that CAFA is responsible for much of the observed increase in diversity class actions.

Analyzing the data in terms of monthly activity, the average number of diversity class actions increased from a pre-CAFA average of 27.0 cases per month to a post-CAFA average of 53.4 cases per month—an increase of 26.4 cases per month. Because this increase in the average number of filings and removals is based on the entire range of pre-CAFA data, and not just on the relatively low 2004 figures, it yields a lower estimate of CAFA's impact than the comparison between calendar year 2004 and the last twelve months of the study period. Over a twelve-month period, the per month increase yields an estimate of approximately 317 additional class actions per

year, over the average annual number of class actions observed in diversity cases from July 2001 through January 2005. Again, this figure is smaller than the 364 case difference observed between calendar year 2004 and the last twelve-month period for which data is available because 2004 saw the lowest level of diversity cases in the study period. However, if one assumes that the downward trend observed in the pre-CAFA periods in Figure 3 would have continued, had CAFA not been enacted, an estimate of CAFA's impact on diversity case filings and removals greater than 317 cases per year would be reasonable.

As discussed in previous subsections, a great number of these additional diversity cases will be state-law contract and fraud class actions. Together, the observed increases in these two categories account for about three-quarters of the overall increase in diversity cases—with contracts increasing by about sixteen cases per month, or approximately 192 per year, and other fraud cases increasing by six cases per month, or approximately seventy-two cases per year.

Origin of cases

The potential effect of CAFA on the origin of cases—whether more diversity cases would be filed as original proceedings in federal court by plaintiff attorneys, or whether the federal courts would see more removals after CAFA—was and is hard to predict. On one hand, CAFA was designed to facilitate removal of class actions with state-law claims, particularly those involving the laws of more than one state, based on minimal diversity. CAFA also eased previous statutory restrictions on removal of cases and thus provided reason to expect that the number and percentage of cases removed would increase after CAFA. But these changes in the law would be as clear to plaintiff attorneys as to anyone. As removal becomes more predictable, plaintiff attorneys might decide to file actions initially in federal court to avoid the costs and delays associated with removal. Thus, in terms of diversity cases, CAFA potentially could increase removals or original proceedings, or both.

Figure 4
Origin of Diversity Class Action Filings and Removals
in 88 Federal District Courts
from July 1, 2001, to June 30, 2006

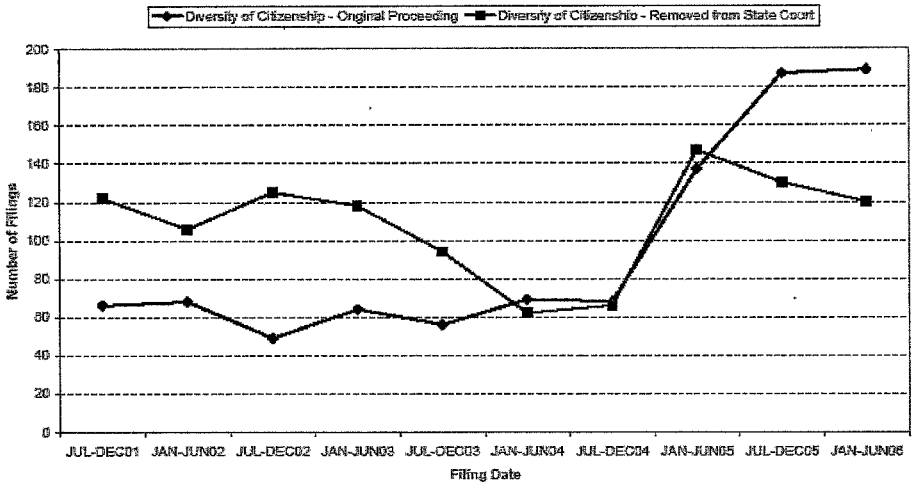


Figure 4 presents data on the origin of diversity cases in the eighty-eight district courts during the study period. As the figure indicates, original proceedings and removals exhibited very different patterns before CAFA's enactment. Pre-CAFA, the number of original diversity actions in federal court was relatively stable, always be-

tween 50 and 70 filings every six months. The number of removals of diversity actions, on the other hand, had actually been falling during the study period, from 122 in July–December 2001 and a high of 125 in July–December 2002 to 94 in July–December 2003, 62 in January–June 2004, and 66 in July–December 2004. The downward trend seen earlier in Figure 3, then, appears to have resulted from a decrease in removals and not from any change in original proceedings. Starting in January–June 2005, the six-month period spanning CAFA's effective date, both original and removed diversity actions increased. Original proceedings totaled 137 in January–June 2005, 187 in July–December 2005, and 189 in January–June 2006. Removals totaled 147 in January–June 2005, but then dropped to 130 in July–December 2005 and 120 in January–June 2006—a figure similar to the number of removals in earlier six-month periods. Interestingly, original diversity class actions outnumber diversity removals in both the July–December 2005 and January–June 2006 periods.

Similarly, in monthly filing and removal terms, most of the increase in diversity class actions after CAFA appears in the form of original actions filed in federal courts. Original diversity cases account for 19.7 of the 26.4 additional diversity cases per month; only 6.7 of the additional cases entered federal courts by removal from state courts. These average monthly figures, it should be noted, are based on the entire pre-CAFA period and not just on calendar year 2004, when removals were at their lowest point, so the average increase in removals is smaller than that of original proceedings. The increase in removals in Figure 4 is actually slightly larger than the increase in original proceedings in January–June 2005, although removals leveled off in the last two six-month periods and original proceedings continued to increase.

These findings suggest that plaintiff attorneys may be anticipating the removal of class actions on the basis of CAFA's minimum diversity provisions and are filing them in federal court as original proceedings. In that way, plaintiff attorneys retain a choice of forum at least to the extent that, in a given case, jurisdiction and venue rules allow filing in more than one federal forum.

Circuit level impact

CAFA's impact is expected to vary from circuit to circuit. In the words of one federal district judge, "it is safe to predict that [after CAFA] the parties will continue to engage in strategic behavior when it comes to choosing a forum."[4] Plaintiffs may exercise their choice of forum by filing class actions as original actions in a district court within the circuit they view as having favorable procedural and legal rules, geographic connections to the litigation, or judges they perceive to be predisposed to ruling in favor of class certification.[5] Defendants in turn may exercise their removal

4. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005,* 80 Tulane L. Rev. 1617, 1642 (2006).

5. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make,* 81 Notre Dame L. Rev. 591, 602–03, 607–15 (2006).

rights in accordance with their own strategic perceptions about favorable procedural and legal rules and judicial predispositions.[6]

Figure 5
Diversity Class Actions, by Circuit, Comparing CY 2004 and the Last Twelve Months of the Study Period

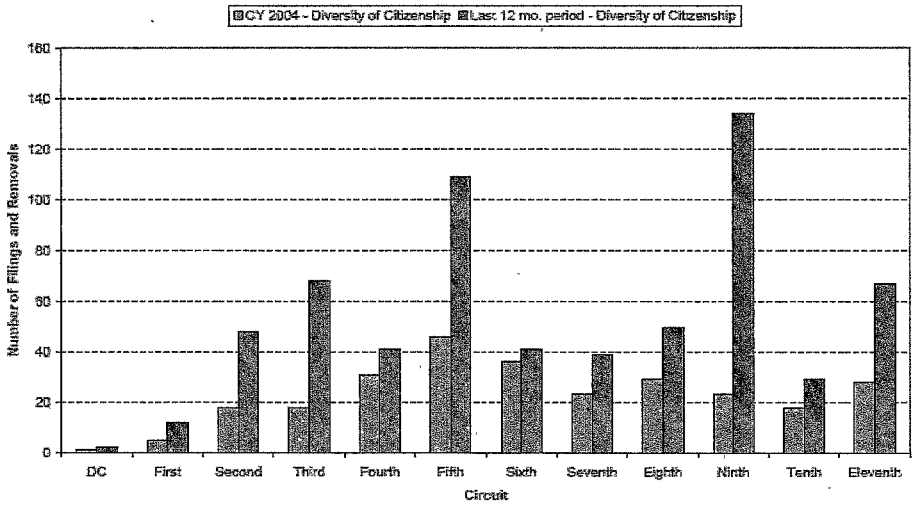


Figure 5 illustrates changes in diversity class actions in the study courts in each circuit by comparing one year of pre-CAFA filing and removal activity (2004, the last complete calendar year preceding enactment of CAFA) with one complete year of CAFA activity (July 1, 2005-June 30, 2006). The figure shows that the level of activity increased in the district courts in all twelve circuits. In seven of the twelve circuits the number of diversity-based class actions at least doubled. In the Ninth Circuit, the level of diversity class action activity in the district courts increased almost six-fold after CAFA, compared to calendar year 2004, accounting for 30% of the overall increase. Together, the district courts in the Fifth and Eleventh Circuits also experienced substantial increases, accounting for 28% of the overall increase. The district courts in the Third Circuit saw a tripling in the filing and removal of diversity class actions compared to calendar year 2004.

6. *Id.* at 615–18.

District court impact

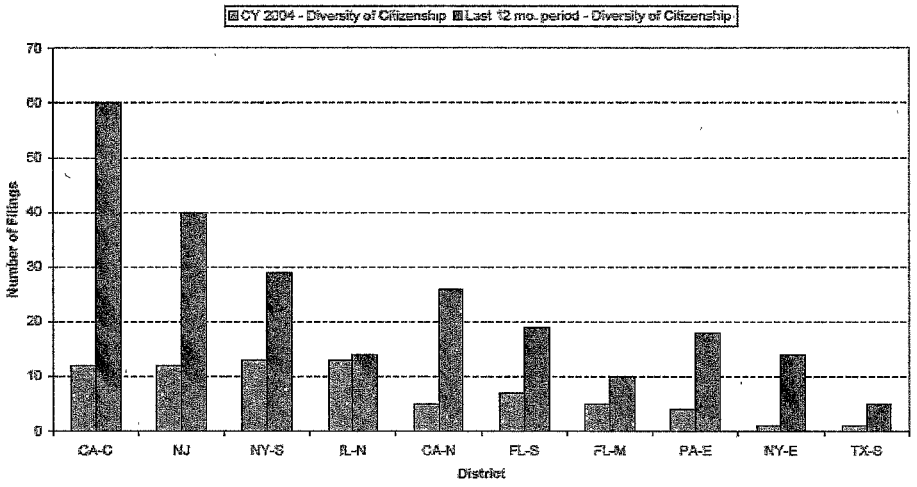
Choice of forum, of course, begins at the district court level. In examining data at the district court level one would expect plaintiff attorneys to compare the procedural and class certification rules of the circuit in which the district court sits with the procedural and class certification rules of the state in which the district court sits.[7] While such an analysis is beyond the scope of our study, others might wish to analyze the forum-selection factors that might be driving the data reported here.

Of the eighty-eight study districts, sixty-two (70%) experienced increases in diversity class actions between calendar year 2004 and the last twelve-month period for which data is available; twelve (14%) experienced no change; and fourteen (16%) experienced decreases. The largest decrease was in South Carolina, where the number of diversity cases went from eighteen in 2004 to eleven from July 1, 2005, through June 30, 2006. Three other districts experienced decreases of four cases each.

Figure 6 presents data for the ten districts with the highest overall level of class action activity during the study period (measured in terms of all class actions, regardless of the basis of jurisdiction or nature-of-suit code). The ten largest overall districts, in order of the total number of *diversity* class action filings in the study period, are the Central District of California, the District of New Jersey, the Southern District of New York, the Northern District of Illinois, the Northern District of California, the Southern District of Florida, the Middle District of Florida, the Eastern District of Pennsylvania, the Eastern District of New York, and the Southern District of Texas. These ten districts account for 30.7% of the diversity class actions in the study. As in Figure 5, Figure 6 compares the number of diversity cases during a one-year period before CAFA (calendar year 2004) with the number of such cases during the last twelve-month period for which data is available, July 1, 2005, through June 30, 2006.

7. *See, e.g.*, Willging & Wheatman, *supra* note 5, at 631–33.

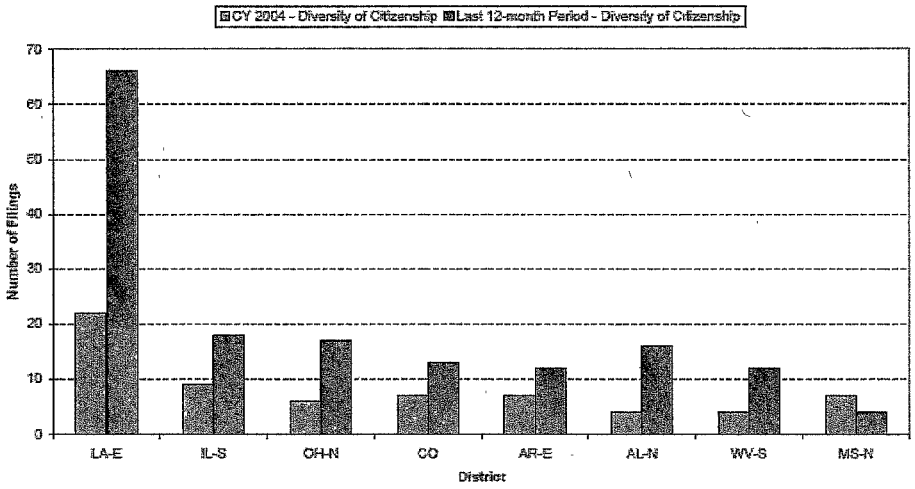
Figure 6
Diversity Class Actions Before and After CAFA
in the Ten Districts with the Largest Number of Class Actions
from July 1, 2001, to June 30, 2006



Nine of the ten largest districts saw at least twice as many diversity cases in the last twelve-month period as in calendar year 2004. The exception to this trend is the Northern District of Illinois, which went from thirteen to fourteen cases. These data strongly indicate that CAFA has had its intended effect of bringing state-law-based diversity class actions into the federal courts.

To further explore the effect of CAFA on diversity cases filed in and removed to the study districts, a similar analysis was performed for the eight additional study districts with more than forty diversity cases in the five-year study period (most of the study districts see very little diversity class action activity). Those eight districts are the Eastern District of Louisiana, the Southern District of Illinois, the Northern District of Ohio, the District of Colorado, the Eastern District of Arkansas, the Northern District of Alabama, the Southern District of West Virginia, and the Northern District of Mississippi. Figure 7 presents the number of diversity filings and removals in these eight districts in calendar 2004 and in the twelve-month period from July 1, 2005, through June 30, 2006.

Figure 7
Diversity Class Actions Before and After CAFA
in Eight Additional Districts with 40 or More Such Actions
from July 1, 2001, to June 30, 2006



Seven of the eight districts included in Figure 7 saw increases in diversity class action activity in the last twelve-month period for which data are available, compared to 2004. The exception is Mississippi Northern, which saw a decrease from seven to four. Although the increase in Louisiana Eastern may be largely the result of litigation based on Hurricane Katrina, it is likely that much of the increase in the six other districts is related to CAFA. It is particularly noteworthy that Illinois Southern, which includes Madison County, one of the "magnet" courts discussed in the run-up to CAFA, saw a doubling of diversity class actions, from nine to eighteen, between the two periods.

Conclusion

CAFA to date has had its intended effect of bringing more state-law diversity class actions into federal district courts. The CAFA period has seen a marked increase in the number of diversity class actions in federal court, both in terms of removals and original proceedings. Estimates based on the data in this report suggest that, conservatively, CAFA's impact is an increase of more than 300 diversity class actions in federal court per year over pre-CAFA levels. These additional cases so far have primarily been contract and common-law fraud cases, plus a small number of property damage class actions. In the next phase of this study we will examine the impact of

those cases on judicial resources and will explore, in depth, most aspects of the class action litigation process.

Methods Appendix

To identify the population of class action cases, we first used national CM/ECF real-time replication databases to identify cases with class action related activities. We searched electronically for the term "class" and eliminated all cases in which the reference was not to class action activity (for example references to "first class mail" or "World Class Distributors"). We also looked in the replication database for a class action flag variable used by the Administrative Office (AO) and by some courts to identify class actions at filing and at termination. We supplemented that search by including cases identified as class actions in the Integrated Data Base (IDB) maintained by the Federal Judicial Center, based on data provided by the courts to the AO. We also included all cases identified as class actions by CourtLink, an electronic service produced by Lexis/Nexis. CourtLink identifies class actions via PACER docket records by searching in the case caption for the terms "similarly situated" or "representative of the class" among the parties' names.

We excluded all actions in which there was not an attorney on the plaintiff side of the litigation because pro se litigants do not have authority to represent a class. For similar reasons we excluded cases dealing with prison conditions. We also excluded counseled habeas corpus class action cases, such as those alleging illegal detention or challenging deportation policies, because the number of such cases is so small that separate analysis is not warranted. We excluded all cases in which the United States was the plaintiff because such cases are almost always not Rule 23 class actions.

To identify and eliminate overlapping and duplicative actions, we searched the above dataset of class action docket records for terms including "consolidate," "transfer," "related case," "MDL," "JPML," "conditional transfer order," and for variations on those terms. If we found no such term or no information that the case was consolidated with another, we counted the case as a single or "unique" case and included it in the study. For all consolidated cases, both intradistrict and interdistrict (including multidistrict or MDL transfers and interdistrict transfers based on an order changing venue), we identified a single "lead" case for inclusion in the study and identified "member" cases for exclusion. The clerk of the Judicial Panel on Multidistrict Litigation (JPML) and his staff[8] provided statistical information that allowed us to double check whether any of the cases we had marked as "unique" were in fact part of an MDL consolidation.

As a further check, we eliminated from the database all cases that had been terminated by transfer to another district, whether following a transfer order from the JPML or an order to change venue issued by a district court. Almost all of the latter were MDL "member" cases but we may find in our updates that some "unique" cases have been transferred, reducing the number of unique class actions for these districts.

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8. We are grateful to Jeffrey N. Lüthi, Clerk of the Judicial Panel on Multidistrict Litigation, and Ariana Estariel and Alfred Ghiorzi of the JPML clerk's office for their timely and invaluable assistance.

The table below displays the number of unique, lead, and member cases.

Table 1. Frequency of Lead, Member, and Unique Cases Examined in Study of Class Action Activity from July 1, 2001, Through June 30, 2006, in 88 Federal Districts

Class Action Case Frequencies	Total	Percent
Lead–intradistrict consolidation	1,495	5.5
Lead–multidistrict (JPML) consolidation	196	1.0
Unique	15,009	56.5
Subtotal–Cases *included* in study	16,700	63.0
Member–intradistrict consolidation	5,934	22.3
Member–multidistrict (JPML) consolidation	3,907	14.7
Subtotal-Cases *excluded* from study	9,841	37.0
Total number of class actions	26,541	

Table 1 shows that approximately 37% of class actions overlapped with or duplicated other federal class actions.

THE FEDERAL JUDICIAL CENTER
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WASHINGTON, DC 20002-8003

April 12, 2007

Memorandum

To: Hon. Michael Baylson

From: Joe Cecil and George Cort

Subject: Estimates of Summary Judgment Activity in Fiscal Year 2006

The following tables contain the results of our analyses of summary judgment activity in 179,969 cases terminated in the 78 federal district courts that had fully implemented the CM/ECF reporting system in Fiscal Year 2006. These figures exclude class action cases, multi-district litigation cases, and reopened cases. The tables indicate the following:

- Nationwide, approximately 17 motions for summary judgment are filed for every 100 cases terminated. Of course, some cases may have more than one motion filed, so the proportion of actual cases with summary judgment motions is somewhat lower. This estimate is based on all terminated cases, including those cases terminated before the issue was joined and before a summary judgment motion would have been appropriate. (Table 1)

- Summary judgment activity in the circuits ranges from a low of 7 motions per 100 cases in the Second Circuit to a high of 34 motions per 100 cases in the District of Columbia Circuit. (Table 1)

- Summary judgment activity varies greatly within circuits, due in part to differences in the composition of the districts' caseloads. Some of the districts with high rates of summary judgment activity also have a high percentage of social security cases, which are typically resolved by the grant or denial of a summary judgment motion. Some of the districts with especially low rates of summary judgment motions have local rules or standing orders that encourage consultation with the judge before filing a summary judgment motion. (Table 1)

- Approximately 9 percent of the motions are for partial summary judgment, and less than 1 percent of the motions seek summary judgment under FRCivP 54. (Table 2)

- Summary judgment activity varies greatly across types of cases, from a low of 9 motions per 100 cases in torts cases to a high of 28 motions per 100 cases in civil rights cases. Summary judgment activity in personal injury product liability cases is difficult to assess due to the frequent consolidation of such cases in class actions and multi-district litigation proceedings. (Table 3)

- Approximately 60 percent of the summary judgment motions are granted in whole or in part, with a somewhat higher rate of motions granted in civil rights cases. (Table 3)

- Over 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part, with considerable variation across circuits and across districts within circuits. (Table 4)

Methodology

The information in the following tables was extracted from the CM/ECF replication database. The individual courts follow somewhat different data recording practices and this may account for some of the variation across districts. For example, summary judgment motions under FRCivP 54 may simply be recorded as summary judgment motions in some districts. Summary judgments arising from a magistrate judge's report and recommendation that is adopted by the district judge may not be noted other than as adoption of the magistrate judge's report. Motions to dismiss that become summary judgment motions when affidavits are filed in support of the motion may not be properly identified as summary judgment motions in all districts. These tables exclude cases designated as class actions and multi-district litigation transfers because summary judgment activity may not be recorded separately for each case that is affected by a consolidated motion. Finally, these tables exclude cases that are reopened, because such cases may not indicate summary judgment activity that occurred earlier in the case, before it was reopened. Together these exclusions eliminated almost 35,000 product liability personal injury cases, 7,000 asbestos cases, and smaller numbers of other types of cases terminated in Fiscal Year 2006.

Please let me know if you wish to discuss these tables or wish to see other analyses.

cc: Hon. Lee Rosenthal
Professor Edward Cooper
Professor Richard Marcus

Table 1: Summary Judgment Motions Across Circuits and Districts

	SJ Motions per 100 Case Terminations	SJ Orders Granting Motion
TOTAL (28,748 motions)	**17**	**60%**
First Circuit (862 motions)	**16**	**55%**
Highest Rate Among Districts	32	57%
Lowest Rate Among Districts	13	51%
Second Circuit (1,276 motions)	**7**	**63%**
Highest Rate Among Districts	25	68%
Lowest Rate Among Districts	4	54%
Third Circuit (3,013 motions)	**16**	**56%**
Highest Rate Among Districts	32	64%
Lowest Rate Among Districts	13	47%
Fourth Circuit (2,626 motions)	**17**	**60%**
Highest Rate Among Districts	39	75%
Lowest Rate Among Districts	13	49%
Fifth Circuit (2,338 motions)	**11**	**60%**
Highest Rate Among Districts	21	65%
Lowest Rate Among Districts	8	52%
Sixth Circuit (3,328 motions)	**20**	**59%**
Highest Rate Among Districts	37	70%
Lowest Rate Among Districts	14	57%
Seventh Circuit (2,999 motions)	**21**	**58%**
Highest Rate Among Districts	40	65%
Lowest Rate Among Districts	13	56%
Eighth Circuit (2,176 motions)	**18**	**59%**
Highest Rate Among Districts	36	68%
Lowest Rate Among Districts	13	26%
Ninth Circuit (4,803 motions)	**18**	**59%**
Highest Rate Among Districts	47	71%
Lowest Rate Among Districts	11	40%
Tenth Circuit (1,542 motions)	**18**	**59%**
Highest Rate Among Districts	22	67%
Lowest Rate Among Districts	14	54%

Eleventh Circuit (2,867 motions)	**16**	**59%**
Highest Rate Among Districts	25	73%
Lowest Rate Among Districts	8	48%
District of Columbia (918 motion)	**34**	**68%**

Table 2: Types of Summary Judgment Motions Across Circuits

	Type of Motion		
	Summary Judgment	Partial Summary Judgment	Rule 54 Motion
TOTAL	**91%**	**9%**	**0%**
First Circuit	91%	8%	2%
Second Circuit	95%	4%	1%
Third Circuit	93%	7%	0%
Fourth Circuit	95%	5%	0%
Fifth Circuit	89%	10%	0%
Sixth Circuit	93%	7%	0%
Seventh Circuit	93%	7%	0%
Eighth Circuit	93%	6%	0%
Ninth Circuit	83%	17%	0%
Tenth Circuit	83%	16%	1%
Eleventh Circuit	90%	9%	1%
DC Circuit	94%	6%	0%

Table 3: Summary Judgment Activity by Type of Case

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided Denied	Orders Decided Granted
TOTAL	**205,058**	**30,556**	**15**	**40%**	**60%**
Contracts	**22,489**	**4,682**	**21**	**47%**	**53%**
110 Insurance	7229	2071	29	46%	54%
120 Marine Contract Actions	1295	118	9	50%	50%
130 Miller Act	352	28	8	63%	37%
140 Negotiable Instruments	307	45	15	50%	50%
160 Stockholders Suits	280	25	9	64%	36%
190 Other Contract Actions	12642	2347	19	47%	53%
195 Contract Product Liability	209	39	19	46%	54%
196 Franchise	175	9	5	44%	56%
Tort	**30,574**	**2,871**	**9**	**46%**	**54%**
310 Airplane Personal Injury	237	24	10	43%	57%
315 Airplane Product Liability	74	22	30	59%	41%
320 Assault, Libel, and Slander	596	78	13	32%	68%
330 Federal Employers Liability	645	89	14	39%	61%
340 Marine Personal Injury	1358	204	15	54%	46%
345 Marine - Product Liability	25	9	36	44%	56%
350 Motor Vehicle Pers Injury	3864	363	9	52%	48%
355 Motor Vehicle Prod Liability	463	92	20	39%	61%
360 Other Personal Injury	7752	987	13	44%	56%
362 Medical Malpractice	1089	185	17	47%	53%
365 Personal Injury - Prod Liab	11505	581	5	45%	55%
368 Asbestos - Prod Liability	1704	3	0	33%	67%
370 Other Fraud	1262	234	19	47%	53%
Civil Rights	**32,277**	**8,924**	**28**	**30%**	**70%**
440 Other Civil Rights	14319	3962	28	32%	68%
441 Civil Rights Voting	117	28	24	35%	65%
442 Civil Rights Jobs	15679	4716	30	27%	73%
443 Civ Rts Accommodation	592	124	21	53%	47%
444 Civil Rights Welfare	40	4	10	0%	100%
445 Am Disab Act Employment	509	48	9	25%	75%
446 Am Disab Act Other	1021	42	4	53%	48%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided Denied	Orders Decided Granted
Prisoner	**50,403**	**3,418**	**7**	**36%**	**64%**
510 Pris Pet - Vacate Sentence	7118	65	1	50%	50%
530 Pris Pet - Habeas Corpus	19619	497	3	46%	54%
535 Habeas Corp Death Pen	161	27	17	44%	56%
540 Prisoner -Mandamus Other	1084	26	2	42%	58%
550 Prisoner - Civil Rights	14052	1652	12	35%	65%
555 Prisoner - Prison Condition	8369	1151	14	33%	67%
Other	**69,315**	**10,661**	**15**	**47%**	**53%**
150 Overpayments - Judgment	271	43	16	72%	28%
151 Overpayments - Medicare	187	107	57	17%	83%
152 Recovery Student Loans	2189	38	2	18%	82%
153 Recovery of Vet Benefits	11	2	18	0%	100%
210 Land Condemnation	215	7	3	14%	86%
220 Foreclosure	2567	132	5	24%	76%
230 Rent, Lease, Ejectment	117	19	16	32%	68%
240 Torts to Land	369	49	13	40%	60%
245 Tort to Land Prod Liability	96	21	22	12%	88%
290 Other Real Property Actns	680	142	21	58%	42%
371 Truth in Lending	458	53	12	38%	62%
380 Other Pers Prop Damage	949	160	17	42%	58%
385 Prop Damage - Prod Liab	413	70	17	40%	60%
400 State Re-Apportionment	3	4	133	100%	0%
410 Antitrust	397	103	26	47%	53%
423 Bankruptcy Withdrawal	706	79	11	46%	54%
430 Banks and Banking	184	25	14	23%	77%
450 Interstate Commerce	420	67	16	57%	43%
460 Deportation	120	6	5	67%	33%
470 Civil (RICO)	589	185	31	65%	35%
480 "Consumer Credit"	1423	63	4	48%	52%
490 "Cable Sat TV"	685	9	1	14%	86%
610 Agricultural Acts	27	1	4	100%	0%
625 Drug Related Seizure	1246	56	4	44%	56%
690 Forfeiture and Penalty	673	38	6	50%	50%
710 Fair Labor Standards Act	2779	300	11	42%	58%
720 Labor/Mgmt Relations Act	1246	354	28	37%	63%
730 Labor/Mgmt Report	69	22	32	18%	82%
740 Railway Labor Act	102	42	41	44%	56%
790 Other Labor Litigation	1182	247	21	37%	63%
791 ERISA	10052	1367	14	46%	54%
820 Copyright	5072	279	6	53%	47%
830 Patent	2352	645	27	53%	47%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
840 Trademark	3318	333	10	50%	50%
850 SEC	1296	143	11	55%	45%
861 Medicare	46	5	11	60%	40%
862 Black Lung	16	2	13	50%	50%
863 D.I.W.C./D.I.W.W.	6296	1285	20	54%	46%
864 S.S.I.D.	6927	1721	25	52%	48%
865 R.S.I.	615	212	34	49%	51%
870 Tax Suits	1175	208	18	44%	56%
871 IRS 3rd Party Suits	88	1	1	0%	100%
875 Customer Challenge	15	1	7	100%	0%
890 Other Statutory Actions	9842	1420	14	41%	59%
891 Agricultural Acts	336	45	13	62%	38%
892 Economic Stabilization Act	4	4	100	50%	50%
893 Environmental Matters	877	270	31	48%	52%
895 FOIA	280	179	64	30%	70%
950 State Statute Constitutional	262	90	34	47%	53%
990 Other	73	7	10	50%	50%

Note: This table excludes the following case types that did not reveal any summary judgment activity: Bankruptcy Appeals (2450 cases); Food and Drug Acts (46); Liquor Laws (2); Airline Regulations (4); Occupational Safety/Health (9); Selective Service (16); Energy Allocation Act (4); and Appeal of Fee - Equal Access to Justice (9). Motions granted in part and denied in part are recorded as granted rather than denied. Orders with no indication of dispositive action are excluded from the table.

Table 4: Summary Judgment Activity in Employment Discrimination Cases

CIRCUIT	DISTRICT*	Percent Granted (in whole or in part)
TOTAL		**73%**
FIRST		**56%**
	Highest Rate Among Districts	60%
	Lowest Rate Among Districts	48%
SECOND		**76%**
	Highest Rate Among Districts	82%
	Lowest Rate Among Districts	71%
THIRD		**69%**
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	54%
FOURTH		**74%**
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	67%
FIFTH		**78%**
	Highest Rate Among Districts	86%
	Lowest Rate Among Districts	66%
SIXTH		**73%**
	Highest Rate Among Districts	78%
	Lowest Rate Among Districts	67%
SEVENTH		**75%**
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	68%
EIGHTH		**70%**
	Highest Rate Among Districts	87%
	Lowest Rate Among Districts	59%
NINTH		**74%**
	Highest Rate Among Districts	93%
	Lowest Rate Among Districts	59%
TENTH		**72%**
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	64%

ELEVENTH		**75%**
	Highest Rate Among Districts	95%
	Lowest Rate Among Districts	56%
DC		**58%**

*Includes the 65 federal district courts that had fully implemented the CM/ECF system in FY2006 and had more than 15 employment discrimination cases (i.e., nature of suit code 442) with summary judgment orders terminated during that year.