ADVISORY COMMITTEE
ON
CIVIL RULES

Chicago, IL
April 20-21, 2009

Civil Rules Advisory Committee
Agenda for April 20-21, 2009 Meeting

1. Introductory remarks by the Chair and Reporter

   (A) Welcome
   (B) Report on the January Standing Rules Committee and March Judicial Conference Meetings

2. **ACTION:** Approve Minutes of November 2008 and February 2009 Meetings

3. **ACTION:** Approve proposed amendments to Rule 56 and transmit them to Standing Rules Committee

   (A) Text of proposed amendments and Committee Note
   (B) Minutes of March 9 and March 23 subcommittee conference calls
   (C) Summary of public comments on proposed amendments

4 **ACTION**: Approve proposed amendments to Rule 26 and transmit them to Standing Rules Committee

   (A) Text of proposed amendments and Committee Note
   (B) Minutes of March 5 subcommittee conference call
   (C) Summary of public comments on proposed amendments

5. Report on 2010 Conference (oral report)

6. **ACTION:** Approve proposed amendments to Rule 8(c) and transmit them to Standing Rules Committee

7 **ACTION:** Approve publication of proposed amendments to Supplemental Rule E(4)(f)

8. Rule 45 project

9 Updates and Reports:

   * New Civil Rules-Appellate Rules Subcommittee
   * Service on government officials in their individual capacities
   * New Privacy Subcommittee
   * Sealed Case Subcommittee (oral report)
   * FJC progress report (oral report)

10. Other matters

11. Next Meeting: Fall 2009

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

April 6, 2009

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON CIVIL RULES

Chair:	**Reporter:**
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Members:	
Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne United States Courthouse 601 Market Street Philadelphia, PA 19106	Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Honorable Steven M. Colloton United States Court of Appeals United States Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044	Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081
Daniel C. Girard, Esquire Girard Gibbs LLP 601 California Street, Suite 1400 San Francisco, CA 94108	Honorable C. Christopher Hagy United States Magistrate Judge United States District Court 1756 Richard B. Russell Federal Building and United States Courthouse 75 Spring Street, S.W. - Suite 1885 Atlanta, GA 30303-3361
Ted Hirt, Assistant Director Federal Programs Branch Civil Division U.S. Department of Justice 20 Massachusetts Avenue, N.W. Room 7106 Washington, DC 20530	Honorable Michael Hertz Assistant AG, Civil Division U.S. Dept. of Justice 950 Pennsylvania Ave., NW Washington, DC 20530

ADVISORY COMMITTEE ON CIVIL RULES (CONT'D.)

Peter D. Keisler, Esq. Sidley Austin, LLP 1501 K Street, N.W. Washington, DC 20005	Honorable John G. Koeltl United States District Court 1030 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312
Honorable Randall T. Shepard Chief Justice, Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204	Anton R Valukas, Esquire Jenner & Block LLP One IBM Plaza Chicago, IL 60611
Chilton Davis Varner, Esquire King & Spalding LLP 1180 Peachtree Street, N.E. Atlanta, GA 30309-3521	Honorable Vaughn R. Walker Chief Judge United States District Court Phillip Burton United States Courthouse 450 Golden Gate Avenue, 17th Floor San Francisco, CA 94102-3434
Liaison Members: Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	 Honorable Diane P. Wood United States Court of Appeals 2602 Everett McKinley Dirksen United States Courthouse – Room 2688 219 South Dearborn Street Chicago, IL 60604
Advisors and Consultants: Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978	 Thomas D. Rowe, Jr. 813 Howard Street Marina del Rey, CA 90292-5516

ADVISORY COMMITTEE ON CIVIL RULES (CONT'D.)

Representative: Ms. Laura A. Briggs Clerk United States District Court 105 Birch Bayh Federal Building and United States Courthouse 46 East Ohio Street Indianapolis, IN 46204	
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K Rabiej Chief Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544	Ms. Gale Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
Ms. Amaya Hain Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the United States Court Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the United States Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Committee on Rules of Practice and Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
Mark R Kravitz Chair	D	Connecticut	Chair 2007	2010
Michael M Baylson	D	Pennsylvania (Eastern)	2005	2010
Jeffrey Bucholtz*	DOJ	Washington, DC	----	Open
David G Campbell	D	Arizona	2005	2011
Steven M Colloton	C	Eighth Circuit	2008	2010
Steven S Gensler	ACAD	Oklahoma	2005	2011
Daniel C Girard	ESQ	California	2004	2010
C Christopher Hagy	M	Georgia (Northern)	2003	2009
Peter D Keisler	ESQ	District of Columbia	2008	2011
John G Koeltl	D	New York (Southern)	2007	2010
Randall T Shepard	CJUST	Indiana	2006	2009
Anton R Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2010
Vaughn R Walker	D	California (Northern)	2006	2009
Edward H Cooper Reporter	ACAD	Michigan	1992	Open
Principal Staff John K Rabiej 202-502-1820				

* Ex-officio

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 2009
San Antonio, Texas
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary's Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

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, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N Barr	Senior attorney, Administrative Office
Emery Lee	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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 Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair

INTRODUCTORY REMARKS

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum. Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J. Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted providing bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the consent calendar and are currently pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress is largely preoccupied at this point in getting organized, but she and others planned to visit members and their staff in February to

discuss the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the last Congress.

Judge Rosenthal explained that the purpose of the proposed legislation is to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee will initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications.

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal card from the President.

Judge Rosenthal noted that the 75th anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the 111th Congress was just getting organized. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines

in 29 statutes. The judiciary hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of the party's wrongdoing may be introduced against the party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress to authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

As for legislation that would affect the criminal rules, Mr. Rabiej reported that a bill likely would be introduced once again on behalf of the bail bond industry to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights.

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill to amend FED. R. CIV. P. 26 by imposing certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110th Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111th Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings

attesting to that effect at an early stage in a case – when the judge knows very little about the case, the documents have not been identified, and little help can be expected from the parties

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. His testimony explained that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He said that several prominent law professors would be willing to help educate staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75th anniversary celebration of the Rules Enabling Act would be a good time to have some prestigious academics conduct seminars to educate Congressional staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

Administrative Report

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on www.uscourts.gov. The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff has continued to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the use of subcommittees. She said

that they will be incorporated in the committee's response to the Executive Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request had been directed to concerns about the supervision by some committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

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 attachments of December 11, 2008 (Agenda Item 6).

Informational Items

FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The proposed amendments would clarify the applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended Fed. R. App. P. 4(a)(1) to clarify the applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in Bowles v. Russell, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal might raise questions under Bowles because those time periods also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involves a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more

effectively at the June 2009 meeting. This would give the Department of Justice additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting another meeting because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore, in coordination with the civil, criminal, and bankruptcy advisory committees, whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also "hybrid deadlines," such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a propose statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules has been particularly helpful in working with her on the matter.

COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R.CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document – and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of "manufactured finality" – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff's most important claims but other, peripheral, claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal.

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the "costs" for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 12, 2008 (Agenda Item 9).

Amendments for Publication

FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

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

Informational Items

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the "means test" provisions of the 2005 Act. The statute, she said, defines "current monthly income" and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms "household" and "household size." The advisory committee believes, though, that "household" is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on "numbers of persons" and "family," rather than "household." Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the "household" may not be a "dependent."

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to "exemptions . . . plus the number of any additional dependents." This provides room for a litigant to argue that a member of the debtor's household could be a "dependent" for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item.

NATIONAL GUARD AND RESERVISTS RELIEF ACT

Professor Gibson explained that after the advisory committee meeting, Congress passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule has now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

PART VIII OF THE BANKRUPTCY RULES

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate rules, though, have been revised several times since, and they have also been restyled as a

body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with two sets of appellate rules in cases that are appealed from the district court or bankruptcy appellate panel to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash,* 529 F.3rd 398 (7th Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

Zedan, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. Zedan, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if Zedan had waited until the discharge was entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation "not know of such fraud until *after* the granting of such discharge."

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in bankruptcy

cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are "core proceedings" under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan,* by a variety of devices.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee's project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today's electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e* , what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor's home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to "cram down" the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges. The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

Discussion Items

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious discovery problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern is that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar has told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee has consulted regularly with judges and lawyers and has been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys.

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be affirmatively enacted by Congress. He pointed to an excellent memorandum in the agenda book by Andrea Kuperman on work-product protection. The advisory committee, he reported, is convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But it concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, for example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as "hired guns." The nub of their opposition is their policy preference for a "truth-seeking" model versus the current "adversary" model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly allows discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask an expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order to allow experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it does not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition is based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding is that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, was devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case will not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however, the bar has not suggested that confining the work-product protection to the discovery phase of litigation will undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the rule cannot provide 100% protection, but the bar has been telling the committee that the amendments offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice. The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge "must" – rather than "should" – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using "must." In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local

bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is deemed an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules.

The committee's local rules project, he said, had been successful in getting the courts to eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R. CIV. P. 56, but the differences of opinion among the courts are so deep that it is extremely difficult to achieve national uniformity

He noted that the 1993 amendments to FED. R. CIV. P 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort. He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is currently used in his district, and all the judges follow it. But a visiting judge from a district without the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue

the inferences drawn from the facts, are more important than the statements of facts themselves. One lawyer-member said that he had practiced in both courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. There simply are more rulings in the point-counterpoint districts. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. The numbers may not be not reliable, though, because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee has been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides. He suggested that the opposition from some plaintiffs' lawyers is really a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense

counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure -- such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal. The civil advisory committee, he said, has been

considering changes to FED. R CIV P 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one The civil advisory committee would be interested, for example, in whether it is appropriate to require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors are on solid grounds, but some clearly are not.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

Informational Items

FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee is considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v. Booker,* 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. ___ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal is designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that

sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED. R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal will add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court held in *United States v. Cotton,* 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton,* the advisory committee is exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more

amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants. The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers. They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues, which were not appropriate for the package of proposed technical changes to accommodate the new time computation rule.

Judge Tallman reported that the advisory committee has been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights

organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

FED. R. CRIM. P. 12.4

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures that could help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

Amendments for Publication

RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, intends no change in the law. Accordingly, it recommends substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601. The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting.

Informational Items

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington,* 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website.

Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow.

Several members endorsed the guidelines and said that they were very well-written and helpful. But one expressed reservations about the specific language of Guideline 4 on the grounds that it appears to give too much encouragement to individual judges to deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can be a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing orders project should be viewed in the context of the local rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

SEALED CASES

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center has been examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seems to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it

will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee has considered reinvigorating motions for a more definite statement under FED R. CIV. P 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee has also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project has been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association

and argued that the plan should be to make procedure so simple that it requires no special knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon It may be because the rules are trans-substantive or govern the litigation of topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain

aspects of proposed FED. R. CIV. P. 56 (summary judgment) now. Getting even modest changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly,* 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. They represent the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the report's recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examined a number of proposals for reform made since the federal rules were adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles – not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied

across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, "one size does not fit all" in civil litigation. Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly,* and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder's notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer's focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a small mini-trial in appropriate cases to see whether it is worth going forward with the case.

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or recognized protocols that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then tell the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly,* holding that a complaint must provide "enough facts to state a claim to relief that is plausible on its face." He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of

discovery forces settlement. He said that the underlying debate in *Twombly* was indeed over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an "application" and obtain relief very quickly based on affidavits and without full discovery Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should "set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College's recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases

discovery costs and delays without producing corresponding benefits. Instead, parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of "relevance," limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College's recommendations are too broad. He offered a range of other, alternative suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV P 16(a) because lawyers simply will not take the initiative on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would work for most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in the case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants, and they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on experience in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said, though, that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants run search terms against electronic databases and come up with many hits. Then, it takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Courts, rather, should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, there now is simultaneous, unlimited discovery on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, and they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to do it. Instead of allowing nine months or so for all discovery in a case, they want nine months for just the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that it is the documents that are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after that. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before they are relieved of that responsibility by the court. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

NEXT MEETING

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009.

Respectfully submitted,

Peter G. McCabe
Secretary

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record, and includes the following items for the information of the Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 12-13, 2009. All members attended, with the exception of Professor Daniel J. Meltzer. Ronald J. Tenpas, Assistant Attorney General, Environment and Natural Resources Division, attended on behalf of the Department of Justice

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T Struve, reporter, of the Advisory Committee on Appellate Rules, Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules, Judge Mark R. Kravitz, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules, Judge Richard C. Tallman, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules; and Judge Robert L. Hinkle, chair of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Emery G. Lee of the Federal Judicial Center; and Professor Geoffrey C. Hazard, consultant to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Rules 1 and 29 and Form 4 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled because no one asked to testify The advisory committee will consider written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is considering a proposed amendment to Rule 40, which would clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee. The advisory committee initially proposed but decided not to pursue a similar change to Rule 4, because the Supreme Court's decision in *Bowles v Russell*, 551 U.S. 205 (2007), raised questions about amending a rule to change a time period set by statute (28 U.S C. § 2107).

The advisory committee is studying problems that arise when an appeal taken before entry of a judgment that requires a separate document under Civil Rule 58 is followed by a post-judgment motion that is timely only because the court failed to enter the judgment in a separate document. The effectiveness of the appeal is suspended until the post-judgment motion is disposed of. The advisory committee concluded that rather than pursuing a rule change, the better way to address these problems is to improve awareness by clerks of court and district judges' chambers of the separate-document requirement. The advisory committee will also explore whether CM/ECF could include a prompt to judges and clerks to have the judgment set out in a separate document.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 6003 with a request that they be published for comment The proposed amendments make clear that a judge may enter certain orders that are effective retroactively notwithstanding the rule's requirement that the relief specified in the rule cannot be entered within 21 days after a petition has been filed The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment

Informational Items

Proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, and new Rules 1004 2 and 5012 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its March 2009 meeting.

On behalf of the Judicial Conference, the Executive Committee in November 2008 approved the recommendation of the Committee to revise Official Form 22A and distribute to the courts Interim Rule 1007-I with a recommendation that it be adopted through a local rule or standing order. The changes implement the National Guard and Reservists Debt Relief Act of 2008, which amends the Bankruptcy Code to exempt from means testing for a three-year period certain members of the National Guard and Reservists (Pub. L. No. 110-438). The Act was enacted on October 20, 2008. Interim Rule 1007-I and the revision to Form 22A took effect on December 19, 2008.

The advisory committee is considering amendments to Official Forms 22A and 22C to clarify certain deductions under the means test for chapter 7 and chapter 11 cases. The

amendments substitute "number of persons" and "family size" for "household" and "household size" to reflect more accurately the manner in which the deductions are to be applied and to be consistent with related IRS standards

The advisory committee has embarked on a project to revise and modernize bankruptcy forms. As part of this project, the advisory committee is studying the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and possible approaches to take advantage of technology advances The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to consider whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. A miniconference of judges, lawyers, and academics is scheduled for March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Civil Rules 26 and 56 were published for comment in August 2008. Two public hearings on the amendments have been held and another public hearing is scheduled in February. The hearings were well attended, and the discussions were robust. The advisory committee will consider the testimony and written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is examining the Rule 26 provisions on experts retained to testify. The American Bar Association has recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-

expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them These recommendations are based on experience since Rule 26 was amended in 1993. That experience has shown that discovery of attorney-expert communications and draft expert reports impedes efficient use of experts and results in artificial discovery-avoidance practices and expensive litigation procedures that do not meaningfully contribute to determining the strengths or weaknesses of the expert's opinions Instead, such practices and procedures significantly and unnecessarily increase the costs and delays in civil discovery.

The proposed amendments to Rule 56 are not intended to change the summary-judgment standard or burdens Instead, they are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice The rule text has not been significantly changed for over 40 years. The district courts have developed local rules with practices and procedures that are inconsistent with the national rule text and with each other. The local rule variations, though, do not appear to correspond to different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities in many of the approaches. The advisory committee is considering proposed amendments that draw from many of the current local rules. Under one part of the proposed amendments, unless a judge orders otherwise in the case, a movant would have to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing

it in part (which could be done for purposes of the motion only) The statements are intended to require the parties to identify and focus on the essential issues and provide a more efficient and reliable process for the judge to rule on the motion. The point-counterpoint statement has been used by many courts and judges It also has been used by courts that have subsequently abandoned it Testimony and comments have provided support for a point-counterpoint procedure, but also have pointed to practical difficulties encountered by its use

The proposed point-counterpoint procedure also presents a more fundamental issue. The proposed rule authorizes a judge to use a different procedure than point-counterpoint by entering an order in an individual case, but does not authorize different procedures by local rule or standing order. Some of the arguments against the point-counterpoint proposal are framed in terms of local autonomy at the cost of national uniformity. The choice to be made will depend in part on the importance of national uniformity, subject to the case-by-case departures authorized by the published proposal.

The advisory committee also is considering concerns raised by some members of the bar about a word change to Rule 56 that took effect in December 2007 as part of the Style Project. That project replaced the inherently ambiguous word "shall" throughout the rules with "must," "may," or "should," deriving the meaning for each rule from both context and court opinions interpreting and applying the rule. Before restyling, Rule 56 had used the word "shall" in stating the standard governing a court's decision to grant summary judgment The Style Project changed the word to "should," based on case law applying the rule. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") Although "should" could simply be carried forward from Rule 56 as amended in 2007, many vigorous comments express a strong preference for "must," based in part on a concern that adopting "should" in rule text will lead to

undesirable failures to grant appropriate summary judgments These comments will be the basis for careful reexamination in light of the case law that supports "should "

The advisory committee is planning to hold a major conference in 2010 to investigate growing concerns raised by the bar about pretrial costs, burdens, and delays The conference will examine possible rule and other changes

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Criminal Rules 5, 12.3, 15, 21, and 32.1 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled The two individuals requesting to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting The advisory committee will consider the testimony and written comments submitted on the proposed amendments at the meeting

The advisory committee is considering proposed amendments to: (1) Rule 12(b)(3), requiring the defendant to raise before trial "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense"; (2) Rule 32(c), requiring disclosure to the parties of information on which the probation officer relies in preparing the presentence report; (3) Rule 32(h), requiring the court to notify the parties of *Booker* variances, as well as departures, for reasons not identified in the presentence report or the parties' submissions; and (4) Rule 41, in consultation with the Committee on Criminal Law, authorizing probation and pretrial service officers to apply for and execute searches as part of their efforts to enforce court-ordered supervision conditions. The advisory committee is also reviewing all the criminal rules

to identify any that should be updated in light of new technologies and the nearly universal use of electronic case filing Additionally, the advisory committee is continuing to study rule changes to conform with case law implementing the Crime Victims' Rights Act and whether further rule changes may be needed in light of possible new legislation

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 501-706 with a request that they be published for comment The proposed amendments are the second part of the project to "restyle" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure The Committee approved the advisory committee's recommendation to publish the proposed amendments to Rules 501-706 and to delay publishing them until all the Evidence Rules have been restyled, which should occur by June 2009.

Informational Items

The advisory committee continues to monitor cases applying the Supreme Court's decision in *Crawford v Washington*, 541 U.S. 34 (2004), which held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

GUIDELINES FOR DISTINGUISHING BETWEEN LOCAL RULES AND STANDING ORDERS

The Committee considered the results of a study submitted by Professor Daniel R. Capra, reporter to the Advisory Committee on Evidence Rules, on local rules and standing orders. The report describes the inconsistent uses of local rules, standing orders, administrative orders, and

general orders, as well as problems in providing lawyers and litigants with adequate notice of standing, administrative, and general orders and making them accessible The report proposes voluntary guidelines to assist courts in determining whether a particular subject matter should be addressed in a local rule or whether it is appropriate for treatment in a standing order. A revised report taking into account suggestions made by several Committee members will be presented for the Committee's consideration at its next meeting

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION AND POSSIBLE REFORM

Gregory Joseph, Esq., led a discussion on studies and reports from a joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System on the growing costs and burdens of civil litigation. The panel, which included Paul B Saunders, Esq (chair of the American College of Trial Lawyers Task Force on Discovery), Judge Rebecca Love Kourlis, Executive Director of the Institute, Joseph Garrison, Esq., and J. Douglas Richards, Esq., focused on the rising costs of electronic discovery, the public's deepening disenchantment with federal trial practices and procedures, and the flight of litigants from federal court to state court and alternative dispute organizations. The results substantiated the Civil Rules Committee's plan to hold a major conference in 2010 with judges, lawyers, and law professors addressing these issues.

JUDICIAL CONFERENCE-APPROVED LEGISLATION

At its September 2008 meeting, the Judicial Conference approved the Committee's recommendation to seek legislation adjusting the time periods in 29 statutory provisions that affect court proceedings to account for the proposed changes in the new time-computation provisions in the federal rules that will take effect on December 1, 2009, assuming that the last stages of the Rules Enabling Act process are successfully completed. The Committee is actively

pursuing the legislation and believes that it can be enacted so that its effective date is coordinated with the time-computation rules amendments

LONG-RANGE PLANNING

The Committee was provided a report of the September 2008 meeting of the Judicial Conference's committee chairs involved in long-range planning The Committee is reviewing its long-range goals to determine whether any changes are appropriate.

Respectfully submitted,

Lee H Rosenthal

David J Beck	John G Kester
Douglas R Cox	William J Maledon
Mark Filip	Daniel J. Meltzer
Ronald M. George	Reena Raggi
Marilyn L. Huff	James A. Teilborg
Harris L Hartz	Diane P. Wood

TAB - 2

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 17-18, 2008

The Civil Rules Advisory Committee met on November 17 and 18, 2008, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Hon. T. Dupree, Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Peter D. Keisler, Esq.; Hon. Randall T. Shepard; Anton R. Valukas, Esq.; Chilton Davis Varner, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); and Ken Lazarus, Esq..

Hearing

The morning began with the first hearing on the proposals to amend Rules 26 and 56 that were published for comment in August 2008. Seventeen witnesses testified, concluding at 1:15 p.m. The hearing transcript is filed separately.

Meeting

Judge Kravitz began the meeting by noting membership changes.

Robert Heim has served two terms, bringing his depth and breadth of experience to bear with invaluable advice on the many complex and sensitive issues that have come to the Committee over these years. He is held in very high regard both by other lawyers and by judges; his current appointment by the Third Circuit in a highly delicate matter speaks volumes of his stature.

The Chief Justice has reappointed Judge Campbell and Professor Gensler for richly deserved second terms. Peter Keisler, who served in the highest tradition of ex officio members, has returned to the fold as an appointed member; his homecoming is warmly welcomed.

The Committee regularly faces questions that would benefit from guidance by a court clerk. Laura Briggs, Clerk for the Southern District of Indiana, has become the clerk representative to the Committee Her experience and insights into the inner workings of the district courts will be most helpful.

Report on Standing Committee

Judge Kravitz reported on the June Standing Committee meeting. The proposals to publish amendments of Rules 26 and 56 were both discussed at length. Differing viewpoints were expressed on several aspects of the proposals. Publication was approved, but the Committee asked that pointed questions be framed by the invitation for comment. There was considerable support for changing "should" to "must" in proposed Rule 56(a) — when the required showing is made, the court must grant summary judgment. The Rule 26 proposals elicited several expressions of concern about the role of trial expert witnesses as little more than the attorney's alternative voice. The Committee was impressed by the work that had gone into the proposals, but has some abiding concerns.

The rule changes published for comment in August 2007 and proposed for adoption were all approved by the Standing Committee, and since have been approved by the Judicial Conference.

The only exception is the proposal to strike "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c), which the Advisory Committee held back for further consultation with the Department of Justice.

April 2008 Minutes

The draft Minutes for the April 7-8, 2008 meeting were approved, subject to correction of typographical and similar errors.

Hearing Review

The testimony at the morning hearing was briefly reviewed, recognizing that two additional hearings are scheduled and that many more written comments are likely to be made.

Summary Judgment Study

It was noted that we now have the final version of the Federal Judicial Center Report on their study of summary-judgment practice. The study compares practice and outcomes in three groups of districts: those that have local rules adopting some form of the point-counterpoint procedure proposed for Rule 56(c), those that require a statement of undisputed facts by the movant but do not require a counterpoint response, and those that do not have either requirement. Judge Kravitz recognized that the report is important for the hard work that went into it and for the data it produced. It shows that there are few differences across the different local practice patterns, and that it is not possible to show whether such differences as appear are caused by the different regimes. The Committee is deeply grateful to the FJC for a task that proved to require more work than was expected.

The "must"-"should" question was noted by referring to Rule 50, which uses "may." It was pointed out that "may" in Rule 50(a) is used to express the valuable opportunity to defer ruling on judgment as a matter of law until the jury has returned a verdict; discretion is an essential element of this practice In Rule 50(b), "may" has a different aspect. It does not recognize authority to enter judgment on a jury verdict that fails the standard for judgment as a matter of law. Instead it recognizes the "discretionary second chance" authority to order a new trial, or even dismissal without prejudice, when the verdict winner has failed to present sufficient evidence to avoid judgment as a matter of law but for some reason seems to deserve a second chance to do so.

The "slice-and-dice" theme that recurred repeatedly in the morning testimony was noted. Several witnesses expressed concern that the point-counterpoint procedure will diffuse attention to congeries of isolated facts, blinding the court to the overall view that relates the facts to determine what inferences they may support. These comments may reflect contemporary insistence that the logic of legal rules needs to give way to the value of narrative as a means of expressing social experiences and inequalities. Because the comments often address employment discrimination cases, they also may reflect the "prima facie case" elements that yield to "articulated explanation"; this body of doctrine can generate real confusion on summary judgment. One specific suggestion was that "inferences" should be added to the nonmovant's opportunity to respond, using the response itself rather than the brief to point not only to "additional facts" but also to the inferences that might be drawn from the complete array of fact assertions. Judges responded that they read the brief — or even the reply brief — first, to get the broad gestalt picture before venturing into the fact statements. This approach avoids the risk of a disaggregated view of the case. A practitioner suggested that the rule should give better guidance to the proper place to tell the story as a whole — whether in the response or the brief.

The disaggregation question has a parallel in the fear that the movant may produce an unreasonably long statement of facts that cannot be genuinely disputed That can be a problem, but

the solution is not to write into the rule a motion to strike on the ground that nonmaterial facts have been included.

Practice in the District of Arizona was addressed by written comments provided by two judges from the District of Alaska who regularly accept assignments to Arizona. Arizona has a point-counterpoint practice akin to proposed Rule 56(c). Alaska does not. The Alaska judges report that their experience with many cases and many summary-judgment motions in both districts show the disadvantages of the point-counterpoint procedure. The judges in Arizona have considered these comments, and despite having thought for many years that the point-counterpoint procedure is a good thing have become persuaded that they should begin to experiment with other approaches. They have the highest respect for the Alaska judges, and have begun to wonder whether it is too early to adopt point-counterpoint as a national rule. They want to be free, after experimenting, to adopt a local rule that dispenses with point-counterpoint practice; the authority under proposed Rule 56(c) to depart on a case-by-case basis may not suffice. It was pointed out that other judges have submitted comments that experience with point-counterpoint practice has shown its shortcomings.

Turning to Rule 26, it was noted that a group of law professors are working on a letter to comment on the Rule 26 proposals; "we have the attention of the academy." But the bar is mostly on board. Lawyers "on both sides of the v" agree. Judge Kravitz had the opportunity to discuss the proposals with the Law and Science Working Group of the National Academy of Sciences and found them very receptive. Opposition in the academy seems to arise from concern that the proposal accepts and may further entrench the role of the expert witness as the lawyer's puppet, misleading credulous jurors by masquerading as a detached truth-seeker.

Enabling Act Birthday

1938 brought dramatic changes to federal practice On April 25 the decision in Erie v. Tompkins abandoned federal common law on matters of substance. On September 16 the Federal Rules of Civil Procedure took effect. The 70th Birthday is an important milestone.

Judge Kravitz observed that reading a collection of essays by Judge Clark, the Reporter for the original Advisory Committee, underscores the lesson that creation of the Rules was a project of heroic proportions. It was a turning point in the history of procedure. We are no longer in the heroic era. The "big bang" is not to be repeated. But Judge Clark recognized the need for continuing revision of the work. Procedure is a means to an end, not an end in itself. It must be continually reexamined and reformed if it is to accomplish the objects of Rule 1 in resolving litigation brought to enforce ever-changing substantive rights. Causes for popular discontent remain. There are challenges ahead. But the Enabling Act process provides the continual reexamination that will ensure the ongoing success of the enterprise.

Peter McCabe presented a time line of major steps in the Enabling Act process, beginning with adoption of the Civil Rules in 1938. The process has developed into one that is open, participatory, thoroughly deliberative, and exacting. It goes through multiple stages and repetitions, and that is good.

Criticisms were made of the process in the 1970s, growing from controversy over the Rules of Evidence. The criticisms initially went to substance, but the process was also criticized as not open and as difficult to penetrate. The Federal Judicial Center began a study of the process in 1981 and made recommendations. In 1983 Representative Kastenmeier initiated what became a five-year study. The Enabling Act amendments adopted in 1988 essentially enacted the procedures prescribed in 1983 by the Judicial Conference. The supersession power was challenged but, in the end, was retained. Local rules were challenged, and some measure of control was established

Criticisms during this period included complaints that rules were considered and adopted without empirical support. Now it is routine to seek as much empirical information as can be had.

Records of rules committee proceedings have been public since 1983. Now they are available electronically, making public access a great deal easier. Old records are being added, and an arduous search is being made in an attempt to establish a complete collection of all records back to 1935.

The Style Project has brought real improvements to rule language. It will be important to maintain its successes going forward.

In 1995 the Judicial Conference adopted a long-range plan It emphasizes the need to adopt rules changes through the Enabling Act process, not through legislation. Rules should be national and uniform. The bench and bar should have ready opportunities to participate in the amending process.

The process yields good products. It is no stretch to say that the products are better than the legislative process can often produce because of the painstaking nature of the Enabling Act machinery. Congress generally respects the process; most of the bills introduced to amend rules of procedure fail. The credibility the process has acquired over the years helps

Professor Coquillette spoke of experiences with other advisory committees and the Standing Committee to illustrate the challenges that confront the Enabling Act process. The illustrations are of crises committees have faced, typifying generic challenges to the system. He arrayed his illustrations around categories of "Sex, Violence, Death, Attorney Conduct, and the Rules System."

The perennial resurgence of efforts to legislate court rules is illustrated by Evidence Rules 412 through 415. Early efforts to amend Rule 412 in Congress were successfully stalled. But in 1994 Congress, prodded by groups actively pressing to address evidence rules in child molestation cases, considered specific proposals. Limited success was achieved in winning first a 150-day waiting period, then a second 150-day waiting period, but in the end Congress acted. The rules it produced are not well integrated with the other Evidence Rules. The Sunshine in Litigation bills that are introduced in every Congress may yet achieve sufficient support to add another illustration.

A somewhat reduced form of Congressional action occurs when Congress directs that rules be adopted on a particular subject, but does not dictate the actual rule language. The Crime Victims' Rights Act is an example. Special interest groups are strongly interested in these rules, and bring to bear considerable pressure to conform to their preferences. Similar examples have occurred in such areas as the E-Government Act and bankruptcy rules.

Relations with the executive branch also are an important part of the Enabling Act process. Top-ranking officials in the Department of Justice serve as ex officio members of the advisory committees and the Standing Committee. It has proved very important to have active participation by these high-placed people, who are able to reconsider initial Department positions in light of ongoing discussions The Civil Rules Committee has been admirably served by the participation of the Assistant Attorneys General for the Civil Division over the last many years. The Department has far-flung litigating experience and is able to provide invaluable insights into how the rules are working and how proposed revisions might work. And, particularly with the Criminal Rules, they may be in a position to affect rules revisions by adjusting their own practices. Consideration of a rule that would codify the Brady rule, for example, has been deferred because the Department adopted changes to the United States Attorneys Manual that addressed the concerns that focused the Committees' interest.

"Local Rules are as inevitable as death." In 1988 Congress came down hard on local rules. Local rules must be consistent with the national rules, but the separate Local Rules Projects undertaken by the Standing Committee have found significant violations of this policy. Under 28 U.S.C. § 331, the Judicial Conference, moreover, has responsibility for reviewing rules prescribed by courts other than the district courts and the Supreme Court. This responsibility was delegated to the Standing Committee when challenges were made to a Ninth Circuit rule adopted to address last-minute habeas corpus petitions filed on the brink of scheduled executions. The rule was designed to provide a very fast means to review stays calculated to defeat implementation of the execution warrant by avoiding review until the warrant had expired. The chair of the Standing Committee, Judge Stotler, is a district judge in the Ninth Circuit. She had the delicate task of telling the Ninth Circuit that the local rule was invalid; she carried on a magnificent negotiation and persuaded the Ninth Circuit to voluntarily withdraw the rule and redraft it to meet the objections that had been found. Local rules will continue to be a challenge. Related problems may be presented by the "standing orders" of individual judges that have the effect of establishing a judge-specific local rule. Professor Capra, Reporter for the Evidence Rules Committee, is working on a project that addresses standing orders.

Attorney conduct matters raise issues that cross all of these concerns. Every district has a local rule governing attorney conduct. Often they incorporate local state practice, either on a static basis as of the time of adopting the local rule or on a dynamic basis that incorporates ongoing changes in state practice. Congress has addressed specific questions of attorney conduct. The Department of Justice has had particular concerns with several rules, especially Rule 4.2 on contact with represented persons and Rule 8.4 on dishonest conduct. In dealing with members of organized crime groups, for example, it may be important that the Department be enabled to help a member obtain truly independent representation, free from representation by an attorney loyal to the group rather than the member. Several years ago, one state interpreted Rule 8.4 to prevent attorneys from participating in undercover or sting operations, even by directing nonattorneys. These problems led to a lengthy project that drafted Federal Rules of Attorney Conduct. It remains unclear whether such rules are rules of practice and procedure within the Enabling Act; legislation was prepared to expressly authorize adoption of rules of attorney conduct. The problems subsided, however, and the project remains on indefinite hold.

The credibility of the Enabling Act committees has been earned over time. It has been earned with Congress, the executive, and the judiciary. It is essential to the continuing success of the enterprise. So long as it is maintained, the committees will be able to meet successfully most challenges of the sort that have been encountered and will be renewed in the future.

Professor Marcus offered a few remarks drawn from his article proclaiming that the Enabling Act process is "Not Dead Yet." The first observation was that for the last twenty-five years the prevalent academic view of the process has been negative. The negative views seem to derive from desires to achieve ideal rules, overlooking the real-world imperfections that make the theoretical best an enemy of the achievable good. Thus nascent criticisms of the current expert-witness proposals rest on dissatisfaction with the roles often played by expert witnesses, failing to recognize that whatever fundamental reforms might be desirable probably are beyond the reach of any court rules and certainly are beyond the reach of the Civil Rules. The next observation was that Congress adopted as statutory command the public comment and hearing process that the Judicial Conference initiated in response to the criticisms described by Peter McCabe. The great strengths and contributions of public involvement have been demonstrated repeatedly, as shown by the hearing on Rules 26 and 56 held this morning. The third observation was that the administrative and research support provided to Enabling Act committees by the Administrative Office and the Federal Judicial Center have been essential to the committees' work. Finally, "big bangs" do not happen very often. The revolution of 1938 will not soon be repeated. But those who object to one proposal or another

often accuse the committees of attempting a revolution. Not infrequently, antagonism toward one proposal will distract attention from another that in fact is more truly transformative In addressing the 1993 disclosure rules, for example, opposition focused intensely on initial disclosure — later developments, including the substantial dilution of initial disclosure, proved wrong the predictions of disaster. Little attention was directed, on the other hand, to the package that transformed discovery of expert trial-witness testimony, including the Rule 26(a)(2)(B) report requirement Events have shown that these changes were far more important.

The Reporter offered observations on two topics. First was the relationships among the Enabling Act process, the common-law procedural powers of individual judges, and the local rulemaking authority. The two-way interdependence between national rulemakers and district courts is familiar. Many rules amendments draw on experience as reflected in judge-made practices or in local rules; often these rules are the most securely founded rules At the same time, drafting the terms of national rules repeatedly encounters the limits of drafting and foresight — it is possible to identify policy and purpose, but not to prescribe detailed answers for specific problems both foreseen and unforeseen. These limits are met by framing rules that rely on district-court discretion to elaborate real procedure through application. Apart from this familiar phenomenon, it also is useful to reflect on a different relationship. An individual district judge, informed primarily by two adversaries and often with scant additional help, may adopt procedures that are beyond reach in the Enabling Act process. This authority stems from the fundamental principle recognized in Marbury v. Madison: having jurisdiction, the judge must decide the case. Decision requires not only identification of substantive principles but also implementing those principles by devising procedures that will bring the case to decision. The Enabling Act process does not face this imperative, and is properly limited in relation to the underlying authority of Congress when procedure intrudes too far into the realm of substance.

The second observation reflected on three areas of current dissatisfaction. The most profound disquiet is reflected in occasional protests that the time has come to abandon the 1938 framework and start over. There are many reasons to believe that present procedures are not ideal. And it may be a lesson of history that the lifetimes of entire systems of procedure, like the lifetimes of empires, are gradually diminishing. Seventy years is a long time in the life of a procedure system. But these reflections are inevitably called up short by an invitation to describe the founding principles and starting point in designing a new system. There is little point in setting off the next big bang until there is a good chance that the destruction will be creative, not chaotic. That leaves two more discrete dimensions of dissatisfaction, both of them familiar. One arises from procedures for cases that simply cannot support the full sweep of The Federal Rules of Civil Procedure. There may be some analogy to the decision to abandon any amount-in-controversy requirement for federal-question cases. If simple federal-question cases deserve access to federal tribunals, it may be increasingly important to find procedural accommodations that enable meaningful access. The attempt to create a set of simplified rules, put on the shelf years ago, illustrates the concern. At the other end of the spectrum lie the huge litigations that impose enormous costs on the parties and courts, and often enough on nonparties as well. Discovery has been a source of profound disquiet almost continually since the 1970 amendments, and repeated efforts through successive rounds of amendment have not quieted the disquiet The questioning of notice pleading in last year's Twombly opinion seems in large part a response to discovery problems — if discovery continues to elude reasonable control in too many cases, perhaps it is time to limit access to discovery by raising higher pleading barriers. The time may have come, and almost certainly will soon come, when the Committee must reconsider the central parts of the 1938 revolution. Even if summary judgment practice is left with the focused procedural changes published for comment this summer, the package of relaxed notice pleading and intense discovery must be examined once more.

Class Action Fairness Act Federal Judicial Center Study

Thomas Willging presented a progress report on the Federal Judicial Center study of the impact of the Class Action Fairness Act on federal courts. The first phase looked to the effect on initial filings and removals. The study is now in the beginning stages of Phase II, which will compare dispositions in a two-year sample of cases filed in the two years before the effective date of CAFA with a two-year sample of cases filed on and after the effective date. The work is well advanced for the cases filed from February 18, 2003 through February 17, 2005. The numbers will change a bit, however, with termination of cases that have not yet terminated It is too early to do much with the cases filed from February 18, 2005 through February 17, 2007, because not enough of them have terminated. When most of these cases have terminated, the comparisons will show how CAFA has impacted the courts.

The findings are detailed in the executive summary. Some of them are surprising in relation to the findings in earlier studies. But the earlier studies used different methods, asked different questions, and considered different variables Because conclusions can be expressed for these studies only within confidence intervals, it is possible that some apparent differences will fall into the category where no firm conclusion can be drawn because the differences lie within the confidence intervals. Still, the apparent differences can help in framing questions to be asked at the next stage.

231 diversity actions are included in the sample analyzed for this report.

One surprising finding was that plaintiffs filed motions to certify a class in fewer than one in four actions. A 2005 study showed rulings on motions to certify in 43% of class actions, and it seems likely that motions to certify were made in other cases but not ruled upon. Similarly higher frequencies of motions to certify were found in the FJC 1995 study, but the differences may be accounted for by the fact that the 1995 study surveyed only four districts selected for having high levels of class-action activity. It may be that actions in those courts were more often brought by lawyers with special familiarity with class-action litigation, and a higher propensity to seek prompt certification. In addition, the 2003 amendment of Rule 23(c), relaxing the time at which certification must be sought, may account for part of the change.

A second finding was that a "litigation class" — one not limited to settlement only — was certified in five of the 231 cases. All five resulted in settlement. The 1995 study showed that 23% of the actions studied resulted in certification of a litigation class. The 2005 study found litigation classes certified in 11% of the actions; because it covered actions filed in 1999 to 2002, some of the certification practice may have been affected by the 2003 amendments.

A third finding was that before a class settlement, plaintiffs typically had to overcome at least one challenge on the merits advanced by a Rule 12(b)(6) motion to dismiss or by a summary-judgment motion. This result was similar to the findings in the 2005 study.

The fourth and fifth findings were that the parties proposed class settlements in 21 of the 231 actions; judges approved all, although only after modifications in 3 of them. This 9% figure addresses all cases; the percentage is higher in relation to the number of cases that remained in federal court without remanding to state court.

A sixth finding was that plaintiffs filed motions to remand in 75% of the removed cases; almost 70% of the remand motions were granted. More than half of the removed cases were remanded.

A seventh finding was that voluntary dismissal disposed of 38% of the cases not remanded, the most frequent disposition of those cases.

An eighth finding was that motion practice was relatively infrequent; in 56% of the actions there was no motion or only one motion.

Finally, it was found that one in five of the cases was terminated by a successful dispositive motion.

The pre-CAFA federal-question cases will be analyzed next.

One Committee member observed that the study focuses on outcomes in federal court. It would be useful to know whether outcomes are different in state courts. The impetus for adopting CAFA was claims that some state courts misuse class actions in serious ways. An examination of outcomes in at least one of the state courts held up as a bad example would provide a useful basis for advising Congress the next time efforts are made to transfer a class of litigation from state courts to federal courts. But the FJC does not have the capacity to generate state-court information. Professor Gensler is working on a study of Oklahoma state-court practice. California has advanced a long way in a study of its state-court experience. But it would be very difficult to generate meaningful comparative data. One difficulty in attempting to measure the impact of CAFA will be that a plaintiff who would prefer to file in one state if the action could not be removed will now file instead in a federal court in a different state because the choice among federal courts may be different from the choice among state courts.

On an anecdotal level, it was noted that the press in California reports that state-court judges have absorbed one feature of CAFA practice by refusing to approve "coupon" settlements. The result is said to be that class-action settlements approved by California state court include cash payments to class members, while parallel class-action settlements in the courts of other states provide class members with only coupons.

It was agreed that it is important to attempt an understanding of possible impacts of legislation like CAFA both on court selection and on actual practice. One long-range purpose of FJC study will be to determine whether the influx of diversity class actions teaches lessons that should be reflected in Rule 23.

Agenda Review

The agenda materials summarized many proposals that have lain fallow, often for a number of years. The cycle of periodic review has come around to the point of undertaking to consider whether some items might better be removed because, however meritorious they might be, the time is not ripe for action even in the near-term future. Other items may deserve to be carried forward for future consideration but without planning immediate work. These topics involve issues that may become important, but that seem better deferred. Deferral may reflect no more than a sense that the issue is not urgent, but it also may reflect a sense that it is better to wait while a problem matures to a point where it is resolved on its own or to a point where developing experience provides a better foundation for considering a rule amendment. Similarly, the time has come to consider whether still other of these items might be advanced for present deliberate consideration, including bundled consideration of related suggestions.

A draft of the memorandum suggesting the approach to many of these items was circulated to the Committee in September, with a request that Committee members nominate any items they think appropriate for further discussion. All members responded The responses were incorporated in the revised memorandum included in the agenda.

The first group of ten items was suggested for removal from the agenda. Eight of them were set for removal without further discussion, including 03-CV-E, 04-CV-J, 06-CV-B, 06-CV-F, 07-CV-B, 07-CV-C, 07-CV-F, and 08-CV-A. One, 06-CV-H, was discussed briefly. It advances two

suggestions The first involves a question that seems to have been resolved Several district courts in the District of Columbia had ruled that the United States is not a "person" that can be subjected to a nonparty subpoena under Rule 45, but the Court of Appeals for the District of Columbia Circuit overruled these decisions. There is no apparent present need to amend Rule 45 on this account. The other suggestion is that something should be done about the questions that arise when a government agency relies on agency regulations to resist compliance with a subpoena on confidentiality grounds These questions do not seem likely subjects of Enabling Act rulemaking. They involve the rulemaking authority of different agencies. Any one agency may act under a number of different statutes. Most of the issues — and perhaps virtually all of them — will involve substantive questions that in part are peculiar to the particular agency and statute and in part involve general administrative law. The Committee concluded that the prospects for action in this area within the foreseeable future are too remote to hold these topics on the agenda.

Another item in the first category, 97-CV-V, included two items that have long since been acted on, plus a suggestion that the notice provisions for an in rem action in Supplemental Rule C(4) be considered for amendment. It was agreed that the Maritime Law Association should be consulted to help determine whether the time has come to reconsider this provision. It seems anomalous in relation to the notice requirements for other civil actions, but it may still be justified by concerns peculiar to admiralty practice. The question will remain on the active agenda only if the MLA suggests that it is ripe for consideration now or in the near future.

It was noted that several of the suggestions involve the integration of CM/ECF practices with rules provisions adopted before electronic filing was introduced. Several of the topics are worthy of consideration But it seems better to wait until CM/ECF is fully integrated with the operations of all federal courts, and then approach the questions by a process that should involve all of the rules committees and perhaps other Judicial Conference committees as well.

A second group of three items was recommended to be carried forward without advancing for immediate consideration. Two, 04-CV-H and 06-CV-D, relate to the offer-of-judgment provisions of Rule 68. It was agreed that they should be considered as part of the accumulating study of Rule 68. The third, 04-CV-I, suggests that Rule 7.1 disclosure statements should be eligible for electronic filing. This suggestion will be carried forward only because the Committee on Codes of Conduct has suggested that Rule 7.1 might be amended in some ways not yet determined. If Rule 7.1 indeed comes on for possible revision, any possible need to address filing methods can be taken up at the same time.

The third set of agenda items listed matters that might deserve present consideration, either to advance for further study or to remove. These items were separated into those relating to discovery and others.

One nondiscovery item, 05-CV-I, asks whether Rule 5 should be amended to allow service by third-party commercial carrier in some manner similar to Appellate Rule 25(c)(1)(C). This question ties to more general questions surrounding service of papers not covered by Rules 4, 4.1, and 45. Some courts already want to rely on electronic service without requiring consent of the person to be served. There has been substantial interest in limiting or deleting the Rule 6(d) provision that allows an additional three days to act after service by most of the means recognized in Rule 5. The Appellate Rules Committee is interested in the parallel 3-day provision in the Appellate Rules. It was agreed that these matters should be carried forward for consideration as a package.

Another nondiscovery item, 06-CV-C, relates to the practice of sealing entire cases. A Standing Committee subcommittee is considering this topic with the help of a comprehensive research project by the Federal Judicial Center The study will examine all cases sealed in 2006. An initial report concerning the frequencey of sealing entire cases should be ready by the time of the June 2009 meeting of the Standing Committee Follow-up research on the reasons and process for case sealing will be done after that. Then it will be time to determine whether rules provisions should be adopted, recognizing that it will be desirable to adopt at least similar provisions in different sets of rules.

A third nondiscovery item, 07-CV-D, is a suggestion from the Maritime Law Association that the final sentence of Supplemental Rule E(4)(f) has been superseded. This sentence states that "this subdivision" does not apply to suits for seamen's wages when process is issued under two named statutes; the statutes were repealed in 1983. It also states that "this subdivision" does not apply to actions by the United States for forfeitures in violation of any statute of the United States. New Supplemental Rule G establishes comprehensive procedures for civil forfeiture actions, including provisions for hearings requested by persons claiming an interest in property that has been arrested or attached. The Committee agreed that the forfeiture experts at the Department of Justice should be consulted to determine whether there is any remaining use for this provision in light of Rule G. If not, deletion of the sentence can be put on the spring agenda with a recommendation to publish.

A final item was a reminder of a matter not in the agenda materials. A proposal to amend Rule 8(c) by striking "discharge in bankruptcy" from the list of affirmative defenses was published in August 2007. The Department of Justice responded with a lengthy statement of reasons why the change should not be made. Bankruptcy judges and the Reporter for the Bankruptcy Rules Committee responded that the reasons advanced by the Department were simply wrong. The Department replied that they were not wrong. Rather than attempt to sort through the confusion in time to make a recommendation to the Standing Committee, this proposal was held back for further consideration in further consultation with the Department and bankruptcy experts. Judge Wedoff conferred at some length with Department representatives, but failed to achieve consensus. Consultations will continue in hopes of reaching agreement, or at least an explanation of the problem in terms that can be understood by those who are not experts in bankruptcy law.

The discovery items include 06-CV-G, a suggestion by Judge Wilson that the Committee should restore pre-1993 discovery rules by repealing the 1993 and 2000 amendments that he voted to approve while a member of the Standing Committee. His concerns address problems with discovery that will continue to occupy the Committee, and perhaps the tie to notice pleading as well. This item will be carried forward with the ongoing long-term consideration of discovery.

Another discovery item is 07-CV-E, submitted in the form of a law review article reviewing practice under Rule 30(e)(1)(B). The rule allows a deposition witness to review the deposition transcript or recording and "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." Some courts are wary of changes that seem simple flat

contradictions of the deposition testimony. At least at times the concern is similar to the concerns underlying the "sham affidavit" doctrine that allows a court to disregard a self-contradicting and self-serving affidavit offered by a party to oppose summary judgment by changing earlier deposition testimony. The Committee agreed to remove this item from the agenda. One observation was that when the matter is important, the deposition testimony is often corrected during the deposition itself — perhaps after a break in the proceedings. Another observation was that the need to revise an answer often arises from a poorly framed question. Yet another observation was that if the witness is going to change the story, it is better to learn of the change before trial than at trial.

Other discovery-related items arise from Rule 45, although the questions extend to trial subpoenas as well as discovery subpoenas. The decision at the end was that all of these questions should be referred to the Discovery Subcommittee for a recommendation whether any should be taken up with an eye to possible amendments. The process will include a broader solicitation to see whether there are additional Rule 45 changes that should be considered, and whether it is possible to do something to shorten and perhaps further clarify this lengthy rule.

One question is raised by 05-CV-H, which addresses the Rule 45(b)(1) provision that serving a subpoena requires "delivering a copy to the named person." A majority of courts interpret delivery to require personal in-hand service; a significant number of decisions depart from this reading. The proposal is that service should be permitted by any of the means recognized for service of the summons and complaint under Rule 4. There may be reasons to stop short of the full reach of Rule 4, or perhaps to recognize methods not generally available under Rule 4. Some sense of accepted present practice, and of practice under state rules, should be gathered. And it will be important to remember that Criminal Rule 17(d) requires that the server deliver a copy of the subpoena to the witness. The Criminal Rules Committee should be advised of any serious consideration of these questions.

A second question is raised by 05-CV-G. Rule 45(b)(2) defines the territorial reach of a subpoena. Service may be made within the district; outside the district [and also outside the state] but within 100 miles of the place of the deposition, trial, production, or inspection; or within the state at a place authorized by state practice. Rule 45(c)(3)(A)(ii) seems to limit this authority further by requiring the court to quash or modify a subpoena that requires "a person who is neither a party nor a party's officer to travel more than 100 miles," except that the person may be required to travel more than 100 miles from a point within the state to attend a trial. (Rule 45(c)(3)(B)(iii) provides for modification of a subpoena that requires a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.) The rule seems clear. But a number of courts have read a negative implication into Rule 45(c)(3)(A)(ii) — because it does not refer to a subpoena addressed to a party or a party's officer, it implies nationwide subpoena power to command attendance at trial. This interpretation has created great anxiety in corporate parties. The question has become prominent only in the last two or three years. The Vioxx litigation brought it to the front. This question has produced a major split at the district-court level, although there may be a trend back toward the obvious interpretation that the explicit Rule 45(b)(1) limits are not somehow expanded by the further limits expressed in 45(c)(3)(A)(ii). The best outcome, however, may lie somewhere in the middle. The docket memorandum points out that the 100-mile limit dates back to the First Judiciary Act and to circumstances in which most 100-mile journeys would be far more arduous than transcontinental travel is today. The problem, further, may be more complicated than the obvious questions of cost and distance. Trial subpoenas may be used in ways akin to the pre-Rule 30(b)(6) notices to depose top corporate officials, aimed in part to flush out the identity of persons with actual knowledge and perhaps in part as a means of harassment. And there may be some temptation to use a Rule 45(a)(1)(C) subpoena to produce as a way around Rule 34 limits.

Another question arises when a nonparty resists a subpoena issued by a court in proceedings ancillary to an action pending in another district. Rule 45(c)(2)(B) says that when a person commanded to produce makes an objection, "the serving party may move the issuing court for an order compelling production or inspection." Rules 45(c)(3)(A) and (B) likewise provide for relief by "the issuing court." (See also Rule 37(a)(2), directing that a motion for an order to a nonparty compelling discovery must be made in the court where the discovery is or will be taken.) Rule 26(c), on the other hand, provides that a motion for a protective order may be made by a party or any person in the court where the action is pending, or as an alternative in the court where a deposition will be taken. Most — but not all — courts read these provisions together to mean that if a nonparty objects or moves to quash a subpoena in an ancillary discovery court, the discovery court must decide the motion. If the request is framed as one for a protective order, on the other hand, the discovery court may be able to defer to the court where the main action is pending. Circumstances arise in which it is important to defer to the main-action court no matter what the means chosen to raise the objection. The main-action court should have primary control over discovery management, and may be in a much better position to assess the need for the discovery and the strength of the objections. A denial of discovery in the discovery court may effectively terminate the action. It would be useful to address this question in the rules.

Yet another question mingled into these questions arises from the relationship between an objection and a motion to quash. Rule 45(c)(2)(B) sets a 14-day limit for objecting to a subpoena to produce documents or tangible things or to permit inspection. There is some confusion whether a motion to quash can be used after expiration of the 14-day period to raise matters that could have been raised by objection.

Discussion included the observation that Rule 45 confuses practicing lawyers. It is used for things that should be done otherwise, as with the example of attempting to substitute for Rule 34 discovery in order to evade the 30-day response period built into Rule 34. "We should not have rules that lawyers need to work their way around." Rule 45 may be used to evade a discovery cut-off by attempting to use a purported trial subpoena as a discovery device.

Sunshine in Litigation Act

Judge Kravitz summarized his testimony last summer on the bill that would become the Sunshine in Litigation Act. Similar bills have been regularly introduced for many years. They seem to be moving gradually toward a point where one may be adopted. The Judicial Conference has steadily opposed adoption, relying on extensive study and lengthy deliberations by the Civil Rules Committee several years ago. Research by the Federal Judicial Center played an important role in this work. There is no empirical evidence to support the fear that protective orders have any significant effect on the public health and safety.

One aspect of the Act would limit the use of sealed settlement orders. Such orders occur in only a tiny fraction of federal cases. Although there is little apparent reason to fear that such orders as courts do enter will conceal information useful to protect the public health or safety, it is not clear how important it is to enable the parties both to ask that their settlement be entered as a court order and that the settlement be sealed.

The other major aspect of the Act addressed protective discovery orders. This part of the Act will create massive problems if enacted. It will impose an impossible task on the district judge at the beginning of an action. At a time when it is difficult to form much idea of what the action will involve, and impossible to determine what sorts of information may be available for discovery, the judge must decide whether a protective order would defeat access to information that would protect the public health or safety, whether any need for privacy outweighs the usefulness of the information, and whether a requested protective order is no broader than necessary to protect the privacy interest.

Confronted with a demand for findings that cannot be supported, the result commonly would be denial of a protective order. Denial of a protective order would in turn exacerbate problems with discovery. Information that now is turned over in reliance on a protective order would be carefully screened at great cost in time and money, refusals to produce information would proliferate, and courts would be called upon to resolve ever more discovery disputes.

It is clear that this legislation will be introduced in the next Congress. The challenge will be to find ways to educate Congress in the careful attention that this topic has won in the Enabling Act process and in the reasons that make enactment a very bad idea.

Discovery Privilege Logs

At the April meeting Professor Gensler observed that the cases show confusion about several aspects of privilege log practice, and suggested that the Committee might want to explore the possible opportunities to address one or more troubling issues. The practicing lawyers agreed that problems do arise, but were uncertain whether there is much opportunity to provide solutions by rule provisions. Professor Gensler volunteered to explore the matter and report to the Committee. Judge Kravitz thanked him for providing a terrific memorandum to launch the topic.

Professor Gensler began by noting that "anxiety and frustration are out there," anxiety arising from uncertainty about the mechanics of complying with Rule 26(b)(5)(A) requirements and frustration at the expense. Most of the expense seems to arise from screening documents for privilege, work product, and other grounds for protection. It is not clear that rules changes can address this problem, although new Evidence Rule 502 may reduce fears about inadvertent privilege waiver.

The questions of mechanics begin with the need to say what is being withheld from discovery and why. At first blush, these questions of how to comply appear to begin with the seeming gap in the failure of Rule 26(b)(5)(A) even to refer to a privilege log. But it seems clear that the manner of asserting privilege will depend on the mode of discovery. Assertions of privilege at deposition will be made on the spot. With Rule 34 requests, responses will vary with the circumstances. Withholding a single document is quite different from withholding many documents; producing part of a document in redacted form is different from withholding the entire document There does not seem to be much room to improve on the directions now provided by the rule.

The question of timing is less certain. It seems clear that the claim of privilege must be made when responding to the discovery request. It is not as clear when the elements required by Rule 26(b)(5)(A) must be provided. This uncertainty seems to arise most persistently with document production. The possible choices include insistence that the required information be provided at the time of responding to the document request; or that it be provided at the time of producing; or that it be provided within a reasonable time from the response or from the production.

The consequences of failing to comply properly or timely in making the assertion or providing the log also are uncertain. The 1993 Committee Note refers to Rule 37(b)(2) sanctions, and adds that withholding materials without the required notice "may be viewed as a waiver of the privilege or protection." In practice, courts seem to take a flexible approach. The case law tends to say that waiver is possible, but courts consider many factors. The usual result is a stern direction to comply, but waiver may be found. Here too it is unclear whether any rule revisions would provide for anything different than courts are doing now.

That leaves the possibility of amending the rule to provide clear directions as to timing. The most likely approach would be to establish a clear provision subject to alteration by agreement of the parties or court order. Similar provisions could be added to Rule 45, subject to the complication

that Rule 45 remains obscure on the opportunity to present a belated — untimely — objection in the guise of a motion to quash.

Discussion began with the observation that the District of Connecticut has a local rule addressing the timing requirements. There do not seem to be any problems

A practitioner noted that in the last couple of years clients have started to "push back hard" on the costs of screening documents. Some clients take the chore inside. It may be divided up among contract attorneys rather than firm associates, or farmed out to independent screening firms. Vendors have become insistent that electronic screening software can do the job at much lower cost — the software may have developed to a point about equal to screening by a first-year associate. The cost of screening is being reduced As for privilege logs themselves, the rule itself seems OK The parties often reach informal agreements. "You want it before the depositions. Usually it is the last thing produced before depositions." One reason for delay is that documents that on their face seem privileged may be unprotected because they have been circulated outside the privilege circle. It may be that nonparties deserve greater consideration and protection than parties, but it would be better to put off consideration for a year.

Another practitioner also noted that there are software programs for identifying privileged documents. At least one in-house lawyer for a client believes that software can screen at least as well as people. Screening takes as much time for a lawyer as it does for a judge, and the task is expanded across far more documents than will be logged or disputed after being logged. In most big document cases it is possible to work out serial production of documents and serial production of privilege logs. The great fear driving the huge amounts of time is subject-matter waiver. As massive volumes of documents come to be involved, correspondingly enormous amounts of time have been required. And it could be even worse — Georgia state-court rules, for example, require an affidavit to support every claim of privilege. All of this can engender boilerplate objections to the log, then review by a special master or magistrate judge, further review by a district judge, and then collateral-order appeals. But there is not a big body of law on abuse of privilege claims.

It was suggested that one reason to keep this topic on the agenda is to see what consequences flow from new Evidence Rule 502. Lawyers are beginning to craft Rule 502 agreements to protect discovery responses.

It was recalled that in the 1980s there was a move to expedite the process by agreeing to a "quick peek" at less sensitive documents without waiver. The next step would be a no-waiver quick peek at sensitive documents, but on an "eyes only" basis. "That got slapped down." Perhaps that can be revived.

Review by outside vendors was noted again. They can do a first review of documents identified by a software program. "They will give you a price per page." But there are reasons to be reluctant. "I cannot imagine relying on a vendor for the final review." A judge noted that he had recently had a hearing in a case in which the software screening failed miserably — it failed to identify a thousand privileged documents.

Another judge noted that party agreements work in big, sophisticated cases. But it would be useful to have rule guidance for smaller scale, less sophisticated litigation.

Still another judge observed that the problems that arise are not those of timing but of failure to produce a log at all. Yet another judge said that he does not encounter log problems.

An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories

of documents. Consider a case that claims an ongoing conspiracy: is counsel obliged to create a log for every letter written to the client while the litigation carries on?

A lawyer member suggested that the only default time that would not be unreasonably early would be "within a reasonable time."

Occasional references to Rule 33 interrogatory answers were picked up at the close of the discussion. Those who spoke agreed that privilege logs are not used for interrogatory answers — the answers simply provide nonprivileged information.

The discussion concluded by agreeing that the Rule 45 privilege log questions would be among those considered by the Rule 45 working group, and that the remaining questions would be carried forward on the agenda.

Rule 68

Judge Kravitz introduced the Rule 68 discussion by noting a recent article by Professor Robert Bone. The article provides a great discussion of the history. Rule 68 was designed not so much to encourage settlement as to deal with recalcitrant plaintiffs. The conclusion is that if promoting settlement has become an important goal, the present rule should be scrapped in favor of starting over.

Four options are presented in the agenda materials: Do nothing; abrogate the rule; undertake relatively modest revisions; or undertake a thorough revision.

Connecticut state courts have a rule that allows offers by plaintiffs as well as defendants, and that imposes big penalties for guessing wrong in the form of prejudgment interest at high rates. The interest award can easily double a jury verdict. The rule "has turned into a game." A plaintiff with a $1,000,000 claim will make an offer of $750,000 before the defendant's attorney even knows what the action is about. The inevitable ignorance-induced rejection then opens the way for further bargaining in the shadow of rule-based sanctions. One challenge will be whether it is possible to develop a rule that is much used without becoming the occasion of gamesmanship.

The history of Committee efforts to address Rule 68 in the 1980s and 1990s was reviewed. The proposal to adopt strong sanctions in the 1980s led to the proverbial firestorm of protest. One concerned and thoughtful observer of the Enabling Act process, John P. Frank, feared that continued pursuit of the subject might lead Congress to alter or abandon the Enabling Act process. The effort in the 1990s made a serious attempt to address many of the complexities that could be foreseen. The work was supported by Federal Judicial Center research. In the end the draft became so complex as to be abandoned. The discussions led several members to the view that abrogation might be the best solution, but the question was never put to a vote.

It is common ground in Rule 68 discussions that offers are seldom made. Even in fee-shifting cases empirical studies have repeatedly shown that offers are made in only a relatively small minority of cases Recent empirical work by Professors Eaton and Lewis shows that attorneys with long experience in civil rights and employment-discrimination litigation, where offers can cut off statutory fee rights, agree that ADR mechanisms are more effective than Rule 68 in promoting early settlement. It also is common ground that no possible version of Rule 68 could do much to increase the number of cases that actually settle; the most that might be hoped is that cases that settle will settle earlier and at lower cost

The list of topics that might be addressed by a modest revision has a way of expanding. One obvious candidate is the ruling that a plaintiff who fails to better a rejected Rule 68 offer loses the right to statutory attorney fees incurred after the offer if — but only if — the fee statute refers to fees as "costs." Turning the consequence on the happenstance of statutory language seems a puzzling

use of "plain meaning" interpretation — no plausible reason can be advanced for believing that the wording choice of fee statutes is made with an eye to invoking, or rejecting, Rule 68 consequences. More fundamentally, it is difficult to agree that Rule 68 should become a vehicle for cutting off fee rights established for prevailing plaintiffs enforcing specially favored rights This effect seems to abridge or modify important substantive statute-based rights. The fear of losing statutory fees, moreover, may create at least a tension between the interests of counsel and the party's interests.

Another seemingly modest change would be to provide an opportunity for plaintiffs to make offers. The difficulty is that sanctions would be available only when the defendant loses more than the offer. The plaintiff would be entitled to statutory costs in any event, so a Rule 68 sanction would have to be something additional. The most common suggestion is to award attorney fees, a manifestly sensitive prospect. Multiple costs might be provided instead. California provides expert witness fees. Finding the right sanction might not be easy, but at least it would make the rule seem more fair if all parties can make offers. Of course expanding the opportunities to offer would also expand the opportunities for strategic game playing.

Other relatively modest changes could begin by changing the procedure to one offering settlement, not judgment. The lawyers surveyed by Eaton and Lewis often said that they do not make offers of judgment because their clients do not want the career-blighting effects of an adverse judgment. The time to consider the offer could be extended from the 14 days available under the day-counting approach of the present rule or the explicit provision of the Time Project revision. Extending the time to consider would be an obvious occasion to answer a question that has divided the courts by allowing retraction of an offer before acceptance. Class actions might be removed from Rule 68's reach.

The Second Circuit has asked for consideration of the complications that arise when offer or judgment include specific relief as well as money. The draft that was put aside in 1994 offered a relatively simple solution to what could be an enormously complicated comparison — judgment and offer are compared by recognizing a judgment for a plaintiff as more favorable than the offer only if it includes all of the nonmonetary relief offered, or substantially all of the offered relief and additional relief as well.

More thorough revision would address such questions as offers made to multiple parties; the opportunity to make successive offers — which could greatly complicate not only the rule, but also the consequent strategic use of the rule; and adoption of a margin of error, hoping to reduce the problems of uncertainty by invoking sanctions only if the offer beats the judgment by a factor of 20% or 25%.

Dissatisfaction with Rule 68 at its core arises in part from the unpredictability of litigation. Imposing sanctions — and particularly imposing sanctions severe enough to create meaningful incentives — may seem unfair when a party simply guesses wrong within an often wide range of plausible outcomes. More fundamental concerns focus on risk aversion and endowment. A poorly endowed plaintiff, in great need of some remedy and unable to bear the risk of relief, may be pressured to accept an offer well below the reasonable range.

Discussion began with the suggestion that one approach would be to amend Rule 68 to provide only § 1920 cost consequences. Overruling statutory fee-shifting consequences would be the next closest thing to abrogation, leaving the rule to wallow in obscurity

It was noted that Indiana has a bilateral rule that "is not much used." Proposals to add greater sanctions have proved controversial. Calling it settlement rather than judgment might make a difference, but the more likely guess is that if the dollars are right the existence or nonexistence of an offer-of-judgment (settlement) provision will not much affect the parties' ability to settle.

Another member noted that Florida has a procedure that can be used effectively

An observer noted that six years ago New Jersey adopted attorney fee sanctions, with a 20% safety margin of difference. Use of the rule "has become complex." The rule was amended to exclude nonmoney judgments and statutory fee shifting. The rule can be useful in addressing the obstinate party who clings to a meritless position.

A member noted that Rule 68 offers are made on rare occasions in class actions, usually in a seeming attempt to moot the individual claim of the class representative. The offer is inherently coercive. And it creates a conflict between attorney and client. If it is carried forward, class actions should be explicitly excluded from its reach.

Another member suggested that it will be very difficult and controversial to make Rule 68 effective. Even small changes will open up controversy.

A judge noted that lawyers very seldom use Rule 68.

Another judge thought it may be worthwhile to explore the option of changing from an offer of judgment to an offer of settlement. An attorney replied that it was difficult to imagine that Rule 68 would make a difference; "if you're talking, you're talking."

A motion to do nothing now carried unanimously. Rule 68 will be carried forward on the agenda, perhaps for more detailed consideration in the fall of 2009.

Notice Pleading Twombly's Aftermath

Judge Kravitz noted that notice pleading and the Twombly decision remain on the Committee docket. The Supreme Court is aware that the Twombly decision has created uncertainty in the lower courts. It has granted review of the Second Circuit decision in the Iqbal case and it seems better to defer Committee consideration until the Iqbal case is decided. The Court might rule that Twombly is limited to antitrust cases; it might adopt the "contextual plausibility" test applied by the Second Circuit; it might do something different in elaborating the Twombly opinion; or it might go off on appeal jurisdiction grounds and let pleading matters lie where Twombly leaves them. A "mailbox" suggestion for pleading rule revisions provided by Ken Lazarus will be carried with the agenda.

Discovery of Electronically Stored Information

Professor Marcus reported on current events in the practice of discovering electronically stored information.

There are no signs that anything done in the discovery rules adopted to address electronically stored information has added to the problems that continue to be reported.

But there continues to be "a lot of anguish" about e-discovery The survey by the American College of Trial Lawyers reports some strange responses. Forty percent of the respondents said they have had no experience with e-discovery. Others said it is a headache. Some of them say that the e-discovery rules are a disaster, but these responses seem to address the phenomenon of e-discovery, not anything inherent in the rules.

Rule 26(f)(3)(C) seems to have had the greatest impact because it forces people to think about all they have to do to be prepared for e-discovery

One reason to think the time has not come to revise the rules is that the e-discovery rules proposed by the Uniform Law Commission and the practices endorsed by the Conference of Chief Justices largely track the federal rules.

E-discovery came to attention as a concern of corporate defendants. It has become a problem for ordinary litigation. Issues of retaining and unearthing electronically stored information are likely to become more pervasive. An example may be things such as e-mail messages from an accident victim sent to friends a day after the accident. "Don't worry, I'm fine" reassurances in such messages will be much desired.

Judge Kravitz observed that it may be useful to build on the work being done by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System to put together a 2-day conference. Empirical data on the cost of discovery would be important. A major focus would be to find out whether discovery really is out of control. Is there anything that can be done to reduce the costs, whether or not the problems might be characterized so dramatically? Do pleading reforms offer a meaningful alternative by limiting access to discovery? Is it possible to develop a simplified procedure for cases that are harmed, not helped, by full-blown discovery? We are told there is a flight from federal courts to state courts — is that true? Why might it be true?

Judge Rosenthal noted that the Standing Committee will have a panel discussion of these issues at its January meeting. The idea of a conference is promising. The conference on discovery at Boston College was a great success, as was the conference on e-discovery at Fordham.

Judge Kravitz asked whether the Federal Judicial Center might be able to help in building foundations for the conference. Thomas Willging replied that the American College survey tends to draw from elite lawyers. Empirical inquiry by the Center would give quite a different picture of what goes on day by day by covering the full variety of cases and practice The work would have to begin almost immediately if it is to be ready in time for a conference in the spring of 2010.

The Committee endorsed the idea of holding a conference, most likely at an academic institution, in spring 2010.

Report on Use of Subcommittees

The Judicial Conference Executive Committee has asked that all Judicial Conference committees review its draft Best Practices Guide to Using Subcommittees and report on each existing subcommittee. The agenda materials include a draft Report from Judge Kravitz to the Executive Committee. Discussion did not elicit any suggestions to change the report. Noting that some time remained before the report must be submitted, Judge Kravitz urged that Committee members review the draft again and offer comments and suggestions. It is important that the report fully describe the many ways in which subcommittees have advanced Committee work without in any way deflecting de novo consideration and independent action by the full Committee.

Appellate Rules Committee Report

Judge Kravitz noted that several projects of the Appellate Rules Committee are again intersecting with matters of interest to the Civil Rules. Professor Struve, Reporter for Appellate Rules, has provided a very helpful summary of matters discussed during the November 13 part of their most recent meeting.

Manufactured Finality: One topic on which the Appellate Rules Committee has sought input from the Civil Rules Committee is "manufactured finality." This topic arises from strategies used to achieve a final judgment for appeal purposes when, if it were not for the desire to appeal, ordinary practice would not establish a final judgment. These strategies arise from dissatisfaction, shared by lawyers and trial judges, with some applications of the final-judgment rule. One problem is that attempts to enter a partial final judgment under Civil Rule 54(b) are not always successful — it may be found that the part chosen for judgment is not a "claim" separate from matters that remain in the

trial court, or (less often) that entering judgment was an abuse of discretion. The circuits disagree as to some of the methods that might be used to manufacture finality. One tactic is to rely on a conditional dismissal with prejudice of claims that have not been decided. The condition is that the dismissed claims can be revived if the judgment is reversed. The Second Circuit recognizes this tactic. Some other circuits do not The Appellate Rules Committee believes that one approach to these questions might be revision of Rule 54(b), it may be that Civil Rule 41 also could be used. These questions must be considered further, beginning with the helpful materials developed for the Appellate Rules Committee.

Attorney Fees as Costs for Appeal Bonds: The Appellate Rules Committee undertook a study of Appellate Rule 7, which authorizes the district court to require an appellant to post a bond to ensure payment of costs on appeal. The broad question was whether "costs" can properly include attorney fees under fee-shifting statutes. The question came to focus on possible use of appeal bonds addressed to attorney fees as a means of regulating appeals by objectors to class-action settlements. The Committee concluded that the questions surrounding objector appeals are very complex, and that an attempt to address the questions by rule might have unintended consequences. They voted to remove this item from the study agenda.

Discussion of appeals by objectors to class-action settlements began by noting that any class member who objects can stall implementation of a settlement by appealing. This can produce real difficulties when class members have been actively engaged in the litigation and are waiting for distribution of their settlement shares. "The current system doesn't work." Appeals can be taken for strategic reasons. But there are legitimate objections, and legitimate objectors. Attempting regulation through appeal cost bonds does not seem desirable. One approach would be to require intervention to establish a right to appeal. The Supreme Court resolved disagreement among the Circuits by ruling in Devlin v. Scardelletti that a class member who objects to a class settlement may appeal. The Court deliberately began by setting aside standing theory and framing the question as whether a nonnamed class member can be considered a party for purposes of the general rule that only a party can appeal a judgment. The results may be undesirable.

It was observed that Rule 23 drafts addressing objector appeal rights were suspended while the Devlin case was pending on appeal, and discarded after it was decided. Rule 23 drafts also addressed the role of objectors in broader terms, struggling with the tension between "good" and "bad" objectors. The only result was the provision in Rule 23(e)(5) that an objection may be withdrawn only with the court's approval.

Discussion returned to the theme that there can be "shake-down appeals," but also good appeals. The appeal bond "is a very blunt instrument." Requiring intervention would open the door to discovery that would "help show what kind of objector this is." The district court is in a good position to determine whether there is a solid reason to pursue unsuccessful objections through appeal. Often the objector should be sent away with thanks for showing how sound the settlement actually is.

It was asked whether the Devlin decision, for all the disclaimers about "standing," involves matters that can be governed by court rule. One response was that before the Devlin decision, the Seventh Circuit had thought that intervention should be required. The question can easily be seen in Rule 23 terms. The ambiguity whether unnamed class members should be seen as "parties" extends beyond appeal rights to such matters as discovery and counterclaims. Intervention should not be required to lodge objections in the district court, but it might well become a requirement to support a right to appeal. This requirement might seem particularly attractive in Rule 23(b)(3) class actions and objections by a class member who could have opted out of the class. Of course there is a prospect that a denial of intervention would itself be appealed, but the appeal might be resolved readily at the threshold by affirming the denial.

It was agreed that Andrea Kuperman would undertake research on the feasibility of requiring intervention to support appeal by an objecting but unnamed class member.

"Mandatory and Jurisdictional" Appeal Time Limits: "[T]here is a nascent circuit split" concerning the consequences of the Supreme Court's explicit reaffirmation of the rule that appeal time periods set by statute are "mandatory and jurisdictional." At least up to now, it continues to be accepted that court rules can affect these statutory periods by suspending appeal time to allow orderly disposition of post-judgment motions. Thus a timely motion for a new trial suspends appeal time. Appellate Rule 4(a)(4) lists six post-judgment motions that suspend appeal time if timely filed, and provides that "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The potential question is whether the requirement that these post-judgment motions be timely filed is itself mandatory and jurisdictional, or whether a court might — on finding sufficient justification — recognize a tolling effect for a motion not timely filed. The Appellate Rules Committee is considering a project to draft a statute that would address the effect of statutory appeal deadlines. The effect of post-judgment motions might be considered in this project.

Rule 58's Separate Document Requirement: The Appellate Rules Committee considered two questions arising from Rule 58's separate document requirement. This requirement has been a perennial fixture in the parallel work of the Civil and Appellate Rules Committees.

One question is a variation on the "time bomb" problem that prompted the 2002 amendment of Rule 58. Failure to enter judgment on a separate document meant that appeal time never started to run; in theory a timely appeal could be filed years after final decision. The rule was amended to provide that if a required separate document is not filed, judgment "is entered" when it is entered on the civil docket and after "150 days have run from the entry in the civil docket." Appeals often are filed before entry of a separate document. Because the entry of judgment sets the time for post-judgment motions as well as for appeal, it remains possible to file a timely post-judgment motion for a considerable period after an appeal has been taken. The belated motion may disrupt orderly processing of the appeal. The Appellate Rules Committee concluded that it is not now necessary to amend Rule 58. Instead, it will recommend that appropriate steps be taken to raise awareness of the importance of honoring the separate document requirement.

A separate question arises from the 2002 amendment and the Committee Note. As amended, Rule 58(a) directs that every judgment and amended judgment must be set out in a separate document, "but a separate document is not required for an order disposing of a motion" in a list of five post-judgment motions. The problem is that the order disposing of the motion, which does not have to be entered in a separate document, often also leads to an amended judgment, which does have to be entered in a separate document. The question is whether appeal time should start to run from entry of the order disposing of the motion — which at least ordinarily will include all of the terms of the amended judgment, but also may include additional material that defeats characterization as a "separate document" — or only from entry of the amended judgment in a separate document. The Seventh Circuit has addressed this question, concluding that a separate document is required. Its approach is explored and explained in Kunz v. DeFelice, 538 F.3d 667 (7th Cir.2008). The Appellate Rules Committee asks for guidance on the desirability of further rules amendments.

Next Meetings

The Committee was reminded that a hearing on the pending Rule 26 and 56 proposals will be held in San Antonio on January 14, 2009, following the Standing Committee meeting. The next hearing will be held in San Francisco on February 2; time should be held open to enable the Committee to meet on February 3 to discuss the information provided by the November 17 hearing and the two remaining scheduled hearings.

Dates for the spring meeting were tentatively discussed. At the moment, the week beginning April 20 seems the most likely convenient time. (Shortly after the meeting the date was set for April 20-21, 2009, in Chicago.)

Adjournment

The Committee adjourned without further work.

Respectfully submitted,

Edward H. Cooper
Reporter

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

FEBRUARY 2-3, 2009

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, for a hearing on proposed amendments to Civil Rules 26 and 56, and for a Committee meeting. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge Steven M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Peter D. Keisler, Esq.; Judge John G. Koeltl; Hon. Randall T. Shepard; and Judge Vaughn R Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq., and Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison).

Hearing

The hearing began at 8:30 a.m., February 2, in a Ninth Circuit courtroom. Twenty-four witnesses testified. The hearing concluded at 4:00 p.m.. A separate summary of the testimony will be prepared from the transcript and integrated with the summaries of the testimony at earlier hearings and the summaries of the written comments

Meeting

Judge Kravitz began the meeting by noting that the purpose was not to reach final decisions on any specific questions. Many valuable contributions have been made in the three hearings and in the written comments that have been submitted. The comment period remains open for another two weeks, however, and review of the hearing transcripts may underscore the ideas offered. But it is good to seize the opportunity created by coming together for the hearing to reflect on the broad questions that were identified in the request for testimony and comments. The Discovery and Rule 56 Subcommittees have work to do in preparing recommendations for the Committee meeting in April, and will benefit from whatever preliminary guidance may be offered.

Rule 56 Point-Counterpoint

Judge Kravitz opened the discussion by observing that the "point-counterpoint" procedure described in proposed Rule 56(c) has provoked an outpouring of comment. Forceful questions have been raised by judges in districts that have adopted and then abandoned similar procedures, and by judges with extensive experience both in courts that have similar procedures and in courts that do not. As often happens in the comment process, the 20 courts that adopted point-counterpoint practices by local rules have not weighed in. They may believe that there is no point in offering comments that this procedure has worked well, since publication of the proposal suggests that the Advisory Committee and Standing Committee are relying on their experience. Acting without hearing from them might mean giving up on an idea that is better than the picture painted by some of the comments. And it would be perilous to act without hearing from them in a way that might require changes in their local practices

Judge Baylson said that the point-counterpoint procedure was recommended after extended discussion. But the comments that question it have made solid points. The other parts of the published proposal are valuable, and seem more important than this part. Much good can be accomplished by going forward with Rule 56 even if the point-counterpoint process is relegated to honorable mention in the Committee Note The revised Rule could continue to require "pinpoint" citations to the record, whether by directing a brief that requires citations or by simply requiring the

citations. The rule also could refer to a response brief and a reply brief, and say nothing about local rules.

The discussion opened by these observations continued with a comment that the point-counterpoint procedure had seemed attractive. But the testimony and comments seem to show that this procedure can create unreasonable burdens — some litigants inflate the importance of the statement, disputes about satisfactory implementation of the practice give rise to derivative motion practice, and judges may not be able to police these problems at reasonable cost to the court and parties. The Southern District of Indiana rule seems attractive. It requires a statement of undisputed facts in the movant's brief, and a responding statement in the nonmovant's brief; because of page limits on the briefs, the experience has been much more satisfactory than experience under that court's earlier rule that provided for statements and responses as separate papers. The brief procedure is better integrated than the separate statement procedure.

A question was asked as to how the statement of facts and narrative are integrated in the brief under the practice in the Southern District of Indiana. Ms. Briggs responded that in practice, "all the facts wind up in the statement."

It was observed that the Local Rule 56.1 statement and counterstatement work very well in the Southern District of New York. The judge is likely to begin consideration of the motion with the briefs, looking to the statement and counterstatement only after reading the stories of how the facts fit into the case. It would be undesirable to write a national rule that requires a statement of facts as part of the briefs — that would undermine the benefits of the direct point-counterpoint process. The national rule should not establish a uniform practice that defeats the opportunity to adopt point-counterpoint local rules. Lawyers do find ways to expand proceedings. The motions, however, generally do not attack the statement directly. Instead, the motions attack the supporting affidavits, arguing that the information in the affidavits cannot be produced in a form admissible at trial At the same time, it would be a shame to see the other advances embodied in proposed Rule 56 swamped by opposition to the point-counterpoint procedures in subdivision (c).

The question of preempting local rules was pursued further. Many districts require a point-counterpoint procedure much like proposed Rule 56(c). Still more require a statement of facts by the movant, but do not require a point-by-point response. And a plurality of districts do not require either. It seems fair to assume that many districts prefer their current practices. Opposition to the point-counterpoint procedure may raise sufficient doubts to defeat it as a national requirement. But that does not mean that a different practice should be mandated by a national rule that, in the name of uniformity, prevents local adoption of a point-counterpoint procedure. There is likely to be significant opposition to any Rule 56 provision that would force uniformity in this dimension of practice.

Another judge observed: "I have point-counterpoint and I don't want you to take it away from me." No one fights "pinpoint citations." Nor is anyone fighting "deemed admitted" practice, and that is very important. We protect pro se litigants by telling them they have to make the counterpoint response. Some courts have local rules prescribing form notices that must be given to pro se litigants. We should pursue a Rule 56 that does not refer to statements of fact in the rule text, achieving uniformity in substance without referring to the number of documents comprising the motion.

This discussion opened the question whether the Committee should shape its recommendations according to its sense of what may prove acceptable in the later stages of the Enabling Act process. The answer was that the Committee should attempt to draft the best rule it can, recognizing the advantages of procedures that, because reasonably agreeable, will be readily enforced by district judges.

Further discussion also suggested that the point-counterpoint provisions of proposed Rule 56(c) should be deleted. We cannot be sure, in light of the comments and testimony, that it is the best practice. Whether or not it is the best practice, it is not so clearly the best practice as to justify forcing it on reluctant courts Nor is there a sufficient need for national uniformity to pick one point on this spectrum and force it on all. There is much in the proposed rule that deserves adoption. It should be protected by omitting any rule text reference to statements of fact. At the same time, it is appropriate to preserve principles that people are not fighting about — the "considered undisputed" provision is an example

A parallel suggestion was that the least satisfactory procedure is one that would require the judge to scour the record. The parties should be forced to identify the facts and to point to the materials in the record that support or dispute the facts. There is not as much need to choose between brief, separate statement, or other mode of presentation.

Yet another member suggested that there is a lot of good material even in proposed Rule 56(c). Paragraphs (1) and (2) — the point-counterpoint procedure and the authority to omit it — should be deleted. The remainder of (c), with some reorganization, can preserve the pinpoint citation requirement and other useful procedures. These procedures will be uniform. There is no need to adopt rule text that notes such matters as point-counterpoint procedure

In a similar vein, it was noted that Rule 56 text should not of itself encourage local rule experimentation. And that departure by an order in a particular case gives notice to the parties in a way that local rules sometimes to not. There is a difference between prohibiting and inviting local rules, especially when there is no apparent correlation to differences in local conditions such as case loads, local culture, or local state practice. Lawyers and judges are enormously inventive. There will be local rules. And judges will develop case-specific orders.

It was suggested that the Subcommittee might frame a draft that neither adopts nor forbids point-counterpoint procedure.

A counter-suggestion was that perhaps there should be a draft that retains the point-counterpoint procedure as a model for opting in. Opposition was expressed on the ground that the model would become a default, inviting all the problems that have been encountered in districts that have adopted and then abandoned similar procedures. The Committee Note can refer to point-counterpoint as one way of framing summary-judgment motions; that would leave the districts that want this procedure free to adopt it, with their own local variations. Of course districts that are adamantly opposed will not adopt it. But if there is an opt-in model in Rule 56, some judges will start to impose it, and with it impose added costs on the parties. This procedure does not change the standard for summary judgment, but it does impose costs.

Another member confessed to liking point-counterpoint in practice. At first he was prepared to force it through as a matter of uniform national practice. But the comments and testimony show that those who oppose it have genuine and valid reasons. The opposition is more than distaste for being dictated to. Although he would not change his local point-counterpoint rule, it cannot be said that this practice is so clearly the best practice that it should be forced on all federal courts.

Rule 56 "Should," "Must," "Shall," or Finesse

The Style Project adopted "should" grant summary judgment to replace "shall." Proposed Rule 56 carries forward "should" as the word in place from December 1, 2007. But the comments and testimony, and discussion at the January Standing Committee meeting, continue to press the question whether it was wise to replace "shall" with "should." Many of the comments express a preference for "shall," often a strong preference, and view "must" as an alternative inferior to "shall" but better than "should." The issue remains very much alive, along with the question whether it is better to finesse the question by omitting any direction to the court. Rather than say that the court shall, should, or must grant summary judgment, the rule might say simply that a party may move for summary judgment, asserting that there is no genuine dispute as to any material fact, etc.

A first observation was that the Rule 56 proposal is not intended to change the "substantive law" of summary judgment. The concern with "should" is that it takes a definitive position on an unsettled issue — what is the nature of "discretion" to deny summary judgment when a party shows there is no genuine issue and that it is "entitled to judgment as a matter of law." At best this is a matter of dispute. The Supreme Court's opinions are not clear — they include seemingly inconsistent pronouncements and can be read to go either way. The best way to retain pre-2007 law is to substitute "must." Rule 56 uses mandatory language, and the Celotex opinion says that it "mandates" summary judgment when an appropriate showing is made. "Must" avoids changing that. To the extent that the Supreme Court has recognized discretion to deny, it has done so in the context of a rule that, with "shall," used mandatory language. The same discretion will remain with "must" as mandatory language. If this discretion is eventually extended, then the Committee should revisit the reference that the movant is "entitled" to judgment as a matter of law. Beyond that, none of those offering testimony and comments have urged that summary judgment should be denied when there is no genuine dispute. And it is better to avoid the alternative that finesses the issue by removing all mandatory or directive language. The standard has been in the rule since 1938. If we take it out, there is a real risk that we will be changing the law in ways that we cannot anticipate. "Must" is better on the assumption that we will not be allowed to say "shall."

It was urged in a similar vein that a lot of case law has developed around "shall." Care is required in tinkering with it. With "should," the Style Project "launched something that people take as changing the law."

The finessing alternative was offered again. Rule 12 provides a model. It describes grounds for various motions, but does not direct the court how to rule. But it was suggested again that removing the familiar direction will open the door for unforeseeable developments. In 1938 Rule 56 directed that "[t]he judgment sought shall be rendered forthwith if [the supporting materials] show that, except as to the amount of damages, 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."

The long pedigree of "shall" led to the suggestion that our first choice should be to restore "shall" to the rule. We should not yield to the impression that the Style Subcommittee conventions are ironclad and unchangeable no matter what the justification for using "shall."

Reversion to "shall" was offered as an illustration of the challenges that will confront a Committee Note explanation of each of the several alternatives. The Note might well remain as published if "should" is retained, leaving it to the Report to the Standing Committee to explain the decision.

A Committee Note explaining a change to "must" will prove trickier Some explanation seems called for when the rule text as recommended for adoption departs not only from what was published but from the text adopted in 2007 with a Committee Note explaining that there is discretion to deny summary judgment even when the movant shows there is no genuine dispute as to any material fact. The explanation might be misleading if it stated simply that there is no

discretion. There are many cases stating that there is discretion to deny. A supposed "entitlement" to summary judgment would be no more than conditional — many cases say that when denial of summary judgment is followed by trial, the question is the sufficiency of the trial evidence. If there is sufficient evidence at trial to defeat judgment as a matter of law, the jury verdict stands even though the summary-judgment record would not have sufficed to defeat judgment as a matter of law. It should be recognized that a showing sufficient to carry the summary-judgment burden may turn on matters of credibility better left for trial, particularly when inference and credibility determinations may be interdependent It might be useful to honor the frequent practice of avoiding close calls on summary judgment, particularly when partial summary judgment leaves the way open for trial on issues that will require consideration of substantially the same evidence as bears on the issues that might be resolved by summary judgment. The relationship between the timing of the motion and the progress of discovery, including the need for further discovery under present Rule 56(f) as slightly revised in proposed Rule 56(d), might be noted. It might be made clear that "must" does not entail an obligation to defer trial in order to take the time required to decide a motion filed too close to trial to support reasoned consideration before trial.

A Committee Note explaining some alternative that omits any direction about granting the motion could present still greater challenges. The effort to say that the new form is intended to carry forward whatever was meant by "shall," without offering any direction to the court, could easily be ignored in the early days and almost certainly would be overlooked in the future.

A Committee Note explaining restoration of "shall" could be reasonably straight-forward. It would note the tide of adverse comments expressing the view that "should" will influence courts toward a gradual and undesirable expansion of the discretion that has been recognized under "shall." It could add that the choice was viewed as a forced choice between "must" and "should," but express the view that the unique history of Rule 56, stretching back to the original language adopted in 1938, cannot reasonably be captured in either word. Restoring "shall" here would not create any ambiguity for other Civil Rules or any other set of rules, at least if it remains unique.

Further support for "shall" was expressed by asking what are the arguments against using it? Restoring it would provide the best protection against changing practice by a forced choice between the equally inadequate alternatives, "must" or "should "

It also was noted that many of the comments suggest that "should" is a "thumb on the scale" pushing for expanded discretion to deny summary judgment, or simply not to rule on the motion.

The alternative of dropping all words commanding or directing the court was raised again. Since the Style Project shifted to the direct voice, several rules say that the court "must" do something. But, as with Rule 12, it is possible to describe the grounds for a motion without addressing the court's action. The Committee Note could say that no change in burdens or standards is intended. It was responded that a rule without some form of the traditional direction will spur another round of litigation that seeks to challenge or recreate the standard

The last comment continued by observing that the choice is made difficult by the dictate that "shall" must never be used. "Shall" is the cleanest way to express the standard that it fostered over a period of nearly 70 years. If we cannot have that, "must" is the better alternative.

Further support was expressed for "shall" as the best alternative. The Committee Note would retract the 2007 Committee Note Perhaps the Committee Note should say that the nature and extent of the discretion to deny a motion that seems to show there is no genuine dispute as to any material fact remain uncertain and are hotly disputed. The only way to allow natural evolution without inviting unforeseeable — and therefore unintended — consequences is to go back to the traditional word.

After agreeing that "shall" is the best choice, it was suggested that a way out might be found by some expression such as "must, unless for good cause shown on the record." This suggestion was met by the counter that invoking "good cause" could easily be read to confer greater discretion than "should."

Yet another member urged that "shall" should be restored. This choice has in fact been shown to be the best way to achieve the goals of the Style Project. The extensive comments and testimony on the current proposal have shown that neither "should" nor "must" are capable of carrying forward the meaning that has accrued to "shall" in Rule 56. This situation is unique within the Civil Rules. "Shall" should be restored here, without any thought that it should be reconsidered in other rules. To be sure, the present proposal is not confined by the goals of the Style Project. Changes in the level of discretion are well within the reach of the ordinary amendment process. But no one has expressed any desire or intent to change the pre-Style standard, not even at the level of defining further the discretion to deny summary judgment when the established standard seems to be satisfied

This discussion concluded by noting that Rule 56 may present a case that falls within another rule of the Style Project. "Sacred phrases" were carried forward without change, partly for the reassurance of familiarity but often because any change in expression might change meaning. Had the comments heard now been stimulated by the Style Project — which provoked very few comments and only one hearing — the style question could have been fought out then. By substituting "should" for "shall," the Style Project may have inadvertently desecrated a sacred phrase Reconsideration may be proper in light of the determination that the present project also is not an appropriate occasion to tinker with the element of discretion that has been recognized but not defined as the law has evolved.

A different point was made to finish the Rule 56 discussion. Even Style Rule 56 refers to materials that "show" there is no genuine issue. We should think about restoring this word as a means of ensuring that the new rule does not inadvertently affect the still uncertain definition of the Rule 56 moving burden after the Celotex decision. The choice may depend on how much of proposed Rule 56(c) survives — (c)(4) identifies the "Celotex no-evidence" motion, and responses, "showing" the required things. It might be good to balance these by restoring "show" to 56(a).

Discussion of Rule 56 concluded by noting that the Subcommittee will consider alternative drafts, most likely by conference call early in March. The Subcommittee should have proposals for consideration at the April Committee meeting. If all goes smoothly, the Committee will be able to make recommendations to the Standing Committee for consideration at the Standing Committee's June meeting.

Rule 26

Profesor Marcus opened discussion of the Rule 26 proposals. Although Daniel Girard is the only Rule 26 Subcommittee member able to attend this hearing and meeting, it will be useful to review the issues raised by testimony and comments with the Committee. The issues are raised in the January 27 Memorandum on Pending Issues prepared by Professor Marcus for the Committee.

The first and most basic question is whether to carry forward with these proposals. The proposals respond to pragmatic concerns that have been raised by practicing lawyers, most notably by the Litigation Section of the American Bar Association. These concerns reflect a judgment, based on widespread experience, that the extensive inquiries into the evolution of draft reports and into attorney-expert communications seldom yield any useful information but impose high costs. They do not necessarily reflect any abstract evaluation of what discovery might fit best in an ideal world of relationships between adversary counsel and their trial-expert witnesses. From the beginning, the Committee and Subcommittee have considered the objection that restoring the discovery limits included in the proposed amendments implies acceptance of unworthy practices that use experts as

advocates rather than true witnesses. This objection has been expressed forcefully in a comment signed by many law professors, 08-CV-070. Their concern is legitimate. But the hearings and comments show that the bar in general supports the proposals. The changes wrought by the 1993 amendment of Rule 26(a)(2) and the accompanying Committee Note were not for the better. So the question: should the proposals be abandoned? By consensus the Committee determined to proceed with the proposals.

A distinct question has been raised as to the possible effects of the proposed amendments on Daubert determinations of admissibility. One tangential source of information is that the New Jersey lawyers participating in the New Jersey miniconference unanimously agreed that the New Jersey discovery rules similar to the Rule 26 proposals are a good thing, but disagreed about the wisdom of the Daubert approach to expert testimony. No hint there that the discovery rule has had an effect one way or the other on Daubert determinations. This question could be addressed by adding to the Committee Note a statement that the discovery rules do not affect Daubert determinations: "These amendments signal no retreat from the judicial gatekeeping function established by the decision in *Daubert* * * *." The addition might be placed with the material at line 153 on p. 57 of the publication book. No one has offered any reason to suppose that Daubert determinations will be hampered by limiting discovery as the proposals would do. It was agreed that it would be desirable to consult with Professor Capra, Reporter for the Evidence Rules Committee, about the form any statement about Daubert might take.

Identifying the expert witnesses to be covered by the work-product protection for attorney-expert communications also has been raised. Several commentators have urged that the protection should extend to some or all of the witnesses that are not required to give a Rule 26(a)(2)(B) report — the "disclosure" experts covered by proposed 26(a)(2)(C). These are witnesses not "retained or specially employed to give expert testimony in the case," and "whose duties as the party's employee [do not] regularly involve giving expert testimony." The broadest suggestion is to protect communications with any witness who would be testifying under Evidence Rule 702. It would be easy to draft the extended protection. Most of the comments, however, have focused on experts who are employed by a party but do not regularly give expert testimony It is argued that the lawyer must be as free to communicate with such expert witnesses as with those retained or specially employed as experts, or with those regular employees who regularly give expert testimony. It might be somewhat more difficult to draft provisions extending work-product protection to employee experts, given the prospect that former employees might well become involved. However that may be, all of the pre-publication comments and discussion focused on outside experts. There was no suggestion that discovery of employee experts presented similar problems, and indeed it was suggested that the relationship between attorney and employee-expert is different from the relationship with an independent expert.

An additional concern was expressed: often employee experts also have fact knowledge apart from their expert evaluations. It could be difficult in practice to sort through the distinction between discovery of fact knowledge and discovery aimed at communications in the course of preparing expert testimony. It was pointed out, however, that extending the protection of proposed Rule 26(b)(4)(C) would not limit in any way discovery as to the employee's fact knowledge. It would not limit discovery as to the development of the employee's expert opinion, apart from communications with counsel. And discovery would be freely available as to communications with counsel as to compensation, facts or data identified by counsel and considered by the expert, and assumptions that counsel provided and the expert relied upon.

Beyond fact discovery, it was noted that several of the commentators sought work-product protection because of uncertainties as to the reach of attorney-client privilege for communications with a party's employees. Some states do not use a "control group" test. Former employees may or may not be within the privilege. Employees who have independent counsel present similar issues.

It is not clear that the variability of state privilege law is an important consideration in shaping federal discovery rules.

Discussion pointed out that the proposal to extend work-product protection arose from concern with the complexity and expense of expert-witness discovery that generally yields little useful information and that impedes the development of expert opinions and testimony. Consensus was reached as to draft reports or disclosures — all experts are protected. As to communications, there are risks in attempting to freeze something in the rule as to employees or former employees. Perhaps some general formulation could be found, giving discretion to the judge in a way that avoids the need for complex drafting about propositions that are not firmly set. There is a risk of abuse if we simply protect communications with all employees — an attorney, for example, might seek to limit discovery by simply asserting that a former employee is an expert witness.

A different observation was that the present project was launched to undo the unanticipated bad effects of the 1993 Committee Note. The proposal seeks to create a protection against the problem the Note created. If we do not say anything about communications with employee witnesses, there may be a negative implication that they are not protected by work-product doctrine. This observation was met by the suggestion that before 1993, it would have been assumed that work-product protection applies to all attorney-expert communications. The 1993 Committee Note never purported to change that as to experts not required to make a Rule 26(a)(2)(B) report. But striking "or other information" from Rule 26(a)(2)(B) has not seemed enough. Still, adding rule text "could create headaches." Perhaps the Committee Note could address this topic.

A committee member agreed that "it does seem a bit odd to deny protection for an in-house expert." But the proposal does a lot, it may not be wise to attempt to do everything. Many employee experts will be "hybrid" fact and expert-opinion witnesses. There may be too many permutations to address in rule text. The request for comments did address these questions, but no specific rule text was proposed. Adding new rule text now might be risky. The three hearings on the 2008 proposals show that we learn a lot from reactions to specific rule language. It may be wise to let this possibility go by, waiting to see whether problems we did not hear about during the pre-publication phase emerge.

Another committee member seconded the observation that, at least from a plaintiff's perspective, there is a potential for abuse if employee experts are brought within the work-product protection of proposed Rule 26(b)(4)(C).

It was agreed that the Subcommittee will consider the question of non-Report, 26(a)(2)(C)-disclosure, experts.

Another issue raised by many comments is whether the work-product protection for communications should extend to communications with an expert's assistants. This question seems to arise with respect to independent, non-employee experts. An expert may rely on others to do a lot of the work that supports the opinion. One event, probably common, is that the attorney communicates with the expert through assistants who act as conduits. The Committee Note could say that the protection extends to communications through a subordinate as conduit, or made directly to the expert in the presence of a subordinate. One place for this statement would be on p. 57 of the publication book, after line 167. A different sort of event, also probably common, is that the attorney may want to talk with the subordinate as if, in substance, a consulting expert who will not be testifying at trial. It is not clear how we should deal with this possibility.

The distinction between subordinate as conduit and subordinate as consulting expert was taken up by suggesting that focus on the "conduit" function may be too narrow, an attempt to squeeze too much into one word. We want to protect communications with the expert's team. The attorney is talking to the assistant as an agent of the expert; the situation is akin to the "common interest" aspect of privilege doctrine.

The distinction was reiterated It is easy to conclude that protection should extend to communications with an assistant as conduit to the expert. But the lawyer may well talk to the assistant understanding that the conversation may not go to the expert. The assistant still may be acting as agent for the expert. The assistant as agent may exercise discretion in deciding what to report to the "boss expert." "The idea is to provided wide protection to avoid gymnastics."

Agreeing that it makes sense to protect communications with the expert's staff, it was asked how often the question comes up? "Who notices a deposition of the staff person who has not been designated as a trial-witness expert"? One witness at the San Antonio hearing said this had happened, but the situation was not described in sufficient detail to advance understanding of possible problems

It was suggested that the staff assistant question could be addressed by a simple sentence in the Committee Note. But it also was noted that Committee Notes should be kept as short as possible.

Another set of issues may be described as "logistical." Suppose a person has already been deposed for fact information and then is disclosed as an expert witness: must a party obtain consent or an order for a second deposition to explore the expert opinion? Would a second deposition count against the presumptive limit of 10 depositions per side? Draft Committee Note language urging a reasonable approach to these questions was considered and dropped. It could be restored. But "anything specific would be too specific." Should we try to say something? Although good lawyers have raised this concern, judges will work it out. It is likely that a Committee Note statement would use quite a few words, and do little more than recommend flexibility. The Committee Note should not become a practice guide. And even if an attempt were made to identify best practices, it would be difficult to describe all the appropriate factors

The comment from the Eastern District of New York committee urges reconsideration of an issue already considered. The Advisory Committee debated a fourth exception that would take outside the Rule 26(b)(4)(C) work-product protection communications "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." This exception was rejected because it would be difficult to find language that does not expand the exception to a point that destroys protection for any communication. The wide scope of discovery that remains as to the origins and development of the opinion, including the three exceptions already built into (b)(4)(C), seems enough. The Eastern District committee is concerned that as drafted the rule will not permit the discovery described as permissible in the request for comment, see p. 47 in the publication book. But the rule text as published does permit this discovery; it is only attorney-expert communications outside the three exceptions that are protected. And even that protection is defeasible if a party makes the showing required to defeat work-product protection. This discussion concluded without anyone suggesting any interest in reconsidering this question.

The next-to-final paragraph of the proposed Committee Note notes that Rule 26 focuses only on discovery, but expresses an expectation "that the same limitations will ordinarily be honored at trial " It was agreed that inclusion of this paragraph should be reconsidered. It has been used to support arguments that Rule 26 is being used to create an evidentiary privilege that under § 2074(b) can take effect only if enacted by Congress. Professor Capra, Reporter for the Evidence Rules Committee, believes it unwise to address evidence rulings at trial in a Civil Rules Committee Note. The Evidence Rules Committee shares that concern in some measure. This paragraph makes it more difficult to understand that Rule 26 is only a discovery rule, not a privilege rule Some will argue to Congress that the Note shows the rules committees are resorting to subterfuge to evade Enabling Act limits. The expectation stated in the Note, moreover, is not necessary to make the discovery limits effective. There are practical reasons to avoid at trial the kinds of wasteful behavior found in depositions — a judge will understand the unimportance of the information being pursued, and a jury

will quickly become impatient. In addition, most lawyers will prefer to avoid asking questions with unknown answers

The discussion of Rule 26 concluded by noting that the Discovery Subcommittee will consider the testimony and comments and prepare a final proposal — perhaps with some alternatives — for consideration at the April Advisory Committee meeting.

2010 Conference

Judge Kravitz noted that planning is under way for the conference to be held in 2010. The conference will consider the basic structure of the notice-pleading/discovery/summary judgment system created in 1938. Anxiety about discovery of electronically stored information continues to grow to levels that demand reflection on the system within which discovery operates. This endeavor will be important even if it does not lead to immediate attempts to revise the basic structure.

Judge Koeltl will chair the planning committee. The planning committee includes both some Advisory Committee members and other members.

The Federal Judicial Center is moving forward on pulling together empirical data. Tom Willging and Emory Lee are designing a new discovery survey. RAND is working on e-discovery. Other researchers also are gathering empirical information.

The planning committee is considering whether to ask a few people to prepare initial "think pieces," of modest length, to help focus further planning and stimulate discussion by those who will be recruited for the panels.

The Conference will be held at the Duke Law School, most likely in mid-May. Dean Levi, former chair of the Advisory Committee and then the Standing Committee, is pleased to host the conference.

Adjournment

Judge Kravitz noted that the Discovery Subcommittee is reviewing a list of questions that arise from Rule 45; a progress report may be available for the April meeting.

Judge Kravitz thanked Andrea Kuperman for her valuable research in support of Committee work. He also thanked the Administrative Office staff.

Respectfully submitted

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Edward H. Cooper
Reporter

TAB-3A

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

FROM. Michael M. Baylson, Chair, Rule 56 Subcommittee

DATE: April 1, 2009

RE: Proposed Rule 56

Following the three public hearings on Rule 56, and the Committee's informal discussions following the San Francisco hearing, our Subcommittee has reviewed several drafts of Rule 56, the Committee Note, and footnotes, and discussed these in two separate conference calls, joined by some members of the Advisory Committee. The attached Proposed Rule 56 has been approved by the consensus of the Subcommittee. Proposed changes in the Rule and Note since publication are shown by underlining and cross-outs. The footnotes are provided to inform our discussions. Although the Note and accompanying footnotes explain much of the proposal, I wish to point out the following highlights:

1. Consistent with the discussion in San Francisco, the Subcommittee recommends that the wording in (a) return to "shall" with an explanation in a short and neutral Committee Note. Judge Kravitz may develop a more lengthy explanation in his cover memo to the Standing Committee.

We also point out that we have restored the word "shows" for the reasons set forth in the Committee Note.

The Advisory Committee should decide whether to include the word "fact" in (a).

2 The timing provision in (b) has been stripped down. Under the default national rule, subject to change by local rule or court order in a case, a summary judgment motion may be filed at any time up until thirty days after the close of all discovery. In view of the fact that we have eliminated any reference to a "response" or "reply," the timing provisions relating to these in the Rule as published have also been eliminated. The timing provisions published last August were included in the Time Project proposals that the Supreme Court has sent to Congress. They are slated to take effect this December 1. The Committee Note explains these events and points out that adoption of the new Rule 56 will supersede the short-lived Time Project provisions.

3. With the elimination of the point/counterpoint proposals, the requirement of "pinpoint" citations becomes the "beating heart" of the proposed Rule. The virtually uniform support for this requirement in the comments and at the hearings should be carried forward as a separate subsection.

The Advisory Committee should decide whether to include the bracketed language "in supporting or opposing a motion" in (c)(1), and whether to substitute the "active" voice.

4. (c)(4) This so called "default" provision has been discussed extensively and two questions have been referred to the Advisory Committee, as expressed in footnote 6. This concept is also dealt with in the Committee Note for (g). One option is to eliminate (c)(4).

5. (c)(3) The Subcommittee recommends that this provision also be stripped down to its essentials so it is clear that the court may consider materials not cited by any of the parties.

6. The remainder of the Rule is basically as published and may be summarized as follows:

(c)(2) The Rule requires that material cited concerning a fact must be presented in a form that would be admissible in evidence.

(c)(5) An affidavit or declaration must be made on personal knowledge and set out facts admissible in evidence by a person who is competent to testify on the matters stated.

(d) This provision continues language similar to the present Rule, that a party must be given the opportunity and time to obtain affidavits, declarations or discovery.

(e) The Rule is now phrased in terms of the "assertions" required by (c)(1) and includes the "deemed admitted" concept, as published.

(f) This provision continues the concept that the court may enter an order not requested by a party, provided notice and reasonable time to respond have been allowed.

(g) The language carries forward from present Rule 56(d)(1) the practice of relying on the summary judgment record to establish a fact as not genuinely in dispute even though the court does not grant all the relief requested by the motion The Committee Note makes further explanation of the relationship between this paragraph and (c)(4). The Advisory Committee should consider whether additional language should be added to (g).

(h) This provision is continued as published.

Rule 56: March 2009 Subcommittee Draft

Clean Version

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each [fact,] claim[,] or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion, Response, and Reply. Unless a different time is set by local rule or the court orders otherwise in the case, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Fact Positions.*** An assertion [in supporting or opposing a motion] that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(A) citation to particular parts of materials in the record, including 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 the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact

(2) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A party may assert that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials not Cited.*** The court need consider only materials called to its attention under Rule 56(c)(1), but it may consider other materials in the record.

(4) ***Accept or Dispute Generally or for Purposes of Motion Only.*** A party's statement, acceptance, or dispute of a fact is for purposes of the motion only unless the party expressly states that it is made generally.

(5) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) **Failure to Respond or Properly Respond.** If a party fails to support an assertion of fact as required by Rule 56(c)(1) or fails to properly address another party's assertion of fact, the court may:

(1) afford an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the parties; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Partial Grant of the Motion.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(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 — after notice and a reasonable time to respond — 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. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each [fact,][1] claim[,] or defense — or the part of each claim or defense — on which summary judgment is sought ~~on all or part of a claim or defense~~. The court ~~should~~ shall grant summary judgment if the movant shows[2] there is no genuine dispute as to any material fact and ~~a party~~ a movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion, Response, and Reply. ~~These times apply u~~Unless a different time is set by local rule or the court orders otherwise in the case, ~~: (1)~~ a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.;

~~(2) a party opposing the motion must file a response within 21 days after the motion is served or that party's responsive pleading is due, whichever is later; and~~

~~(3) any reply by the movant must be filed within 14 days after the response is served.~~

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[1] "Fact" was suggested in subcommittee discussion. A motion may be made to resolve only one fact, or a stated set of facts. The reference to "part of each claim or defense" was intended to include a single fact. The Committee Note also addresses the point. The intended meaning is likely to work without adding "fact" to the rule text. But clarity may be enhanced, at the cost of but a single word and a couple of commas, by making this explicit.

[2] "shows" is restored. It has appeared in Rule 56 from the beginning. The new words provide an indirect reference to the burden that must be carried on summary judgment even by a movant who does not have the burden of production at trial. The direction that the court shall grant summary judgment when the movant makes the required showing helps to distinguish the court's authority to act on its own under subdivision (f), which says only that the court "may" act beyond, contrary to, or without a motion.

(c) Procedures.

(1) ***Supporting Fact Positions.***[3] An assertion [in supporting or opposing a motion][4] that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(A) citation to particular parts of materials in the record, including 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

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[3] It has been suggested that the decision to retract the point-counterpoint procedure may warrant retraction of this "pinpoint citation" provision. Drawing from present Rule 56(c), all of (c)(1)(A) could be transferred to a brief reference to record materials in (a). The shortest form would be: "The court shall grant summary judgment if the summary-judgment record shows there is no genuine dispute * * *." This version would avoid any explicit reference to the movant's Rule 56 burden. It also would avoid the need to say anything about the matters covered by (c)(1)(B). Because (c)(1) begins by stating that an assertion must be supported, account must be taken of the fact that citations to the record are not the only means of supporting an assertion. An assertion that a fact is genuinely disputed can be supported by arguing that the materials cited by the movant do not show the absence of a genuine dispute. An assertion that a fact is not genuinely disputed can be supported by showing that a nonmovant who has the trial burden of production lacks admissible evidence to carry the trial burden.

[4] Two questions are raised by the bracketed words. Are they any use? An assertion will be made either to support or oppose the motion [or, conceivably, to express neutrality]. The only advantage is as a reminder that the "pinpoint citation" requirement applies to any of the methods that may be used to present them — motion, response, reply, sur-reply, brief, memorandum, conceivably oral presentation, or something else. The Subcommittee divided on this question.

A second question is whether the active voice would be better: "A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:" That seems to work. It becomes more convoluted, however, if the "supporting or opposing" language is carried over: "A party supporting or opposing a motion by asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:" This may be an added argument against adding the "supporting or opposing" language.

(B) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A ~~response or reply to a statement of fact may state~~ party may assert that the material cited to support or dispute ~~the~~ a fact ~~is not~~ cannot be presented in a form that would be admissible in evidence.

(3) *Materials not Cited.* The court need consider only materials called to its attention under Rule 56(c)(1)~~(A)~~, but it may consider other materials in the record.~~:~~

~~**(A)** to establish a genuine dispute of fact; or~~

~~**(B)** to grant summary judgment if it gives notice under Rule 56(f).~~[5]

(4) ***Accept or Dispute Generally or for Purposes of Motion Only.*** A party's ~~may~~ statement, acceptance, or dispute of a fact is ~~either generally or~~ for purposes of the motion only unless the party expressly states that it is made generally.[6]

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[5] The ABA Litigation Section urged that notice should be given either way, which could streamline the rule: "but it may consider other materials in the record if it gives notice under Rule 56(f)." The Subcommittee concluded that the court should not be required to give notice before either grant or denial. Notice should not be required if, for example, a party pinpoint cites two pages of a deposition transcript and the court, choosing to read more of the transcript, finds other testimony that either defeats or supports summary judgment. The Subcommittee also concluded that deleting the notice requirement in subparagraph (B) is not such a change as requires republication

[6] The Subcommittee determined to refer two questions to the full Committee.

The first question is whether there should be a "default" provision. It may help to set out the rule as published without the changes shown in text: "A party may accept or dispute a fact either

generally or for purposes of the motion only." One motive for this provision tied to the point-counterpoint system. The most important concern was that a movant might state far too many facts, mostly immaterial or even irrelevant. The burden of disputing each fact might be onerous. A nonmovant who believes that only a few disputed facts will defeat summary judgment should not be forced at the summary-judgment stage to dispute the rest, on pain of forfeiting the right to dispute them later. Although not explicit, the published version seemed to imply a default — if a party accepts a fact without expressly limiting the acceptance, it is accepted; only an express "accept for purposes of the motion" would limit the acceptance. Some comments urged a contrary and explicit rule: an acceptance is for purposes of the motion only unless it is expressly made for general purposes.

One choice may be to abandon this provision. It is not clear that there is any real need to address the question after abandoning point-counterpoint. A party would remain free to take a position solely for purposes of the motion; the rule text simply would not provide a prompt. There would be no need to worry about a "default" interpretation; a position is taken for all purposes unless the party disclaims. Or at least the national rule would not complicate this question.

The Subcommittee believes that the basic provision should be that a statement, acceptance, or dispute of fact is for purposes of the motion only. It defers to the Committee the question whether there should be a qualification recognizing that a party may expressly state that its fact position is made generally. The underlined rule text may not often be invoked in practice, and there are many alternatives — a party may withdraw from a position, admit, offer to stipulate, or otherwise engage an adversary in reducing the number of disputed facts.

The default question ties to the second question. Many comments expressed concern that a party who accepts a fact "for purposes of the motion only" might find that the purposes of the motion include a subdivision (g) order that the fact is not genuinely in dispute and is established in the case. The Subcommittee agrees that this use was not intended. The question is whether to ensure this result by redrafting subdivision (c)(4), subdivision (g), or both.

(c)(4) might be amended by adding a second sentence: "An acceptance for purposes of the motion only does not establish that the fact is not genuinely in dispute for purposes of Rule 56(g)." Or — avoiding the double negative — "does not support an order under Rule 56(g) treating the fact as established in the case."

(g) also might be amended. One way of accomplishing the purpose would be: "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case. <u>But a party's acceptance of a fact for purposes of the motion only does not [support {such an} order][establish that the fact is not genuinely in dispute].</u>"

(5) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion; ~~response, or reply~~[7] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.**[8] If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

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The draft Committee Note substitutes for rule text by expressing these thoughts both in describing subdivision (c)(4) and in describing subdivision (g).

Either approach seems better than the alternative of writing rule text that attempts to elaborate on what is meant by "all the relief requested by the motion." If the motion asks only for a ruling that there is no genuine dispute as to fact A and the nonmovant accepts fact A for purposes of the motion, granting the motion is all the relief requested by the motion. The motion is granted without moving on to subdivision (g). If the motion asks for summary judgment that the defendant negligently drove the car that destroyed the plaintiff's $35,000 car, the defendant's accepting negligence solely for purposes of disputing the allegation that the defendant was the one who drove the car does not warrant an order establishing the defendant's negligence if the court finds a genuine dispute about who drove and about the value of the destroyed car Trying to put that into rule text might be difficult.

[7] This revision responds to eliminating the point-counterpoint provisions.

[8] The Subcommittee rejected suggestions that a nonmovant should be able to respond in the alternative — "I believe that the information in this response defeats the motion, but if it does not I want more time to get more information." This dilemma generates some sympathy, but it also may be unfair to ask the court to decide whether it would grant the motion, and then if so to jeopardize the decision by allowing time for further discovery that may generate an additional response, a new reply, and so on. "No one wants seriatim Rule 56 motions."

(3) issue any other appropriate order.

(e) **Failure to Respond or Properly Respond.** If a ~~response or reply does not comply with Rule 56(c) — or if there is no response or reply —~~ party fails to support an assertion of fact as required by Rule 56(c)(1) or fails to properly address another party's assertion of fact,[9] the court may:

(1) afford an opportunity to properly ~~respond or reply~~ support or address the fact;

(2) consider ~~a~~ the fact undisputed for purposes of the motion,

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the ~~motion, response, or reply~~ parties; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

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[9] The Subcommittee concluded that abandoning the point-counterpoint procedure does not lead to abandoning the explicit recognition that a failure to properly support or address a fact may support considering the fact undisputed for purposes of the motion. The "deemed admitted" practice established by point-counterpoint local rules is found useful by many districts. Recognizing the practice will protect against arguments that it is inconsistent with Rule 56. (As drafted, subdivision (e) now applies to a failure to support an assertion in a motion; denial of the motion for that reason is covered by paragraph (4).)

(g) **Partial Grant of the Motion.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.[10]

(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 — after notice and a reasonable time to respond — 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.

[10] Footnote 6 discusses the possibility of adding a second sentence at the end of (g) "But a party's acceptance of a fact for purposes of the motion only does not [support {such an} order] [establish that the fact is not genuinely in dispute]." A similar sentence is added to the draft Committee Note.

COMMITTEE NOTE

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that ~~a party~~ the movant 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*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc* , 477 U.S. 242; and *Matsushita Electrical Indus. Co v Zenith Radio Corp.*, 475 U.S. 574.

Subdivision (a) Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The "part" may be as focused as a single fact. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — "must" or "should" — is suitable in light of ambiguous and conflicting decisions on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v Liberty Lobby, Inc* , 477 U.S. 242, 255 (1986)("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948))," with *Celotex Corp v Catrett*, 477 U.S. 317, 322 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial "). Eliminating "shall" created an unacceptable risk of changing the summary-judgment

standard. Restoring "shall" avoids the unintended consequences of any other word.[11]

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) ~~[were consolidated and substantially revised as part of the time computation amendments that took effect in 2009.] These provisions are adapted by new subdivision (b) to fit the context of amended Rule 56. The timing for each step is directed to filing.~~ are superseded. [The provisions adopted as part of the Time Project in 2009 anticipated adoption of detailed provisions for response and reply. Those provisions have been abandoned in light of experience in several districts raising doubts about practical implementation.] Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive

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[11] This paragraph is deliberately brief. Several purposes must be balanced. One is to qualify the statement in the 2007 Committee Note explaining that "should" was adopted in the Style Project because "[i]t is established that * * * there is discretion to deny summary judgment when it appears there is no genuine issue as to any material fact." Comments on the 2008 proposal show fervent disagreement about this proposition. At the same time, research undertaken in response to the comments shows much support for every side in the debate Thus the Note should not take any position on this [substantive] issue, which may be clarified by further developments in the case law and ultimately by the Supreme Court. A related purpose is to satisfy the proponents on all sides of that question that the Committee Note is not offering any clandestine support for any side in this debate. And still another purpose is to offer hope for those who oppose any use of "shall" that this one relapse does not signal a more general retreat.

It would be possible to elaborate the reference to ambiguous and conflicting decisions by providing brief descriptions of three Supreme Court opinions. This suggestion has been resisted up to now It may seem awkward to complain that the Court has provided uncertain guidance. More importantly, almost any descriptions might be seen as taking sides by offering interpretations. The Committee began the Rule 56 project with a firm determination to avoid anything that changes the summary-judgment standard or the allocation of moving burdens. Addressing discretion to deny might seem to infringe on that determination.

pleading[12] [other pretrial proceedings have been had]. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

~~Subdivision (b)(2) sets an alternative filing time for a nonmovant served with a motion before the nonmovant is due to file a responsive pleading. The time the responsive pleading is due is determined by all applicable rules, including the Rule 12(a)(4) provision governing the effect of serving a Rule 12 motion.~~

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

~~The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit from different procedures. The order must be specifically entered in the particular case. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion, tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.~~

~~The circumstances that will justify departure from the general subdivision (c) procedures are variable. One example frequently suggested reflects the (c)(2)(A)(ii) statement of facts that cannot be genuinely disputed. The court may find it useful, particularly in complex cases, to set a limit on the number of facts the statement can identify.~~

~~Paragraph (2) spells out the basic procedure of motion, response, and reply. It directs that contentions as to law or fact be set out in a separate brief. Later paragraphs identify the methods of supporting the positions asserted, recognize that the court is not obliged to search the record for information not cited by a party, and carry forward the authority to rely on affidavits and declarations.~~

~~Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which~~

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[12] This reference to the time to file a responsive pleading reflects a feature of subdivision (b)(2) as published. The time to respond to a motion was set at "21 days after the motion is served or that party's responsive pleading is due, whichever is later." If a motion is served with the complaint, for example, most defendants would have the 21 days allowed by Time Project Rule 12 for answering and the additional 21 days. The United States would have the 60 days allowed by Rule 12 plus the additional 21 days. A reminder in the Committee Note seems all the more important because the Time Project adopted the subdivision (b) times for response and reply, anticipating that the point-counterpoint procedure would be recommended for adoption effective December 1, 2010. No warning was needed until the (b)(2) time provision was abandoned.

~~summary judgment is sought. A motion may address discrete parts of an action without seeking disposition of the entire action.~~

~~The motion must be accompanied by a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded 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, by correspondingly numbered paragraphs, accept, dispute, or accept in part and dispute in part each fact in the Rule 56(c)(2)(A)(ii) statement. Under Rule 56(c)(3), a response that a material fact is accepted or disputed may be made for purposes of the motion only.~~

~~The response may go beyond responding to the facts stated to support the motion by concisely identifying in separately numbered paragraphs additional material facts that preclude summary judgment.~~

~~The movant must reply — using the form required for a response — only to additional facts stated in the response. The reply may not be used to address materials cited in the response to dispute facts in the Rule 56(c)(2)(A)(ii) statement accompanying the motion. Except for possible further rounds of briefing, the exchanges stop at this point. A movant may file a brief to address the response without filing a reply, but this brief cannot address additional facts stated in the response unless the movant files a reply.~~

[Subdivision (c)(1) does not address the method used to provide the required citations. Different courts and judges have adopted different procedures. So long as the court gives clear notice of its expectations, it may direct that the citations be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.][13]

Subdivision (c)(1)~~(4)(A)~~ addresses the ways to support a statement or dispute of fact. ~~Item (i)~~ Subparagraph (A) describes the familiar record materials commonly relied upon and requires that the

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[13] This text makes clear that the uniform national rule does not mandate any particular method of meeting the requirement of pinpoint citations. But the wide variety of local practices already in place seems to ensure that there will be no fear of preemption. The reference to clear notice of local requirements may be no more than a nagging reminder of the principle expressed in Rule 83(b): "No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement "

movant cite the particular parts of the materials that support the facts. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B)~~(4)(A)(ii)~~ recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2)~~(5)~~[14] provides that a ~~response or reply may be used to challenge the admissibility of~~ party may assert that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. ~~The statement in the response should include no more than a concise identification of the basis for the challenge. The challenge can be supported by argument in the brief, or may be made in the brief alone~~ There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3)~~(4)(B)~~ reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties. ~~If the court intends to rely on uncited record material to grant summary judgment it must give notice to the parties under subdivision (f).~~

Subdivision (c)(4) recognizes that a party may wish to state, accept, or dispute a fact only for the purpose of addressing all the relief requested by the motion. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes. A statement, acceptance, or dispute of fact thus is made only for purposes of [considering all the relief requested by] the motion unless the party expressly states that it is made generally.

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[14] This paragraph has been relocated to reflect the reorganization of subdivision (c).

Subdivision (c)(5)~~(6)~~ carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A)~~(4)(A)(i)~~ that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) should consider seeking an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a ~~response or reply does not comply with~~ a party fails to support an assertion of fact as required by Rule 56(c)(1), or fails to properly address another party's assertion of fact. ~~requirements, when there is no response, or when there is no reply to additional facts stated in a response.~~ Summary judgment cannot be granted by default even if there is a complete failure to respond to the motion ~~or reply~~, much less when an attempted response ~~or reply~~ fails to comply with all Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to ~~respond or reply in proper form~~ properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of direct facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed

despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper ~~responses and replies~~ presentation of the record Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant or deny a motion on legal or factual grounds not raised by the ~~motion, response, or reply~~ parties; or consider summary judgment on its own. In many cases it may prove useful to act by inviting a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g) Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion ~~under subdivision (c)(2)(A)(i)~~. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. {Version 1: A order under subdivision (g) cannot rest on a party's acceptance of a fact for purposes of the motion only. Unless an acceptance is made generally under subdivision (c)(4), the order must rest on a record-based determination that the fact is established beyond genuine dispute.} {Version 2: Accepting a fact for purposes of the motion only under subdivision (c)(4) does not [of itself] {support such an order} {establish that the fact is not genuinely in dispute}}.[15]

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact 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 ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

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[15] This sentence makes clear the possibility that a party may accept a fact for purposes of the motion only in order to avoid the risk that any attempt to dispute the fact will fail. But drastic surgery would be required to attempt to address this ploy in the rule as it is now shaped.

Subdivision (h) Subdivision (h) carries forward former subdivision (g) with two changes Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond

Published Rule 56(c):

(c) Procedures.

(1) ***Case-specific procedure.*** The procedures in this subdivision (c) apply unless the court orders otherwise in the case.

(2) ***Motion, Statement, and Brief; Response and Brief; Reply and Brief.***

(A) *Motion, Statement, and Brief* The movant must simultaneously file:

(i) a motion that identifies each claim or defense — or the part of each claim or defense — on which summary judgment is sought;

(ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and

(iii) a brief of its contentions on the law or facts.

(B) *Response and Brief by the Opposing Party.* A party opposing summary judgment:

(i) must file a response that, in correspondingly numbered paragraphs, accepts or disputes — or accepts in part and disputes in part — each fact in the movant's statement;

(ii) may in the response concisely identify in separately numbered paragraphs additional material facts that preclude summary judgment; and

(iii) must file a brief of its contentions on the law or facts.

(C) *Reply and Brief* The movant:

(i) must file, in the form required by Rule 56(c)(2)(B)(i), a reply to any additional facts stated by the nonmovant; and

(ii) may file a reply brief.

(3) ***Accept or Dispute Generally or for Purposes of Motion Only.*** A party may accept or dispute a fact either generally or for purposes of the motion only.

(4) ***Citing Support for Statements or Disputes of Fact; Materials Not Cited.***

(A) *Supporting Fact Positions* A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(i) citation to particular parts of materials in the record, including 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

(ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(B) *Materials not Cited* The court need consider only materials called to its attention under Rule 56(c)(4)(A), but it may consider other materials in the record.

(i) to establish a genuine dispute of fact; or

(ii) to grant summary judgment if it gives notice under Rule 56(f).

(5) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A response or reply to a statement of fact may state that the material cited to support or dispute the fact is not admissible in evidence.

(6) ***Affidavits or Declarations.*** An affidavit or declaration used to support a motion, response, or reply must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) **Failure to Respond or Properly Respond.** If a response or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:

(1) afford an opportunity to properly respond or reply;

(2) consider a fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

TAB - 3B

NOTES, MARCH 9, 2009 RULE 56 SUBCOMMITTEE CONFERENCE CALL

The Rule 56 Subcommittee held a conference call on March 9, 2009. Subcommittee participants included Judge Michael M. Baylson, Subcommittee Chair, and Hon C Christopher Hagy, Ted Hirt, Esq., and Hon. Vaughn R. Walker Observers included Hon. Mark R. Kravitz, Chair of the Advisory Committee, and Advisory Committee members Hon. David G. Campbell, Hon. Steven M. Colloton, and Anton R. Valukas, Esq.. Hon. Diane P. Wood observed as liaison from the Standing Committee, and Hon. Eugene R. Wedoff observed as liaison from the Bankruptcy Rules Committee. Other observers included Andrea Kuperman, Esq. (Rules Clerk for Hon. Lee H. Rosenthal), and Jessica Siegal, Esq. (Department of Justice). John K. Rabiej, Esq , and Jeffrey N. Barr represented the Rules Committee Support Office. Edward H. Cooper participated as Advisory Committee Reporter.

Rule 56(a): "Show": Judge Baylson opened the meeting by suggesting that one question be reserved for later discussion: whether "show" should be restored to Rule 56 text: "The court [shall, should, must] grant summary judgment if the movant [motion] shows there is no genuine dispute * * *." The question was not discussed further.

Rule 56(a): "Shall": Judge Baylson then asked whether the Subcommittee had indeed reached a consensus on the choice among "shall," "must," and "should" at the Advisory Committee meeting on February 2 following the hearing in San Francisco. All agreed that "shall" is the preferred choice. Notwithstanding the general Style convention, choice of any substitute will have unforeseeable effects on the summary-judgment standard. The only way to protect the purpose to leave the standard unchanged by the present project, free to continue evolving as it has developed over many decades of "shall," is to retain "shall." "Must" could easily lead to an untoward sense of obligation to grant summary judgment, cutting back on the elements of discretion to deny that can be found in many cases. "Should," adopted in the Style Project under sway of the "never shall" edict, could easily lead to an increased sense of freedom to deny summary judgment despite a clear showing that there is no genuine dispute of material fact.

Still other alternatives have been discussed. One is to avoid any reference to the standard for acting on the motion — Rule 56 would simply say that a party may move for summary judgment, asserting that there is no genuine dispute as to any material fact. This would follow the model for Rule 12(b)(6), which describes a motion to dismiss for failure to state a claim without articulating any standard for acting on the motion. This approach would establish "a kind of symmetry" with Rule 12, and would avoid the need to enter the controversy about discretion to deny But it also could lead to changes in the summary-judgment standard even greater, and more unforeseeable, than those that could follow a choice of either "must" or "should." The vast body of case law built up around Rule 56 while it said "shall" ought to be retained with "shall."

With full agreement on "shall," the next question was whether the Subcommittee should recommend a second choice, for fear that a rigid Style convention rejecting "shall" might prove insurmountable. If the Standing Committee rejects "shall," the outcome might be either a choice between "must" and "should" made without advice from the Advisory Committee, or a remand to the Advisory Committee for further advice. If indeed the Advisory Committee has no preference, ceding the choice to the Standing Committee makes sense. But if the Advisory Committee has a preference, the Standing Committee would benefit from learning it. On the other hand, there may be a risk that presentation of any second choice would undermine the attack on the Style convention that would bar "shall."

The concern that presenting a fall-back position might weaken the strong preference for "shall" was echoed in further discussion.

Discussion turned to the Committee Note to explain "shall." It was agreed that the Note should be brief. Judge Colloton has prepared an illustrative draft. The basic theme should be that both the Style Project choice of "should," and also the Style-permitted alternative "must," create a risk of unintended and unforeseeable changes in the summary-judgment standard. "Shall" is restored to ensure evolution of the standard along a path that continues the long history of development guided by "shall." It may prove wise to refer to the uncertainties surrounding discretion to deny summary judgment when there appears to be no genuine dispute of material fact. Whether it will be wise to go beyond to point to specific decisions, even in the Supreme Court, remains to be worked out.

It was agreed that the decision whether to recommend either "should" or "must" as an alternative to "shall" should be made by the Advisory Committee. The reasons for making an alternative recommendation are strong, but so are the reasons against.

Rules 56(b), (c): Point-Counterpoint and Response-Reply Procedure: Discussion began by noting that many districts harbor strong feelings about their local rules governing summary judgment. The simpler the national rule is made, the better its reception will be. The comments and testimony have made it clear that the time has not come to adopt a national point-counterpoint procedure, not only because it would encounter fierce resistance but also because the resistance is based on persuasive experience. The time is not ripe to consider the possibility that the procedure might be salvaged by shifting the separate statement of facts to become part of the brief, subject to brief page limits. Published subdivisions (c)(1) and (2) will be discarded, and the remaining paragraphs of subdivision (c) will be rearranged.

The next question was whether to trim out the references and time limits for response and reply in subdivision (b) as published. These time limits are included in the Time Project revisions that are pending in the Supreme Court, on track to take effect December 1, 2009. But they were included in anticipation of the pending proposal to amend Rule 56 a year later by incorporating the point-counterpoint procedure. Still there may be some advantage in establishing national uniformity governing the times for response and reply, even though the balance of the rule does not develop the character or role of response or reply.

It was proposed that subdivision (b) be simplified to read:

> **(b) Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise in the case, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

This form is consistent with the general pattern of the rules, which do not set detailed times for responding to motions. Briefing deadlines are not set for the analogous motions governed by Rules 12 and 50. It has possible further advantages. Many of the comments suggested that the 21-day period that (b)(2) set for a response is too short — the movant has the advantage of preparing the motion throughout the discovery period, and can dump a complex package on the nonmovant who must scramble to work through the motion and supporting materials, and then to find both contradicting materials and its own independent showings. Many other comments suggested that it was wrong to stop the exchanges with the movant's reply. They urged that the nonmovant should be allowed a sur-reply, guaranteed by the rule text The need for a sur-reply was regularly bolstered by observing that often the motion is made in general terms, with only general supporting citations. After the nonmovant responds, the movant replies with an amplified and clearer submission that calls out for a sur-reply. But it is not obviously desirable either to lengthen the time for response beyond 21 days, or to add a provision for sur-reply. Earlier drafts included a sur-reply provision that was deleted as an unnecessary complication.

A different drawback to deleting proposed (b)(2) was noted. Present Rule 56 allows a party claiming relief to move for summary judgment at any time after 20 days have passed from commencement of the action. Changing to allow the motion at any time created a problem for actions in which the United States is allowed 60 days to answer the complaint. This was addressed in (b)(2) by measuring the time to respond to a summary-judgment motion at the later of 21 days after the motion is served or 21 days after the responding party's responsive pleading is due Deleting all of (b)(2) will mean that the Department of Justice will be forced to address its need for special time allowances in the context of local rules and individual judge practices. This need will occur in the context of proposed Rule 56(d), which carries forward present Rule 56(f) provisions for winning additional time for obtaining affidavits or depositions or for discovery. Ordinarily the Department should encounter no difficulty in asking for sensible timing, but its situation will represent a cost for abandoning proposed (b)(2).

A different question was asked: whether or not the response and reply provisions are stripped out, should (b) be revised to refer to brief and supporting papers: "a party may file a motion for summary judgment, together with a brief and supporting papers, at any time * * *." This suggestion was resisted on the ground that the rules ordinarily to not address briefing requirements or schedules Local rules may vary, but should be left alone to work as they are.

It was agreed that subdivision (b) should be simplified by dropping proposed paragraphs (2) and (3). This decision resolved any questions whether to add a paragraph (4) governing sur-replies.

(c)(1): Supporting Fact Positions: A rearrangement of proposed subdivision (c) paragraphs (3), (4), (5), and (6) was approved to reflect deletion of paragraphs (1) and (2). What was (c)(4) will become (c)(1). This paragraph requires "pinpoint" citations unless the nature of the motion or response obviates the need. Deletion of the response and reply provisions of subdivision (b) makes it possible to streamline the opening words: "An assertion that a fact cannot be genuinely disputed or is genuinely disputed must be supported by: * * *." It was asked whether it would help to add a few words to ensure that this provision applies to motion, response, reply, and any sur-reply: "An assertion in supporting or opposing a motion that a fact cannot be genuinely disputed * * *." It was agreed to carry this question forward for consideration by the Advisory Committee

(c)(2): Admissibility of Evidence: Proposed subdivision (c)(5), to become (c)(2), provided that a response or reply may state that the material cited to support a fact is not admissible in evidence. Elimination of the subdivision (b) reference to response or reply suggests some simplification may be possible. In addition, several comments have suggested that it is wrong to rest the response on the assertion that the material "is not" admissible in evidence. It is clear that affidavits and declarations may be used on summary judgment, even though they would not be admissible. The same may be true of deposition transcripts. Proposed subdivision (c)(6), to become (c)(5), recognizes this by providing that an affidavit or declaration must set out facts "that would be admissible in evidence " The same expression should be used in both subdivisions.

A more particular suggestion was that the rule might designate the admissibility argument as one to be made in brief. But again it was decided that it is better not to designate the specific paper in which the objection is raised; local practice can properly regulate this point. The important thing is to make it clear that a challenge to admissibility may be made, as urged by participants at the second miniconference. The Committee Note can continue to observe that it is not necessary to make a motion to strike, and that failure to make a motion to strike or to object at the summary-judgment stage does not forfeit the right to object to admissibility at trial.

Drafting alternatives were discussed. The ABA proposed that words should be added to discourage prolix objections: "including a concise statement of the grounds of inadmissibility." This

suggestion was made in the context of a draft specifying that the objection could be made in a response or reply. Deleting the specification of response or reply reduces the concern about undue length. It was agreed that subdivision (c)(2) should read:

> A party may assert that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3): Materials Not Cited: Proposed subdivision (c)(4)(B), to become (c)(3), provides that the court need consider only materials called to its attention under Rule 56(c)(1), but may consider other materials. It does not require notice to the parties if "other materials" are considered to establish a genuine issue, but does require notice under proposed subdivision (f) if the other materials are considered to grant summary judgment. The ABA suggested that notice should be given in both settings, whether the other materials are considered to support either grant or denial of summary judgment.

Discussion of the notice question began by observing that in some districts it is routine to supplement pinpoint citations to the record by relying "on all the evidence in the record." Does this recital relieve the court of the obligation to give notice before relying on material that is in the record, but was not specifically cited? If so, the notice requirement would be hollow — the concern is that the court may find something that seems to show there is no genuine issue (or, on the ABA proposal, to show there is a genuine issue), but not also find still other material in the record that defeats the apparent force of the material not specifically cited.

The question was renewed: from time to time, someone files discovery materials that are not cited in the summary-judgment motion. Does the court have to give notice before reading the record? Or at least before considering anything in it that seems to bear on the motion? Notice has advantages. But also comes at a cost in delay. The judge should be able to rely on materials in the record, even though not pointed to by the parties, without having to give notice. One situation occurs rather commonly — a party makes an assertion on summary judgment that directly contradicts the same party's assertion at an earlier stage, such as a motion to dismiss. Should notice be required then?

It was urged that the rule should be left as published — notice is required if the court means to rely on uncited record material to grant summary judgment, but not if it relies on the material to deny summary judgment. No one objected to this part of the proposal; the Committee should be reluctant to withdraw it absent adverse comment. The abstract danger remains that something may be taken out of context, particularly when the full context is scattered across the full record. The parties, who should know the full record better than the judge can realistically come to know it, have not pointed to the seemingly important material. The failure may represent a fuller understanding of the record, not oversight or inadvertence

But the challenge was renewed: a party attaches a complete deposition transcript to the motion, but cites only to particular parts The court should be able consider the entire deposition without giving notice that it is doing so.

The conclusion was that the court should not be required to give notice of considering record materials not cited by the parties, whether the result is to grant or deny summary judgment. Paragraph (3) will read:

> ***(3) Materials not Cited.*** The court need consider only materials called to its attention under Rule 56(c)(1), but it may consider other materials in the record.

The question of the relationship between (c)(3) and proposed subdivision (f)(2) was discussed briefly. Subdivision (f)(2) requires notice and a reasonable time to respond before the court grants or denies a summary-judgment motion on grounds not raised by the motion, response, or reply [parties]. The Committee Note might point out that (c)(3) addresses consideration of materials that bear on grounds raised by the parties, while (f)(2) addresses grounds not raised by the parties. The question whether the Note should add this observation was left open.

(c)(4). Accept Generally: Proposed subdivision (c)(3), to become (c)(4), provided that "A party may accept or dispute a fact either generally or for purposes of the motion only." Several comments observed that parties will not always remember to make a specific choice, and suggested a "default" provision that a fact position is for purposes of the motion only unless it is expressly made general. This suggestion tied to concern that a position taken solely for the purpose of the full relief requested by the motion should not become the basis for a subdivision (g) order treating a fact as established in the case.

The first question simply restated the concern: if a party does not accept a fact for all purposes, can its limited acceptance be the basis for a subdivision (g) order?

The next question was whether there is any need for subdivision (c)(4). It was responded that it can be very useful to assure the parties that a position can be taken for purposes of the motion only, to let the lawyers know that it will not be held against them for all purposes.

The Subcommittee decided that this question should be reserved for consideration by the full Advisory Committee.

Subdivision (d): Proposed subdivision (d) carries forward, with minor changes, present subdivision (f)'s provisions for showing that additional time is needed for investigation or discovery before responding to a summary-judgment motion. Some comments suggested that the nonmovant should be allowed to respond in the alternative — summary judgment should be denied on my present showing, but if it would be granted then I need more time to prepare a better showing. This suggestion was rejected after brief discussion. "No one wants seriatim Rule 56 motions "

Subdivision (e): Elimination of the subdivision (b) paragraphs on response and reply supports simpler drafting, deleting the reference to response or reply. As revised, the proposal will read:

> **(e) Failure to Respond or Properly Respond.** If a party fails to support an assertion of fact as required by Rule 56(c)(1) or fails to properly address another party's assertion of fact, the court may: * * *

Subdivision (g): Proposed subdivision (g) carries forward the "establishing facts" provisions of present Rule 56(d)(1), clarified so that it applies only when the court does not grant all the relief requested by the motion. It was observed that this provision "scares litigants." They fear that a position taken for purposes of the motion — most often a limited acceptance — will be taken to establish a fact even though the motion is not granted This is part of the confusion generated in drafting subdivision (c)(4): how can it be made clear that a position can be asserted only for the purpose of deciding whether to grant "all the relief requested by the motion," without becoming the basis for a subdivision (g) order?

One judge observed that the subdivision (g) procedure is invaluable for purposes of simplifying a case. One possibility would be to incorporate a cross-reference: "[the court] may, consistent with Rule 56(c)(4), enter an order stating that any material fact * * * " Another possibility

will be to drop any default provision in (c)(4), leaving it to a party who wants to take a position only for purposes of the motion to say so. This question will be taken to the Advisory Committee.

NOTES, MARCH 23, 2009 RULE 56 SUBCOMMITTEE CONFERENCE CALL

The Rule 56 Subcommittee held a conference call on March 23, 2009. Subcommittee participants included Judge Michael M. Baylson, Subcommittee Chair, and Hon. C. Christopher Hagy, Ted Hirt, Esq., and Hon. Vaughn R Walker. Observers included Advisory Committee members Hon. Steven M. Colloton, and Peter D. Keisler, Esq . Hon. Diane P. Wood observed as liaison from the Standing Committee, and Laura A. Briggs observed as representative of District Court clerks. Other observers included Andrea Kuperman, Esq. (Rules Clerk for Hon. Lee H Rosenthal), and Jessica Siegal, Esq. (Department of Justice). Jeffrey N. Barr represented the Rules Committee Support Office. Edward H. Cooper participated as Advisory Committee Reporter.

Partial Summary Judgment: Judge Baylson began the call by asking whether the subcommittee should recommend adding these words to Rule 56(a): "A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought." The first question was whether "identifying" is a word that has acquired a special significance in the Style Project. No such meaning can be identified, but further discussion failed to produce a better word. "Identifying," however, is not an obvious best choice; if a better word can be found, it can be adopted.

The next question was whether "fact" should be added: "identifying each fact, claim, or defense * * *." Usually responsible lawyers will stipulate to particular facts that are not genuinely disputed, but sometimes they fail. A motion for summary judgment on a particular fact or set of facts can be useful in shaping the case for further proceedings. A fact-only motion "is a useful technique." Discussion suggested that such motions are not common, but no reason was suggested for excluding them. It was noted that "part of" a claim or defense was intended to include a single historic fact. That can be pointed out in the Committee Note. But this presents the usual question: if clarity can be advanced by adding a single word to the rule text, the addition may be wise.

The relationship of a fact-only motion to subdivision (g) was discussed. Subdivision (g) recognizes that when a court does not grant all the relief requested by a motion, it may order that a fact shown to defy genuine dispute is established in the case. It has proved difficult to draft rule text that clearly captures the relationship between partial summary judgment that grants all the relief requested by a motion for partial summary judgment and a subdivision (g) order. This question was put off for further discussion with subdivision (g); the result was to add some new language to the Committee Note.

It was agreed that "[fact]" would be added to the text reported to the Advisory Committee for discussion. The addition will be reflected in the Committee Note at line 23, p. 8 of the current draft.

"Shall": The draft note prepared to reflect the March 9 decision to recommend "shall" in expressing the direction to grant summary judgment was presented in two versions. Each is designedly brief; the main difference is that the footnoted alternative refers to a profusion of cases, while the main version simply refers to conflicting decisions on discretion to deny summary judgment when there is no genuine dispute as to any material fact. It was agreed that the outpouring of comments and testimony on the choice between "must" and "should" suggests it will be wise to offer only a brief explanation of the decision to restore "shall "

Some earlier drafts of the Committee Note explicitly referred to Supreme Court decisions that seem to conflict on the question of discretion to deny. Both Kennedy v Silas Mason and Anderson v. Liberty Lobby seem to recognize this discretion. In the Celotex opinion, on the other hand, the Court said that Rule 56 "mandates" summary judgment when there is no genuine issue. It was suggested that it may be wise to refer to these opinions, although briefly, because the 2007 Committee Note explained the Style Project adoption of "should" by saying "It is established that * * * there is discretion to deny summary judgment when it appears there is no genuine issue as to any material fact," citing the Kennedy case. The choice not to refer to the Supreme Court opinions in the current draft Note rested on two concerns. First, it seems a bit awkward to reflect on apparent ambiguities or conflicts among Supreme Court opinions. Second, the accusation of ambiguity or

inconsistency depends on a difficult choice in the art of reading opinions. It can be urged that the Court has been clear when it has focused directly on the question in the Kennedy and Anderson opinions, while a general observation that Rule 56 "mandates" summary judgment does not reflect any intent to reject discretion to deny in an appropriate situation. A further observation was that a position is taken even by referring to ambiguity or conflict — some argue that the resolution is clear, one way or the other. The citations are not needed to show that the Note, which recognizes the conflicting decisions, recedes from the position taken in the 2007 Note.

It was agreed to add two words to the Committee Note at line 34: "Shall" "is suitable in light of ambiguous and conflicting decisions * * *." The Note also will be revised to soften the statement that the Style Project "prohibited any use of 'shall.'" The revised version will read: "Rule 56 was amended in 2007 to replace 'shall' with 'should,' acting under a convention that prohibited any use of 'shall.'"

"Shows": The Subcommittee agreed to restore "show," a word that has appeared in Rule 56(c) from the beginning. Proposed Rule 56(a) will read: "The court shall grant summary judgment if the movant shows there is no genuine dispute * * *." This will be a reminder of the moving party's burden. And it may help to reflect the contrast with subdivision (f): summary judgment shall be granted if the movant makes the required showing, while the court's authority to act on its own is reduced to "may." The court is not under the command of "shall" to act on its own to initiate the question, nor even to grant a motion when the movant has failed to make the required showing but the court has identified grounds to grant. Nor is the court required to make an independent inquiry if the movant appears to have made the required showing

Subdivision (b): On March 9 the Subcommittee agreed to recommend deleting the provisions for timing response and reply. The Department of Justice continues to be concerned, however, that it may not have adequate opportunity to respond when a plaintiff moves for summary judgment before the Department has had an opportunity to answer. Some help is provided by the provision in present Rule 56(a)(1) that requires a plaintiff to wait for 20 days after commencing the action. The parts of the draft Committee Note on premature motions help, but something more should be said about the nonmovant's opportunity to respond. These words will be added to the Committee Note, subject to improvement: " * * * in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading and other pretrial proceedings have been had."

Subdivision (c)(1): The first drafting question was posed by bracketed words in the rule text: "An assertion [in supporting or opposing a motion] that a fact cannot be genuinely disputed * * *." Do the bracketed words add anything by making it clear that the pinpoint citation requirement applies equally to movant and nonmovant, and at all stages of motion, response, reply, and sur-reply? The rule no longer adopts a point-counterpoint procedure, leaving it to local practice to determine whether the record citations should be provided in the motion, a statement of undisputed facts, the brief in the course of stating and arguing, a separate section of the brief, or otherwise. Still, there may be some value in emphasizing the nationally uniform requirement that there be pinpoint citations. Some participants thought the help provided by the words outweighs the word-count cost of adding them. Others were not so sure. They will be carried forward in brackets for discussion in the Advisory Committee.

A second drafting question was whether it would be better to draft (c)(1) in active form to parallel (c)(2). As presented, (c)(1) says: "An assertion * * * that a fact cannot be genuinely disputed * * *." It could be made active: "A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must ~~be supported~~ support the assertion by:" If the "supporting or opposing" language is retained, this might become: "A party supporting or opposing a motion by asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:" Support

was expressed both for the active and for the passive voices. The question will be presented to the Advisory Committee.

Subdivision (c)(3): The Subcommittee decided on March 9 to recommend deleting the requirement that the court give notice to the parties before granting summary judgment after considering record materials not called to its attention by the parties It was agreed that this change is not one that, if accepted by the Advisory Committee, would require republication.

Subdivision (c)(4): "Default" Provision: The Subcommittee unanimously agreed to delete words presented in brackets for discussion: a statement of fact "is only for the purpose of [considering all the relief requested by] the motion * * *." These words were designed to help explain the relationship between accepting a fact only for purposes of the motion and the subdivision (g) authority to establish a fact even though the court does not grant all the relief requested by the motion. Everyone agrees that accepting a fact only for the purpose of opposing all the relief requested by the motion should not be binding if the court does not grant all the requested relief. It has proved difficult to capture that proposition in rule text. This indirect effort was found to confuse more than it might help.

The relationship between accepting a fact only for purposes of the motion and subdivision (g) will be addressed in the Committee Note on both subdivision (c)(4) and subdivision (g). The draft for subdivision (g) will be changed to avoid a double negative. One version might be: "Accepting a fact for purposes of the motion only under subdivision (c)(4) does not ~~[of itself]~~ establish ~~that~~ the fact ~~is not genuinely in dispute~~ for an order under subdivision (g)." Or: "does not admit that the fact is established for an order * * *."

The final words of (c)(4) qualify the general provision that a fact position is taken only for purposes of the motion: "unless the party expressly states that it is made generally." This qualification was challenged: how often will a party accept a fact generally? A party who wishes to do so can simply admit the fact, or withdraw the assertion; the parties often can stipulate, and stipulations — including stipulations for purposes of the motion only — are recognized in (c)(1) Rather than recognize both limited and general positions, with a default in favor of limited positions, it may be better to say simply that a position is taken only for purposes of the motion. This question will be submitted to the Advisory Committee.

Committee Note, Subdivision (b): The draft Committee Note addresses the recommendation to delete provisions added to Rule 56 as part of the Time Project amendments transmitted to Congress to take effect next December 1. Those provisions anticipated adoption of the point-counterpoint procedure in Rule 56(c) as published. Retraction of that procedure obviates the occasion for addressing the time for response and reply. The draft Note explains that the point-counterpoint procedure was withdrawn "in light of experience in several districts raising doubts about practical implementation." The reference to practical implementation was deliberately ambiguous. The Committee's tentative decision to withdraw this procedure was based on respect for local autonomy in light of the widespread and vigorous opposition to forcing a nationally uniform procedure on courts that think it unwise. The published proposal recognized that the procedure may not be ideal for all cases by authorizing the court to order otherwise in the case. Many comments reflected doubts whether the procedure will work well in most cases for most courts. Discussion led to a consensus that there is no need to offer this ambiguous "explanation." This sentence will be revised to read: "~~Those~~ The response and reply provisions have been abandoned in light of experience in several districts ~~raising doubts about practical implementation~~."

Committee Note, Subdivision (c)(1): The draft Committee Note includes a paragraph observing that the required pinpoint citations to the record can be provided by several different means, "[s]o long as clear notice of the court's expectations is provided." The Subcommittee was uncertain whether

this paragraph is useful The decision to abandon a defined procedure focused on a statement of undisputed facts simply leaves matters where they stand now — many different procedures are employed. Is it useful to provide a reminder that there is a uniform national requirement of pinpoint citations, while leaving implementation to local practice? Is there any need to refer to "clear notice," or even "notice," to admonish courts that a party should not be penalized for failing to understand a procedure that is not embodied in a local rule or by a standing order? Rule 83(b), after all, says that no sanction or other disadvantage may be imposed for violating a requirement not in a local rule "unless the alleged violator has been furnished in the particular case with actual notice of the requirement." This paragraph will be carried forward for consideration by the Advisory Committee.

Committee Note, Subdivision (c)(2): The draft Note includes a sentence stating that a challenge to admissibility "can be made in any form compatible with local practice." The Subcommittee agreed to delete this sentence.

Committee Note: Subdivision (c) Length: The draft Committee Note may err on the side of offering too much "practical advice." The Reporter will consider further reduction.

TAB-3C

SUMMARY OF COMMENTS: 2008 RULE 56 PROPOSAL

General

08-CV-004, Benjamin J Butts, Esq.: Supports the proposed Civil Rules amendments.

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: "In general, our group strongly supports" the revision.

08-CV-028, Hon. H. Russel Holland: The focus is on proposed Rule 56(c), but there is a general comment that "the proposed amendments to Rule 56" are not compatible with the purposes stated in Rule 1.

08-CV-037, Professor Adam Steinman: It is wise to refrain from attempting to change the summary-judgment standard or the assignment of burdens. But Rule 56(c) should be redrafted to protect against inadvertent misinterpretations that could change the standard or the burdens.

08-CV-039, Professor Alan B. Morrison: "[T]he changes will improve the operation of the Rule and bring the practice in line with the better practices in a number of districts." But the references to local rules at pp. 85, 99-100 in the publication booklet should be reconsidered. "If these amendments are adopted, as I hope they will be, that should be the end of local rules in this area."

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: "Summary judgment today is widely inappropriately used and the proposal before you is apt to exacerbate that problem." It began as a device to enforce plaintiffs' debt-collection and like claims, overcoming sham defenses. It became generalized; now it is not a plaintiff's device, and indeed has become a dilatory tactic. It has grown to reach questions of negligence, intent, and the like that are unsuited to summary disposition. It deters settlement, increases aggregate legal expenditures, and biases results against plaintiffs in civil rights cases. "[T]he less conscientiously it is used as a tool to weed out purely legal disputes, the more intense the doubts that it comports with the Seventh Amendment's jury trial guarantee."

08-CV-049, Professor Elizabeth M. Schneider: The discussion of the point-counterpoint procedure in proposed subdivision (c) is set against a background of concern for the overall impact of summary judgment on civil rights and employment cases. The detailed statement and response procedure may aggravate an already unsatisfactory situation. The FJC study demonstrates the facts that summary judgment is sought more often in employment discrimination and other civil rights cases, is more often granted, and more often terminates the litigation. Other empirical research reaches similar conclusions, and also demonstrates that the differences are not due to the "weak" nature of many of these cases r to poor lawyer selection of what cases to bring.

08-CV-055, Gregory P. Joseph, Esq.: "I do not support the amendments to Rule 56. * * * I * * * concede at the outset that it reads much better than the existing text." (The chief concern addresses the point-counterpoint procedure, as summarized with Rule 56(c) below.)

08-CV-061, Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform: Supports the proposal, but with two changes. "Should" grant ought be changed to "must grant", sanctions should be provided for moving, responding, replying, or submitting an affidavit or declaration "without reasonable justification."

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The Committee should "reconsider amending the rule." It "has generated a large body of interpretation over years of practice, judicial construction, and academic study. Altering a rule with such an extensive interpretive history may lead to unintended adverse consequences that neither the Advisory Committee nor this committee can predict."

08-CV-100, L. Steven Platt, Esq.: "[I]n practice the courts are treating the plaintiff as still having the burden of proof in opposing summary judgment motions and the courts improperly take the inferences in favor of the moving party * * * " "[T]he Committee should move in the direction of limiting the one-sidedness (i.e., favoring the moving party) of the current rule. A considerable body of research shows that summary judgment and other procedural devices disproportionately limit the access to justice by plaintiffs in civil rights cases. * * * The rule should discourage the current, overly aggressive use of summary-judgment practice, and especially should discourage judges from granting this motion[] improperly because they have such crowded dockets." One means "would be a rule providing that summary judgment should be denied if any of the movant's 'material facts not in dispute' are, in fact, disputed or otherwise * * * not a legitimate basis to rely on * * *."

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: "[T]he Committee should move in a different direction [from point-counterpoint procedure]. It should take appropriate steps to limit the abuse of summary judgment motions in civil rights and other cases where the parties are disproportionate in resources." One means would be to provide that summary judgment "will be denied if any of the movant's 'material facts not in dispute' are, in fact, disputed or otherwise * * * not a legitimate basis to rely on for summary judgment purposes."

08-CV-116, Keith B. O'Connell, Esq., for Texas Assn. of Defense Counsel: Apart from urging adoption of "must," the Association "generally supports the adoption of the other proposed amendments to Rule 56 * * *."

08-CV-127, Michael R. Nelson, Esq.: "The Committee's goals of establishing a clear, consistent national standard governing summary judgment and developing an improved summary judgment procedure without changing the standard for the entry of summary judgment are laudable."

08-CV-133, Sharon J. Arkin, Esq.. Although the conclusion of this section states that it would be a mistake to substitute "must" for "should," the underlying theme is a more general suggestion that summary judgment should not be further encouraged. "[T]he proposed changes to Rule 56 are not only unnecessary but actually destructive to the fundamental purpose of the civil justice system: Fair and just resolution of disputes." "I am a strong supporter of the jury system." "The ever-growing prevalence of summary judgment motions is having a very negative impact on the justice system. One of the most significant impacts is on the public's perception of justice itself." A party who loses after jury trial is likely to believe that at least there was a day in court with a fair process; a party who loses after a judge decides on paperwork submitted by the lawyers is "confused and appalled," feeling "cheated and angry." Defendants make summary judgment motions for many reasons — to flush out the plaintiff's theories or experts; to increase billings before settling; to take advantage of a judge's desire to clear the docket, or the plaintiff's inability to respond adequately; or to exploit the possibility of a mistaken grant. Summary judgment is appropriate in cases where undisputed facts require resolution of a particular question of law. But it is often granted in complex cases that involve issues of credibility, intent, and reasonable inferences.

08-CV-145, Professor Stephen B. Burbank. This long comment focuses on the point-counterpoint procedure of subdivision (c). But it includes general observations as well. Rule 56 "is very differently interpreted in different circuits and in different types of cases." "Another problem is

suggested by evidence that some courts are granting summary judgment by resort to techniques of factual and legal carving that threaten the right to jury trial and the integrity of the substantive law. Still another is that — apart from the problem of delay — summary judgment motions may be used by one party to inflict expense on the opponent." The threat to jury trial is augmented by the risk of "cognitive illiberalism." A judge may not be aware of the personal experiences that shape understanding of the world and fail to recognize the different experiences that may lead jurors to different understandings. Employment discrimination cases are a particularly troubling example of summary judgments granted when a jury including members sharing the life experiences of the plaintiff may have a different understanding of probable discrimination.

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: "Strategies of attrition, resistance, and delay have, to our clients' detriment, all too often exploited loopholes and unintended opportunities in procedures that were designed to serve and balance the interests of both sides. * * * Procedural innovations, including time limits, bifurcation, and aids to juror comprehension, are and should be increasingly used to decrease cost, while increasing effectiveness, and preserving the jury's irreplaceable fact-finding function." Rather than rush to summary judgment, courts should explore summary jury trials, which "provide useful information on how [witnesses, advocates, and experts] play, in the real world." Summary judgments beget appeals; summary jury trials beget settlements.

08-CV-160, Professor Stephen N. Subrin: "The amendments would continue the trend of replacing oral advocacy and trial in open court with disposition by documents " Summary judgment, further, "often inherently calls for subjective determination of what is a sufficiency of evidence and what inferences to draw from evidence Judges, like all humans, cannot be perfectly neutral, try as they may." As Cardozo expressed it, there is an "'inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.'"

08-CV-167, Cynthia L. Pollick, Esq.: Attaches a letter sent by a client to the judge who granted summary judgment for the defendant, expressing concern that the justice system failed her by denying a jury trial. The comment urges that the present system is hard enough, the proposed amendments would make it harder for everyday citizens, leaving unfortunate long-lasting impressions about the federal justice system.

08-CV-175, Hon. Marcia S. Krieger: The Rule 56 title should be "Summary Judgment or Summary Determination." The ruling may not be a judgment, but only a determination. "This confusion is particularly significant when the rule is used for determination of 'part of' a claim or defense."

08-CV-177, Paul R. Harris, Esq.: "[T]he summary judgment device truly is broke and in great need of fixing." Adding point-counterpoint will only make it worse. "[I]n the employment law context, summary judgment practice needs to be restricted, not enhanced."

08-CV-183, Professor Eric Schnapper: This comment includes a long paper on the development of Rule 56 into a device that was not — and could not have been — foreseen when it was created in 1938. The core theme is that present procedure does not provide the nonmovant a fair opportunity to respond when the motion addresses the sufficiency of the evidence. Changes should be made to provide an opportunity that comes closer to the setting in which judgment as a matter of law arises at trial. The paper is fascinating reading, but cannot be adequately summarized. Particular points are noted below

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91: "[P]laintiffs don't like summary judgment very much and defendants would like to have more of it "

Hon. Royal Ferguson, Jan. 14 hearing, 7-10: In opposing point-counterpoint, begins: "Summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the cost and risk to plaintiffs in the pretrial phases of litigation, while diminishing both for defendants. * * * [S]ummary judgment, as we have it today, has created an unlevel playing field." The procedure should not be further complicated by adding point-counterpoint.

Michele Smith, Jan. 14, 32, at 39-40: Summary judgment should be made meaningful because it is an important part of practice. Point-counterpoint will help by forcing careful attention in deciding whether to make a motion, and in deciding how to respond. "I do not file motions out of just habit or routine. * * * [I]t really affects your credibility before the judges before whom you practice. * * * [M]y clients aren't the type of clients that like to pay for summary judgments that don't have a prayer of being granted."

Rule 56(a)

PARTIAL SUMMARY JUDGMENT

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: It is good to adopt the common phrase "partial summary judgment." Recognizing motions that address a claim, defense, or part of a claim or defense "will serve to promote greater utilization of the summary judgment process."

08-CV-161, Federal Magistrate Judges Assn.: It is good to add "partial summary judgment" to the title.

08-CV-180, U.S. Department of Justice: Recognizing partial summary judgment "will be a valuable clarification and recognition" of this practice.

GENUINE DISPUTE

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Does not object to change from "issue" to "dispute," as a change adopted for clarity without changing the standard.

ORAL ARGUMENT

08-CV-048, Stephen Z. Chertkof, Esq.: The rule should provide that courts should hear oral argument before granting a motion, and must hear oral argument before granting a "Celotex no-evidence" motion. It is difficult to fully understand the facts and issues solely on a paper record.

08-CV-117, Malinda Gaul, Esq.: Summary judgment motions are made in every employment dispute. They are granted far more often than denied. Many grants are reversed on appeal, but many employees cannot afford to appeal. "Therefore, I encourage the addition of a requirement for the Courts to conduct oral arguments on all motions."

Prof. Elizabeth Schneider, Nov. 17, 62 at 76-77: "[Y]ou really want oral argument often in summary judgment cases because it's everything That's it." It is like going back to equity trial on the papers.

Malinda Gaul, Esq., Jan. 14, 23 at 25-26: Opportunity should be provided for oral argument. There is only a short time to respond. An oral argument would provide an opportunity to address the facts.

Brian Sanford, Esq., Jan. 14, 27 at 31-32: "[O]ral argument would be a nice thing, which is not the practice" in the Northern District of Texas.

Margaret Harris, Esq., Jan. 14, 44 at 49-50: Oral argument should be provided. It makes a difference when a judge misunderstands the record. Telling the parties what the judge thinks is called for and giving an opportunity to respond can be important.

"SHOULD," "SHALL," "MUST"

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: When there is no genuine dispute, "there appears to be agreement all around that imposition of summary judgment should be mandatory." "[A]ccuracy should trump style here and * * * it would be preferable to substitute the word 'shall' for 'should.'"

08-CV-011, Robert B. Anderson, Esq.: Although it speaks of retaining "the present language," it seems clear that this comment favors "shall," not "should." The concern is that "should" will be seized by the trial judges and appellate courts that disfavor summary judgment to deny motions "even when undisputed facts and settled law would otherwise mandate summary judgment." There is a risk that summary judgment will become "totally discretionary under all circumstances," particularly as state courts and legislatures pick up on the federal model.

08-CV-016, Joseph D. Garrison, Esq.: In frequent appearances at the annual NYU employment-law seminar, he asks judges to raise their hands if they have "encountered situations where testimony at trial differed from that presented in summary judgment affidavits. It was the rare judge who did not raise his or her hand. This is why I believe judges should preserve their discretion to deny summary judgment in those circumstances where, for whatever reason, the judge is unwilling to credit a material affidavit."

08-CV-039, Professor Alan B. Morrison: "Should" is the proper choice. It may be easier to have a short trial, particularly in a nonjury case, make Rule 52 findings, and send the case up to the court of appeals once And "there are rare exceptions with no disputed material facts in which a denial is still appropriate " "[A]ll the incentives for the judge are to grant summary judgment"; there is little likelihood that judges will abuse whatever discretion they have to deny

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel of Johnson & Johnson, responsible for global litigation. "I believe it critical that the mandatory 'must' replace the precatory 'shall'," making it clear that summary judgment is a matter of right. "Summary judgment rulings applying legal principles to undisputed facts create the guidance that unquestionably the business community seeks and which benefits the process of making reasonable choices in a complex world. The uncertainty engendered by delegating to juries that application of law to fact contributes to the litigation-fearing culture that is so prevalent in this country."

08-CV-044, Claudia D. McCarron, Esq.: If "shall" was ambiguous, it should be replaced by "must." "Should" will mean an increase in the number of cases in which discretion is exercised to deny summary judgment; facing the cost of moving, "fewer meritorious motions will be filed." The concern that trial may produce a different record is misplaced — "trial will always change the record." Rule 56 embodies the judgment that summary judgment is an appropriate juncture at which

to terminate a case. And it is the responsibility of lawyers to ensure that pretrial circumstances do not fail to afford a fully reliable record for summary judgment.

08-CV-045, Debra Tedeschi Herron, Esq.. Summary judgment too often is deferred, ultimately leading to denial. "When properly supported, summary judgment must be granted as it lessens the exorbitant costs of litigation and restores faith in the juridical system " A discretionary standard compromises the importance of summary judgment "and is a waste of time and resources."

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: It would be wrong to adopt "must." "[R]educing trial judge discretion to deny summary judgment from little to zero in any circumstance would be a profound and dangerous mistake." "Trial judges need, and should be encouraged to sue, the discretion to deny summary judgment simply because the procedure does not promise to streamline litigation " [This view is stated as one conclusion that flows from a lengthy statement of challenges to the point-counterpoint procedure in proposed Rule 56(c). That procedure can be misused by stating an overwhelming number of facts, most of them not material. More importantly, breaking the case down into discrete facts loses the power of narrative, of story, distorting the process of deciding on the evidence as a whole.]

08-CV-047, Professor Edward Brunet: "Must" should be restored. Discretion has considerable costs. Fewer motions will be granted, leading to trials in cases that do not present fact issues. Arguments addressed to the court's discretion will be different, and more difficult for the court. The price of settlement likely will increase because the transaction costs of litigation will increase. The cost of making a summary-judgment motion also will increase by making the process discretionary and thus more complex; some parties may be deterred from making any motion. It must be recognized that courts already possess some degree of discretion, as reflected in statements of reluctance to grant summary judgment in some types of cases, including antitrust, civil rights, and negligence claims. This kind of discretion in turn threatens the transsubstantive nature of the Civil Rules, a value vigorously championed by Judge Clark It is not too late to undo the choice made in the Style Project.

08-CV-049, Professor Elizabeth M. Schneider: Keep "should." "[T]here are some cases where there are no disputed issues of material fact where summary judgment should still be denied."

08-CV-050, Stephen G. Morrison, Esq.: The "unbounded discretion" conferred by "should" "could result in parts of the case, or the entire case, being tried to a jury when it never should have made it that far." "Must" will promote the most efficient and inexpensive manner of providing justice.

08-CV-051, Latha Raghavan, Esq.: It has long been understood that "shall" is a mandate to grant summary judgment. It has meant "must " "[T]o preserve the intent and purpose of summary judgment, it is preferable to" adopt "must."

08-CV-056, Hon. Frank H. Easterbrook: "Must" is the proper word. Some judges prefer to deny, despite the absence of genuine dispute as to any material fact, because at least one party will be satisfied by the jury's verdict, both parties will appreciate being heard, and trial spares the need to decide the motion. But the party who shows there is no genuine dispute should not have to bear the costs of trial, nor should other parties in the trial queue have to wait longer. Beyond that, recognizing discretion to deny the motion will lead to arguments on appeal in this form: To be sure, there was no genuine dispute But it was an abuse of discretion to grant the motion because better evidence might have appeared at the time of trial and trial would have been short. "That is not an argument that appellate litigants should be allowed to make, or appellate courts to address."

08-CV-057, R. Matthew Cairns: The 2007 Style amendment should be unwound by substituting "must," "though in my opinion 'shall' was just fine." Recognizing discretion to deny will be a disincentive to moving for summary judgment. The Committee believes that summary judgment may properly be denied if the record is not fully developed or if it is difficult to ascertain credibility from the paper record. But it is the responsibility of nonmovant's counsel to develop the record to show there is a genuine dispute, or to use cross-examination or other evidence to create a credibility dispute. "The court should not substitute itself for counsel * * *, or bail out the party or counsel who fails in his obligations under the rules and good practice, just as it wouldn't at trial."

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: With only 3 members of the 36-member committee dissenting, favors "must" "[i]f Rule 56 is to mean anything." The laudable purpose of summary judgment is to render judgment short of trial when there are no disputed facts. This purpose should not be undermined by non-mandatory language. "Many College Fellows also are troubled by the current practice of some courts to use their discretionary power to force settlement "

08-CV-061, Lawyers for Civil Justice, U.S. Chamber Institute for Legal Reform: Summary judgment "remains an underutilized and ineffective tool." Motions are too often deferred until trial or denied without explanation. Adhering to "should," as added by the Style Project, undermines the purpose and utility of summary judgment. "Should" will lead courts to an increasingly expansive view of the "negative discretion" to deny well-founded summary judgment motions. The Supreme Court has said that Rule 56 "mandates" summary judgment when there is no genuine dispute. That was the plain-language meaning of "shall." The decision in Kennedy v. Silas Mason Co., cited in the 2007 Committee Note, turned on finding disputed facts; it does not support discretion to deny a properly supported Rule 56 motion Nor is there persuasive support in lower-court decisions for finding such discretion. It would be a mistake to distinguish between summary judgment on an entire action and "partial" summary judgment, recognizing discretion to deny partial summary judgment despite the absence of a genuine dispute as to some part of the action — summary judgment is needed to narrow the issues for trial

08=CV-066, Richard L. Seymour, Esq.: "Should" is the proper word. If "must" is substituted, the result will be an increase in improper grants of summary judgment in close cases. The risk is shown by a computer search for grants of summary judgment in employment-discrimination cases between September 1, 2008, and November 16, 2008. 145 cases were found. 122 involved grants "solely to employers." In these 122, 98 were affirmed, 9 were reversed or vacated, and 15 were affirmed in part and reversed in part. "When nearly a fifth of summary judgment decisions are reversed at least in part, it is difficult to conclude that summary judgment is not being granted in close cases." An improper grant delays the case even when reversed, and adds a great deal of expense. Many parties cannot afford the expense of appeal.

Decisions in the First, Second, and Third Circuits "have criticized the tendency of district courts to use summary judgment as a device to clear their dockets rather than to identify and dispose of hopelessly unmeritorious cases." This tendency too will be exacerbated by "must."

(The comment and testimony explore two cases — one leading to reversal on appeal, the other to affirmance — that are described as "highly improper grants of summary judgment." Adopting "must" will mean "that the existing rate of miscarriages of justice, whatever its number, will be increased.")

Finally, it is urged that in the employment discrimination field courts have "fairly routinely" accepted concepts offered as rules of thumb that might properly be used as jury arguments but instead become "hardened * * * into 'no reasonable jury could disagree' rules of law The rule of thumb concepts are then relied upon to destroy countless close cases until the Supreme Court disapproves them." Numerous examples follow

In the end, it is argued that frequent use of summary judgment decreases respect for the courts, while trials increase respect

08-CV-110, G. Edward Pickle, Esq.: "In changing 'shall' to 'should,' the scriveners of the 2007 changes exceeded the scope of their stylistic charge and wrought a material, substantive change in Rule 56." "There is no room or viable reason for discretion." The argument for discretion when it is a matter of partial summary judgment at most ignores the reality that few cases are tried. "Narrowing issues as early as reasonably practicable lessens the scope of discovery, trial preparation, and other costs." Carrying unnecessary issues into trial may confuse or prejudice the jury — granting partial judgment as a matter of law after the verdict does not unring the bell, much less show "whether its clanging drowned out other evidence." "The grant or denial of a partial summary judgment motion generally has a palpable effect on the settlement value of a case."

08-CV-111, Carlos Rincon, Esq.: Those who favor "should" seem to be attacking summary judgment practice as a whole as unfair to plaintiffs, who must rely on jury assessments of credibility and of matters "that are inherently grey, such as motive or intent." But trial is appropriate only when there are material issues of fact. "Should" "opens the door to discretion even in cases that as a matter of law require dismissal," leaving undeserving cases to increase litigation expenses and unfairly drive up the costs of settlement.

08-CV-113, John H. Martin, Esq.: Strongly supports "must," for the reasons advanced by so many others. "Granting total, or even partial, summary judgment in proper cases can result in enormous savings of unnecessary litigation costs."

08-CV-116, Keith B. O' Connell, Esq., for Texas Assn. of Defense Counsel: "Must" ought to replace "should." "'Should' has never meant 'shall,'" and "will render the rule both under-utilized and ineffective. "[T]he need for clear guidance, more certainty and more clarity is palpable." The need is illustrated by the denial of summary judgment in a recent case, followed by great expense for expert witnesses and attorneys and then settlement in an amount reflecting plaintiff's estimate that the case had little merit. Jury trial is vanishing, but not because summary judgment is granted too often. It is the increased costs of litigation and loss of confidence in the jury system that are "forcing parties to move outside of our civil justice system."

08-CV-117, Cary E. Hiltgen, Esq.: "'[S]hould takes away any requirement judges had to sustain meritorious motions and all advancements made by the requirements relating to the statement of facts become inconsequential. Moreover, the force behind the filing of a summary judgment motion would dissipate." "Should" "creates confusion in the burden required by the moving party." A court could decide for jury trial even when there is no genuine dispute of material fact. Many state courts recognize greater discretion than the federal rule has recognized, and for that reason "summary judgment motions filed in state court do not seem to have the same effect as those filed in federal courts." Eliminating claims without factual support is critical in promoting inexpensive and speedy trial. Taking the strength out of the motion also decreases the possibilities for settlement. "The fear placed on the opposing party that a well-written summary judgment could prevail is an important strategic tool." Denial of partial summary judgment will make trials longer and will create greater jury confusion.

08-CV-119, Thomas J. Crane, Esq.: "I am strongly opposed to making the grant of summary judgment mandatory in certain cases * * * Since 1992, I have seen summary judgment more and more become a docket clearing device." "In ADA cases, today, 92-97% of reported ADA Title I cases are dismissed by summary judgment or judgment as a matter of law." "Summary judgment

is already granted frequently and even routinely In my experience, deserving cases are too often dismissed through summary judgment."

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) "[T]he rule should provide that a court 'should' grant summary judgment for either party" if entitled, "either globally or on any specific issue, regardless of whether they are the movant or the respondent " (This seems an implicit endorsement of "should," but there is no elaboration.)

08-CV-124, Wayne B. Mason, Esq., for Federation of Defense & Corporate Counsel: "Must" will avoid any ambiguity. Summary judgment too often is not granted, even when both sides move and agree that the case should be determined by ruling on the motions. Clients should be spared the expense of preparing and trying a case that should have been disposed of on summary judgment.

08-CV-127, Michael R. Nelson, Esq.: Changing "shall * * * forthwith" to "should" "will result in the creation of a more discretionary standard." Defense litigators regard the change as drastic. Summary judgment is not disfavored; it is necessary to avoid "long and expensive litigation productive of nothing." "Furthermore, summary judgment 'serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so.'" In Celotex, the Court says that Rule 56 mandates summary judgment when the standard is satisfied. Professor Shannon has it right in his article submitted as 08-CV-134. Adopting "should" would be akin to expressing a speed limit as a matter of the driver's discretion. To be sure, there is discretion to deny summary judgment "as long as there is a genuine dispute as to a material fact."

Mr. Nelson also expresses doubts about recognizing discretion to deny partial summary judgment, but concludes: "[S]o long as any amendment to Rule 56(a) indicates that complete summary judgment 'must' be granted, the discretionary standard of 'should' would be acceptable for rulings on partial summary judgment."

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: "Should" "is better, adequately preserves the competing interests involved and is most consistent with the law described in the 2007 Advisory Committee Note describing the stylistic change. "To the extent that 'shall' in the original Rule 56(c) was meant to be mandatory, that is not how courts applied the rule * * *. If experience taught the courts to ignore a mandatory rule in practice, it would be expected that the same good reasons * * * would cause them to ignore a similar mandatory rule in the future. Rather than cause courts to discreetly break the rule, it is better to honestly acknowledge that there may be circumstances where a savvy court would not grant summary judgment * * *." Concerns of case management, the timing of settlement discussions or trial, or the eventual admissibility of evidence at trial may be reason to deny. "[T]he slight additional discretion" in "should" as compared to "must" "is not likely to result in judges failing to dispose of cases on summary judgment that deserve such disposition. Courts' self-interest in disposing of cases on their dockets should not be discounted." Nor should courts be discouraged from attempting to settle cases immediately after summary judgment motions have been briefed. Nor is the word "must," without a specific deadline, "likely to do anything to actually speed those recalcitrant or overworked jurists who are unable or unwilling to make a decision." Nor does it make sense to distinguish between granting summary judgment on an entire case and partial summary judgment — the standards should be the same.

08-CV-133, Sharon J. Arkin, Esq.. Prefers "should," out of the general distrust of summary judgment summarized with the general comments at the beginning

08-CV-135, Marc E. Williams, Esq., for DRI. The practical effect of adopting "should" "has been to grant Courts wide discretion in their ability to deny a party summary judgment when there is no disputed issue of material fact. Celotex says that Rule 56 mandates summary judgment. "Meritless cases that were once ripe for summary judgment are now subject to the threat of an extended, expensive litigation process " And there is a risk that "should" will be interpreted inconsistently by different judges. "Must grant" is better.

08-CV-136, Andrew B. Downs, Esq.: "Should" is wrong. "If the facts and the law support entry of summary judgment, a refusal to do so provides fuel for those who perceive result-oriented actions by courts or the use of calculated uncertainty to pressure parties to settle."

08-CV-137, Mary Massaron Ross, Esq.: "Should" "changed the standard in fundamental ways." The language of Rule 56 before the Style Project shows that it mandated summary judgment. The 1986 cases show that the right to summary judgment is a legal entitlement. The utility of Rule 56 "is severely hampered when the rule permits unbridled discretion to deny summary judgment." This will undermine the confidence of litigants in the civil justice system. It is vitally important that baseless suits be dismissed as soon as possible to reduce the costs imposed by unfounded litigation — "civil rights suits are regularly filed without factual or legal support." Summary judgment also plays an important role in simplifying the cases that do proceed to trial, providing a better focus for the jury. Summary-judgment benefits both plaintiffs and defendants by making the federal courts an efficient, just, and speedy dispute resolution mechanism

08-CV-138, Jeffrey W. Jackson, Esq.: Experience as General Counsel of State Farm Insurance Companies shows that "summary judgments are rarely granted." Over the last three years, approximately 3.5% of actions against the company were fully resolved by summary judgment (the cases were 18% in federal court and 82% in state court). "Should" will lead to still fewer grants. Except for Pennsylvania, all state summary-judgment rules now say "shall"; it is likely that states will gradually follow any federal lead to "should," adding congestion to the dockets of all courts. Summary judgment, moreover, is for cases "at the margin"; they devour litigants' resources and court time. These costs are factored into insurance rates. And courts are "judicious in granting summary judgment motions" — of 20 cases taken on appeal from summary judgments for State Farm, 17 were affirmed. "Shall" "does not deny deserving litigants their day in court."

08-CV-139, Kimberly D. Baker, Esq.: In 24 years of defending litigation, effective use of summary judgment has been seen to reduce the costs of litigation, and the motions prompt settlement negotiations or mediation. Many commentators expect a large increase in employment litigation in the current economic environment, including claims that have no sufficient legal basis. "Businesses and employers should be certain that when an employee has not met the legal standards to prevail, the lawsuit will be dismissed, eliminating the need to present a defense to a jury that may be comprised of citizens who are angry about the economic downturn and seeking an avenue to strike back." Employment actions, moreover, "commonly seek relief under many statutes"; discovery commonly shows that many of the claims have no legal or factual basis. Summary judgment should be used to focus the case. "Shall," not "should," is the appropriate word.

08-CV-140, Donald F. Zimmer, Jr., Esq.: "Must," or "at a minimum 'shall.'" "The word 'should' is vague and provides little comfort to moving parties seeking certainty if they are able to meet their burden of proof."

08-CV-142, Hon. David F Hamilton: (1) "Must" is too strong; it should be used only when there are consequences, such as review by appeal or mandamus for denials of summary judgment. "I doubt the Committee intends to go in that direction." (2) "Should" is strong enough. Judges are not going

out of the way to look for work by trying cases that clearly should be decided on summary judgment. "[T]he summary judgment standard often requires the appellate court to consider a highly artificial and even hypothetical set of facts, or even two or more sets of hypothetical facts when there are cross-motions In those close cases, I think it's helpful to have the option of a trial, where shaky testimony can be knocked down, rather than to force the appellate courts to develop the law based on improbable testimony "

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn · "Should" is proper. The judge should not be forced to rule on all aspects of a motion There is no outcry that federal judges have been denying summary judgment in employment cases that deserve summary judgment. The empirical evidence is to the contrary. "If the language is rewritten as 'must,' will there be a genuine appellate issue that a court refused to grant summary judgment, perhaps for legitimate reasons of docket control, when 'the record demanded it'"?

08-CV-144, Ralph A. Zappala, Esq.· "Must" is better. "[A] pending summary judgment motion provides an incentive for resolving cases. Seeing an adversary's case presented in orderly fashion, with evidence, is beneficial to the litigants." "Must" will provide an incentive for litigants to focus on the claims and defenses and related facts."

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): "Must" is needed to avoid the practice before 1986, when "courts routinely denied motions for summary judgment and treated them as disfavored motions." "Should" "will, as a practical matter, return summary judgment to that disfavored status * * *."

08-CV-156, Brian P. Sanford, Esq.: A court should not be required to state reasons for denying summary judgment. "[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial."

08-CV-158, Professor Suja A Thomas: "Should" is appropriate "because courts should be given discretion in tough cases. * * * Indeed, judges in the same case often disagree on what the evidence shows and thus whether summary judgment should be granted."

08-CV-161, Federal Magistrate Judges Assn.: "Should" "reflects the current law." And "must grant" "might suggest that the court 'must' entertain motions that address the case in a piecemeal fashion."

08-CV-161, Federal Practice Comm., Dayton Bar Assn.: "'[S]hould' does not lend itself to clarity. * * * 'Must' also is not inconsistent with the pre-2007 version of the rule, whose use of the word 'shall' adequately conveyed the concept * * *."

08-CV-167, Michael T. Lucey for Federation of Defense & Corporate Counsel: "Must" is important. It is not uncommon to have a court deny cross-motions for summary judgment even though the parties agree that the case should be determined by the court Failure to grant a motion sometimes appears to be used as a settlement tool. There should be a clear, unambiguous direction to grant meritorious motions

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: "While there is room for debate, we believe that, on the whole, giving the district court discretion to deny summary judgment, if used in limited circumstances, is salutary, and thus the 'should grant' language is preferable to the alternative 'must grant.'"

08-CV-176, State Bar of California, Committee on Administration of Justice· Supports retaining "should" "for the reasons given by the Advisory Committee, and because 'should' allows for the limited discretion recognized by the case law."

08-CV-180, U.S. Department of Justice· Celotex says that Rule 56 mandates entry of summary judgment. Mandatory language — either "must" or "shall" should be used. The rare instances in which discretion to deny summary judgment can be exercised can be accommodated without using discretionary words in Rule 56 "[I]n those cases, the district judge should be under a specific obligation to state on the record why summary judgment is not being granted."

08-CV-181, Lawyers for Civil Justice, etc.· This comment supplements earlier comments, 08-CV- . "Must" best represents modern usage under the Celotex trilogy. "We would, however, reluctantly support restoring 'shall be granted' on the basis that it is a 'sacred phrase' that retains the standard applied over seventy years of summary judgment jurisprudence." "[R]ules must be rules, not suggestions, or they serve little purpose to guide those who comply with them." As Judge Easterbrook notes, 08-CV-056, "should" "introduces additional appellate issues regarding judicial discretion." "Should" will return summary judgment to the disfavored status it had before Celotex and its companion decision made it a pillar of the civil justice system. "The filing of a well-written summary judgment motion can provide the catalyst for settlement negotiations, making it an important strategic tool." "AN ineffective summary judgment procedure will continue to make trial preparation more expensive and time consuming, increase the number of cases on court trial dockets, and result in longer trials." "Judicial discretion is inherent in the standard that requires a judge to determine the facts in dispute and the law applicable to those facts." "If American business is to remain competitive in the world marketplace, the cost and inefficiency of our civil justice system must not continue to put our businesses at a competitive disadvantage."

08-CV-183, Professor Eric Schnapper: "Should" is correct. "It is entirely common for the evidence and contentions of the parties to be somewhat different at trial than they were at summary judgment. * * * [T]hese differences would at times lead the district judge to conclude that the nature of the future trial record is insufficiently clear to warrant summary judgment. In addition, a judge considering a summary judgment motion may reasonably conclude that he or she does not understand the factual issues as well as he or she would at the end of a trial." Rule 50, for that matter, does not require that a motion made during trial be granted even when the judge believes that the evidence up to that point is insufficient to support a verdict.

Claudia McCarron, Esq., Nov. 17, 5, 9-15· Advocates have long believed that they are entitled to summary judgment on showing no genuine issue of material fact. "The interjection of a discretion to deny an otherwise meritorious motion suggests a kind of arbitrariness that I believe will breed distrust." The cases that seem to recognize discretion to deny might as well have denied by finding a material issue of fact. Kennedy v. Silas Mason was decided in 1948; whatever it means, to the extent that its flavor reflects distrust of summary judgment the 1986 decisions reflect a different view. The cases decided since December 1, 2007, do not seem to reflect that "should" has made an difference, but that is because the change has not sunk into professional consciousness. Discretion was no an issue in any of the cases reviewed for this period. But people who dislike summary judgment will pick up on the change and the Committee Note. The view that it may be simpler to try a case than to wade through mountains of motion papers to determine whether there is a genuine issue of material fact does not justify denial; "the bar will view a denial, a discretionary denial, and litigants even more than the bar, as something that is arbitrary and unpredictable." And there are opportunities for partial summary judgment in these circumstances.

Richard T. Seymour, Esq., Nov. 17, 15, 26: The primary argument is that in employment cases courts too often grant summary judgment because they fail to consider the inferences that might be drawn in favor of the nonmovant. Then urges that "should" is the right word. "[C]hanging it to 'must' has got to produce a stomp on the accelerator pedal in the grant of summary judgment * * *."

Leigh Schachter, Esq , Nov 17, 26, 31-36: The substitution of "should" for "shall" in the Style Project simply did not catch the attention it should have drawn. It is unfair to put to trial a party who has demonstrated that there is no genuine dispute of material fact. The place where discretion is needed is reflected in present Rule 56(d), which reflects the need to allow adequate opportunity for discovery. After the process has been gone through, there is no need for discretion. Partial summary judgment may seem different, at least when there is a relationship between an issue ripe for summary judgment and other issues that will go to trial, although even then it is better to grant summary judgment. The lack of any standard to limit discretion, further, "really does run the risk of providing an opening for a situation where courts don't want to grant summary judgment, and unfortunately there are some * * *."

Steve Cherkof, Esq., Nov. 17, 34: "One of the things I've noticed in the testimony, whether you believe in 'must' or 'should' seems to depend on whether you think you're bringing the motions or responding to the motions."

Prof. Edward J. Brunet, Nov. 17, 52: "[S]ummary judgment mechanics need to be as firm and nondiscretionary as possible in order for Rule 56 to work its magic. * * * The word 'entitled' in this discussion needs to be given some meaning." Summary judgment will become flabby and ambiguous. Adoption of "should" a year ago has not yet tilted the practice, but long-term use will result in additional judge-made exceptions. Movant and nonmovant will come to argue in difficult-to-decide discretionary terms. Fewer motions will be granted; the number of trials will increase. "Now, there is discretion in summary judgment. It comes from appellate courts So in three types of cases, including antitrust, civil rights, and negligence, we see great reluctance to grant summary judgment * * * " And "interesting things will happen" if summary judgment is "should" but no corresponding change is made for directed verdict. De novo review is a substantial safeguard; review for abuse of discretion will lead to arguments that a grant was an abuse of discretion. But there is a need for some discretion when the choice is between partial summary judgment, sending the case to trial on closely related issues, or instead trying all issues. As to language, it is better to avoid must, should, or substitutes such as required or appropriate. It should be. "Summary judgment is granted if * * *."

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 88: The view that there is an "entitlement" to summary judgment raises a serious Seventh Amendment question. Summary judgment is denied; the movant loses the jury verdict on evidence that properly defeats a motion for judgment as a matter of law; on appeal from judgment on the properly supported verdict the movant argues that it is entitled to judgment on the summary-judgment record. Reversal of judgment on the jury verdict appears to be reexamination of a fact found by a jury contrary to the Seventh Amendment.

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91-97: The American legal system is preeminent in the world. "The only negatives are the issues of high cost and intrusiveness * * * " Summary judgment is an important safeguard against the costs of discovery on issues that can be disputed when the case can be resolved as a matter of law on other issues. There is no justice in a system that does not grant summary judgment to a litigant who is entitled to it. Current subdivision (f), to become (d), provides adequate protection by ensuring adequate opportunity for investigation and discovery before summary judgment is granted To add "an undisciplined,

unrestrained, if you will, undefined, notion of discretion," without any idea of what "should" means, will present a serious issue of meritorious motions being denied. "Shall" was interpreted by the Supreme Court in Celotex as mandating summary judgment. Even under "shall" there was some language — not holdings — suggesting some sort of implicit discretion to deny. "That occurred under 'shall.' We know what's going to happen using the word 'should.'" There is no need to worry that with "must" a meritorious jury verdict after trial will be upset because the verdict loser shows that judgment ought to have been granted on the summary-judgment papers. (In response to a question, avoiding the issue by saying "summary judgment is to be granted" "is as strong as most.")

Theodore Van Itallie, Esq., Nov. 17, 105-111: The simple style change from "shall" to "should" might not have caused a problem. But the present proposal has drawn comments and testimony, creating a legislative history that makes it much more consequential to persist with "should." Retaining "should" may suggest that the Committee embraces the discretion that some courts feel they have. An attempted finesse, such as "is to be granted," is not effective. There is an inertia against summary judgment. Courts are obliged to grant summary judgment when the facts are undisputed. This is important to provide pronouncements of law that will guide others. The lack of opinions providing clear guidance on the law feeds into undesirable risk-averse behavior. "[T]here's a benefit in getting rules articulated, and this is the perfect vehicle." Because of settlement, from the perspective of providing legal guidance too few cases will get to trial in any event. To be sure, it is proper to deny summary judgment when there are competing reasonable inferences. But it is not proper to deny because there are important public issues — resolution of the law by a clear summary judgment ruling is all the more important. Nor is it proper to deny summary judgment simply because it is less work for the judge to send the case to trial.

Stephen G. Morrison, Esq , Nov 17, 120, 121-126: It is rare that either plaintiff or defendant is able to dispose of an entire action on summary judgment. Instead summary judgment focuses the case on the matters that truly are in issue. It provides three opportunities for speedy, just, and inexpensive resolution — and all are enhanced by "must." First, the motion itself often brings the parties to the table and leads to serious discussions. Second, they come together during oral argument and each may concede some points — again, if they know the judge faces a true "shall" or "must" decision, they will consider matters more seriously Third, after the judge rules they have another chance to resolve the case by settling. "Should" or "may" is inappropriate even for partial summary judgment. It is not fair for a judge to punt merely because it is too hard or too time-consuming to rule on the motion. Nor is it proper to deny the motion because the case involves the public interest — juries do not have to give reasons, while the reasons given by a judge for summary judgment better serve the public interest. Avoiding the problem by deliberately writing an ambiguous "if/then" rule will lead to different standards in all of the circuits, and eventually a resolution by the Supreme Court. It is better to achieve clarity now by adopting clear rule language.

Bruce R. Parker, Esq., for International Assn. of Defense Counsel, Nov. 17, 129, 139-141: Summary judgment is rarely granted in personal injury actions. But it had never occurred to me that "shall" admitted of any discretion. If the facts are truly undisputed and the law is in our favor, summary judgment must be granted. Trying to explain denial to a client is difficult. Denial "breeds a certain disrespect for our litigation process."

Debra Tedeschi Herron, Esq., Nov 17, 141-143: Favors "must." It will avoid lengthy trials.

Latha Raghavan, Esq., Nov. 17, 143-146: "Thou shalt not kill" is a command. "Shall" means "must." Celotex establishes a mandatory standard. The point-counterpoint procedure forces the attorneys to do the work. Further protection is provided by the rule that the judge need not search the record.

Alfred W. Cortese, Jr., for Lawyers for Civil Justice, Nov. 17, 153, 154-161, 163: "[W]e did not focus on" the change from "shall" to "should" in the Style Project "because we were content with the committee's assertion that they were not changing the substance of any of the rules." Celotex established a mandatory interpretation of "shall." That was the intent of the original rule. It should be restored. "[W]e've heard a lot today about how plaintiffs' lawyers and liberal academics don't like slicing and dicing. I would assume they would prefer shake and bake, that you just shake it all up and throw it against the wall and hope that it hits." "Should" does not fit with "entitled" to summary judgment. It is a suggestion, not a rule. It is wishy-washy. "[S]ummary judgment should be utilized as a tool by the judge to focus on the facts and law in the cases and to give the litigants a clear decision one way or the other." "Should" gives "yet another opportunity basically not to enter — not to enter an order that should be required under the original rule and under the law as set out in the Celotex trilogy." "I would leave you with the thought that we do want commandments, not suggestions. [Q] Because they've been so effective? [A] They haven't been effective enough. I wouldn't dilute them."

Hon. G. Patrick Murphy, Jan. 14, 12-13, 19-20, 43-44: "I agree with that "must." If there's no disputed issue of fact, surely you must grant the motion." Why would you want to have a trial if there's nothing to try? But does that mean that disappointed movants will be petitioning for mandamus? "I'm not sure what that means." (Responding to questions Judge Wood put to another witness, Judge Murphy later expressed concern that "must" might mean that a busy judge might have to drop everything else to make a prompt ruling on a summary-judgment motion, or face mandamus, but offered no firm conclusion.)

Brian Sanford, Esq., Jan. 14, 27 at 31: Because it is a "should standard," the judge should have absolute discretion to deny summary judgment and not have to explain it.

Michele Smith, Esq., Jan. 14 at 32, 34-37, 40-43: "Must" is important to offer direction on the obligation to grant summary judgment. "Clear and unequivocal guidance is imperative * * * [because] most judges * * * do not like granting summary judgment." Some judges believe summary judgment is just not appropriate, that all cases should get to a jury. Others worry about reversal. The reality of practice is that it is much easier to get summary judgment in a case with small stakes than in a case with large stakes, even though the cases are indistinguishable under the summary-judgment standard. Judgment often is denied with the suggestion that the parties mediate, leaving the defendant in the unenviable position of determining whether they would prefer to pay some money to get out of the case and avoid "the uncertainty of a trial in jurisdictions that may not be favorable." Partial summary judgment, further, saves resources for all parties, and for the court. And "must" is better than "shall " Judge Wood asked whether reality is better expressed by "should," because there will be cases in which the judge just is not ready to rule, and also whether the standard should be the same when granting partial summary judgment would leave part of the case for trial. Ms. Wood responded that the standard should be "must" both for full and for partial summary judgment. She also recounted her own experience with having to tell a client that there is no effective way to make sure the judge will decide a summary-judgment motion before trial

Margaret Harris, Esq., Jan. 14, 44 at 49: "Shall. I kind of like that. * * * [I]f I were a District Court Judge, I might take a little offense if the rules were telling me I must do something. I would think that I'm intelligent enough to exercise my own discretion * * *."

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60 at 61-63, 66-70, 71-75: Clients are frustrated when counsel has to explain that the motion is right on the undisputed facts and on the law but it is not granted. Sometimes there is no ruling at all. Sometimes there is a denial without any explanation. "[I]t should not be discretionary." "[I]t is important * * * for

people to be able to trust the fact that it will be ruled on " It costs a lot to prepare for trial — in many cases it is not a 3-day trial, but a 3-week trial or even potentially a 3-month trial. Even when trial is likely to be brief, partial summary judgment can narrow the issues and has an effect on settlement. The most important issue in the rule is "must" rather than "should." "Shall" was understood to be mandatory. Nonetheless petitions for mandamus to compel a ruling were rare. They will remain rare if the rule says "must"; no one wants to seek mandamus on a question like this. "I'm not naive enough to * * * believe that there are times when summary judgment would still be denied under the 'must' standard." But the message should be that it is nondiscretionary; if "should" remains, state courts are likely to follow this lead and the situation in state courts is already bad enough.

John H. Martin, Esq., Jan. 14, 82, at 91, 93-96: "Must" is appropriate. In one recent experience a motion for summary judgment on a narrow ground in an otherwise complex case languished without any decision until a new judge was appointed to the case and promptly granted summary judgment, which was affirmed on appeal. "I don't have a good answer to how you make a judge rule on any motion." But softening the command to "should" "might send a message to some judges that they've got a lot more discretion on summary judgments than they think they do."

G. Edward Pickle, Esq., Jan. 14, 104, 107-111, 113-115: For 70 years "shall" has made summary judgment mandatory when there is no genuine issue. Our civil justice system is too costly; it is not competitive with other democratic developed nations. Summary judgment is one of the most effective tools for managing costs. Legions of cases establish the mandatory meaning of "shall." If we stick with "should," judges who have some antipathy toward summary judgment — either as a matter of overwork or as just disliking it — "can drive a truck through it." The discretionary option will be a "total way out." Most lawyers have not yet caught up with the 2007 Style change, but the risk is there. And uniformity is crucial on this point — the standard for summary judgment cannot vary from one court to another. Nor should the standard be relaxed for partial summary judgment. No smart lawyer will risk provoking a partial summary judgment that will be reversed after trial and appeal, forcing another trial. In managing outside counsel I would never approve such a motion. When there is a solid basis, however, partial summary judgment is important. It narrows the issues for trial, and gives the parties a better foundation for settlement. One of the biggest problems practitioners have is the judge who simply will not rule on a motion. When the ruling is deferred to the start of trial, most often it is a simple and unexplained denial. But there may be a partial grant — that simplifies trial, but an earlier ruling would have spared the parties the costs of preparing to try those issues.

Cary E. Hiltgen, Esq., Jan. 14, 121-128: His own practice is not to file a summary-judgment motion in every case. For one client, he has tried 100 cases to completion. He made summary-judgment motions in 26 of those cases — 12 were in federal court, 14 in state court. He kept the motions simple. His clients are interested in cost — they do not want to pay the cost of a losing motion, but they do want to save trial costs by successful motions Partial summary judgment works. If summary judgment is made discretionary, "you are asking to exacerbate the amount of time and money involved." There is no room for discretion The party has "the absolute right" to get rid of claims that lose on the undisputed facts. "Must" is the proper word.

Keith B. O'Connell, Esq., for Texas Assn. of Defense Counsel, Jan. 14, 129-140: It should be "must." As an anecdote, offers a case in which summary judgment was not granted despite a compelling showing, leading to prolonged proceedings, and settlement at a low value that avoided the cost of trial but probably left the plaintiff with very little in relation to a serious loss. Faith in the system is diminished if people believe courts act arbitrarily That includes denial of warranted summary judgments. There are lots of cases that seem to recognize discretion to deny. But they did not involve motions that satisfied all of these conditions. "the motion is not premature; there has

been adequate time for discovery; an adequate record to support the judgment has been made; the motion has been filed in accordance with a schedule order — you know, the deadline, it's not filed on the eve of trial; proper notice has been given to the other side; the other side has had a reasonable opportunity to respond; the movant has — the movant has shown, based on an adequate record, that there is no genuine issue of material fact; the movant has shown, based on an adequate record, that the movant is entitled to judgment as a matter of law." When all of those things do not occur, it is proper to deny summary judgment, whether the rule says "shall" as it has or instead says "must." Nor will it help to attempt to avoid the issue by rewriting the rule to say only that a party may move, without stating any standard to guide the court's action. There is too much history, too much risk of changing the standard.

Stephen Pate, Esq., Jan. 14, 140, 141-144: Has had motions for summary judgment denied both as defendant and as plaintiff in insurance contract cases. "[J]udges are reluctant to rule on summary judgment motions, even though it's a situation involving a contract which involves matters of law." Cross-motions are both denied even when you expect one side or the other is right on the law. Adopting "must" does not threaten a wave of petitions for mandamus — "I don't think a case has ever been strong enough for it," and lawyers are reluctant to mandamus a judge. "Must" also will protect against judges who use summary-judgment as a settlement tool. An example is provided by a case in which a judge waited seven months and then granted partial summary judgment a week before trial — "I think he thought he was a mediator and not a judge * * * "

Carlos Rincon, Esq., Jan. 14, 147, 148-152: "Must" is right. For all the talk that summary-judgment motions are filed in every case, "we are very cautious." The data on employment cases reflect the fact that changes in other areas of the law are drawing more lawyers to employment case, leading to more employment cases. Nor is the wish for actual jury trial and confrontation all that it may seem. Litigants are increasingly anxious for "an opportunity to vent, to tell their story. And that certainly happens." They are more concerned with solutions, including ADR as a means of achieving solutions.

Tom Crane, Esq., Jan 14, 156, 156-157: Summary judgment is overused. There is no need to increase its use by changing to "must."

STATE REASONS

08-CV-056, Hon. Frank H. Easterbrook: The rule should say "must," requiring a statement of reasons both for grants and for denials. A grant usually is the terminating order. Even for a partial grant, the reasons will help counsel plan the rest of the case. Reasons are essential for a denial when it may be appealable, as with official immunity. The invitation for comment suggests nothing would be gained by requiring the court to state the obvious, "but when the reasons are obvious a sentence or two will do. The problem with using the word 'should' in the rule is that it authorizes the judge to keep silent even when the reasons are not obvious."

08-CV-071, Hon. Paul J. Kelly, Jr.: The Committee Note generates inappropriate pressure to state the reasons for denying summary judgment by stating that the court need not address every available reason. The Note "should make it clear that courts are not required to state on the record the reasons for denying a motion for summary judgment, but rather retain discretion to deny a motion summarily."

08-CV-156, Brian P. Sanford, Esq.. A court should not be required to state reasons for denying summary judgment. "[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial."

08-CV-161, Federal Magistrate Judges Assn.: Agrees with requiring the court to state the reasons for granting or denying the motion.

08-CV-180, U.S. Department of Justice: "It is critical that parties understand the basis for the court's ruling, whether the motion is being granted or denied." The Department supports this provision.

08-CV-183, Professor Eric Schnapper: It is important to have an explanation for grant or denial of a question-of-law motion; denial of a motion based on the statute of limitations, for example, will often be the last time the issue is addressed in the district court and it is important to have an explanation for purposes of any later appeal. Explanation also is important to permit review when the court grants an evidence-sufficiency motion. But an explanation of denial of an evidence-sufficiency motion is not always helpful. If the judge thinks an explanation will help the parties prepare for trial, the judge can explain. But explanation of a denial usually is meaningless after trial — the sufficiency of the evidence will be measured by the trial record, which usually is different from the summary-judgment record.

Brian Sanford, Esq., Jan. 14, 27 at 31: Findings should be required on granting summary judgment, but there is no need on denial. "[A] judge should have absolute * * * discretion to deny summary judgment and not have to explain it. They still get a trial "

STANDARD: INFERENCES

08-CV-048, Stephen Z. Chertkof, Esq.: Provide that "a moving party must support its motion by undisputed facts without inferences, while the nonmoving party may rely on both undisputed and disputed factual assertions as well as inferences drawn from such evidence."

08-CV-066: Richard T. Seymour, Esq.: Rule 56 should require the movant to show that its position does not rely on disputable inferences in its favor, "and that no reasonable inference from the record could be drawn to support the nonmoving party with respect to the contention at issue." And the nonmoving party should be required to address the question of inferences. Without these requirements, "the court does not have a developed perspective as to the possible inferences in the case, and can result in the court's inadvertent drawing of inferences in favor of the moving party." Courts can easily slip into this error.

08-CV-075, Mark Hammons, Esq.: Summary judgment must be denied when different inferences can be drawn from undisputed facts. "Because a change in intent might be inferred from [(c)(2)], the language should be altered to read: "There is no genuine issue as to any material fact or material factual inference "

08-CV-118, Malinda Gaul, Esq.: The rule should provide that a motion can be supported only by undisputed material facts, "without inferences." The nonmovant "may support its response by undisputed and disputed facts, as well as any inferences drawn from the evidence."

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: The point-counterpoint procedure "does not work well for those cases where the plaintiff relies heavily on inferences to be drawn from undisputed facts, and which depend on placing those facts in a broader context of other facts." "[T]he complex narratives typical to [sic] our members' cases cannot be effectively told in a list of undisputed facts." The nonmovant should be expressly permitted to articulate the reasonable inferences that might be drawn from the listed facts, and to point to other facts in the record that support the inferences.

08-CV-157, Margaret A. Harris, Esq.. "But what about inferences"? They should be added to the rule text: "should grant summary judgment if, after resolving all factual disputes and drawing all inferences in favor of the non-movant, there is no genuine dispute * * *." In the employment law field, the case law is not clear as to what facts are "material." The Supreme Court has recognized in Ash v. Tyson Foods, 126 S.Ct. 1195 (2006), that "meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."

08-CV-171, Sue Allen, Esq.. "I am a plaintiff's employment lawyer and am frustrated by the failure of judges to give my clients the benefit of inferences in their favor." The proposed Rule 56 changes "will add to the considerable burden that employment law claimants bear * * * "

Richard T. Seymour, Nov. 17, 15-26: Studying innumerable appellate opinions in employment discrimination cases shows too often summary judgment is granted "by a judge taking a rule of thumb, transmitting it into no reasonable juror could disagree with this principle of law," and winning appellate affirmance. Jury arguments become rules of law. Of 122 appellate opinions suitable for analysis rendered since this September 1, almost one-fifth reversed summary judgments. Some of the opinions comment on a rush to judgment that uses summary judgment as a docket-clearing device. The problem is structural. Inferences are left out of the equation. The motion is made without ever identifying the range of inferences that can be drawn in favor of the nonmovant, without showing the inferences that must be drawn in the movant's favor to support summary judgment. "[T]here is no developed argument that enables the judge to take a look at what both sides have to say about the range of permissible inferences." Inference problems are easily demonstrated by the many cases that require a showing of intent without any open statement of intent by the defendant. The rule text should be changed to require that "inferences be addressed by the parties in an orderly fashion." (Then describes several sequences of cases in which rules of thumb adopted by lower courts to grant summary judgment against employment plaintiffs have been ultimately rejected by the Supreme Court.)

Prof. Edward J. Brunet, Nov. 17, 52 at 59-60: The suggestion that a reference to inferences should be written into the rule text is unwise. the text "can't cover every issue, and I think inference is just an asking for liability to go there."

Margaret Harris, Esq., Jan. 14, 44 at 46-48, 51: Employment discrimination cases are very complex. "Hardly ever do we have direct evidence." What facts are "material" can be difficult to define when the case depends on complex circumstantial evidence. The Supreme Court recently reversed lower courts that failed to consider the inference of discrimination that may flow from addressing an African-American employee as "boy." "[T]he word 'inferences' needs to be in the language of teh rule. that is the law " "[T]hink about Hamlet. How do you reduce that to a point/counterpoint? Is the guy crazy or is he not? How do you decide was revenge appropriate or wasn't it? I mean, all those are inferences that you draw." "[O]ur cases are proved more like we're the hounds barking at night. Little tiny — little tiny things."

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony is summarized with the point-counterpoint procedure. Argues at length that when intent is at issue decision commonly turns on inferences from facts that, standing alone, do not seem "material." The rule text should make clear that a nonmovant can respond by pointing to reasonable inferences that defeat a motion that seems to show there is no genuine dispute as to material facts.

Rule 56(b)

08-CV-039, Professor Alan B. Morrison: **(1)** The proposal allows times to be varied by local rule [at the end, he suggests this is a mistake]. Why not allow the parties to stipulate to different times, unless there is a scheduling order? **(2)** "[A]dditional time should be allowed either side if the other moves for summary judgment at or near the end of the time allowed," again with an exception for cases governed by a scheduling order. **(3)** It sounds unduly directory to establish the time limits for response and reply by stating that the opposing party "must" file a response, and the movant "must" file a reply. These should be reduced to "may."

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: (1) allowing a defendant to move at any time "likely will force many nonmoving plaintiffs to respond to summary judgment motions before they can conduct enough discovery to obtain the support they need for the responses that proposed subsection (c) requires." [It is not clear just what drafting change is recommended] (2) The movant — the defendant — can take months to prepare a motion, billing by the hour; 21 days is not sufficient time to respond, "even if the defendant's statements of undisputed facts are clear and correct." Plaintiffs' lawyers typically work for a contingent share of the recovery; imposing the duty of responding to extensive statements of undisputed facts impairs efficiency. Plaintiffs should be allowed to challenge the number of fact statements in the motion, or to challenge the materiality of the facts, before a full response is required.

08-CV-133, Sharon J. Arkin, Esq.: "[A]a defendant should not be permitted to file a motion for at least 60 days after its answer has been filed, in order to permit the plaintiff a reasonable opportunity to conduct necessary discovery." Close judicial supervision will remain necessary to make sure that a recalcitrant defendant does not make discovery so difficult as to impede opposition to the motion. (California has expanded to 75 days the time to oppose, Code Civil Procedure § 437c.)

08-CV-156, Brian P. Sanford, Esq.. The time limit should be 30 days before the close of discovery. Motions often present declarations or witnesses not deposed or documents not emphasized. Discovery should be available to respond to the motion.

08-CV-179, Robert J. Wiley, Esq · Discovery usually ends before the motion is made. "This encourages defendants to hide the ball and litigate by surprise." It is important to allow the nonmovant to depose the witness after a Rule 56 affidavit is filed. Summary judgments should be due not less than 45 days before the close of discovery, with a corresponding 45-day response deadline.

08-CV-180, U.S. Department of Justice: Supports the timing provision, including the response provision recognizing that under Rule 12(a)(2) the United States may have 60 days to plead, and that the 21-day response period should be measured from the time the responsive pleading is due.

08-CV-183, Professor Eric Schnapper: The movant controls the time of moving, and often relies on material — most notably affidavits — unknown to the nonmovant. The nonmovant's dilemma is aggravated by the inadequacy of present Rule 56(f) (to become 56(d)), which virtually forces a simultaneous response to the motion and request for greater time for discovery. The rule should require that the movant disclose any affidavits and documents it intends to rely on at least 90 days before making the motion and before the close of discovery.

Brian Sanford, Esq., Jan. 14, 27 at 29-30: The motion should be filed before discovery is ended. I cannot cross-examine a declaration. If the motion is made before the discovery deadline, "I can notice that person up for a quick deposition, I can send out another set of discovery requests." I should not have to make a special motion for added discovery time. Some judges let me have more time, but some do not.

Rule 56(c)

POINT-COUNTERPOINT

08-CV-003, Leslie R. Weatherhead, Esq.: "Enthusiastically" supports proposed Rule 56. Sets out E D.Wash. Rule 56.1, a point-counterpoint rule that permits the court to assume the facts claimed by the moving party are admitted without controversy except to the extent they are controverted by the nonmovant's "counterpoint" statement. "This procedure forces the disorganized lawyer to think clearly about the evidence in his or her case before bringing a motion for summary judgment, and forbids the wily practitioner from manufacturing a spurious 'genuine issue of material fact' by raising a confusing welter of facts in opposition * * *." [The local rule allows the nonmovant to dispute or "clarify" a fact. "Clarify" is a word that may deserve consideration.]

08-CV-006, Hon. Avern Cohn: Suggests adding a requirement that the movant and nonmovant integrate the statement, response, and supporting citations in a single document. Each fact would be set out separately, in a form that includes statement, response, supporting citations, and response citations. In like fashion, a single document (apparently a separate single document) would be used to merge any additional facts stated by the nonmovant and the movant's reply.

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: By requiring additional specificity of proponents and opponents, the rule "will ultimately serve to refine and further enhance the summary judgment process."

08-CV-009, Hon. G. Patrick Murphy: Seems to be addressed to subdivision (c), recounting that "this procedure was tried in our court by local rule and it proved to be a waste of time * * *. An entire motion practice developed around what is an 'undisputed fact.'" The practice adds to the tremendous advantage larger firms have over smaller firms. The amendment will be a disaster; "don't do it."

08-CV-010, Hon. Scott Kreider: "[C]ases where parties have submitted their statements of fact in enumerated paragraph format often lead to more litigation over what is and is not disputed * * *." If a separate statement of facts is to be required, it would be better to have a joint statement that sets out the opposing party's responses with each alleged fact. And it might work better to require citations to the record in the argument section of the summary judgment memorandum; many lawyers simply refer in the argument to the statement of material facts, a practice that "is often annoying and time consuming."

08-CV-014, Hon. Ortrie D. Smith: Joins Judge Sedwick's opposition, 08-CV-017 "This may be one of those instances where making work does not equate to making better."

08-CV-016, Joseph D. Garrison, Esq.: The problem with detailed statements is that some lawyers defending individual employment cases make abusive submissions detailing hundreds of facts, imposing inappropriate burdens on the small firms that often represent plaintiffs. The remedy should be a motion to strike an abusive submission; there is no need for other sanctions. This proposal is summarized at greater length with Rule 56(e) on defective motions.

08-CV-017, Hon. John W. Sedwick. Judge Sedwick compares practice in the District of Alaska, his own court, with practice in the District of Arizona, where he has been assigned more than 1,200 cases over the last ten years. Arizona Local Rule 56.1 "is in substance identical to" proposed Rule 56(c). Experience shows it is a mistake that increases costs for clients, imposes greater burdens on the court, threatens to force busy district judges to transfer still greater parts of civil litigation to

magistrate judges, will yield little or no benefit in better dispositions, and will differentiate federal practice from state-court practice. These consequences flow from the greater length of motions under this practice, and are augmented by a corresponding increase in motions to strike. "Summary judgment papers in Arizona can be truly gargantuan", in one recent case, the motion listed 322 facts, and appended 524 pages of exhibits. "A list of 20 to 30 statements of fact with 75 to 100 pages of exhibits is probably typical " It takes "up to twice as much time" to decide these motions. "One might speculate that the elaborate statements of fact required by the Arizona rule improve the quality of the court's decision. That has not been my observation." Even if there is some benefit, it likely "would be small, for summary judgments are not often reversed due to a factual error by the trial court." Without this rule, a motion that simply asserts there are no material facts in dispute may be met by a response that agrees and argues only the law, or by a response that points to two or three issues of disputed fact. It is rare to encounter a response that provides a long list of allegedly material and disputed facts. Under proposed subdivision (c), "[b]ecause counsel for the moving party cannot know what facts the opposing party might contend are material, he or she is very likely to create a longer list than is actually necessary. * * * Lawyers who have even a tiny doubt about whether a fact should be listed will usually resolve that doubt in favor of adding the fact to the list." And responding parties may be led into "substantial effort to show that facts which actually do not make any difference are in dispute " Once started down this track, the responding party also may be tempted to include additional facts that will then be attacked by the reply.

08-CV-020, Hon. Joseph M. Hood. Joins Judge Sedwick's comments, 08-CV-017, noted above. "This may be one of those instances where making work does not equate to making better."

08-CV-028, Hon. H. Russel Holland: Judge Holland joins Judge Sedwick. Like Judge Sedwick, Judge Holland has "assisted with Arizona civil cases for the last ten years." As compared to Alaska, the Arizona local Rule 56 practice is "not compatible with" the purposes of Rule 1. The separate statement of facts requirement "causes summary judgment motion practice to be more complex and convoluted." The Arizona rule "actually encourages counsel to claim the existence of fact disputes that either do not exist or are not material to the case." And it generates subsidiary motion practice "in somewhere between one-third and one-half of the cases where summary judgment motions are made" — "squabbles over whether a party has or has not met all of the technical requirements of the Arizona rule and/or efforts to strike portions of a party's separate statement of facts. We rarely see that kind of subsidiary motion practice in Alaska * * * " (Judge Holland offered similar points in his summary, 08-CV-149· Counsel generally do a responsible job of setting forth in a memorandum of points and authorities the material facts that are claimed to be undisputed.)

08-CV-030, Hon. Graham C. Mullen: Also joins Judge Sedwick's comments. There has been little difficulty with summary-judgment motions in the Western District of North Carolina. "The lawyers have all but uniformly cited to appropriate parts of the records in their briefs." The occasionally sloppy motion can be dealt with by a simple direction to refile. Rather than fix a problem, proposed Rule 56(c) will add cost, delay, burden on the courts, and unnecessary wheel spinning.

08-CV-033, Hon. Inge Johnson: Separate paragraphs may be workable, but it will not work to require separate numbered paragraphs for undisputed facts. "I have had experience with such a rule and you would be surprised how many attorneys cannot count. * * * It is easier to read just an essay about what the undisputed facts state and the reference to the record "

08-CV-037, Professor Adam Steinman: There is a minor flaw in (c)(2)(B)(ii), which can be fixed: "(ii) may in the response concisely identify in separately numbered paragraphs additional material facts — as to which there is at least a genuine dispute — that preclude summary judgment." It

should be clear that the nonmovant need not rely on facts established beyond genuine dispute; it suffices that the fact is material and subject to dispute.

08-CV-039, Professor Alan B. Morrison: **(1)** Offers a number of drafting suggestions that carry through the suggestion made for subdivision (b), reducing "must" to "may" in many applications. **(2)** Would add two words in (c)(4)(A): "(A) A statement that a fact cannot be genuinely disputed or that is genuinely disputed must be supported by * * *." **(3)** It is unclear how a party "shows" that an adverse party cannot produce admissible evidence to support a fact It does not work simply to cite to parts of the record that do not show admissible evidence; explanation is needed. Should the explanation be in the statement of facts, or in the brief? If in the statement, the statement will be made longer and more argumentative than a statement of undisputed facts usually is. If in the brief, page limits may be effectively reduced. **(4)** It is not clear how to relate the (c)(5) statement that cited materials
are not admissible in evidence to the (c)(6) requirement that an affidavit must set out facts admissible in evidence. The confusion can be eliminated by revising (c)(6). "An affidavit or declaration may be used to support a motion, response, or reply ~~must be~~ if it is made on personal knowledge, sets ~~out~~ forth facts * * *, and shows * * *."

08-CV-042, Hon. Robert G. Doumar: Proposed subdivision (c) "is unnecessary and approaches changes for the benefits of billable hours of large law firms." Continuing amendments of the Civil Rules have raised the cost of litigation so high that "small businesses of the United States cannot afford to ever be in federal court." Most lawyers in the Eastern District of Virginia refuse to come to federal court because of the complexity of litigation under the Rules This proposal "promotes less benefit than it costs."

08-CV-043, Hon. David C. Norton: Proposed (c) "would make our jobs [as district judges] more difficult, not less difficult. Also, it would raise, not lower, the cost of litigation " Discarding (c) will require revising (e), which refers to (c), and also "jettison[ing] Proposed Rule 56(g) in its entirety, for it would be inoperable without Rule 56(c)."

08-CV-044, Claudia D. McCarron, Esq.: In her early years in practice, summary-judgment motions commonly stated "for reasons stated in the attached memorandum of law"; the memorandum provided a narrative. Then some districts adopted local rules, or individual judges adopted individual practices, requiring a statement of material facts and a response. "[R]equiring such a statement is useful and rarely unduly burdensome." It "allows the moving party to impose clarity on case * * *. This is particularly valuable in federal cases where notice pleading permits suits to be initiated without specificity * * *." "Opposing parties who have a clear understanding of their respective theories also benefit from being required to state the material facts and respond to them." Cross-motions are often filed in insurance disputes. Left to narratives, each party clings to its own reality and "the parties produce motions papers that seem nearly unrelated. * * * Advocates will benefit from the discipline imposed on them by requiring statement of fact and responses thereto." The process "ensures that the parties reach some shared reality regarding their agreements and disagreements." There is a risk that the procedure will generate motions "that arrive in boxes and overwhelm a smaller firm However, in these cases, discovery materials and trial exhibits will be no less burdensome "

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.. Offers several points.

(1) Conceptually, the party who bears the trial burdens should have the same freedom as at trial to present the facts as a persuasive whole, not rent "into individual threads of fact, each of which the court must consider in isolation." The facts are found by listening to a narrative, through a

process of making sense of information by creating a meaningful summary. Analytical abilities are radically insufficient for full competence in telling and understanding stories. The point-counterpoint process distorts the factfinding chore.

(2) The rule is rigid, trapping the nonmovant into a response pointing to admissible evidence or explaining why none is available

(3)The (c)(4)(B) provision that the court need not consider materials not called to its attention creates an incentive for better-funded parties to load their fact statements so heavily as to increase the chance that a poorer adversary will miss something. In districts with local rules that resemble the point-counterpoint process, movants "pile up fact averments to an absurd degree * * * in an attempt to obtain or exploit a tactical advantage over a less well-resourced opponent."

(4) There is no procedure for ruling on the admissibility of the materials relied upon: what is the test of relevance or materiality at the Rule 56 stage? Does a balancing test apply? What of the ability to "link up" one piece of evidence to another, or evidence whose admissibility depends on other evidence?

(5) There is no provision for responding to a listed fact "by pointing out that the fact does not allow the inference the movant wants to draw, or that the fact is divorced or disaggregated from a context that puts it in a different light and would allow other inferences against the movant * * *." Some judges in districts with local rules similar to proposed Rule 56(c) are reported to reject such filings "because they do not fit into a specific provision of the rule."

08-CV-047, Professor Edward Brunet: There will be complaints that the point-counterpoint procedure will increase costs both for movants and nonmovants. Some lawyers already prefer state courts because of the perceived brevity, simplicity, and lower costs of their procedure. But the point-counterpoint procedure is desirable. Stating the facts will focus the judge's attention. Providing record citations "requests work already done by careful counsel," and will save the court's time in searching the record. The nonmovant "should see the summary judgment issues with greater clarity following efforts to cite to record, a vision that greatly facilitates case evaluation and settlement promotion." The Committee Note, p. 38, line 76, emphasizes the need to avoid over-long motions; the Note as a whole should be revised to better reflect the importance of this concern.

08-CV-048, Stephen Z. Chertkof, Esq.: "To discourage unnecessarily lengthy lists of proposed disputed facts * * *, the proposed rule should define 'material facts' as those 'that might affect the outcome of the suit under the governing law' * * *." The rule text also should provide that summary judgment must be denied if the nonmovant shows a genuine dispute as to any single fact designated as material by the movant. Facts that are not designated as material may not be included in the statement of facts, but may be included in the brief when that helps full understanding.

08-CV-049, Professor Elizabeth M. Schneider: Expresses concern that the proposed point-counterpoint procedure will have a particularly adverse impact on employment discrimination and other civil rights actions. The judges who have experience both in districts with this procedure and districts without this procedure is telling. The procedure adds additional and unnecessary work for parties and the court without offsetting benefit. The effect of breaking the case down into too many discrete parts is to detract from the often necessary holistic appraisal of different aspects of the evidence in the context of the legal claims. "Slice-and-dice" atomization is a mistake. There is no real reason to do this — only 20 districts have adopted local rules analogous to the full point-counterpoint procedure proposed now

08-CV-053, Hon. Benson Everett Legg: The judges of the District of Maryland completely agree with Judge Sedwick, Comment 08-CV-017 above, and unanimously urge that proposed Rule 56(c) not be adopted.

08-CV-055, Gregory P. Joseph, Esq.: Offers both criticisms and drafting suggestions.

"In my practice, statements of indisputable fact ("SIF") are expensive and pointless." Consider the mammoth statement needed in a big corporate fraud case. The response to each paragraph of the statement would "meticulously analyz[e] each verb, adjective, advert and noun in every statement. even those statements with which there is no substantive disagreement will largely be restated to make sure that the phrasing is acceptable and that nothing is being snuck by."

A movant cannot trust that the nonmovant will agree to anything, so every statement must be restated in an affidavit or declaration

If there are simultaneous motions, "as is common," there will be competing SIFs

How does Rule 56(c) apply when a motion under Rule 12(b)(6) or 12(c) is converted to summary judgment by considering materials outside the pleadings?

The Rule 56(c)(3) provision that a party may accept or dispute a fact either generally or for purposes of the motion only should have a default provision — and it should be that if the nonmovant does not specify, an acceptance or denial is for purposes of the motion only. "A point that a party may be willing to concede or is forced to fight in one constellation of claims, to make one argument * * * on summary judgment, may be prejudicial before a jury or otherwise harmful under the post-summary judgment array of claims and relevant facts."

So too, the movant's statement of indisputable facts should be for purposes of the motion only. An example is a motion based on a limitations defense, in which the defendant recites the notoriety of its misconduct. No matter how careful the defendant may be to hedge the statement so it is not an admission of "mis"conduct, there may be slips.

08-CV-057, R. Matthew Cairns, Esq.: For years the District of New Hampshire has required a separate statement of material facts and a response that specifically lays out the facts that are disputed. This practice "has forced movants and opponents to focus on that which is truly material * * *, rather than simply asserting a long litany of facts * * * or throwing numerous facts against the wall * * *. It has also focused the court's attention and permitted it the luxury of not having to decipher what a party thinks is material or in dispute. This latter point is particularly important in cases where there are pro se litigants * * *."

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: "[T]he adoption of the 'three-document' approach to motions and oppositions that already is used in the vast majority of district courts should provide uniformity of practice across all federal courts."

08-CV-062, Hon. Roger L. Hunt: Joins Chief Judge Sedwick's comment, 08-CV-017, "strongly urging against" proposed Rule 56(c). It would only serve to increase the cost of litigation and the burden on the Courts, with no appreciable benefit."

08-CV-064, Hon. James C. Fox: Also joins Judge Sedwick's views, 08-CV-017, urging rejection of proposed Rule 56(c).

08-CV-072, "Practitioners' Comment": Seventy lawyers — one of them Gregory P. Joseph, author of 08-CV-055 — succinctly "urge the Committee not to mandate the use of statements of undisputed fact ("SUF") as the default rule in connection with all summary judgment motions but, rather, to make the default rule that no SUF is required, permitting the judge, in any particular case, to require an SUF if he or she deems it appropriate."

08-CV-090, Hon. Claudia Wilken: Judge Wilken writes on behalf of the Northern District of California. "From at least 1988 until 2002" the court's local rules required "a statement of material facts not in dispute." [Apparently there was no express requirement of a counterpoint response.] The rule was abandoned in 2002. "Since this rule change, we have found the summary judgment motion

practice to be much improved." This improvement is described as "our experience with judicial efficiency and understanding." Comments by lawyers will "express the inefficiencies and expense that proposed Rule 56(c) would cause them and their clients."

Under the local rule, memoranda supporting the motion commonly also stated the undisputed facts; the separate statements "were supernumerary, lengthy and formalistic." "Opposing parties frequently filed objections * * *, and sometimes their own statements of purportedly undisputed facts," again duplicating the fact statements in the memoranda. (08-CV-155 adds that the statements often sounded "almost like fact pleading or requests for admissions." The fact statements in movants' briefs were repetitive but more understandable Nonmovants often offered objections and opposing facts that "really raise[d] only semantic disputes over the way the facts were phrased." And matters became really complicated with cross-motions, where the same party is both a nonmovant, whose facts must be accepted as true, and also a movant who must accept the truth of the other party's facts. "[T]he statement of undisputed material facts is a format that particularly lends itself to abuse by the game-laying attorneys and by the less competent attorneys.")

"A complex narrative cannot be effectively told in a list of undisputed facts. There may be facts that are disputed, where the disputes are not dispositive but are necessary to an understanding of events." The nonmovant cannot effectively communicate its version if it must do so by responding in the order of the movant's statement, "again, without the context of disputed but important facts." Then the nonmovant must set out its own set of undisputed facts outside the chronological order established by the movant's statement

"Further, a case whose disposition relied on inference cannot be well explained in formal lists of facts. * * * Even the nomenclature of undisputed facts is counter-intuitive; often the ultimate facts are legitimately disputed, due to competing reasonable inferences * * *." "The complex circumstances of a case can best be expressed in a narrative statement which addresses the uncontestable facts, in the context of all of the facts necessary to explain the events, in a meaningful chronology."

(08-CV-155 adds that since abandoning point-counterpoint in 2002, fact statements are submitted in narrative form as part of the briefs and within brief page limits. The practice is much improved. Narrative statements address "incontestable facts and reasonable inferences from them, in the context of all the facts necessary to explain the events, in a meaningful chronology." The opposing party can provide its own narrative, unrestricted by the chronology chosen by the movant. Objections to admissibility are made in a motion to strike, or — better — in the brief. This procedure works better than a procedure that would require a separate statement of undisputed facts as part of the brief; the separate statement either would require duplicating the facts, or attempting to use the statement as the narrative.)

08-CV-098, E.D.N.Y. Committee on Civil Litigation: An earlier Local Rule 56.1 required a statement of material facts about which the moving party contends there is no genuine issue, with a specific record citation. The opposing party is required to file a response. The Rule was similar to proposed Rule 56(c). "Many attorneys in our district expressed confusion about the meaning and operation of the predecessor Local Rule 56.1 * * *." It was revised.

08-CV-100, L. Steven Platt, Esq., writing "As a past President of the National Employment Lawyers Association": The point-counterpoint system used in the Illinois district where Mr. Platt practices "doesn't work and unfairly favors the defendants."

Statements of facts allegedly not in dispute are too long In one recent case the statement recited 250 facts. Responding entails "an enormous waste of time and extreme burden"; the burden is particularly severe for employment plaintiffs' lawyers who typically do not charge on an hourly basis.

The point-counterpoint system is, for many reasons, "biased against plaintiffs and their lawyers in civil rights cases " (1) The rule recognizes only one mode of response — advancing facts

that contradict the asserted facts (2) There must be a way to respond to facts that "may be accurate, but that are misleadingly [sic] or are stated disingenuously. It may be true that the employer has a written policy prohibiting discrimination; but it also may be true that it is not enforced — yet the nonmovant could be sanctioned for providing the context. (3) The fact may be correct but irrelevant. (4) The fact may be correct, but the inference the movant claims is unwarranted An employee violates company policy and is fired, but the full facts show that all employees violate the policy and this employee was instructed by his supervisor to violate the policy (5) The asserted fact may depend on the credibility of a witness the jury is not required to believe. (6) The asserted fact is based on inadmissible evidence Under the proposed rule the nonmovant cannot rely confidently on its inadmissibility argument, and thus must undertake the additional work of responding fully. (7) An accurate fact may have "a different significance if considered in conjunction with other facts that are not listed." An employee may admit that her supervisor never openly propositioned her, but have a great deal of other evidence of quid-pro-quo harassment. The facts cannot be treated in atomized fashion.

It is unfair to allow the movant to reply but not to provide a sur-reply. "That is especially true in light of the growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond."

08-CV-104, Hon. Robert L. Miller, Jr.: Chief Judge Miller writes for all the District and Magistrate Judges of the Northern District of Indiana. The Southern District of Indiana once adopted a local rule that was much like the proposed point-counterpoint procedure The Northern District studied the procedure in the hope that state-wide uniformity could be achieved by adopting a parallel local rule, but decided that the rule was "likely to lead to inefficiency." The Southern District eventually abandoned its rule because it "led to too much satellite briefing, such as motions to strike for non-compliance with the requirement." Rule 56 leaves crevices in practice that, for the most part, have been admirably filled by local rules or individual orders. Uniformity is not an end in itself, but should be pursued only when it serves the goals expressed in Rule 1.

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: The District of Massachusetts has a point-counterpoint practice. "From our perspective as plaintiffs' civil rights lawyers, this system is an unmitigated disaster." **(1)** "[T]he sheer length of the lists of assertedly not-in-dispute material facts encouraged by the system tends to overwhelm plaintiffs and their lawyers." In a recent case the statement, including exhibits, exceeded 600 pages. The labor required to show that all of them are unsupported, irrelevant, or misleading is an enormous burden. **(2)** The methods allowed to respond are too narrow, the rule "is profoundly biased against plaintiffs and their lawyers in civil rights cases." The asserted fact may be accurate, but misleadingly stated, disingenuously utilized, irrelevant, or offered to support an unwarranted inference. The fact may turn on the credibility of witnesses the jury is entitled not to believe — "As such, it cannot be meaningfully disputed." The fact may be inadmissible, but the nonmovant must respond fully because the admissibility issue is seldom certain The significance of the fact may turn on other facts that are not listed. **(3)** It is "profoundly one-sided" to stop the exchanges with the movant's reply. "In practice, movants' reply briefs virtually always raise central points that require a response * * * " There is "a growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond."

08-CV-110, G. Edward Pickle, Esq.: Point-counterpoint "facilitates resolution of summary judgment motions. A non-responsive arguments and obfuscation are rendered more obvious "

08-CV-111, Carlos Rincon, Esq.: The proposed procedure "would preserve and establish a more efficient summary judgment practice." Litigants and counsel will remain focused. "[B]y highlighting what truly is at issue based on the case record, the parties are on notice of what truly is

critical in a case and it affords the parties a sense of transparency in understanding what the Court construes as being more significant * * * "

08-CV-113, John H. Martin, Esq.. Strongly favors point-counterpoint. He has practiced in districts that do it, and in those that do not. The procedure "requires the parties to specify clearly what facts they contend are, or are not, truly in dispute." Although a party may list facts that are not material, the nonmovant has ample opportunity to demonstrate which dispositive facts they contend are disputed. The result usually is a very small number of potentially disputed issues.

08-CV-114, Gregory S. Fisher, for Alaska Chapter, Federal Bar Assn.: Point-counterpoint "will needlessly increase fees and costs as it will take more time to draft, review, and file motion papers. It will also take more time to analyze responses * * *. Current practice provides for a streamlined filing that incorporates argument with relevant facts in one filing." The experience of courts and judges that have worked with this procedure and rejected it is telling. A district that likes the procedure can adopt it by local rule.

08-CV-117, Cary E. Hiltgen, Esq.: "[T]he requirement of undisputed facts will bring consistency nationwide, promote good motion practice and will allow Courts the ability to easily and properly adjudicate claims * * *."

08-CV-118, Malinda Gaul, Esq.: Supports the proposed (c) procedures, but the requirement that the movant present only material facts that cannot be genuinely disputed should be enforced by providing that the court must deny the motion if the nonmovant shows a dispute as to any fact the movant claims is material. (And the movant may not advance inferences, while the nonmovant may respond with undisputed facts, disputed facts, and inferences.)

08-CV-120, Hon. John W. Sedwick: Judge Sedwick writes for all the District Judges of Alaska (he wrote for himself, 08-CV-017, summarized above). The judges unanimously oppose (c). "[I]t is particularly discouraging to see a committee of the Judicial Conference pursuing a concept that will make a significant aspect of our work more burdensome."

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is on behalf of the American College of Trial Lawyers.) "[A]n explicit disclosure of the undisputed facts or any statement of evidence disputing the opponent's facts is necessary," but it is better included in the brief rather than a separate statement. A separate filing only increases the paper required.

08-CV-123, Hon. Barbara B. Crabb: W.D.Wis. uses a procedure very much like proposed (c), "and I find it very helpful * * *. Yes, the process can be daunting, particularly in patent cases and class actions, but it does seem to cut through the chaff." But it should not be written into Rule 56. Other courts find that different procedures work better for them. "So long as each court makes it clear to the litigants what its expectations are, I'm not convinced that litigants are affected adversely by not having a consistent federal rule on the subject "

08-CV-132, Hon. Timothy J. Savage: "Having used the same procedure that is proposed * * * for several years, I support the proposed new rule. Using the procedure requiring the parties to specifically identify disputed and undisputed facts with citations to the record has been invaluable * * * The procedure eliminates the wasteful and needless searching of the record with which the attorneys are familiar and the court is not." Sufficient flexibility is preserved by allowing the court to depart by order in the case.

08-CV-133, Sharon J. Arkin, Esq.: Point-counterpoint "is * * * very disturbing * * *. because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking, piecemeal way." California has a similar procedure; defendants often propose more than 100 facts. "Responding to these individual facts is daunting, tedious, time-consuming and resource-intensive." "I am convinced that defendants deliberately utilize this process in the hope that plaintiff's counsel will simply be overwhelmed and unable to adequately respond * * *." The effect is exacerbated by "the very common circumstance that trial court judges — probably because of workload issues — simply do not consider the effect of reasonable inferences from the facts set forth in the point-counterpoint." Even if the fact is true, that does not mean there are no contrary inferences. "But I have found it common that judges ignore the reasonable inferences and simply grant summary judgment if the plaintiff cannot cite to directly contrary evidence."

08-CV-135, Marc E. Williams, Esq., for DRI: Point-counterpoint will identify the facts and legal issues at an early juncture. The court will be focused solely on the material issues. Some commentators fear that this procedure "will leverage the advantage that 'larger firms' have over 'smaller firms,'" but "any additional work associated with the litigation of the statement of undisputed facts will likely be more than offset by a process that is streamlined to focus the subsequent litigation solely on issues that are relevant to a swift resolution "

08-CV-136, Andrew B. Downs, Esq.: This procedure is similar to the procedure adopted by California in 1984. It works, and proposed
Rule 56 improves on California practice. Allowing the court to go beyond the motion under proposed 56(f) protects against abuse by not restricting the court to the formulations used by the parties. There are lengthy motions under this procedure, but other motions will be more narrow or will not be filed at all because of this procedure. But some judges have standing orders that require the parties to provide a joint statement of undisputed facts. That procedure can work when all lawyers are intellectually honest and fully candidate with the court — and have clients that will authorize unfavorable admissions — but it often precludes meritorious motions or generates ancillary motion practice. The Committee Note should disapprove court orders for a joint statement.

08-CV-140, Donald F. Zimmer, Jr., Esq.: Point-counterpoint, the practice in California state courts, "is neither wasteful nor cumbersome, * * * but actually helps focus the parties on the material facts at issue." Practitioners will attest that "shorter is often better." Courts will not be fooled by extraneous disputes over non-material facts, and "can discern whether papers have been lodged in an attempt to obfuscate the real issues at hand."

08-CV-142, Hon. David F. Hamilton: From 1998 to 2002 S.D.Ind. required separate "point-counterpoint" documents, as the proposal would do. But this "provided a new arena for unnecessary controversy." Hundreds of facts were asserted, and "became the focus of lengthy debates over relevance and admissibility." Lawyers made sterile objections and trivial arguments over admissibility and relevance "that would never be made in a trial." "[W]hat happened was an exponential increase in motions to strike." But the procedure brought a clarity we were reluctant to abandon The revised local rule requires that the movant include a statement of material facts not in dispute in the brief; the nonmovant is required to include in brief a statement of material facts in dispute. Both are required to support their positions by citations to the record. This works because the page limits on briefs curtail overlong statements.

08-CV-143, Stefano G Moscato, Esq., for National Employment Lawyers Assn.: "The efficiency and cost of opposing motions for summary judgment" is important to NELA members, who mostly are sole practitioners or work in offices with no more than 3 attorneys and generally no paralegals. In point-counterpoint districts NELA members find that the procedure allows "(and even

encourage[s]) motions which contain unrestricted statements of supposedly undisputed material facts." The statements are "very lengthy, overly burdensome, abusive * * *." "[T]he real merits get lost in the shuffle." The defendant can begin preparing the motion long in advance "The small-office plaintiff's counsel, receiving a statement with more than 100 statements, supposedly all material, has no way of responding effectively * * *." Admitting facts solely for purposes of the motion is too risky because a lawyer cannot predict what facts the judge will agree are immaterial. The nonmovant should be allowed to strike an entire statement that is not concise. (But point-counterpoint might work if there is an effective way to ensure that statements of fact are concise, to allow express arguments for inferences from both undisputed and disputed facts, and to allow a sur-reply.)

08-CV-144, Ralph A. Zappala, Esq.: Point-counterpoint can lead to efficient disposition by pushing the parties to recognize "what evidence exists and what evidence really matters to the case at hand." "[I]n commercial litigation, too often general pleadings lead to expensive discovery based upon causes of action that will not stand the test of scrutiny." Summary judgment can remove parts of the case, saving "large sums of money otherwise spent on discovery." The procedure also can lead to better evaluation of the merits and thus settlement — in an action to collect on a contract claim, for example, a counterclaim for breach of the plaintiff's obligations can have this effect.

08-CV-145, Professor Stephen B Burbank: This comment, focused entirely on subdivision (c), cannot be adequately summarized — it fits into 13 pages as much content as a law review article of considerably greater length. The conclusion is that point-counterpoint procedure is too risky to adopt. Rule 56 has been put to uses never contemplated by its makers, but of itself that is not bad — Rule 56 operates in a litigation environment never contemplated by its makers. There is, to be sure, great disuniformity in practice now. But why impose a practice adopted by a minority of courts — and abandoned after experience by a few — on the much large majority that have not adopted it? Good things may come from adopting good local rules into the national rules, but bad things also may happen — the 6-person jury is a classic example. Many of the comments show the costs of this procedure; 08-CV-72 is from "some seventy of the most prominent plaintiffs' and defense lawyers in the country." FJC data show that point-counterpoint procedure is associated with substantial delay in deciding — the risk of uncertainty about causal connections should be borne by those promoting this format. This procedure has a potential for abuse by strategic motion practice designed to extract favorable settlements from plaintiffs; at a minimum, the Committee should seek empirical data about the costs of preparing motions and responding under this procedure. The increased rate of dispositions shown by the FJC study, further, is offset not so much by fewer trials as by fewer settlements. And the FJC data show that the impact may not be neutral, but instead tends to more terminations by summary judgment, particularly in employment discrimination cases. For example, the FJC data show that within point-counterpoint districts, the "no disposition" rate is much lower in employment discrimination cases than in other types of cases. The high rate of disposition may result not from deserved differences but from the incentive this procedure furnishes "to take a partial and incomplete view of the relevant facts and/or to distort legal doctrine by subdividing it specifically for the purpose of enabling summary adjudication." Summary judgment in employment discrimination cases, further, runs the risk of cognitive biases, of "cognitive illiberalism" blinding a judge to the view of the facts that would be taken by jurors whose life experiences better reflect the plaintiff's experiences. In all, "the risks of uncertainty that proposed Rule 56(c) presents are far too serious to warrant proceeding with its adoption at this time "

08-CV-146, March Buchanan, Esq.: Experience in employment discrimination law shows that the point-counterpoint procedure "would be nothing more than abusive, in that it allows the defendant to select the theme of the motion, and prevents the plaintiff * * * from submitting reasonable inferences from the facts " How does a plaintiff point out that the weight of harassment accumulated

over time? — is this fact, or inference? The plaintiff's testimony of her experience would challenged as inference, not fact, by a motion to strike; the procedure will spawn motions that seek to remake the law of evidence

08-CV-147, Gene Graham, Esq.. The proposed changes put the movant in a very favorable position. "Plaintiffs in employment cases already have to overcome a very negative attitude toward civil rights cases in the 8th Circuit." Plaintiffs should not be put in a straight jacket in responding to the motion.

08-CV-148, Thomas A Packer, Esq.: A similar practice in California state courts has generally positive support from counsel and judges. "The reality faced by the courts and litigants is that undisputed material facts must be set forth in some fashion in any event. Having them set forth in an orderly, clear manner benefits all. * * * [O]ne bringing a motion for summary judgment tends to err on the side of a smaller, rather than larger, list so that there are fewer facts for the opposition to contest."

08-CV-149, Hon. H. Russel Holland: This summary is noted with Judge Holland's first comment, 08-CV-028

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: Point-counterpoint forces a binary approach — yes-no, on-off — to a factfinding process that is essentially analog. "The whole truth * * * is often greater than the sum of its parts." "Erecting a haystack of [statements of uncontested facts] frustrates and obscures the search for that ultimate rarity: the truly material and genuinely undisputed fact on which a purely legal question turns." The binary approach places a deep discount on "the central adjudicatory concepts of inference, credibility, and context." It will add cost in time and dollars. Summary judgment can work well in the rare case "when the pertinent facts are well-defined and incontestable." But that is not true of the complex disputes that are the province of the federal courts The point-counterpoint procedure can work well in some cases, and can be required on a case-specific basis by invoking Rule 16 — but most often, its value cannot be determined until the moving papers, and perhaps the responses, have been filed.

08-CV-151, Joan Herrington, Esq.: In a pending case the separate statements in Rule 56 motions by plaintiff and defendant contain 457 material facts. "And this is a comparatively simple [employment] case in that Plaintiff is relying on direct evidence of retaliatory motive. * * * The proposed amendments * * * requiring point-counterpoint separate statements will exacerbate these problems." The idea that summary judgment should be available to avoid discovery in supposedly unmeritorious cases is wrong Summary judgment is fundamentally unfair if a party is denied access to potential evidence; "[t]his position is particularly egregious in employment rights litigation where the defendant employer holds almost all the evidence and the plaintiff employee must file motion to compel after motion to compel to gain access to it."

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): When properly used, point-counterpoint statements "may facilitate the identification of key issues and significantly advance the resolution of an action." But in many instances they are misunderstood or are misused "to overburden the other side with the need to respond to * * * far too numerous, detailed and complex fact statements * * * Similarly, careful lawyers seeking to avoid any admission frequently try to deny facts that are genuinely not in dispute, as by challenging an adjective used or the phrasing of the statement." Often the statement is prepared as a mechanical task after the brief is completed. This procedure can be salvaged by imposing a defined limit, such as no more than 20 facts per claim or cause of action; a movant or respondent should be allowed to seek relief from the limit, or from the point-counterpoint procedure as such

08-CV-157, Margaret A. Harris, Esq.. "The proposed rule is unwieldy and would result in an inordinate increase in the amount of time spent by counsel * * * and, more importantly, result in the district court receiving, at minimum, four additional (and lengthy) documents that must be checked and cross-checked against one another." There is no such rule in S.D.Tex., and the lack has no adverse impact. But if there is to be a point-counterpoint procedure, it should stress the importance of limiting the statement to material facts by adding a (c)(1)(A)(iv): "If the non-movant establishes that any one or more of the identified material facts is disputed, the motion may not be granted as to that claim." Inferences also should be brought in to the rule text: in (ii), the statement of facts "may not contain any inferences from any fact, and must be supported, wherever possible and in large part, by reference to the non-movant's testimony or admissions." So for the response: (B)(i): " * * * or, as appropriate, state inferences from the facts that preclude summary judgment." And (B)(ii) may in the response concisely identify * * * additional material facts or inferences from the facts that preclude summary judgment." And for the reply, (C)(i): " a reply to any additional facts or inferences stated by the non-movant and show that no jury could reach the stated inference and rule in favor of the non-movant."

08-CV-158, Professor Suja A. Thomas: Point-counterpoint procedure is not merely a matter of procedure; it will change the standard. The FJC study shows a higher rate of granting summary judgment in point-counterpoint courts; before adopting the procedure, there should be further study to show that this procedure is not the cause for the higher rate. This is particularly important as to the findings in several studies that the rate is higher still in civil rights cases, "some of the most factually intensive cases in the court system." The point-counterpoint procedure also will add to the burden on courts, as shown by the greater time to disposition found by the FJC study — the effort to show there may not be causal link shows only that there should be further study to ensure there is no time increase or that any increases are otherwise justifiable. The increased cost of this procedure also may lead to more pre-discovery motions to dismiss, and more grants. Finally, if this procedure is adopted the rule text should specify that pro se plaintiffs are exempt.

08-CV-160, Professor Stephen N. Subrin: "I concur with Professor Burbank's opposition [08-CV-145] in every respect." In addition, this proposal is of a piece with amendments that "continue to add steps to the process. * * * Each of these steps has the realistic potential of increasing time and expense." There is no empirical support of adding another set of documents to the Rule 56 process.

08-CV-161, Federal Magistrate Judges Assn : There should be national debate about forcing the point-counterpoint procedure as a uniform rule, but these comments assume it will be adopted. The provision that allows departure by order in the case will impose a burden on judges who decide to depart, and in the absence of a local rule will create greater uncertainties about procedures within a single district. The rule should permit districts and judges to *supplement* the procedures in Rule 56(c) by local rule or standing order.

08-CV-162, Federal Practice Comm., Dayton Bar Assn : Point-counterpoint should not be forced on districts that, as the Southern District of Ohio, do not have it. "We endorse the well-written and compelling views of Judge Sedwick and Judge Wilken." But if it is adopted, the rule should state that a nonmovant's failure to address a fact stated by the movant "shall or should) be construed by the court as acceptance of that fact for purposes of the motion only."

08-CV-163, 20 lawyers at Perkins Coie, endorsing letter by Hon. Robert S. Lasnik signed by all judges in W.D.Wash.: Point-counterpoint will substantially increase burden and expense without meaningful or identifiable benefit. Fully agrees with the letter from all the district and magistrate judges in W.D.Washington. The letter begins by observing that a typical motion begins with reciting the truly undisputed facts without citations because they are indeed undisputed. "The handful of

facts that are truly contested becomes clear through the exchange of coherent narratives and a few well-chosen pieces of evidence." The proposed point-counterpoint procedure will require far more Each fact must be stated, "and evidence supporting each contention must be provided even if the contention is undisputed. The cold enumeration makes it very difficult for a party to present its narrative in context or to argue for reasonable inferences The opposing party is even more disadvantaged * * * " The nonmovant will feel the need to address every fact, for fear of waiver later in the proceedings. The lists of facts will become an issue, generating collateral fights. "A number of judges in this district have presided over cases utilizing the point-counterpoint procedure Our experience with this cumbersome form of motion practice has been consistently unsatisfactory * * *. Over the years, we have revised our local rules to avoid" the duplication and waste entailed by point-counterpoint. A single moving paper is required, with strict page limits and pinpoint citations

08-CV-164, Hon. Janice Stewart: D.Ore. has had a point-counterpoint local rule since well before 1993. "I now always waive the filing." The practice has generated widespread dissatisfaction; the local rules committee is considering deletion of this rule unless national Rule 56(c) requires it The statements do not assist the court. They do not seem to help the parties. "Because the moving party cannot know in advance what facts the opposing party will dispute, it is likely to create a longer statement of facts than is absolutely necessary." The response disputes and adds more facts. "These competing fact statements become duplicative, time-consuming, confusing, disputes over semantics, and counterproductive to an understanding of the issues. This is especially true in employment disputes (a large source of summary judgment motions) where the parties rely primarily on reasonable inferences from a synthesis of facts." The local rule sets a five-page limit for the statements, but parties routinely move to expand the limit. The separate statements usually duplicate the fact section of the legal memoranda — the narratives of the memoranda are much more useful. The memoranda, however, cite not to the record but to the citations in the statement, complicating the court's task. And there is no point at all in having these statements in proceedings for review on an administrative record.

08-CV-165, Scott Jerger, Esq., with three more lawyers: Expresses complete agreement with Magistrate Judge Stewart's comments about experience in D.Ore., 08-CV-164 The concise statement of facts required by the local rule "fails to context the dispute." The fact section of the memoranda works much better. The concise statements frequently recite non-material facts and facts not needed to decide the motion. Proposed Rule 56(c) does not impose a page limit, making it possible to state hundreds of facts; the nonmovant must respond to each, for fear of having the fact considered not disputed; this "could lead to attorney gamesmanship." If the rule goes forward, a five-page limit should be imposed.

08-CV-166, Hon. Sue L. Robinson, for D.Del. Judges: "Even if we assumed * * * that proposed Rule 56(c) had some merit, the Federal Rules of Civil Procedure were never meant to be a 'best practices manual.'" Judges "should be credited with the wisdom, through experience, of using the procedures best suited to their cases, consistent with the culture of their court."

08-CV-170, Karen K. Fitzgerald, Esq.: "In an employment discrimination case, much often turns on subtleties." Defendants state facts in terms designed to be persuasive. "[T]he point-counterpoint system makes it even more difficult for the plaintiff to adequately correct some of the subtle misconceptions because the plaintiff is forced to respond within the confines of the defendant's stated version of the story." The plaintiff should be allowed to tell the story in a persuasive way.

08-CV-172, David L. Wiley, Esq.: "I'm against the point-counterpoint amendment for the same reasons cited by NELA * * * [T]his process makes more burdensome a procedure that is already burdensome enough."

08-CV-173, Committee on Federal Courts, New York City Bar, by Wendy H. Schwartz, Esq.: The Southern and Eastern Districts of New York have had point-counterpoint since at least the early 1960s. The Second Circuit has blessed it as a means of streamlining summary judgment, freeing judges from the need to hunt without guidance through voluminous records. The Advisory Committee aspires to an exchange of documents that concisely focuses the parties and the court on the important facts. "But this is often not how it works in practice, and there is no mechanism set forth in the proposed rule to force attorneys to use the procedures in this way." Instead, the statement generally repeats the facts set forth in the memoranda of law or affidavits; the nonmovant often feels compelled to respond in terms more complicated than a simple "admit" or deny," so the response also duplicates the memoranda. "The end result is a parallel track set of duplicative summary judgment papers that is unnecessarily burdensome * * *." Nor does the proposed rule include a mechanism to force the desired attorney behavior. The local rules in New York provides that facts are deemed admitted for purposes of the motion unless specifically controverted; proposed Rule 56(e) leaves it to the judge to decide whether to consider a fact undisputed Finally, there is no need for a uniform national rule on this issue. Many courts have different practices, and the proposed rule allows wide variation by order in the case. There is no national consensus.

08-CV-174, Federal Bar Council, by Robert J Giuffra, Jr., Esq.: Point-counterpoint "requires a high level of preparation, but we agree that a summary judgment motion should not be made — or resisted — without that preparation."

08-CV-175, Hon. Marcia S. Krieger. "[I]t is difficult/inconvenient for counsel to decide what facts are truly material to a given issue. They want to tell the 'whole story,' that is why they prefer the narrative statement of the facts." Judge Krieger attaches her Practice Standards, and urges a similar procedure for Rule 56: "1) the movant be required to identify the claim/defense on which a summary determination is sought, what party has the burden of proof, what the standard of proof is and what the elements are, and 2) the listing of material facts should be limited to those that are material to the claim/defense, or part thereof, which is the subject of the motion."

08-CV-176, State Bar of California, Committee on Administration of Justice: Separate statements are beneficial for the reasons given by the Advisory Committee, and there is appropriate allowance for opting out. But a minority of the Committee believe that the choice of this procedure should be left to local rules or to individual judges

08-CV-177, Paul R. Harris, Esq.. Joins the NELA comments. "[F]or certain the summary judgment device truly is broke and in great need of fixing, but adding this additional hurdle doesn't fix anything. Far from streamlining the process, it just adds another layer of complexity and time. And it forces non-movants (overwhelmingly plaintiffs) to make a point by point response to any piece of information the movant decides to throw in there. This kind of requirement only adds to the disputes, the papers, and the contentiousness between the parties "

08-CV-178, Alice W. Ballard, Esq.: Joins the NELA comments. "[I]n some motions, the listing of purportedly uncontested facts is quite persuasive, in and of itself. The facts in the listing look dry and neutral, but when you read them, they have theme, context, and a narrative structure that tells the defendant's story well." The plaintiff is forced to respond within the confines of the defendant's story. "This gives the moving defendant not only primacy, but also remote control over the context and narrative structure of the story." Judges know the jury will hear the plaintiff's story first, but on some level "the extra persuasive edge * * * will inequitably color the judge's view of how a reasonable juror will respond to the evidence."

08-CV-179, Robert J. Wiley, Esq.: A tit-for-tat comparison works well for direct evidence. But with indirect, circumstantial evidence, four or five facts taken together may raise an inference that contradicts another fact. Most non-FLSA employment cases turn on circumstantial evidence. "In such cases, the effect of the proposed rule will be to prevent the court from seeing the forest for the trees." The vast and overwhelming majority of courts, although free to adopt this procedure on their own, have chosen not to It should not be imposed on them.

08-CV-180, U.S. Department of Justice: The Department generally supports this procedure, "already used in a number of districts, [as it] should bring clarity to resolving these motions." But point-counterpoint is not appropriate when summary judgment is used as the vehicle to review an administrative decision on the administrative record. An exception should be written into the rule — for example, "The procedures for filing statements of material fact and responses to statements of material facts do not apply to cases involving challenges to agency action where judicial review is based on an administrative record."

08-CV-181, Lawyers for Civil Justice, etc.: This comment supplements earlier comments, 08-CV- . Point-counterpoint "ensures that the parties reach some shared reality regarding the merits of the case." It can be made acceptable to most by placing numerical or page limits on the required statements, or by combining the statement and the brief or motion in one document. Or courts could be permitted to opt out by local rule.

08-CV-182, Amy Gibson, Esq.: The response to a summary-judgment motion in a First Amendment employment retaliation case ran 87 pages. "As a non-movant on a dispositive motion, I felt the need to respond to any ground, even a no-evidence ground slipped into a footnote or some not expressly stated, yet vaguely argued, ground for the motion."

08-CV-183, Professor Eric Schnapper: Point-counterpoint procedure is useful, if at all, only for "question-of-law summary judgment " Such motions are truly controlled by a few simple facts that no one disputes — what was the date of the event that measures the limitations period is an example. But when the question goes to the sufficiency of the evidence of some fact — such as "negligence" — the motion typically "does not turn on 'a small number of truly dispositive facts.' There usually are no 'dispositive facts' favoring the party seeking judgment as a matter of law. The statements and responses offered with regard to an evidence-sufficiency summary judgment motion are lengthy because the parties are (quite properly) seeking to summarize the often lengthy evidence that would occur at a trial of a week, or far more; the documents are 'unwieldy volumes' because a dispute about the sufficiency of the evidence of the non-moving party calls upon both sides to present essentially the documentary evidence they would offer at trial. No sensible judge would propose that a Rule 50 motion refer only to 'a small number of truly dispositive facts,' or suggest that the court intends to ignore the 'unwieldy volumes of materials' in evidence at trial."

08-CV-186, Allen D. Black, Esq.. Point-counterpoint "imposes an enormous amount of unproductive busywork on both the parties and the Court." In complex cases the statements "almost universally
list hundreds of facts * * *, many of which have only tangential impact on the core dispute. The non-moving party is then compelled to contest or at least re-case hundreds of peripheral facts * * *." In a recent antitrust case, the movant listed 156 undisputed facts, the nonmovant responded with 144 single-spaced pages contesting them, the total of these submissions was 556 separately numbered paragraphs and 228 single-spaced pages. A better procedure would be to require a conference with the judge before filing any summary judgment motion; plenty of experience with Rules 16 and 26 show that such conferences work. Alternatively, the number of facts could be limited, perhaps to 10, with provision for expansion by court order. The procedure, as it is, prompts the courts and

parties "to look at each fact individually rather than looking at the case as a whole. This could have substantive impact in some cases, notably employment and antitrust."

08-CV-187, Hon. Rebecca Beach Smith. Joins Judge Payne's request, 08-CV-190, that point-counterpoint be deleted and left for regulation by local rule and individual judges.

08-CV-188, Hon. Leonie M. Brinkema: Joins Judge Smith, 08-CA-187, and Judge Payne, 08-CV-190, opposing point-counterpoint. "Setting clear limits on the length of submissions by counsel conserves limited judicial resources and actually improves the quality of the pleadings * * *."

08-CV-189, Stuart R. Dunwoody, Esq., for Federal Bar Assn., W.D.Wash: Point-counterpoint "will add burden and expense," make Rule 56 practice "more complicated and expensive," and "generate disputes concerning the admissibility of the evidence cited." W.D.Wash. has no such requirement, and "summary judgment motions are typically resolved efficiently without separate fact statements." The Ninth Circuit Representatives to the Western District of Washington" also oppose point-counterpoint. If this procedure is retained in Rule 56, districts should be allowed to opt out by local rule.

08-CV-190, Hon. Robert E. Payne: The local rule in E.D.Va. requires that the movant's brief "include a listing of undisputed facts with citations * * *. The responsive brief then must include a specifically captioned section listing all material facts contended to be in genuine dispute with citations * * *." The rule "helps focus the briefing." It works in conjunction with another local rule that limits opening and response briefs to 30 pages, and rebuttal briefs to 20 pages. Experience shows that if lawyers are allowed to file separate statements of fact with citations, they exercise no restraint. But the page limits on briefing accomplish the objectives sought in proposed Rule 56(c) Without these limits, proposed (c) "will make the job of judges much more difficult and indeed presents the very real risk that the process of dealing with summary judgments will overwhelm judicial dockets."

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: Rule 56, which cuts off the right to trial, "should not be amended in a way to create traps for the unwary." Statements of undisputed facts will "add enormous cost both in time and dollars to the litigation process," and "decrease the emphasis on the established concepts of credibility and inference." Some cases might benefit from this procedure, but "this would be the clear exception." Attorneys who have the advantage of hour billing will have an incentive to use this procedure, adding burdens that do not crystalize issues or serve to identify material issues of fact in dispute or undisputed. "There are plenty of other ways, and motions, to weed out non-meritorious cases prior to trial." And the plaintiff should always have the last word.

08-CV- , Hon. Robert J. Faris, for Conference of Chief Bankruptcy Judges of Ninth Circuit: Some of the judges think that point-counterpoint forces counsel to think carefully and tends to improve presentation of summary-judgment motions Others find the system "less than useful." Attorneys often do not do a good job of preparing statements and counterstatements, the procedure is hard to enforce, and the cost to the parties outweighs the benefits." Disagreeing about the merits of the technique, "we do agree that it should not be imposed as a uniform national practice." Courts that want to use it should be free to do so. Others should be free to adopt procedures that suit their local legal culture, the preferences of the judges, and the demands of their caseloads. Bankruptcy courts would face particular problems because they have a large number of small cases and only a small number of large cases. If point-counterpoint is adopted in Rule 56, the bankruptcy rules should be amended to allow bankruptcy courts discretion to opt out of the procedure, or modify it, "in some or all adversary proceedings and contested matters."

Claudia McCarron, Esq., Nov 17, 5, 6-9. Has extensive experience both with point-counterpoint and with other submission practices, much of it in insurance coverage disputes. Often the lawyers for both sides agree that the case is suitable for decision on cross motions, and yet, without point-counterpoint, "I find that the advocate in each lawyer makes it nearly impossible to file a brief that really clarifies the points of agreement and disagreement, but when that procedure is in place for a statement of material fact by each party, real clarity can be achieved." It is protested that the motions "arrive in boxes I get complaints that arrive in boxes." But the work is worth it. And "my experience is, as a practical matter, those motions have not arrived in boxes * * *. [A]s an advocate you lose the advantage of the statement if you burden it with subsidiary facts "

Leigh Schachter, Esq , Nov. 17, 26, 27-31: As in-house practitioner at Verizon Wireless finds summary judgment very important. Many cases "are at heart not so much fact cases * * * but are really purely legal cases" that can be decided promptly. It is important to have a system in which summary judgment is actually considered. And it is important to have a uniform rule throughout the country — it is difficult and inefficient to have to encounter differences in practice. Point-counterpoint "is a very useful tool for trying to identify and narrow what are the issues in the case." It shows whether there is a genuine dispute as to a fact and, if there is, whether it is material. Yes, the statements can become so long as to be burdensome; it is important that bench and bar work together to make sure the statement is concise and limited to facts that are important. But as a practical matter the movant wants to limit the statement to a small number of facts — the more facts you present the greater the prospect that there will be a genuine dispute as to at least one fact that you have characterized as material.

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony addresses inferences of intent in employment discrimination and retaliation cases. Addressing the response part of the point-counterpoint procedure, it is urged that the nonmovant need not rely on "material" facts, but should be able to point to "additional facts or inferences that preclude summary judgment." The problem is that intent and state of mind often depend on inferences facts, no one of which seems "material." The running illustration is clear: an employee who has been highly valued for 20 years goes to the company Equal Opportunity Office and makes a discrimination complaint against her supervisor. Two days later she comes to work 10 minutes late and is fired for being tardy. The first undisputed material fact is that she was 10 minutes late. The second fact will be that both the EEO office and the supervisor deny that the EEO office told the supervisor about the complaint. But being 10 minutes late seems a trivial offense. The facts may show that many other employees frequently arrived much later. These facts may warrant an inference that the supervisor had learned of the complaint, and that tardiness was not the reason for firing the plaintiff. But they are not facts identified as "material" by the rules that govern the substantive claim.

So, while point-counterpoint may be effective in cases where the ultimate issue is one of objective fact, it is less often useful, and can work against clarification of the issues, "where subjective intent and motivation are at issue." It is very hard to get at motivation through point-counterpoint. The danger that the movant will state too many facts should be addressed by a rule provision that the motion must be denied if there is a genuine dispute as to any one fact the movant says is material and beyond genuine dispute. Some relief might be provided by the provision that allows a nonmovant to accept a fact only for purposes of the motion, but an employment plaintiff's attorney might be too fearful of this course, "for fear of never getting the second chance."

Credibility presents problems similar to inference problems. Summary judgments are granted on the basis of the statements of witnesses that a jury would not have to believe. Most of the witnesses are interested; they are aligned with the employer or not. Many of these cases are "basically a conflict among several witness's testimony. Employers frequently have more witnesses " The plaintiff should not lose simply because of the number of witnesses.

That summary judgments against employment plaintiffs are often affirmed does not mean the judgments are right. "[T]here are rules and inferences being drawn against plaintiffs in this context that seem different than in other contexts." Summary judgment is not warranted simply because the EEO officer says he never told the supervisor about the complaint and the supervisor said he never heard of it. The circumstances of firing a valued 20-year employee for being 10 minutes late two days after filing the complaint warrant an inference of intent As nonmovant, the plaintiff should be able to respond to the motion with facts that are not independently material but that do support favorable inferences. Simply arguing inferences in the brief is not enough. The real material fact is the supervisor's intent, and that can be reached only by inference. "I've never had a perfect employee" as plaintiff. There always will be some shortcoming that can be assigned as the reason for adverse action.

Prof. Edward J. Brunet, Nov. 17, 52 at 60-62: Point-counterpoint has a cost, but is helpful. "A good lawyer cites to the record and focuses the claim." There are four advantages. It saves judicial time searching the record. It focuses the issues. Opposing counsel see the issues with greater clarity by being forced to search the record, "a vision that greatly facilitates case law promotion and settlement promotion." And it aids appellate review "by mandating a more tidy and transparency in the summary judgment record." By focusing on the record, it also enables more precise rulings and thus is related to the choice between should, must, may, or is. The Committee Note admonition against stating too many undisputed facts is good, but it should be given still greater prominence.

Professor Elizabeth Schneider, Nov. 17, 62 at 63-79: Point-counterpoint aggravates the tendency to "slice and dice" the record, looking at individual facts in isolation and losing sight of the whole picture. Summary judgment has become the do-or-die place in federal civil litigation. It has had a huge impact in removing cases from public adjudication The proposals create an extensive process in cases where it often would be easier just to go to trial. It may affect the choice of forum — already, there is an impression that federal courts are courts for defendants. Nor is the procedure going to compensate by making judicial decision-making more effective. To be sure, it may push the lawyers to more effective marshalling of the facts Good lawyers already cite to the record. But there are particular risks for civil rights and employment cases in the "impermissible disaggregation of legal issues." The "integration, interrelationship of fact and law," is being segregated out. The opportunity to argue the whole picture in the brief is not enough to offset this tendency. Nor is there enough protection in the provision that the court can order a different procedure on a case-by-case basis — that will make the process still more cumbersome by adding arguments about what the procedure should be. It would be better to require specific citations to the record in the briefs. The judges do want and need direction through the record, but allowing for integration of fact and law in the brief is better.

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 80-88: Summary judgment is most often a defendant's tool. The plaintiff has the trial burden, and at trial carries the burden by telling a story. The point-counterpoint procedure enables the defendant to deflect the story by focusing on small pieces and requiring a response by small pieces. "The sum of an evidentiary presentation may well be greater than its constituent parts * * *. [F]acts can get in the way of finding truth when you don't get the whole story." "[Y]ou're dealing with a problem of cognition, a problem of how people perceive facts[,] of how we come to know things * * * " The opportunity to provide the narrative in the brief is not always adequate — page limits impose constraints, and the constraints may be severe when the case also presents meaty legal issues.

Joseph Garrison, Esq., Nov. 17, 97, 98-106: Uses point-counterpoint, and as a plaintiffs' employment lawyer supports it But there are motions that abuse the procedure by stating too many undisputed facts, including "supposed material fats which are not at issue." Many plaintiff-side

employment firms are firms of one, two, or at most three lawyers, and do not have the resources to respond. Accepting a fact for purposes of the motion is not a remedy. Indeed it may be worse than not responding at all — with no response, the court will take at least some look at the record. "[N]ot responding or admitting for purposes of the motion carries the risk of guessing wrong on materiality, and if you guess wrong, you could lose * * *. You have to respond to these because you can't take that chance of guessing wrong The remedy for the over-long statement of undisputed facts is a motion to strike The motion should not be in a form that specifies that of the 250 facts 50 are hearsay, another 20 are irrelevant, 30 are background, and so on. That form of motion is ugly collateral litigation. There have to be boundaries on the motion to strike, just as on the statement of undisputed facts. It should suffice to point out that the motion goes beyond a concise statement of material facts. It is a blunt tool, but it's better than nothing.

R. Matthew Cairns, Esq., Nov. 17, 114, 119-120: Has not encountered the "250-fact" statement. Such statements are a mistake — "you are not focusing the court where you need to be focusing the court." The same is true of replies that throw everything up against the wall.

Stephen G. Morrison, Esq., Nov. 17, 120, 122: A summary-judgment motion provides an opportunity for speedy, just, and inexpensive resolution. "[T]he point-counterpoint puts a fine focus on that."

Debra Tedeschi Herron, Esq., Nov. 17, 141-143: Point-counterpoint supports the "must" standard for granting, because it gives greater confidence in the process of identifying facts that cannot be genuinely disputed It enables the court to provide a better statement of reasons for granting or denying the motion And changing subdivision (h) to provide a remedy for statements or responses that are not objectively reasonable will avoid the over-long statements that include peripheral facts

Latha Raghavan, Esq., Nov 17, 143, 144-145: Judges know how to control point-counterpoint, avoiding the 200-fact statements. The procedure forces the attorneys to do the work by citing to the record, both in supporting and opposing the motion. If any concern remains, it can be addressed by enhancing the sanctions provision.

Hon. G. Patrick Murphy, Jan. 14, 10-23: The Southern District of Illinois had point-counterpoint. When the local rules were reconsidered a canvass of the bar showed overwhelming support for abandoning the procedure. A cottage industry developed "around what is disputed and what isn't disputed." The nonmovant would respond to statements of undisputed facts by disputing them, and the movant would say they cannot be disputed. There were motions to strike and other procedural problems. "[T]he small players are going to be disadvantaged." The local rule was adopted with the hope of speeding up disposition of summary-judgment motions."[I]t just didn't work for us." The rule was revised. "[S]implicity works. Keep it simple. Have a few rules. Apply them ruthlessly and it will work " "We still grant summary judgments at the same rate. * * * It just takes less time and less money." Rule 56 is not underutilized; "I have never had a civil case where I didn't get a Rule 56 motion " "And it's usually a pretty big job. * * * A summary judgment motion, it's not unusual for it to be * * * 9 inches to a foot thick. I don't know how you avoid that " Nor does it help to allow use of a different procedure by order in the case — "[T]here should be a presumption against rules where the exception eats the rule."

Malinda Gaul, Esq., Jan. 14, 23-27: In the Western District of Texas "what we practice is the shotgun method. Basically you get big summary judgment motions, everything's thrown at the wall and the defense hopes that something sticks." Point-counterpoint is interesting, but it should focus on the material fats that affect decision. "Not every single fact should be lined up. It shouldn't be 200 point/counterpoints." We need a definition of "material," because "what we're seeing is

statements of facts that go on for pages and pages and pages." Once the nonmovant raises something to dispute the fact, "that's it." The case should not be tried on paper

Michele Smith, Esq., Jan. 14, 32, 37-40. Talking with others who have more experience with the practice, has been advised that point-counterpoint "does require more work on the front end," but makes it harder for either side to hide the issues. By forcing attention on the issues it may dissuade a movant from making the motion at all. It may force the nonmovant to take a hard look before the hearing. Because the motion may educate your adversary, requiring a detailed motion may discourage some motions entirely

Margaret Harris, Esq., Jan. 14, 44, 45-46, 51-59: Has not practiced with point-counterpoint, but her partner has. The movant filed 109 statements of material fact; most of the statements were paragraphs. Responding to the statements added 6.5 hours to the time required to respond, and the effort added nothing to the response. We don't get oral argument to buffer the risk entailed by responding to only a few of the stated facts, asserting that disputes as to them defeat the motion. This is not plaintiff-friendly in employment cases. We have to respond to the motion, and then duplicate the effort in responding to the statement. It would be OK if the movant were limited to 4 or 5 facts. "I don't feel comfortable telling a District Court judge I disagree with these nine, and not even say anything about that other 100." This adds work for the judge as well as for the nonmovant. If point-counterpoint survives, the tendency to state too many facts should be diminished by adding a provision that if a genuine dispute is shown as to even one of the stated facts, the motion is denied. That would not be a "sanction." It's something like an estoppel — the movant, having identified the fact as material, cannot then back off and assert that it is not material and summary judgment still can be granted.

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60, 63-66, 67-68, 70-71: Point-counterpoint "does force you to focus on the issues of your case * * *." At times in a point-counterpoint jurisdiction looking at the case in light of the rule has persuaded me not to file the motion. Busy practitioners have lots of work to do; it is good exercise to be forced to look at the case this way. To be sure, "'motion lawyers' do dumping whether it's point/counterpoint or not, and whether it's a 109-page brief, or whether it's a 109 points * * *." I understand that some judge will not like to be told they must adhere to this procedure. National uniformity is valuable, but as a national practitioner I understand that a court does not have to change its practice for me just because I happen to travel around the country; I have to learn the local rules. A numerical limit on the number of facts claimed to be established beyond genuine dispute might prove difficult in complex cases, even with express recognition of the right to seek permission to state more facts. Another way to deal with it would be to impose cost-shifting on a party who states too many facts.

John H. Martin, Esq., Jan. 14, 82, 91-93, 96-99: Has practiced in courts that have point-counterpoint and in courts that do not. Is about to use it in a court that does not have the practice. Point-counterpoint forces counsel to "get analytical about it"; that can dissuade from filing any motion at all. And "it makes lawyers do a better job in filing a motion." It saves costs. But it is not possible to say whether the procedure affects the rate of appellate affirmance of summary judgments. In trying mass tort cases all around the country, particularly air crash cases, a "300 undisputed facts" motion has never appeared. "I cannot conceive of filing one. I cannot conceive of filing a summary judgment motion that has more than a handful of undisputed facts that were material in support of a motion." The absence of a rule requiring this format does not prevent counsel from using it. But national uniformity is important — not only because it may be difficult to learn local practice, but also for the intrinsic advantages of uniformity. Parallel cases are not always consolidated; it is useful to be able to file the same motion in the same form in different courts.

G. Edward Pickle, Esq., Jan. 14, 104, 111-113: One system that should be put aside, although it is practiced in some courts, requires the parties to submit a joint statement of material facts It simply does not work. Point-counterpoint, on the other hand, refines the issues down to clear specifics. "I can't conceive how that does not make a judge's job easier, as oppose to a throw-it-up-against-the-wall motion * * *. [Y]ou know, if you're the opponent to a summary judgment motion, your whole job is to simply try to muddy the waters, to make things as complicated as you possibly can * * *." There is a problem in managing "material," which is a pretty broad term. It may help to focus on the elements of claim and defense. "It shouldn't require a thousand-page litany of material facts to deal with the specific issues, especially if we're talking about a partial summary judgment motion."

Cary E. Hiltgen, Esq., Jan. 14, 121-128: Keeps motions "simple Very few statements of material facts. Now, I get a lot of counter responses with lots of facts because they're trying to develop a fact in issue to keep it from summary judgment being sustained." "I have never had a motion for summary judgment where I did not have point/counterpoint. Again, my statement of facts go right down the elements. I want it simple. Those complicated ones, that just gives you * * * the ability to say, Oh, there's a question of fact."

Stephen Pate, Esq., Jan. 14, 140, 144-145: Point-counterpoint is good. It forces attorneys for both sides to marshal their evidence and analyze the case. And a motion in this form "really helps to educate the judges " It would be extremely foolish for a defense attorney to overplay his hand by offering long lists of undisputed facts. "[W]hen I do it, I keep it short and simple and succinct." "You got to do it right "

Carlos Rincon, Esq., Jan. 14, 147, 152-155: Point-counterpoint is effective It forces lawyers to sit down and evaluate the case. It is a lot of work, but you have to understand your case; this process "ultimately does save time." The concern that defendants will impose huge and unwarranted burdens on small plaintiffs' firms is not accurate. Corporate clients are savvy about monitoring litigation. Filing for summary judgment must be approved by in-house counsel. Firms are required to produce litigation budgets. "And as expensive a summary judgment in practice is, jury trial, and the preptime for jury trial * * * still makes up at least 45 percent of the entire litigation cost of many of the cases that I handle."

Tom Crane, Esq., Jan. 14, 156, 157-158: Has done it a couple of times. The "uncontested facts" were largely irrelevant. The statements were never referred to or really used. And it is difficult to encapsulate inferences in a one- or two-sentence format.

(c)(2): ADD SUR-REPLIES

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: "Of special help with motions filed early in a case would be explicitly to permit sur-replies where the reply supporting summary judgment contains any factual matter beyond the scope of the response."

08-CV-048, Stephen Z. Chertkof, Esq.: "Provide a right of sur-reply for the non-moving party so that the party with the burden of proof at trial is fully heard, rather than giving the moving party the first and last word and a disproportionate ability to frame the issues."

08-CV-075, Mark Hammons, Esq.: Present practice allows a nonmovant to respond to new fact materials or new legal argument offered in a movant's reply. This opportunity is essential; compare present Rule 56(c), which allows a nonmovant to serve opposing affidavits before the hearing day. The rule should provide that the movant's reply may not contain new evidentiary materials or new

legal arguments, but also provide that if the reply violates this restriction the court must either exclude the new materials and arguments or allow the nonmovant to respond

08-CV-109, Ellen J. Messing, Esq , for Seven Massachusetts Lawyers: As summarized with the point-counterpoint comments — movants commonly raise new and central points that require a sur-reply.

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.. Sur-replies should be permitted, but both reply and sur-reply should be confined to responding to materials in the opposing submission. "NELA members have complained that they have been 'sandbagged' by primary brief which had provided abbreviated or unclear statements of facts or arguments, tactically written to prevent cogent or complete responses, with teh Reply Brief clarifying or even adding arguments and providing additional authorities in support of those arguments."

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice. The plaintiff has the burden at trial, but the proposed structure gives a moving defendant the first shot and last shot. "A surreply opportunity, at the least, should be permitted, in this duel of 'facts,' to give each side the same number of shots."

08-CV-156, Brian P. Sanford, Esq.: "To more closely simulate the burden of proof at trial, the court should allow the party with the burden of proof a sur-reply to a motion for summary judgment." Often the motion relies on cross-examination of the plaintiff at deposition. "The plaintiff is not allowed to present his or her direct testimony until after defendant's selection of plaintiff's cross-examination and the plaintiff is chastised if gaps are filled, and punished if there is any change in testimony."

08-CV-157, Margaret A. Harris, Esq.: A sur-reply should be added as a new (b)(4).

08-CV-179, Robert J. Wiley, Esq.: Plaintiffs usually go first at trial. In employment cases usually the defendant goes first on summary judgment. Plaintiffs should be allowed to surreply.

08-CV-183, Professor Eric Schnapper: The comment is supported by a lengthy paper. The paper develops a theme heard in may comments: often the movant adduces its most important evidence in supporting the reply. The sequence is a motion that ignores some or all of the evidence the nonmovant will rely on; a response that adduces the nonmovant's evidence; and a reply that spells out the defects the movant relies on to undermine the probativeness of the nonmovant's evidence. The nonmovant must have an opportunity to reply — Rule 56(b) should be modified to allow a fourth filing.

Brian Sanford, Esq., Jan. 14, 27 at 30-31: A defendant's motion for summary judgment "turns trial practice on its head." The defendant frames the issues, the plaintiff gets one chance to respond, and then the defendant has the last word. The Eastern District of Texas local rules provide an automatic sur-reply. This should be generally available.

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: The point-counterpoint procedure gives the movant — usually the defendant — the first and last word. But the plaintiff has the burden of proof. "[T]he plaintiff should always have the last word as s/he does at trial."

Steve Chertkof, Esq , Nov 17, 34, 51. There should be a right of sur-reply. And oral hearings.

(c)(3). ACCEPT FOR MOTION ONLY

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance of a fact for purposes of the motion only No one will be willing to accept a fact for purposes of the motion only

08-CV-071, Hon. Paul J. Kelly, Jr.: Allowing a party to accept a fact only for purposes of summary judgment may make the summary judgment process more efficient, but it will have two undesirable effects. Cautious counsel will accept only for purposes of the motion, while accepting facts generally would make trial more efficient. And accepting facts only for purposes of the motion will reduce the effectiveness of proposed Rule 56(g) — a general acceptance would enable the court to find a fact not genuinely in dispute, while an acceptance for purposes of the motion only defeats this prospect.

08-CV-161, Federal Magistrate Judges Assn.: Allowing a party to accept or dispute a fact either generally or for purposes of the motion only is beneficial.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To protect against trapping a party who accepts for purposes of the motion only, Rule 56(g) should be revised to provide that the court may not "state" a fact if a party accepted it for purposes of the motion only.

08-CV-175: Hon. Marcia S. Krieger: Rule 56 should provide for a joint stipulation of facts and a joint request for a legal determination. "I often offer this when the dispute is limited to an application of the law — ERISA, declaratory judgment/insurance coverage, contract interpretation cases, agency appeals." The parties simultaneously file opening briefs, and simultaneously file reply briefs.

08-CV-176, State Bar of California, Committee on Administration of Justice: The Committee Note states that acceptance for purposes of the motion only does not provide a basis for an order under Rule 56(g), but this relationship is not clear from the rule text. Rule 56(g) should be revised "to make it clear that a conditional acceptance under subdivision (c)(3) cannot provide the basis for an order under subdivision (g)."

(c)(4): SUPPORTING MOTION AND RESPONSE

08-CV-037, Professor Adam Steinman: Proposed (c)(4)(A)(ii) allows a movant to show "that an adverse party cannot produce admissible evidence to support the fact." **(1)** This language can be misread in ways that, contrary to the Committee's intent, will change the moving burden. A party who bears the trial burden of production
should not be able to prevail simply by showing that the nonmovant does not have evidence; the movant must show that it can carry its trial burden to the point of shifting the trial burden of production to the nonmovant. This part of the proposal is intended to apply only to a motion by a party who does not have the trial burden of production; it should say so expressly. (Proposed rule language is included.) **(2)** A second shortcoming is that the proposed language may imply that the movant need not cite to any materials in the record. The Celotex opinion is clear that the movant always has the initial responsibility of identifying the materials that show there is no genuine dispute. (Again, proposed corrective language is included.)

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Even after stating that material is not admissible, the response or reply must refute the fact as if the

supporting material were admissible, lest summary judgment be granted. In fairness, there should be a ruling on admissibility before having to respond on the merits. (And it is asked whether the challenge must be stated in the brief, impairing the best use of limited pages.)

08-CV-183, Professor Eric Schnapper: The paper supporting this comment includes a draft of Rule 56 provisions, including detailed provisions for Celotex no-evidence motions. The starting point is that "the moving party demonstrates that at trial the non-moving party [who has the burden of proof] will not have legally sufficient evidence on the basis of which a reasonable jury could find for the non-moving party." The motion must "(a) state with particularity the fact or facts regarding which the moving party asserts that the non-moving party will lack sufficient evidence at trial, (b) set forth the discovery undertaken by the moving party to identify the evidence regarding such facts which the non-moving party would have at trial, (c) set forth why the non-moving party bears the burden of proof regarding the fact or facts in question, and (d) be accompanied by an affidavit and/or documents reflecting any information in the possession of the moving party with regard to those fact or facts, including information that might lead to the identification of relevant admissible evidence. If the moving party has no such information, it shall so state in a sworn affidavit." (Note that (d) would go part way back to the "heartburn" aspect of the initial disclosure rule in force from 1993 to 2000.)

08-CV-161, Federal Magistrate Judges Assn.: Expresses confusion as to the intended meaning of (c)(4)(A)(ii), and recommends that it be revised to be clearer.

(C)(4)(B)· MATERIALS NOT CITED

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A one-way notice provision makes little sense. "Notice to the parties should be required if the court goes beyond the material cited, whether doing so to grant or to deny summary judgment."

(C)(5): STATE CITED MATERIAL NOT ADMISSIBLE

08-CV-037, Professor Adam Steinman: Summary-judgment materials need not themselves be in a form admissible at trial — an affidavit or declaration ordinarily is inadmissible hearsay, but suffices. Courts now divide on the use of material that is not in a form admissible at trial, but that can be reduced to a form admissible at trial — an affidavit that recounts the hearsay statements of a different witness is surely relevant if the proponent "indicates an intent to call at trial the individual who made the out-of-court statement." The cure is to eliminate (c)(5) "[b]ecause the use of trial admissibility standards at the summary judgment phase is an open question under the current version of Rule 56 * * *."

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The language should be changed to parallel subdivision (c)(6): " * * * may state that the material cited to support or dispute the fact is would not be admissible in evidence." This would make it clear that evidentiary determinations at the Rule 56 stage would be made "in anticipation of whether a foundation for admissibility will be available for the evidence at trial."

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: Most courts agree that material may be considered so long as it can be reduced to an admissible form at trial. (c)(5) should be amended to allow a statement that material "could not be reduced to a form admissible in evidence at trial."

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A clear mechanism to challenge admissibility is useful. But there should be meaningful notice of the basis for the challenge. The rule should include: "together with a concise citation to or identification of the basis for the challenge "

08-CV-162, Federal Practice Comm., Dayton Bar Assn.· Approves allowing an objection to admissibility without filing a separate motion to strike.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To parallel (c)(6), and to clarify that rulings on admissibility anticipate whether a foundation for admissibility will be available for the proffered evidence at trial, this should be revised: "A response or reply to a statement of fact may state that the material cited by the adverse party to support or dispute the fact would not be admissible in evidence "

Rule 56(d)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: When a party seeks time for additional discovery, "we believe that it would be helpful to require some specification of the material facts that the opposing party expects to discover."

08-CV-055, Gregory P. Joseph, Esq.: "There is no convincing reason why 56(f) has to be renumbered 56(d)." Future computer searches will be more complicated

08-CV-082, Robert S. Mantell, Esq.: Points to First Circuit cases said to refuse an alternative response that both asserts the nonmovant has sufficient evidence to defeat summary judgment and also requests an opportunity for further discovery. A nonmovant's request for Rule 56(d) relief should not be taken as a tacit admission that the nonmovant cannot defeat summary judgment without the relief Nor should a response on the merits waive the right to request Rule 56(d) relief This sentence should be added: "A nonmovant may seek relief under this provision while arguing in the alternative that the nonmovant has produced sufficient evidence requiring denial of the motion "

08-CV-142, Hon. David F. Hamilton: Some comments suggest a nonmovant should be permitted to respond in the alternative — the motion should be denied, but if the court is inclined to grant it I would have more time for discovery. "[I]f an alternative response is a permissible response, * * * I expect it will become the standard response." A decision to grant summary judgment will become an advisory opinion — more time is allowed for discovery, the parties brief the motion anew, and the court will issue a second and real decision "Please — make clear that this is not a permissible response."

08-CV-157, Margaret A Harris, Esq.: This provision, as present Rule 56(f), presents the problem that a nonmovant does not have a clear mechanism to obtain a ruling on the motion for more time before having to file a response to the Rule 56 motion. "And when there is a response on file, lower courts often see that as sufficient and thus deny the 56(f) motion — leaving the non-movant with a less-than otherwise available record should summary judgment be granted."

08-CV-183, Professor Eric Schnapper: Present practice is clearly unsatisfactory. Things work well if a sensible order is imposed by a scheduling order. Otherwise the movant controls timing. There is every incentive to move before potentially inculpatory evidence has been discovered — and often the movant is the one who knows this. "Summary judgment thus operates as sort of a retroactive discovery cutoff * * *. The filing of a summary judgment motion summarily ends the record

building process." With only a short time to respond, the nonmovant is usually unable to do more than summarize the information it has in hand. "[T]he key weapon for preventing the disclosure of adverse information is delay * * *. A moving party's control over the timing of summary judgment can be outcome determinative if it is used to stop the clock before the process has run its course." The nonmovant ordinarily must respond at the same time as it litigates its request for additional time. "Such a system would be inconceivable in the process of creating a trial record. No court would permit a litigant to control the trial date and keep it secret from the opposing party until a few weeks before trial." Even making a Rule 56(f) request is discouraged by the need to divert precious time from preparing a response to the motion. Some lawyers may be discouraged by the fear that even asking for more time is inconsistent with the position that the nonmovant does have sufficient evidence. A number of courts, moreover, address Rule 56(f) requests by asking whether the nonmovant has been sufficiently vigorous in pursuing discovery — that is inconsistent with the safeguards built into the procedures for imposing discovery sanctions. "At best the Rule 56(f) process confers on the district judge discretion to cut off the record-building process." That is fundamentally different from the process at trial. And at worst, the system "creates significant institutional pressures on the judge to proceed to decide the summary judgment motion on the merits (at the time of the moving party's choosing), as it would any other motion, rather than start the process over again." (This is followed by a longer plea for scheduling orders that establish "a structure more similar to the predictable and equitable record building process that precedes a JML motion.") The supporting paper includes a draft rule provision: "within 30 days after the filing of a motion for summary judgment, the non-moving party shall either file a response to that motion, or submit a request under Rule 56(f) or otherwise for additional time for investigation of discovery. If such a request is made, a response to the motion itself shall be filed within the period determined by the court."

Rule 56(e)

DEFECTIVE MOTIONS

08-CV-016, Joseph D. Garrison, Esq.: Proposes the rule should include a motion to strike an abusive submission. The motion would toll the time to respond. The problem is one encountered in representing plaintiffs in individual employment actions. It is illustrated by cases in which defendants submitted far too many allegedly material facts — the numbers encountered in his own practice have ranged from 92 through 107, 237 (a case involving 8 individual plaintiffs), 246, and 292. References were made to the record for each fact, "sometimes correctly, sometimes not." The work of responding entails substantial costs to the clients. A motion to strike an abusive submission will, to be sure, lead to collateral litigation in the short term. But once defense firms learn the lesson, they will conform to sensible practices. Other sanctions are not needed — it is enough that the lawyer who presents an abusive motion "would have to confront the client with the need to do it over."

08-CV-123, Hon. Barbara B. Crabb: The only reason for considering a fact undisputed is for purposes of deciding the motion (2) and (3) should be combined "so that it is clear that the court will not only consider the fact undisputed but may proceed to grant summary judgment for the movant on the basis of that undisputed fact and others." (It is not clear whether this assumes that the court will always consider the fact undisputed.)

08-CV-176, State Bar of California, Committee on Administration of Justice: "[S]upports the proposed amendments, for the reasons stated in the Advisory Committee report."

Rule 56(f)

NOTICE

08-CV-123, Hon Barbara B. Crabb: What kind of notice is contemplated? Would a local rule or procedure saying the court can do these things suffice? "Or would it be necessary to pause between deciding the motion and making it public to give specific notice to the litigants * * *? Does notice have to come from the court and does it have to be anything more than the losing party's being 'on notice that she had to come forward with all her evidence?' Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) "

(F)(1). GRANT FOR NONMOVANT

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) "[T]he rule should provide that a court 'should' grant summary judgment for either party in the event that the motion and briefs show that they are entitled to it, either globally or on any specific issue, regardless of whether they are the movant or the respondent."

(F)(1): GRANT FOR NONMOVANT

08-CV-175, Hon. Marcia S. Krieger: It is unwise to require notice before granting summary judgment for the nonmovant. The movant takes that risk.

(F)(2): GRANT OR DENY ON GROUNDS NOT IN MOTION

08-CV-161, Federal Magistrate Judges Assn.: This provision requires notice and opportunity to respond before either grant or denial on grounds not raised by the motion. Proposed (c)(4)(B) requires notice before granting on materials not cited, but not before denying on materials not cited The distinction is so subtle that it will give rise to arguments "[T]hese two subsections should be consistent."

(F)(3): CONSIDER ON COURT'S OWN

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Codifying the practice that allows a court to initiate summary judgment without a party's motion "would add greatly to whatever cost and delay the parties judged they could handle before the court intervened " The parties may understand the facts far better than the court, and understand that the case is not appropriate for summary judgment.

08-CV-133, Sharon J. Arkin, Esq.: "One of the most frightening changes proposed is to permit judges to initiate summary judgment proceedings sua sponte." "Because the parties know their case best, it is for them to determine whether a summary judgment motion is appropriate."

08-CV-183, Professor Eric Schnapper: The supporting paper, but not the formal comment, expresses concerns that seem to reflect the risk of overlooking information not called to the court's attention because the motion did not present the issues the court addresses. The problem seems to be lack of notice and opportunity to respond,
something proposed Rule 56(f) does require

Rule 56(g)

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance

of a fact for purposes of the motion only No one will be willing to accept a fact for purposes of the motion only.

08-CV-123, Hon Barbara B. Crabb: "[W]hat does the committee contemplate would be the relationship between facts treated as 'established in the case' and (c)(3), which talks of accepting or disputing a fact either generally or for purposes of the motion only"?

08-CV-176, State Bar of California, Committee on Administration of Justice: (1) (g) seems properly limited to facts, not issues, claims, or defenses. If so, the title "Partial Grant of Motion" may be misleading — "Order Establishing Material Fact" would be better. (2) "~~including an item of damages or other relief~~" could be read to refer to something other than facts; these words should be deleted. (3) The Committee Note refers to "facts ~~and issues~~"; the reference to issues should be deleted.

Rule 56(h)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: "We would like to see some further explication of 'expenses' in the Rule or Committee Note and support the shifting of all out-of-pocket costs, where relevant, including printing fees, deposition expenses, travel and subsistence expenses, fees for experts, etc."

08-CV-039, Professor Alan B. Morrison· Generally does not favor sanction motions. But if they are to be made, the problem is not bad-faith affidavits or declarations. "If there is a problem, it is that a motion for summary judgment is made (or in some cases an opposition filed) solely for purposes of delay, especially when made by defendants who have every incentive to delay. I would change 'affidavit or declaration' to 'motion or response.'" The focus would be on the entire motion or response, not one part.

08-CV-055, Gregory P. Joseph, Esq.: By saying that the court "may" order sanctions if satisfied that an affidavit is submitted in bad faith or solely for delay, the rule "appears to contemplate that some bad faith or dilatory affidavits may be permissible " "It is time to accept that Rule 56(h) is a relic. The area is covered by Rule 11 and multiple other sanctions powers. I would just retire it."

08-CV-061, Lawyers for Civil Justice and U.S Chamber Institute for Legal Reform: The statement of undisputed facts procedure of proposed Rule 56(c) may allow a case to survive too long through extensive discovery and motion practice. There may be "frivolous motions" by any party. A nonmovant may insist on discovery to search for facts that do not exist or are immaterial. An indisputable fact may be contested without support. "[A] party that is in a position to know the undisputed facts" but demands additional discovery should bear the costs imposed on the movant. A party who disputes facts without reasonable justification should bear the costs. It is a mistake to rely on subjective intent, as do the limited provisions of present Rule 56(g) and proposed Rule 56(h). The rule should provide that reasonable expenses, including attorney fees, may be awarded if "a motion, response, reply, affidavit or declaration under this rule is submitted without reasonable justification."

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel in charge of global litigation for Johnson & Johnson, urges "a reasonable fee-shifting rule" to tax the losing party when "summary judgment is defeated or deferred based on an assertion that can be said to be objectively unreasonable."

08-CV-045, Debra Tedeschi Herron, Esq.: Rule 56 should "provide for a reasonable cost allocation when materials are submitted without reasonable justification, in place of the current 'bad faith' standard."

08-CV-050, Stephen G. Morrison, Esq.: "[T]he Committee should adopt an objective tool in teh form of an allocation of expenses triggered by a party's submission of materials without reasonable justification."

08-CV-110, G. Edward Pickle, Esq.: Sanctions should be imposed for "non-responsive arguments and obfuscation."

08-CV-124, Wayne B. Mason, Esq. for Federation of Defense & Corporate Counsel: "Courts are often disinclined to make a finding of bad faith based on a subjective intent." The rule should provide for "cost shifting when summary judgment papers are submitted without reasonable justification." Rule 11 provides sufficient basis for sanctions.

08-CV-127, Michael R. Nelson, Esq.: Sanctions should be expanded beyond bad-faith affidavits and declarations, authorizing the court to order payment of reasonable expenses, including attorney fees, if a motion, response, reply, or affidavit or declaration is submitted without reasonable justification.

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Approves recognizing current practice treating sanctions as a matter of discretion.

08-CV-167, Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel: "We favor a cost shifting when summary judgment papers are submitted without reasonable justification." The allocation should be "objective, reasonable and discretionary." But Rule 11 should remain as the source of sanctions.

Theodore Van Itallie, Esq., Nov. 17, 105, 111-112: There should be an appropriate cost-shifting standards both for inappropriately made motions and for oppositions that are objectively unreasonable. Cost-shifting will lead to greater care in deciding whether to make the motion and in how to oppose it.

Stephen G. Morrison, Esq., Nov. 17, 120, 126-127: Rule 56(h) should be modified to include an objective standard for cost shifting. This would not be a punitive rule, not a bad-faith rule, not a subjective standard, but cost-shifting when motion or response is made "without reasonable justification." "As you know, Rule 56(g), nobody ever finds bad faith on the part of the lawyers, and so it's an ineffective rule."

Debra Tedeschi Herron, Esq., Nov. 17, 141, 142-143: An objective reasonableness test should be adopted, providing consequences for over-long statements of undisputed facts or similar responses. That will make the point-counterpoint procedure effective.

Latha Raghavan, Esq., Nov. 17, 143, 145: If there is any lingering doubt about point-counterpoint procedure for fear of over-long statements or responses, "you may want to look at your sanction section," rewording it so "attorneys understand that the only things that should be put in the material statement of facts are things that will lead to the ultimate result and nothing else."

Alfred W. Cortese, Jr., Esq., for Lawyers for Civil Justice, Nov. 17, 153, 161-162: Members are divided, but on balance "we think the system would benefit by having a reasonable cost allocation mechanism that would discipline adherence to these new rules and also the filing of motions." There

is a fear that only "target defendants" would incur these orders for making objectively unreasonable motions, but the risk is worth it to achieve a discipline that encourages adherence to the rules, "particularly when we see many instances in which there are frivolous responses to motions, as well as in some instances frivolous motions * * * "

Wayne Mason, Esq , for Federation of Defense & Corporate Counsel, Jan. 14, 60, 75-76: Cost-shifting is the best way to deal with the lawyer who files an unreasonably long statement of undisputed facts. This is not as a sanction — Rule 11 suffices for that. It compensates the other party if a motion or response is inappropriate.

G. Edward Pickle, Esq., Jan. 14, 104, 112: There should be a cost allocation mechanism for abuse of the system.

Staged Discovery

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: Rules 16 and 26 on scheduling orders, scheduling conferences, and pre-discovery conferences should be amended to direct the parties to at least consider the possibility of phased discovery, directing attention first to the "real frailties" in the case that may lead to disposition by summary judgment.

Style

08-CV-056, Hon Frank H. Easterbrook: "as to" is misused in draft 56(a). Make it: "no genuine dispute ~~as to~~ about any material fact."

Other

08-CV-057, R. Matthew Cairns, Esq.: Not only should summary judgment be made mandatory by adopting "must" in the standard. "Must" "should also extend to state court claims that have been joined in the federal action, rather than having those claims remanded to the state court should the federal claims be dismissed * * *."

TAB - 4A

RULE 26 ISSUES

Although the Rule 26 expert disclosure and discovery proposed amendments attracted less commentary than the Rule 56 proposals, they did receive considerable attention. A summary of the testimony and public comments regarding the Rule 26 amendments should be included in the agenda book after this memorandum.

After the final public hearing in San Francisco, the Committee met on Feb. 3, 2009, to discuss a number of Rule 26 issues that had been raised, as should be reflected in the minutes included in this agenda book. At that time, there was no sentiment for retreating from the basic policy choice to limit the intrusion of discovery into certain aspects of interaction between lawyers and expert witnesses, and into the initial drafting of expert reports or disclosures.

A number of other issues discussed on Feb. 3 did remain, however, and the Discovery Subcommittee met by conference call on March 5, 2009, to address those issues and others that appeared to warrant attention. The notes of that conference call are included at the end of this memorandum. On the basis of this conference call, the published draft was revised and re-circulated to the Subcommittee. Based on that circulation, some small further revisions of the Committee Note were made. The Subcommittee proposes that the Advisory Committee endorse approval of the revised amendment proposal included in this memorandum.

The few changes to the published draft are briefly explained by footnotes in the revised proposal, which immediately follows. A more detailed discussion of several of these changes is reflected in the notes on the March 5 conference call, which follow the proposal itself. By way of initial introduction (in the order they appear in the revised amendment proposal that follows) the following enumeration of changes may assist the full Committee in its initial review of the proposed revisions:

(1) Replacement of "the Rule 26(a)(2)(A) disclosure" with "this disclosure" in proposed Rule 26(a)(2)(C): Professor Kimble, the Consultant of the Standing Committee's Style Committee, recommended this change to achieve consistency with the treatment elsewhere of cross-references in the rules, and the Subcommittee saw no substantive issue with the change.

(2) Substitution of "written or electronic" for "regardless of the form" in proposed Rule 26(b)(4)(B): Because the published rule provided protection for draft reports or disclosures "regardless of the form" of the draft, the published Committee Note raised the possibility of an "oral draft." The Subcommittee proposes changing (B) to refer to "written or electronic" drafts because it became concerned that it could not say what an "oral draft" would be. Anything that the amendment seeks to protect should be encompassed within protection for "written or electronic" drafts, which are the only type the Subcommittee has heard about. To the extent an "oral draft" would really consist of communications between the lawyer and the expert witness, the pertinent protections come from (C), not (B). And (C) is explicitly limited so that inquiry is allowed about three specified topics. If protection does not apply under (C), retaining "regardless of the form" in (B) creates a risk that (B) might be invoked to nullify the discovery (C) seeks to assure. If, for example, a lawyer contends that all oral interaction with the expert witness was part of the preparation of an "oral draft" of the expert's report, (B) might be advanced as an objection to discovery about communications that (C)(i), (ii), or (iii) seek to assure can occur. Substituting "written or electronic," on the other hand, seems to provide all the protection we want to provide under (B) and to obviate the undesirable practices that have grown up in efforts to avoid creating a "draft report." Venturing beyond that to provide protections for "oral reports" creates uncertainties best avoided by making this change.

(3) Restyling of Rule 26(b)(4)(C)(i), (ii), and (iii): The first letter in each of these items has been changed to lower case per restyling recommended by Prof. Kimble.

(4) Revisions of Committee Note to avoid implication that Rule 26(a)(2)(C) summary of facts applies to all facts known to a "hybrid" fact/opinion expert witness: At two points, the Committee Note was clarified to defeat arguments that the witness could not testify to any facts not included in the new attorney disclosure regarding opinions to be offered by witnesses not required to provide a full expert report. The concern was that sometimes lawyers encounter difficulty communicating with these nonretained experts, and that it should be made clear not only that the new provision only requires a "summary," but that this summary requirement only applies to the facts that bear on the opinion to be offered under Fed. R. Evid. 702, not to all factual evidence the witness may offer.

(5) Revision of Committee Note regarding replacement of "regardless of the form" with "written or electronic" in Rule 26(b)(4)(B): This change is explained as ensuring that Rule 26(b)(3)'s limitation of its protections to "documents or tangible things" does not limit the new rule's protection with regard to electronic draft reports or disclosures.

(6) Addition of Committee Note language regarding communications between attorney and assistants of expert: Addressing a concern raised during the public comment period, Committee Note language was added to make clear that the protected "communications" covered by the rule include those with the expert's assistants.

(7) Addition of Committee Note language making clear that the discovery revision should have no effect on Daubert decisions: Addressing another concern raised by some, a sentence was added affirming that the gatekeeping function remains the same.

(8) Deletion of reference to use at trial: The paragraph in the published draft Committee Note regarding use at trial is deleted as unnecessary and arguably inappropriate in a note to a Civil Rule about discovery.

Subcommittee consideration of other possible changes: The Subcommittee also gave serious consideration to a number of additional possible changes to the published preliminary draft, as described more fully in the notes of its telephone conference. Ultimately it decided that further changes were not appropriate. In addition, the Subcommittee unanimously concluded that another restyling suggestion from Prof. Kimble -- to combine Rule 26(b)(4)(B) and (C) into a single provision -- would have undesirable substantive effects, particularly given the change in (B) to provide protection only for "written or electronic" drafts, while (C) protects communications between attorneys and retained expert witnesses "regardless of the form of the communications " This discussion is reflected in the notes of the March 5 conference call, and an attempt is made there to show how the rule would have looked under Prof. Kimble's restyling.

Revised Rule 26 Amendment Proposal
April 20-21 Advisory Committee Meeting

[Additions to rule language are indicated by double underlining, and deletions to initially proposed rule language are indicated by underscoring and strikeover Changes to Committee Note language are indicated by underscore for additions and strikeover for deletions.]

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures

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(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) *Witnesses Who Must Provide a 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 facts or 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) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this ~~the~~ ~~Rule 26(a)(2)(A)~~ disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under

Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D~~C~~) Time to Disclose Expert Testimony A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E~~D~~) *Supplementing the Disclosure* The parties must supplement these disclosures when required under Rule 26(e).

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(b) Discovery Scope and Limits

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(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may

be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect written or electronic drafts of any report or disclosure required under Rule 26(a)(2)~~, regardless of the form of the draft~~.[1]

(C) *Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) ~~r~~Relate to compensation for the expert's study or testimony;

(ii) ~~i~~Identify facts or data that the party's

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[1] This revision of the rule language is designed to avoid possible complications from the suggestion that there is such a thing as an "oral draft" of an expert report. To the extent it is important to protect oral interactions between counsel and the expert witness, proposed Rule 26(b)(4)(C) should provide sufficient protection. It provides protection for communications "in any form." Drafts would ordinarily be either written or electronic, and should be protected by this revised provision.

attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

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

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

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

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

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

(ii) for discovery under (DB), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel. Together, these changes provide broadened disclosure regarding some expert testimony and require justifications for disclosure and discovery that have proven counterproductive.

The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970, permitting an interrogatory about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Influenced by the Committee Note to Rule 26(a)(2), many courts read the provision for disclosure in the report of "data or other information considered by the expert in forming the opinions" to call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports.

The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and

confidential case analyses, often called "core" or "opinion" work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their ~~effective~~[2] work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Rule 26(a)(2)(B) is amended to specify that disclosure is only required regarding "facts or data" considered by the expert witness, deleting the "or other information" phrase that has caused difficulties. Rule 26(a)(2)(C) is added to mandate disclosures regarding testimony of expert witnesses not required to provide expert reports. Rule 26(b)(4) is amended to provide work-product protection for draft reports and attorney-expert communications, although this protection does not extend to communications about three specified topics.

Rule 26(a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment to Rule 26(a)(2)(B) is intended to alter the outcome in cases that have relied on the 1993 formulation as one ground for requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit the disclosure requirement to material of a factual nature, as opposed to theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

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[2] This word was removed as unnecessary.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of ~~regarding~~ the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions.[3] It requires disclosure of information that could have been obtained by a simple interrogatory under the 1970 rule, but now depends on more cumbersome discovery methods. This disclosure will enable parties to determine whether to take depositions of these witnesses, and to prepare to question them in deposition or at trial. It is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement, reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable. *See Minnesota Min. & Manuf. Co. v Signtech USA, Ltd* , 177 F.R.D 459, 461 (D. Minn. 1998) (requiring written reports from employee experts who do not regularly provide expert testimony on theory that doing so is "consistent with the spirit of Rule 26(a)(2)(B)" because it would eliminate the element of surprise); *compare Duluth Lighthouse for the Blind v. C.B. Bretting Manuf Co* , 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a report requirement because "we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct"). With the addition of Rule 26(a)(2)(C) disclosure for expert witnesses exempted from the report requirement, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(1)(A) and provide the disclosure required under Rule 26(a)(2)(C) with regard to their expert opinions. This disclosure obligation does not include facts unrelated to the expert opinions the witness will present.[4]

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[3] This sentence was revised to clarify that the fact-disclosure requirement applies only to those facts that support the opinion to be offered, and to emphasize that only a "summary" is required.

[4] This added sentence reaffirms (along with the language added at ftn. 3 above) that the disclosure obligation is limited to the facts bearing on the expected opinion

Rule 26(a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies to any draft report or disclosure, in written or electronic form, without regard to whether it would be considered a "document or tangible thing" within Rule 26(b)(3)(A) ~~regardless of the form of the draft, whether oral, written, electronic, or otherwise~~.[5] It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide ~~comparable~~[6] work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery ~~routine wholesale discovery~~.[7] The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. Protected "communications" include those between the party's attorney and assistants of the expert witness.[8] The rule provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). It does

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[5] This change in Note language recognizes the revision in Rule 26(b)(4)(B) that limits the rule to written or electronic drafts. It removes from the Note the notion of an "oral" draft that was previously included.

[6] The word "comparable" is deleted here to avoid confusion since the "regardless of the form" language has been removed from (B), and the protection is not, in that sense, comparable.

[7] This language was changed because "routine wholesale discovery" seemed somewhat colloquial and perhaps inappropriate for a Committee Note.

[8] This addition is designed to address concerns raised during the public comment period about protecting attorneys' communications with assistants such as graduate students or staff of the expert witness.

not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

Rules 26(b)(4)(B) and (C) apply to all discovery regarding the work of expert witnesses. The most frequent method is by deposition of the expert, as authorized by Rule 26(b)(4)(A), but the protections of (B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v Merrell Dow Pharmaceuticals, Inc* , 509 U.S. 579 (1993), and related cases.[9]

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a particular expert witness will testify on that party's behalf in several of the cases. In such a situation, a court should recognize that this protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be

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[9] This sentence is added to address any concerns that *Daubert* analysis might be affected by this rule change.

the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in ~~of~~ the present case, would be included. This exception includes compensation for work done by the expert witness personally or by another person associated with the expert in providing study or testimony in relation to the action. Compensation paid to an organization affiliated with the expert is included as compensation for the expert's study or testimony. The objective is to permit full inquiry into such potential sources of bias.

Second, consistent with Rule 26(a)(2)(B)(ii), under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. In applying this exception, courts should recognize that the word "considered" is a broad one, but this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel. And the exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed For example, the party's attorney may tell the expert witness to assume that certain testimony or evidence is true, or that certain facts are true, for purposes of forming the opinions they will express. Similarly, counsel may direct the expert witness to assume that the conclusions of another expert are correct in forming opinions to be expressed. This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

The amended rule does not absolutely prohibit discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures. But such discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A contention that required disclosure or

discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(B) or (C), although it may provide grounds for a motion under Rule 37(a).

In the rare case in which a party does make a showing of such a substantial need for further discovery and undue hardship, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

~~Rules 26(b)(4)(B) and (C) focus only on discovery. But because they are designed to protect the lawyer's work product, and in light of the manifold disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, it is expected that the same limitations will ordinarily be honored at trial. *Cf. United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial discovery).~~[10]

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

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[10] This paragraph is deleted on the ground that it may be inappropriate for a Committee Note to a Civil Rule to instruct on admissibility at trial -- more commonly governed by the Evidence Rules -- and as unnecessary to cure the problems addressed by these amendments to the discovery rules.

TAB - 4B

Notes of March 5 Conference Call

Discovery Subcommittee
Advisory Committee on Civil Rules

The Discovery Subcommittee of the Advisory Committee on Civil Rules had a conference call on March 5, 2009. Participating were Judge David Campbell (Subcommittee Chair), Judge Mark Kravitz (Chair of the Advisory Committee), Chilton Varner, Daniel Girard, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Assoc. Reporter of the Advisory Committee). Anthony Valukas, a member of the Subcommittee, was unable to participate but submitted reactions on the issues to be discussed in advance of the conference call.

Judge Campbell opened the discussion by suggesting that the topics be covered in the order specified in Prof. Marcus's Feb. 26 memo.

(1) Limiting protections of Rule 26(b)(4)(C) to retained experts

This issue was introduced in the materials for the conference call as involving easy drafting if attorney communications with all witnesses who may offer testimony covered by Fed. R. Evid. 702 are to be covered by the new protection. But expanding the protection to this extent might well be overbroad, and some who favored considering an extension to nonretained expert witnesses wanted it only for in-house experts. Indeed, that was much of the argument in favor of expansion -- that lawyers need to talk to these employees of the client and that some states' attitude on the control group test may mean that there is no attorney-client protection for such conversations. Work product protection might often apply, but that could possibly be debated also. Drafting a rule that provides protections only to some experts not required to prepare a report but not to others would be considerably trickier than providing it for all who would offer expert opinion testimony. Would only "employees" be eligible? How about retired former employees? How about "independent contractors"?

Even if suitable drafting could workably distinguish between nonretained experts who are covered and those who are not, real concerns remain. As is often the case, an enduring problem is the "hybrid" fact/expert witness. The discussion during the Feb. 3 meeting touched occasionally on such problems. If one considers that at some companies or organizations most or all of those involved in the activities giving rise to a lawsuit might be considered experts to some extent, the sweep of affording protection under the rule to otherwise unprotected communications could be quite broad. And it could be that, when they are really functioning in a manner like the role of outside experts, one would consider these in-house experts "retained or specially employed" and therefore subject to the report requirement and also protected by proposed 26(b)(4)(C). During the hearings, several witnesses favoring expansion of the protection also acknowledged that they could largely solve the problem by "retaining" the witness (although this would mean that the full report requirement would apply with regard to that witness). Whether there is really a problem here could be debated, and it does not seem to have been one we heard about before. The New Jersey rule applies only to experts "retained or specially employed," and we were told during the San Francisco hearing that this limitation had caused no difficulty in New Jersey.

One further thought related to the next topic: To the extent the Rule 26(b)(4)(C) protection applies also to attorney communications with "assistants" of the expert witness, extending it to expert witnesses not specially retained may include an additional and substantial layer of party employees who are the "assistants" of the employees who will -- in whole or in part -- give expert opinion testimony. If those experts or their assistants were also actors involved in the underlying events, that protection could prove important.

None on the call favored expanding the communications protection in (C) to include experts not specially retained.

There was discussion whether the transmittal to the Standing Committee should express regret that it seemed too late in the process for such an expansion. Perhaps it would be desirable to suggest in that way that future expansion was a possibility depending on experience under the amended rule. This observation prompted the reaction that such expansion might be dubious: "Do we really want to provide that protection for communications with the police officer or the treating physician?"

The response was that we do not, but that things are different when the communication is with the client's employee who will give expert testimony. As to that concern, however, it was noted that a major concern of many who raised this issue during the public comment period seemed to be that the attorney-client privilege might not be a broad as they would prefer. If so, it is dubious for the rules to be designing work-product protection to plug holes in the attorney-client privilege. They are really not the same thing. It was also noted that, with regard to in-house expert witnesses, it often will be possible to take extra measures to ensure that they are "specially retained" to assist the lawyer and provide expert testimony. Then the Rule 26(a)(2)(B) report requirements would apply to them, but so would the communications protections of Rule 26(b)(4)(C). Changing our rule proposal to obviate that step is dubious. Finally, it was noted that trying to provide communications protections only for "employees" could raise tricky issues regarding former employees and independent contractors.

Ultimately, the resolution was that no change was needed, but that it would be valuable to make clear in the transmittal to the Standing Committee that this issue was considered carefully and to suggest some of the reasons why no change seemed appropriate.

(2) Communications with the expert's staff

The concern about attorney communications with the expert's staff was raised during the public comment period. The possibility of changing rule language to address this concern caused uneasiness about possible side effects. Most experts don't have employees, and even if they do the possibility of deposing an employee is not a realistic worry. One reaction was: "If somebody tried to do that, you could almost certainly get a protective order." The need for some protection for communicating with others in the expert's office was confirmed, however, by an example from experience. *X*, a leading groundwater expert, is often called as an expert witness. But lawyers who retain *X* quickly find that their dealings are almost entirely with *Y*, who works in *X*'s office. *Y* is the one who is in the office, and *X* is often out of the office. When counsel contact the office, *Y* is usually the one they will be talking to in order to convey information to *X* or learn about the insights or concerns of *X*. Should there be uncertainty about whether those communications with *Y* are protected? That could inhibit the sort of collaboration we seek to facilitate.

The consensus was that some recognition of this sort of situation would be desirable, but that the place to do so was in the Note. It was agreed that the way to do so was to add the following after line 167 in the published Note.

> Protected "communications" include those between the party's attorney and assistants of the expert witness.

The language eventually selected was "assistants" rather than the "staff" of the expert witness or "agents" of the expert. The selected language seemed best to capture what we were trying to accomplish. It seemed to apply to any who would assist the expert witness in preparing for the testimony -- including the drafting of the expert's report.

(3) Committee Note paragraph on use at trial

The question of use at trial first arose early in Advisory Committee discussion of this possible set of amendments. Considerable research allayed concerns that the possibility of inquiry at trial would undercut the changes in attorney behavior that the discovery amendments were designed to accomplish. Nonetheless, a paragraph (lines 241-48 of the published draft) adverted to the expectation that at trial courts would respect the limitations embodied in the rules.

Whether such an observation is appropriate or needed was discussed The Supreme Court's declaration in the *Nobles* case that work product protection applies at trial suggested that there was no need to say so in the Note. Another practical consideration that suggests it is not necessary is that lawyers are unlikely to ask questions at trial if they have not determined through discovery what the answer is.

On the question whether it is appropriate to include such a comment, it is certainly true that, in general, a Committee Note to a Civil Rule is not a way to affect admissibility determinations at trial, which are normally governed by the Evidence Rules. But to some extent the Civil Rules can affect admissibility at trial. An obvious example is Rule 37(c)(1), which says that items that were not disclosed when the discovery rules said they should be turned over may not be "used" at trial. It was also noted that the Committee Note to our package of amendments says at line 240 as published that the protections the amended rule provides for lawyer-expert communications do not impede thorough interrogation "in deposition *or at trial*." That comment is in a context that is quite different -- designed only to emphasize that lawyers have manifold opportunities to challenge the expert's opinions under the amended rule -- but it shows that some commentary about what will happen at trial is sometimes appropriate in a Civil Rule Committee Note.

Ultimately, this could be seen as an issue of rulemaking process, and the conclusion was that it would be better to remove this paragraph because it is dubious to include it in the Note and, in all likelihood, unnecessary. It would be good for the transmittal material to explain the deletion in such terms for the Standing Committee

(4) Reference to *Daubert*

There have been expressions of concern that this discovery change might affect *Daubert* decisions on the admissibility of proposed expert testimony. That is not the goal. Saying so in the Note seems worthwhile. Various methods of saying so have been considered. Simplicity and brevity eventually appeared preferable to adding detail The consensus was to add the following at line 153 of the published draft:

> These discovery changes therefore do not affect the gatekeeping functions called for by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and related cases.

(5) Possible negative implication on privilege protection due to new disclosure requirement

There have been some suggestions that adding a disclosure requirement for experts not required to make a report, while limiting the communications protection in proposed Rule 26(b)(4)(C) to those who are required to prepare a report, could imply that existing protections for attorney communications with these expert witnesses no longer apply. That would be a result like the consequence of the addition of the expert report requirement in 1993 for the experts covered by 26(b)(4)(C) It might be supported in part on the following language at lines 134-36 of the published draft Committee Note to Rule 26(b)(4)(C): "The rule [26(b)(4)(C)] provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C)."

One possibility would be to add a sentence to the Committee Note with regard to Rule 26(a)(2)(C) saying that the disclosure obligation did not abridge privilege or work-product protection with regard to such witnesses. The response to this idea was the published draft Committee Note already deals with the issue right after the material quoted just above (in lines 136-38):

> It [Rule 26(b)(4)(C)] does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

Additionally, unlike the situation in 1993, there is nothing in the current amendment package like the Committee Note in 1993 saying that the result of that amendment was to defeat privilege or work-product protections for information provided to the expert. This time, the overall thrust of the amendments is to provide protection even with regard to expert witnesses required to provide a report. The consensus was that the statement already in the Note should suffice, and that adding a parallel statement in the portion of the Note focused on Rule 26(a)(2)(C) would not be necessary.

(6) Refining what "facts" must be disclosed under Rule 26(b)(2)(C)

One comment urged that amendment to Rule 26(a)(2)(C) be changed to clarify that the "facts" that must be disclosed are only those related to the opinion to be offered by the witness. One reaction to this concern was that it looked like what a person trying very hard to find something to object to would raise, and that it was not a real problem. Although that was generally agreed, another related concern emerged

The related concern was that, as to some witnesses for whom disclosure is required (e.g., the treating doctor or a police officer), the lawyer may have great difficulty gathering the details. It is possible that some facts would emerge only later, and not in the hurried phone conversation the lawyer can arrange with the expert witness. Should there be a risk that the witness would not be allowed to offer those facts that also support the opinion because they were not included in the disclosure? Perhaps the amendment should be revised to explain that only the facts on which the opinion is based need be included.

A response was that the initial draft of this amendment package was long ago softened from more demanding disclosure requirements instead to require only a "summary," and that the current Committee Note makes clear from the outset that the disclosure is about the opinion, not all facts on which the witness would testify. To the extent some facts are left out, the reference to a "summary" is likely to be of more use than distinguishing between those facts that relate to the opinion and others that do not. Since there is no obligation under Rule 26(a)(2) to disclose anything except in connection with such an opinion, it would be very odd to exclude the unrelated facts. And for those that are related but were not included, the summary requirement is designed to deflect undue demands. It was noted that the Note now says (as published, lines 81-84): "Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have."

Changing the rule amendment seemed not to be warranted, but some adjustment of Committee Note language did seem worthwhile. A consensus found the following revision at lines 72-74 of the published draft to satisfy the concern:

> Rule 26(a)(2)(C) is added to mandate summary disclosures of ~~regarding~~ the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions.

(7) Preservation and privilege log treatment

The Federal Magistrate Judges Association supported the amendments, but also expressed concern about the omission of discussion of preservation and/or the listing of protected matters on privilege logs. It was agreed that these are important topics, but also that they are not what this amendment package was seeking to address. Trying to include something about these topics would therefore go beyond the amendments being proposed. The consensus was to make no changes.

(8) Restyling issues

Prof. Kimble sent us his style proposals in December. The topic was introduced as involving three possible reactions from the Subcommittee, and ultimately from the full Committee. Style issues are under the general jurisdiction of the Standing Committee's Style Subcommittee, which Prof. Kimble advises. If something is purely a matter of style, that committee's direction should control, although the Advisory Committee could bridle at it as bad style The key concern from the Advisory Committee's perspective, however, should be whether "style" changes really raise a risk of frustrating or complicating the objective of rule provisions. Amendments are designed to accomplish certain purposes, and to be used by lawyers and judges in courtrooms across the land. If "style" changes make amendments less effective or frustrate their goals, the Advisory Committee may say that the matter is not purely one of style and goes to substance, which is the province of the Advisory Committee, not the Style Subcommittee.

Rule 26(a)(2)(C): Prof. Kimble says that "Rule 26(a)(2)(A)" should be deleted from line 36 of the published rule amendment draft because it is an unnecessary cross-reference. His proposal reflects a more general preference in the style project not to include unnecessary cross-references in the rules.

In terms of the Advisory Committee's role, then, the question is whether the cross-reference is unnecessary. Many lawyers don't read rules -- or amendments -- in full, and therefore they may not appreciate how new pieces connect to existing pieces unless the existing pieces are brought to their attention in the new pieces. Thus, a cross-reference in an amendment may be important to explain what is meant even if a careful reading of the full rule should make that clear.

In this instance, Rule 26(b)(2)(B) does say that "this disclosure" (required by Rule 26(b)(2)(A)) must be accompanied by a written report. It would be wholly consistent with that locution for new (C) to say "this disclosure" rather than "the Rule 26(a)(2)(A) disclosure," a change consistent with what Prof. Kimble urges. The question is whether a lawyer who focuses only on the amendment will understand the reference if the rule number is not included. Because the lawyer will have to determine whether the witness is required to provide a report by reference to 26(a)(2)(B), which uses "this disclosure," it seems safe enough to delete the rule number. But in order to be parallel, "this" disclosure seems preferable to "the" disclosure.

Rule 26(a)(4)(B) and (C): Prof Kimble says that the first word in (i), (ii), and (iii) of proposed (C) should not be capitalized. That was agreed to be entirely a matter of style.

Prof. Kimble also proposed combining (B) and (C) into a single provision (to be called (B)) dealing with drafts and communications. It seems that Prof. Kimble's objective in combining (B) and (C) into a single provision is to save words. The proposal was conveyed in handwritten notations on the published draft An attempt to show what would result from these restyling changes produced the following:

> **(B)** ***Trial Preparation Protection for Draft Reports or Draft Disclosures, and Communications Between the Party's Attorney and an Expert Witness.*** Rules 26(b)(3)(A) and (B) protect the following, regardless of their form: drafts of any report or disclosure required of an expert; and communications between the party's attorney and any expert witness required to provide a report, except to the extent that the communications:
>
> (i) relate to compensation for the expert's study or testimony;
>
> (ii) identify facts that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Prof Kimble was not aware that the Subcommittee would eventually conclude that (B) should be limited to "written or electronic" drafts, while (C) should continue to provide protection for communications "regardless of the form of the communications." (This topic is covered in item (9) below.) He therefore did not attempt to factor this difference between the treatment of drafts and communications in his restyling efforts, but it clearly would magnify those difficulties.

The Subcommittee's consensus was that -- even without the further complication caused by the change to (B) it was proposing (see item (9) below) -- combination of (B) and (C) would cause substantive difficulties. Combining the two provisions would invite confusion and could frustrate what the Subcommittee is trying to do with this set of amendments. Indeed, early in the drafting process leading to the development of the published proposed amendment, the Subcommittee tried for some time to devise a workable combined treatment of draft reports and attorney/expert communications. Only when drafts and communications were separated into different provisions did the Subcommittee make drafting progress that ultimately led to the published preliminary draft.

One participant's reaction to the combined provision reproduced above emphasized the sorts of problems that combining (B) and (C) could cause. It was asked whether the combined provision meant that draft reports are discoverable to the extent they satisfy (ii) -- they identify facts the party's attorney provided to the expert. Certainly one could say that a draft report did that (or, alternatively, identified assumptions, as provided in (iii)). Would discovery of draft reports that identified facts or assumptions provided by the lawyer then be a matter of right under the amended rule?

The answer was that draft reports can be obtained only when the showing required for production of work product is satisfied. That is the clear meaning of (B) in the published draft, but the combination of (B) and (C) introduced this uncertainty. In all likelihood, the phrase "except to the extent that the communications," appearing just before (i) in Prof. Kimble's combination of (B) and (C), was meant to convey that the three exceptions apply only to communications and not to draft reports. At the same time, the basic point is that such potential misconstruction is exactly the sort of confusion that could blunt the attempt to solve expert discovery problems. Busy lawyers and judges could easily succumb to that misinterpretation if (B) and (C) were combined. This example shows, in short, that combining (B) and (C) would have the sort of substantive effects that are within the province of the Advisory Committee.

It was observed that one manner of combination might avoid those difficulties, but that this solution seems to be contrary to existing style guidelines. If we could subdivide new (B) into (i) draft reports, and (ii) attorney-expert communications, with the three exceptions clearly tied only to (ii), that might solve this particular problem (even if it would not solve others). But it is our understanding that such further division of rule provisions is not allowed. Even if allowed, this solution would result in the need to create another sub-level of rule provisions and very large spaces of white space on the page.

In addition, as noted in item (9) below, the suggestion of removing the "regardless of their form" provision from the rule on draft reports, but retaining it for attorney-expert communications, would make combining the two in a single provision even more problematical.

In sum, the consensus was that combining (B) and (C) would threaten or defeat important objectives sought through the amendments and there would be substantive. It was also noted that the combination did not really save a lot of language compared to the version developed by the Advisory Committee, so that it was of limited value in terms of the assumed objectives of the Style Subcommittee.

(9) Draft reports and the "regardless of their form" provision

A new question was raised about the "regardless of their form" provision in proposed (B). This question does not apply to the protection in (C) for attorney-expert communications; retaining "regardless of form" in (C) is important.

The concern is that including this phrase in (B) invites too much gamesmanship. What is an "oral draft"? The published draft Committee Note suggests at line 122 that there is such a thing. Isn't anything that might be considered an "oral draft" already protected, to the extent we want to protect it, by (C) since that would protect attorney-expert communications? And doesn't this invite lawyers to take the position that everything done by the expert is somehow a "draft." Shouldn't we be careful about authorizing that sort of thing? Won't lawyers say that the expert's notes and work papers are "drafts." What if the lawyer says that all conversations she had with the expert -- even those about matters clearly falling within (C)(i), (ii), or (iii) -- are part of an "oral draft" of the report. Would that mean they are protected under (B) even though (C) is designed to guarantee discovery on those topics? Leaving "regardless of their form" in (B) may undercut (C).

A reaction was that the notes and work papers examples do not really address the question raised, for those items are (presumably) in writing. The "regardless of their form" phrase was included to deal with the limitation in Rule 26(b)(3) that declares that its protection applies only to "documents and tangible things." Often a draft report will be in electronic form, and therefore not clearly within 26(b)(3). The 2006 amendment to Rule 34(b) seems to confirm that electronically stored information is not a "document," and it's surely not tangible So if one wants to reach those electronic items one needs to go beyond 26(b)(3) as presently written. The Subcommittee briefly discussed changing 26(b)(3) early in its consideration of the current amendment package, but concluded quickly that attempting to alter the work-product rule could raise many difficulties.

Nonetheless, the enduring question was "what is an oral draft?" Unless there's a good answer to that question -- and it involves something we want to protect that is not protected by (C) -- there seems no reason to invite difficulties by using the "regardless of their form" phrase in (B). Indeed, as suggested above, saying there is such a thing as an "oral draft" might support arguments that (B) precludes discovery that (C) tries to make available. It was suggested that it would suffice to say "written or electronic" drafts are covered. Would that leave anything out? Would this mean that the expert's discussion of the problem with anyone would constitute an "oral draft" of the report? The consensus was that "written or electronic" should suffice as rule language and would be preferable to "regardless of their form."

Trying to draft a revision to the rule during the conference call seemed hazardous. Instead, it was resolved that Prof. Marcus would attempt to work up a revised rule and circulate it by e-mail (an "electronic draft") for review by the Subcommittee members in the near future. It was noted that this change in (B) was an additional reason why (B) and (C) should not be combined.

TAB-4C

SUMMARY OF TESTIMONY AND COMMENTS
RULE 26 DRAFT AMENDMENTS, 2008-09

Rule 26(a)(2)(B) -- "facts or data"

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The proposed substitution of "facts or data" for "facts or other information" would clearly place within Rule 26(b)(3) work product protection any documentary or other tangible "information" that counsel exchanges with a testifying expert beyond "facts or data." AAJ favors this change.

Written Comments

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.). The Council supports the proposed amendment to Rule 26(a)(2)(B)(ii).

Rule 26(a)(2)(C) -- Disclosure requirement

Washington, D.C

Stephen Morrison, Esq. (testimony and 08-CV-050): I fully support addition of this provision to the rules. This disclosure requirement is a rational requirement and does not impose a heavy burden.

Bruce R. Parker, Esq. (Int'l Assoc of Defense Counsel): This amendment creates a new category I call "disclosure experts." One concern would be that local rules or Rule 16 orders often limit the number of expert witnesses a party can call. How are these witnesses to be counted? This is not a matter that can, perhaps, be precisely controlled by the national rules, but at least it would be desirable if the Committee Note said something about the expectation whether these witnesses should be counted toward the maximum number of expert witnesses to be permitted.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): I agree with the proposed amendment to Rule 26(a)(2) Having an attorney-prepared summary protects both sides so as to promote fairness and avoid trial by ambush.

Latha Raghavan (testimony and 08-CV-051): The proposed rule seems to solve the dilemma of determining the extent of disclosure necessary for employees who are "experts" due to the nature of their employment, but do not ordinarily testify as experts. Where I practice, the magistrate judges often say that if a witness is going to offer testimony covered at all by Fed. R. Evid. 702 there should be a full report. For the clients I represent, this is a major expense, and also raises issues of attorney-client privilege on occasion. This amendment will reduce complaints about surprise and deal with the risk of preclusion at trial for the employer. I strongly support this amendment

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The AAJ supports this change. It provides adequate disclosure of expert opinion and thereby permits informed decisions about whether to depose the proposed witness. At the same time, it avoids burdening witnesses who have not made themselves available to be burdened with such litigation concerns as preparing a full report. The handling of "mixed" witnesses under the rule is welcome, as it imposes the report requirement flexibly based on the character of the testimony rather than rigidly by witness identity. Excluding Fed. R. Evid. 701 witnesses from the list of those for whom disclosure is required is a correct decision also, because it honors the distinction between lay and expert testimony.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.): These proposed changes look sensible to me. This way, people will not be ambushed by testimony from nonretained expert witnesses.

Wayne Mason (Fed of Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rule is sound. It provides a sound scheme for precluding employee experts from disclosure requirements.

G. Edward Pickle, Esq. (testimony and 08-CV-110). Requiring in-house experts who don't regularly provide expert testimony to file full reports would be wasteful. The proposed disclosure should be sufficient without imposing that burden. The world outside the courtroom does not revolve around litigation

Cary E. Hiltgen, Esq. (president elect of DRI) (testimony and 08-CV-117): This proposed change will be most beneficial and alleviate any concerns about unfair surprise like those often argued when disputes arise over the Rule 26 report requirement's exception for certain witnesses who provide expert testimony. Making this change to the rule would reduce the temptation for courts to conclude that full reports are required from these witnesses despite their exemption from the report requirement. As things now stand, attorneys feel compelled to submit an expert report to avoid any potential dispute if none is supplied Their fear is not unfounded, as many courts have insisted on reports despite the exception in the current rule

San Francisco

Kevin J. Dunne, Esq.: It would be desirable to have more certainty on who's an expert required to be disclosed.

Peter O. Glaessner, Esq.: I am concerned about situations in which I cannot get the information needed to provide the disclosure required under proposed Rule 26(a)(2)(C). As a defense lawyer, I may sometimes want to list plaintiff's treating doctor as a witness. But I'm ethically precluded from asking the doctor about his or her opinions outside the context of a deposition. So I am unfairly constrained by the requirement to provide disclosure on that. This is basically a timing issue; the problem would exist if disclosure is required before I can take the deposition of the treating doctor.

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I strongly support the addition of summary disclosure for expert witnesses who are not required to provide a report. Presently, lawyers may feel obliged to prepare a full report even for experts who are not really required to provide reports under the rule. This amendment would eliminate this trying conundrum by ensuring that the parties are able accurately to ascertain the rule's distinction between employees who do not provide expert opinions in the regular course of their duties and those hired to provide an expert opinion.

Daniel J Herling, Esq. (testimony and 08-CV-129): I support this change. It would go far in reducing the number and scope of arguments relating to who is an expert and who is not.

Kimberly D. Baker, Esq. (testimony and 08-CV-139): I encourage the adoption of the proposed changes to Rule 26(a)(2)(C). The change will allow all parties to get to the task at hand -- discussing the facts of the case openly and candidly with the experts and formulating opinions that relate to the disputed issues. A summary of the opinions offered will apprise opposing counsel of the opinions held, and counsel can then further explore the factual basis and assumptions underlying the opinions and prepare for cross-examination of the witness.

Written Comments

Gregory P. Joseph, Esq. (08-CV-055): The proposed disclosure is similar in substance to the pre-1993 interrogatory inquiry about expert testimony. The timing is a bit vexing. There is no set time for the new disclosure except "at the times and in the sequence that the court orders" under Rule 26(a)(2)(D). Until pretrial orders are amended to cover these new disclosures, they may be made at any time up until 90 days before trial. Identical timing for these disclosures and the Rule 26(a)(2)(B) reports is implicit. But the reality is that the timing of the reports currently required is governed by pretrial orders. It will take a substantial period of time for pretrial orders to uniformly cover these new disclosures. Gamesmanship will be possible because the opponent is forced to respond with expert rebuttal within 30 days. If the new disclosures occur in the middle of intense discovery or motion practice, it may be very challenging to arrange the expert

testimony necessary to respond to them within 30 days. In addition, the rule against a second deposition of a witness could present difficulties if the person so designated has already been deposed before disclosure. Leave to take a second deposition to deal with the expert disclosures should not be required. Instead, the party making the disclosure should have the burden to show that a second deposition is inappropriate if that is the party's position.

Patrick Allen, Esq. (08-CV-041): Change is needed. Presently various courts take different approaches, and there are often situations in which the lawyer knows and can name his or her expert as required by Rule 26(a)(2)(A) but is unable to accompany that disclosure with the expert's report. The problem is that the timing is too strict. There should be more flexibility for providing the Rule 26(a)(2)(B) expert report. Perhaps the time should be set forth specifically in the rule.

Hon. Frank H. Easterbrook (7th Circuit) (08-CV-056): In Rule 26(a)(2)(B)(iv), the word "authored" appears as a verb. Use of this word as a verb is becoming more common, but it is not standard usage and is inappropriate for formal writing. The word survived re-stylization but should be fixed now. It is also imprecise. Suppose an expert wrote in 1996 a paper that was published in 1998. Should that be included in a list of publications prepared in 2007? Indeed, the advent of Internet circulation has made "publication" itself ambiguous. In addition, a sentence in amended Rule 26(a)(2)(D) begins "Absent a stipulation." This use of "absent" is an archaic legalism that should not be employed in modern writing.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): We strongly support this amendment that substitutes an attorney summary disclosure for preparation of a full report by a trial witness expert who is not required to provide a report under Rule 26(a)(2)(B). This change confirms the original intent in 1993 of exempting employee "experts" from the report requirement Under the actual regime now found in many places, an abundance of caution causes most parties to submit a written report even of "exempt" employees to avoid the risk of adverse consequences later on. It is burdensome and unreasonable for the employee expert to have to compile the various materials required for such a report, particularly when the employee has spent many years at the company and has gained expertise through on-the-job experience.

Wendy S. Goggin, Esq. (Chief Counsel, U.S. Dep't of Justice -- Drug Enforcement Administration) (08-CV-084): We anticipate that many attorneys will still want to take a deposition of the expert even after receiving the new disclosure, and therefore question whether the requirement will meet the goal of reducing litigation costs.

Charles Miers, Esq. (08-CV-112): I strongly support the changes to Rule 26(a)(2)(C). Under the current rules, I am often forced either to submit a full Rule 26 report for employee experts or risk having the district court preclude them from offering any testimony that may be considered "expert" in nature. Receiving or providing a Rule 26 report for an employee provides little benefit in my experience, adds to the costs of litigation, and generally provides nothing more than what the new rule requires, a summary of the facts and opinions known by the witness. The parties usually attempt to reach an agreement whereby each party's employees who may be considered "experts" are exempt from the current report requirement. The amendment will prevent manipulation of the rule.

Prof. Stephen D. Easton (08-CV-169): I support the amendment to Rule 26(a)(2)(C) regarding disclosures from experts not required to prepare written reports.

U.S. Dep't of Justice (08-CV-180): The Department supports the concept of requiring written disclosure of the anticipated testimony of witnesses such as treating physicians and employees of a party. A written disclosure of an employee's testimony ordinarily should be sufficient for purposes of discovery and will be less time-consuming and burdensome than requiring the employee to prepare and submit an elaborate report. The Department recommends, however, that the rule state more clearly that attorney-client privilege and/or work product protections should apply to communications between the attorney and the employee This could be accomplished through rule text or, at least, through mention of the existence of such protections in the Committee Note. For example, the Note could add: "Communications between an attorney and the client's employees often will be privileged Otherwise privileged communications between an attorney and the client's employee will remain privileged even if the employee is an expert who does not provide a written report under Rule 26(a)(2)(C)."

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): The Council urges that proposed Rule 26(a)(2)(C) not be amended. If it is adopted, we recommend clarifying that the rule does not apply to party witnesses involved in the underlying facts in dispute. We also recommend that the requirement for a summary not apply when the expert is available to a party only through compulsory process or when a deposition of the expert has been taken and has covered the subjects for which the witness is expected to present expert evidence. We fear that the amended rule is likely to provide new grounds for disputes and unlikely to streamline discovery These disputes are most likely when parties are experts in their fields. It is unclear how fully the disclosures mandated by the proposed rule would apply to party witnesses who are both experts in their fields and percipient party witnesses. Such party witnesses often testify that they believed their own conduct met relevant professional standards (in professional malpractice or fraud cases, for example). The proposed rule could be read to apply to all such witnesses (although we question whether that is its intent). With nonparty percipient witnesses, there may be situations where counsel are unable to obtain summaries of the sort set forth in the amended rule except through compulsory process. Without further definition, parties may not agree on the degree of detail required to provide a "summary of facts and opinion." We recognize that the current report requirement may be too limiting in situations in which expert testimony is proffered by a party's employee who lack direct factual involvement and for whom expert reports are not provided. We believe that it would be preferable to leave such isolated instances to the courts' discretion in managing their cases rather than adding a new rule requiring summaries and introducing additional points of dispute. If the rule is added, the Committee should clarify that it does not apply to party witnesses involved in the underlying facts in dispute, or when the expert witness is available to the party only through compulsory process.

Reuben A. Ginsburg (08-CV-176) (Chair, St. Bar of California Comm. on Admin. of Justice): The Committee believes that the requirement disclosure of the "facts" to which the witness is expected to testify in proposed (a)(2)(C)(ii) is too broad. There may, for example, be individuals who are expected to testify as both a percipient witness and an expert witness, and the Committee believes that the disclosure requirement should apply only to the basis for expected expert opinions (which would include any facts upon which the expected opinion is based). We therefore recommend that the new subdivision be rewritten as follows. "a summary of the ~~facts and~~ opinions to which the witness is expected to testify and the expected basis and reasons for those opinions."

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26(a)(2). The proposed amendment conforms the rule to the actual practice used in the Sixth Circuit regarding expert witnesses who are not "specially retained." See Fielden v. CSX Transp., Ins., 482 F.3d 866 (6th Cir 2007).

American Institute of Certified Public Accountants (08-CV-185): This amendment effectively balances the cost of providing an expert report with a simpler disclosure that affords fairness with regard to the exchange of the key facts, information and opinion the expert will present at trial.

Rule 26(b)(b)(4) -- generally

Washington, D.C.

Theodore B. Van Itallie, Jr., Esq., Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040). I am enthusiastic about the Committee's decision to confront the unforeseen consequences of the 1993 Committee Note to Rule 26(a)(2)(B). Inquiry into all communications between experts and counsel has multiplied expense with little benefit to the parties, and has contributed to the costly practice in our cases of retaining two experts. Although as an original matter it might be preferable to employ the approach used in Australia (where it is unheard of for counsel to steer or direct the contribution of experts), the Committee's second choice solution of reasonably protecting the interactions between counsel and expert makes sense. Perhaps at some point the Committee could consider an entirely different approach to expert witnesses by encouraging selection by the court

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): I generally support the position set forth by the Lawyers for Civil Justice in support of the changes to Rule 26 (08-CV-061). I have not found that the current regime of disclosure impedes me in retaining university professors or the like as expert witnesses because they are unwilling to adhere to the strictures that result from the disclosure regime.

Stephen Morrison, Esq. (testimony and 08-CV-050): I support the amendments providing protection for attorney-expert communications. Acrobatic maneuvering by attorneys to avoid creating discoverable draft reports and communications does nothing for the integrity of our discovery process. Although thorough exploration of opposing experts is important, requiring production of all drafts and communications creates an economic divide. Clients who can afford to hire consulting experts are protected, but those who cannot afford to do so are denied protection. The need to engage in this acrobatic maneuvering is an obstacle to hiring the best sort of academic experts, who bridle at the artificiality of what the current rules require

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): On behalf of the IADC, we totally endorse the extension of work product protection to draft reports and attorney-expert communications. One problem that will arise, however, is the fact that with mass tort litigation like the cases I work on, the same experts may be called in cases in state court and federal court. So the protections that apply in federal court may not be respected by state courts, and that may curtail their value

Debra Tedeschi Herron, Esq (testimony and 08-CV-45): I favor extending work product protections to drafts and -- subject to the three exceptions -- to attorney-expert communications. This amendment will promote fairness in the discovery process and promote comprehensive discussions between counsel and the expert witnesses.

Latha Raghavan (testimony and 08-CV-051): I favor the changes. It is essential that attorneys in the trenches be able to communicate freely with experts to fully develop and understand the issues in the case. Ethical obligations prevent the attorney from dictating ultimate opinions of the experts. But free exchanges -- including draft reports -- are essential to effective interaction. It is impossible for the expert to opine without first having extensive communication with counsel. Forcing discovery of such communications and draft reports discourages full and effective representation. "The 'gotcha' moment of revealing that an attorney had some input in the process of obtaining the final expert report may feel good for the moment when revealing the lack of integrity of opposing counsel or expert, however, such a moment is often misleading since it ignores the complexity of litigation." I strongly support the rule changes

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ is the largest plaintiff lawyer organization in the country. Although there is a small minority of lawyers who favor complete independence of expert witnesses, the vast majority of our members favor these amendments. Lawyers representing both plaintiffs and defendants agree that practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product that takes up time better spent focusing on the expert's conclusions themselves. We understand that it is often essential for lawyers and expert witnesses to work together, and that the work product of each is laced with the work of the other. But discovery of material passed by the lawyer to the expert almost inevitably intrudes into attorney work product. The crucial thing is to eliminate the squabbling that has become so pervasive. If there is a problem with the amendments, it is perhaps that they don't go far enough. Rule 26(b)(3) still is limited to documents and tangible things, a limitation not adopted in proposed 26(b)(4)(C). The Committee should address that feature of Rule 26(b)(3). For the present, the reality is that experienced lawyers regularly stipulate around the provisions of the 1993 amendments, recognizing that they do not need this material and that expansive interpretations of Rule 26(a)(2) have produced negative consequences. AAJ members with experience using the New Jersey state-court practice -- which provides work product protection like that proposed here for the federal courts -- has been that providing protection has had the welcome result that squabbling has been curtailed. Another feature of the amendment is that it is critically important when the lawyer and the expert are separated by many time zones. If the lawyer is on the East Coast of the U.S. and the expert is in Singapore, modern technology provides manifold methods for communicating, but the 1993 amendments mean that using those methods creates the sort of information that is routinely held discoverable.

Alfred W. Cortese, Jr , Esq.: Speaking for Lawyers for Civil Justice, I can report that a few believe there ought to be free and open discovery of all communications between lawyers and expert witnesses, but the large majority of members favor the proposed changes. The proposed amendments are probably the best way to provide the protection that is needed.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.). The Rule 26 changes look sensible and helpful to me.

Wayne Mason, Esq. (Fed. Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rules provide a well-reasoned framework for protection of counsel/expert communication and an expert's draft reports. This will provide needed clarification of the roles played by experts and counsel in litigation. Too often well-funded clients routinely retain both a testifying and a consulting expert.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): In a large number of cases, far too much time is expended in wasteful deposition discovery, especially with expert witnesses. The purpose of a deposition of an expert witness should be to explore the validity of the opinions themselves. Instead, what often happens is that lawyers spend unnecessary time exploring what the lawyer and the witness talked about, whether draft reports contain minor, and usually insignificant, factual misstatements, and the mechanics by which the final report came into being. On one occasion I got a draft report of an opposing expert that had a nugget of gold in it, but that once-in-a-career experience is not a reason to spend all this time and money on the hunt for another nugget. The proposed amendments should cut down on this activity, and also provide protection to the attorney-expert communications that permit communication without wasteful measures to avoid creating a draft report or other discoverable material. It is not a surprise that expert witnesses often act as advocates for the side for which they testify. There are hired guns, it is true, but the rule provisions are not likely to affect their

behavior. The problems come up when you try to hire the honest expert who is uncomfortable with the process. This rule will have a positive effect, enabling lawyers to hire leading figures

G. Edward Pickle, Esq. (testimony and 08-CV-110): I applaud the changes recommended Expert witness and consulting fees have become one of the most significant economic burdens of litigation, generally taking a back seat only to attorney fees and the costs of electronic discovery The current regime regularly more than doubles the expert expenses of a party because counsel must retain a second set of experts to receive confidential expert advice. That is the only way to protect the lawyer's thought processes. The proposed rule would solve this problem by allowing one expert to serve as both the consulting advisor and the testifying expert. Protecting draft reports would also produce benefits. The proposed amendment is a sensible, common sense approach, and reflects what had been common practice in most jurisdictions into the 1980s. An expert witness either is or is not capable of defending a position; the substance of discussions with counsel does not aid in assessing that topic

Cary E. Hiltgen, Esq. (president-elect of DRI) (testimony and 08-CV-117): The protection for draft reports will not only further efficiency, but also serve accuracy interests in the process of working with expert witnesses. The fear that drafts will be disclosed under the current regime creates barriers between the attorney and the expert witness. These barriers complicate litigation and drive up expenses. The protection of attorney-expert communications is also important. The fear of discovery now prevents most written communication and limits even verbal communication. Ultimately, the expert is working on behalf of the client, much the same as the attorney The opinions of the experts -- good and bad -- need to be reviewed thoroughly and discussed in order to prepare effectively for trial.

Keith B. O'Connell, Esq. (Tex. Ass'n of Defense Counsel) (testimony and 08-CV-116): We support the Rule 26 amendments for the reasons articulated by the International Ass'n of Defense Counsel.

San Francisco

Kevin J. Dunne, Esq.: The changes are terrific. This is not a position distinctive for a defense lawyer like me. Within the last six months, I've had plaintiff's counsel in two different cases call me and ask that I agree to stipulate out of the current federal disclosure regime regarding draft reports and attorney-expert communications. Expert discovery has become crazy under the current regime. I have to hire a consulting expert to whom I can say "I think this is a weakness, do you?" The current preoccupation with "collateral" matters during depositions and at trial is distracting and disruptive. Lawyers will spend their entire time questioning about the back-and-forth between the expert and the lawyer. This is undesirable.

Peter O. Glaessner, Esq.: I strongly support the changes

Daniel J. Herling, Esq. (testimony and 08-CV-129): I support the changes. They will not only eliminate the verbal gymnastics that many attorneys engage in while discussing a case with an expert, but also eliminate the fiction that drafts are not prepared or that they are systematically eliminated by virtue of the word processing equipment being used by the expert. It will also allow a much more thorough vetting of the proffered opinions

Thomas A. Packer, Esq.: I support the changes. From the practitioner's standpoint, this is a real breath of fresh air. Right now, attorneys may feel that they can only communicate with their experts by phone or in person. E-mail is clearly better, except for the discovery consequences This change allows us to practice in the 21st century.

Kimberly D. Baker, Esq. (testimony and 08-CV-139). Time is often wasted by asking why a particular word was used in one report versus another or similar queries about changed formats, etc., which can be more productively and cost efficiently used for real discovery. Once the cloak of protection from discovery is draped around the attorney-expert communications, a more expansive exchange of information can occur and both parties can focus on the facts and developing opinions, rather than writing and rewriting reports Lawyers have to hire duplicative witnesses, at great cost.

Loren Kieve, Esq.: The ABA Civil Discovery standards have endorsed provisions like the ones in the proposed rule since 1999. We support the proposed amendments. Good lawyers do this now by stipulation; it's time to put these provisions in the rule.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): The practice of having to retain two experts on the same topic (one to testify, one with whom the client and attorney can freely consult) is expensive and contributes to a legal fiction which need not be perpetuated.

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The Trustees of the Association unanimously assented to writing to support these rules changes. It is unique for the Trustees to do something unanimously. These changes build on the New Jersey experience under revisions to New Jersey State Court practice since 2002. In New Jersey, practitioners have reported a positive experience with this rule. Operating under the rule, lawyers can focus on the substance of the proposed opinions. Sometimes parties with weak positions try to draw attention away from the content of the opinions to focus instead on the largely irrelevant side show of "who said what to whom," or what language changed from draft one to draft two to draft three. The rule enables more effective communication between counsel and expert, permitting the expert to formulate a thorough, relevant opinion with a solid empirical basis. Under the prior system (comparable to the federal regime), inquiry into collateral issues frequently took on a life of its own entirely, creating satellite litigation, substantially increasing the cost of litigation, and making it more cumbersome. Experienced federal litigators prefer the New Jersey State Court regime, and stipulate around the current federal regime. We are aware that some academic commentators (see 08-CV-070) favor moving toward the expert witness practices of the legal systems of some foreign countries. But those foreign systems are not adversarial, and rely instead on a state-appointed inquisitor to supplant much of the function of counsel. None provides the extraordinary disclosure and discovery requirements that the federal system imposes. The academics also urge that providing this sensible protection will somehow make expert reports less reliable. We cannot see how taking the focus off the collaborative process of the lawyer and the expert and instead focusing on the content of the opinion will do that. They also suggest that adoption of the proposed amendment will contribute somehow to the decline of ethical conduct. None has been observed in New Jersey since the new rule went into effect over six years ago.

Written Comments

Leslie R. Weatherhead, Esq. (08-CV-003): I oppose the proposed change, not on the ground of any of the specified mechanics I do not dispute the proffered efficiencies, or doubt that lawyers are routinely agreeing not to ask one another's experts searching questions about how the lawyers reworded their drafts. I do not doubt that the proposed rule will make trial practice cheaper by obviating expensive dodges lawyers and experts employ. But I very much doubt that, by validating those dodgy practices, we will take trial practice in the direction in which it ought to go. Expert testimony under our evidence rules is an extraordinary exception to the usual rules, and it affords these witnesses rhetorical tools of great power. I think that this

privilege produces an implied covenant between the expert and the court, but this covenant has been strained as lawyers became more creative and paid experts-for-hire more willing to put the interests of the litigants ahead of the experts' devotion to craft and profession The Supreme Court, in *Daubert*, has devoted considerable attention to the tendency of expert witnesses to break the bonds of professional restraint. Viewed in terms of these concerns, I am completely unconvinced that a rule change that simply yields to the partisan instincts and habits of the lawyers is a good thing Rather than validate the fun and games being played by the lawyers, the rules should more strongly condemn them.

William M Griffin III, Esq. (08-CV-007): The proposed changes are wrong-headed Experts are the only ones who can express opinions as witnesses, but if that opinion has been created by a lawyer or with the help of a lawyer, the jury needs to be aware of that fact. Obviously, a jury needs to know that the person who actually drafted and created the expert's "opinion" is, in fact, the attorney. Today, so many experts are "for hire" that many will say almost anything depending on how they are paid. To further protect these individuals from the light of cross-examination is a travesty. The entire background on the expert and his communications with the attorney who hired him should be brought into the open before the jury.

Kenneth A. Lazarus, Esq. (08-CV-008): Our current litigation system permits expert witnesses to express opinions and does not limit them to matters on which they have personal knowledge. The assumption is that expert witnesses are facilitating the search for truth. The proposed amendments would completely undermine this assumption, suggesting instead the expert witnesses are really advocates, simply another part of the litigation team. This change would facilitate greater deception and manipulation in the presentation of a case, and thereby undermine public respect for law.

Robert L. Rothman, Esq. (Chair, ABA Section of Litigation) (08-CV-038). The Council of the ABA Section of Litigation wholeheartedly supports the proposed amendments of Rule 26 dealing with expert witnesses. The proposed changes are consistent with existing ABA policy and meet the needs of the practicing bar and the public in fulfilling the mandate of Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

Patrick Allen, Esq. (08-CV-041): I am especially pleased with the protections included in the proposed amendments to Rule 26(b)(4). Should these changes become effective in federal court, I will seek adoption of a similar rule under the Ohio Rules of Civil Procedure. Our firm recently was required to hire an outside expert to try to retrieve electronic communications between the attorney and the expert witness at considerable expense

Gregory P. Joseph, Esq. (08-CV-055): I strongly favor the Rule 26 amendments for the reasons detailed in the article attached to the comment. The problem originated in the 1993 amendment to Rule 26, which was construed to open the door to discovery of all communications between the lawyer and the retained expert. These amendments would close the door to almost all discovery of those communications. Among other things, this change means that attorney-client privileged materials, which formerly might be presumptively discoverable upon disclosure to an expert witness, are not stripped of their protection. I have received a draft of a law professors' comment letter (08-CV-070), and found it distinctly unpersuasive. First, they maintain that the amendments will adversely affect the search for truth. They ignore the exceptions in proposed Rule 26(b)(4)(C), which permit open discovery into facts and assumptions provided by counsel. They also ignore *Daubert*, and the burden placed on proponent counsel of proving the reliability of their expert's testimony. Second, they assert that the current practice is an expression of the basic value of independence of the expert. The kindest thing one can say about this notion is that it is unburdened by exposure to reality. Expert

independence is best maintained by a free exchange of ideas between lawyer and expert. Third, they opine that the fact that the current regime causes lawyers and experts to engage in avoidance behavior demonstrates that there are problems with expert testimony requiring further "safeguards." This ipse dixit ignores the reason for the "evasive measures" -- lawyers curtail their written communications with experts to avoid creating highly distortable testimony and exhibits for their adversaries. Hiring two sets of experts may make sense in academia, where every case is worth every conceivable cost, but not in the real world. Fourth, they argue that allowing further inquiry upon a showing of good cause is tautological because there will always be such a need. But the real issue is the merit of lack of merit of the expert's opinion; inquiry into the factual predicate or the reliability or methodology or the fit may or may not implicate counsel/expert interaction. Current practice broadly permits extensive discovery, requires the engagement of multiple experts, and otherwise imposes enormous, pointless costs.

Chris Kitchell (Chair, American College of Trial Lawyers Federal Civil Rules Committee) (08-CV-060): The College fully supports the proposed changes to Rule 26. In our judgment, these proposed changes provide an appropriate balance between the disclosure obligations that are necessary for that parties to develop their cases and prepare for trial, on the one hand, and the burden and expense that frequently results from the discovery of draft reports and communications with counsel, on the other.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): On balance, LCJ and ILR support the core amendments that would protect work product and attorney-expert communications. Some of our members are opposed to protecting such communications and drafts, preferring open discovery as a bulwark against threats to the integrity of expert testimony. However, an overwhelmingly large majority of our members support the changes because the small benefits of open discovery do not justify the cost and burden of protecting such communications and the erosion of attorney work product protection. The widespread interpretation of the 1993 amendments to justify broad discovery has handicapped counsel in their efforts to provide vigorous and effective defense for the client. An attorney's collaboration with the expert is a logical and, in the current environment, a necessary extension of the analysis in Hickman v. Taylor. This collaboration often takes the form of exchanging drafts. The "solution" of employing two sets of experts inflicts an unnecessary and often substantial expense on the client.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We write as tenured academics who have often been retained as expert witnesses or consultants in connection with litigation. We oppose the proposed changes to Rule 26(b)(4). They entrench a partisan relationship between the retaining lawyer and the expert witnesses that has long been recognized as the prime source of the pathologies of expert testimony. The lawyer can influence the expert too easily, but the amendment would drastically restrict cross-examination, which is the main safeguard against lawyer influence over expert witnesses. Such a change would be directly contrary to the changes many scholars have long advocated in our system of expert testimony. Most foreign legal systems avoid partisanship by having experts appointed by the court. Although that has not been done in this country, *Daubert* reflects the view that we need additional, not fewer, safeguards to protect the reliability and integrity of expert evidence Instead, the proposed amendment embraces the practice of treating experts as paid advocates rather than as learned observers and interpreters. We think that discovery as now allowed is valuable even if it is true that it usually fails to yield evidence (a claim that has not been empirically investigated). Knowing that their interactions will be scrutinized, experts can be expected to write their own reports, and lawyers to avoid proposing drastic changes in reports. The avoidance behaviors that the amendment is proposing to eliminate seem to us to show that the change would be a bad one. Making it more attractive to use the same expert as a witness

and consultant seems to us to get things backward. Such a witness faces still greater temptations to provide testimony that will vindicate his or her advice in regard to settlement and the like.

Charles Miers, Esq. (08-CV-112): I support the addition of these protections. In my practice, I have often entered into agreements with opposing counsel to circumvent the current regime's requirements and direct that neither side will produce draft reports. By now, most experienced experts know not to put anything down on paper until they are ready to create a "final" report to avoid discovery. This maneuvering interferes with the free exchange of information.

Phil R. Richards, Esq. (08-CV-121): I am opposed to this amendment Traditionally experts have been considered witnesses who are removed from the partisan positions of those who retain them and come into court to render an unbiased opinion based on their unique knowledge. In some jurisprudence experts are deemed witnesses of the court, rather than the parties. One of the best assurances that an expert is being forthright in testimony is the ability of the opposing lawyers to obtain all documents and communications related to the formation and rendering of the expert's opinion.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We favor the amendments because we believe that they will focus the courts on the substance of the expert's opinion, reduce litigation expense for all concerned and advance the command of Rule 1. We are convinced, as experienced trial lawyers, that the costs of the 1993 amendments far outweigh any theoretical benefits of allowing the parties to explore every nook and cranny of the communications between counsel and expert We have seen a letter from some academics (08-CV-070) taking issue with the proposed amendments. These academics' views are strikingly lacking in qualitative or quantitative evidence. In contrast, the practicing bar, on both sides of the "v," overwhelmingly supports the proposed amendments. These practicing lawyers know that they still will be able to cross-examine and test the opposing expert based on what matters -- the content and quality of the expert's report and testimony. Since 1999, the ABA's Civil Discovery Standards have recommended that attorneys stipulate to an arrangement like the one provided by the proposed amendments. The professors say that the proposed amendments are "contrary to the changes many scholars have long advocated in our system of expert testimony," and that "[m]ost foreign judicial systems seek to avoid this partisanship by having experts appointed by the court, often from a list of certified experts." We are not told who these scholars are or their experience with or background in U.S. civil litigation. The invocation of foreign legal systems overlooks the fact that most do not have an adversarial system, and none has the exceptional disclosure and discovery mechanisms of the U.S. system. The professors say they seek to promote more reliable expert testimony, but offer no evidence that focusing expert discovery on the expert's opinion is less reliable if the expert is permitted to develop that testimony through discussions with counsel. The professors seek "a pure and untrammeled world of litigation," again presumably based largely on the continental inquisitorial system, when they object that the amendments risk "compounding the ambiguity and confusion that currently clouds the role of testifying expert witnesses." There is no ambiguity or confusion in the real world of litigation in the U.S An expert is hired by one side to make a presentation that favors that side. Jurors know that If, for some reason, they do not know that, opposing counsel will make that clear. If the case is tried to the court, the court will also know that. The expert's testimony will stand or fall, and be accepted or not, based on its content and credibility, not on any preliminary steps that led to it.

John A.K. Grunert, Esq. (08-CV-159): Generally the proposed amendments to Rule 26 are well-conceived and well-drafted.

Federal Magistrate Judges Ass'n (08-CV-161): The FMJA believes the proposed changes bring needed national uniformity to discovery practices relating to experts which will establish brighter lines for counsel's decisionmaking and reduce the number of areas over which there could be a dispute. But neither Rule 26(b)(4)(B) and (C) nor the Committee Note addresses questions related to preservation of draft expert reports and the necessity for filing privilege logs when Rule 26 is asserted to protect the disclosure of this sort of work product material. Although these two subjects currently are covered by various circuit authorities, it would be helpful to set forth some clarification, either in the Rule or in the Committee Note, regarding whether the changes in the Rule were intended to alter any of those authorities.

Prof. Stephen D. Easton (08-CV-169): Although I applaud the Committee's interest in reducing disclosure and discovery expenses, I oppose these changes as wrong-headed. "As one who has spent much of the last decade advocating for more, not less, disclosure and discovery regarding the potentially insidious relationship between retaining attorneys and hired experts," I seek to reinforce the adversary system, not replace it. Unlike many academics who call for replacing party-selected expert witnesses with court experts, I do not believe that would be beneficial. But the cross-examiner needs full discovery and disclosure of the extent of the retaining attorney's influence over the expert. For full discussion, see Stephen D. Easton, Attacking Adverse Experts (ABA Litigation Section 2008), especially chapters 4 and 5. Experts are the only witnesses who can be paid, and paid handsomely, for their testimony. The lawyers are in effect their paymasters, and it is crucial that their influence on the testimony be fully explored. One of the most important ways for the lawyer to influence the expert is through control of the information provided to the expert. Beyond that, the lawyer can control the content of the expert's report. "By foreclosing the discovery of information about the attorney's editing of 'the expert's' report, the proposed amendments would give the attorney carte blanche to massively rewrite -- or even write ab initio -- the expert's report and thereby influence her final opinion, free of any concern that opposing counsel might expose this influence to jurors. This is a major step in the wrong direction."

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): We generally recommend adopting the proposed amendments to Rule 26(b)(4). But we worry that, because the proposed protections are not absolute, there is likely to be collateral litigation over the applicability and scope of the protection, and some lawyers may therefore continue the very practices the Committee is hoping to end. The amendments are a welcome attempt to solve the problems currently facing litigation practice with regard to expert witnesses. The Committee's depiction of the problems is accurate. The amendments would encourage open and free communication between attorneys and experts, and would address inefficiencies and ineffectiveness in the current disclosure requirements. But we fear that, as worded, the amendments may not have their intended effects. The protection provided by invocation of Rule 26(b)(3) is not absolute, and invites highly fact-specific determinations that would engender uncertainty over the protection for given communications, although the discussion in the Committee Note about the difficulty of making a showing of need will provide comfort to practitioners. We are also concerned that the amendments fail to address the situation of a party's involvement in multiple suits -- and in particular instances in which one of the suits is in state court. This omission may mean that the amendments fail to achieve their purposes. A state court may be unwilling to afford Rule 26(b)(3) protection despite the provisions of the amendments.

U.S. Dep't of Justice (08-CV-180): The Department supports the proposed amendments. The Department concludes that, on balance, the benefits of this proposal outweigh its disadvantages. Although it understands the concerns of some who say that the amendments will enable attorneys to have undue influence over the expert's report and opinions, the Department concludes that the discovery explicitly permitted under the amended rule -- regarding the facts or

data the attorney provided to the expert and the assumptions the attorney provided -- ordinarily should be sufficient to enable the attorney to determine if an expert's opinions have been improperly influenced by the attorney.

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26. The amendments will enhance the effective use of expert witnesses and decrease litigation costs.

American Institute of Certified Public Accountants (08-CV-185): We support this proposed amendment. It is important for CPA experts to collaborate with counsel to develop and revise theories and opinions The current open-ended discovery rules chill the process. Limiting the expert discovery as done by the amended rules would not only limit the need for and cost of consulting experts, but also focus expert discovery on issues that bear on the testifying experts' final opinions.

Extent of Rule 26(b)(4)(C) Protection

Washington, D C.

Theodore B. Van Itallie, Jr., Esq , Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040): Regarding those expert witnesses not required to make a report under Rule 26(b)(2), and therefore not protected by the proposed amendments to Rule 26(b)(4), it should first be true that their draft disclosures are protected. Rule 26(b)(4)(B) would protect those. Regarding attorney-expert communications, I think I would contend that work product protection applies to those communications. The thrust of the proposed changes to Rule 26(b)(4) is to retract the broad intrusion into attorney-expert communications that was introduced by the 1993 amendments. With that intrusion retracted, I would think that the argument that work product applies to attorney communications with experts not specially retained would be valid.

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): The protection provided by Rule 26(b)(4)(C) is too limited. It extends only to attorney communications with the expert and not with the expert's staff. But just as attorneys often rely on paralegals or others in their offices to prepare cases, so do expert witnesses. A university professor, for example, may use graduate students in the professor's doctoral program to assist in research, and counsel may deal with those students on a day-to-day basis as the expert's team works on the conclusion to be presented, and preparing the expert's report. The Committee Note should make clear that attorney communications with the expert's assistants are protected just as are attorney communications directly with the expert. Additionally, consideration should be given to extending Rule 26(b)(4)(C) to communications with in-house experts who do not regularly testify as expert witnesses even though they are not required to provide a report under Rule 26(a)(2). To make suitable disclosure under the new disclosure requirements for such witnesses, counsel will have to communicate with them, so those communications arguably should be protected as well. The current draft does not adequately explain why Rule 26(b)(4)(C) protection does not extend to such communications, or why the two types of expert witnesses are treated differently. I have not formed a conclusion on whether the protection should be expanded, but urge further thought about the subject. A major concern here is the attorney-client privilege; the in-house person may or may not be within the "control group" under New Hampshire attorney-client privilege law, but the communications with that person should be covered. So the in-house person is different from other expert witnesses not required to provide a report, such as the treating physician. Indeed, in New Hampshire, plaintiff's counsel can freely communicate with plaintiff's doctor, but defense counsel can't. If in a deposition of the doctor we ask what plaintiff's lawyer said to the doctor we encounter a privilege objection and have to suspend the deposition to work around that problem. Regarding underlings, he finds that he does have to interact with them when he cannot reach the retained expert (such as a university professor), but has not to date been impeded by the disclosure rules in engaging in strategic interaction with retained expert witnesses.

Stephen Morrison, Esq. (testimony and 08-CV-050): I favor including protection for attorney communications with the expert's assistants within the protection.

Bruce R. Parker, Esq. (Int'l Assoc of Defense Counsel): In the defense bar, there is a debate about whether to favor extending protections to cover those expert witnesses who don't have to provide a report. Some argue that the attorney-client privilege is an uncertain protection. As a lawyer who has represented many companies sued in mass tort litigation, I know that in-house scientific people are often the most helpful to me in understanding the issues. They are likely not to be people who regularly testify as expert witnesses, so they would not have to prepare reports. But I really need to be able to talk strategy with them. So that consideration

might cause me to favor extending protection beyond those experts required to prepare a report. But on balance I am opposed to that extension because of the importance of allowing defendants to challenge treating doctors. Those witnesses are likely to be viewed by the jury as the most important expert witnesses, both because they have long-term involvement with the plaintiff and because they are regarded as truly independent, while an employee of defendant is not. It used to be that we could often obtain by agreement an opportunity to talk to the treating doctor, but since the passage of HIPAA -- with its stringent rules on patient confidentiality -- that is no longer possible. So from the defense side, the only way I can talk to the doctor is in a deposition. And I know that plaintiff counsel sometimes tell treating doctors things that prejudice them against my clients. If I could not ask about that I could not do an adequate job for my clients. That is too high a price to pay to insulate my discussions with my client's in-house experts Regarding grad students and others who assist the expert witnesses, I've never asked them their opinions about the issues raised in the case. I have found, however, that if discovery is a possibility I will be cautious about talking to those people.

Alfred W. Cortese, Jr., Esq.: LCJ does not yet have a uniform position on whether the protection should be extended to all expert witnesses rather than only those specially retained. Similarly, LCJ is not certain of its position on whether communications with the expert's staff should be protected On these topics, we may submit further comment.

San Antonio

Wayne Mason, Esq. (Fed of Def. & Corp. Counsel) (testimony & 08-CV-125): We favor extending the protections to include "disclosure experts" who are not specially retained but would be subject to disclosure under the changes to Rule 26(a)(2). Lawyers need to communicate with these people, and they need to communicate with the lawyer. The attorney-client privilege may apply to some of these people, but often does not apply. In the defense community there is a debate about whether protecting communications between counsel and the plaintiff's treating doctor is desirable. Although some of our members have concerns regarding physicians, on balance we believe that the better-reasoned approach is to provide work product protection for communications with all witnesses who do not provide a written report. In my view, the three exceptions to protection under the proposed amendment sufficiently equip me to interrogate the treating doctor even if the communications with plaintiff's counsel are generally protected. I do not need more, and protection as to the in-house witnesses of my client who will offer partly expert testimony is more important. Handling waiver of this protection is uncertain. That comes down to whether this is a "privilege" or a "protection " This protection should extend also to communications with the employees and representatives of expert witnesses.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113). I support extending the work product protection to disclosure experts. I am willing to give up the right to cross plaintiff's treating doctor about what the plaintiff lawyer said. I need to be able to talk freely with the company's employees who will give expert testimony. I also need to talk freely to the company's employees who will not give expert testimony. Although I have some concern about the possibility that the opposing lawyer will be able to influence expert witnesses, I view it as a trade off, and believe the protection is more important than the opportunity to examine the other side's expert witnesses. I also think that the protection should extend to the staff of the expert. I need to be able to communicate with them. They are conduits between me and the expert In fact, I've had an instance in which the staff members were deposed.

G Edward Pickle, Esq. (testimony and 08-CV-110): I favor extending the protection to attorney communications with those witnesses not required to provide a report There is a trade-off from the defense side in thus insulating the communications between the plaintiff lawyer and

treating doctors, but it is worth it. For in-house experts, the proposed disclosure provisions of amended Rule 26(a)(2)(C) would provide information, and further discovery would be allowed. We should avoid becoming more demanding.

Stephen Pate, Esq. (vice president, Fed. of Corp. & Defense Counsel): At first I did not agree with Wayne Mason's view (see above). But on reflection I have come to agree with him. There is a trade off between the benefit of inquiry into communications between my opponent and his or her experts and the burdens of similar inquiry about my communications with mine.

San Francisco

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I support the extension of protection to communications with expert witnesses to include employee witnesses not required to prepare a report. Work product protections are essential to the litigation process, and providing additional protection for these people outweighs any potential additional costs. By extending this protection, the Committee would help to ensure that parties are able to gather information free from the underling threat of having to divulge that information at a later date. This is important with in-house experts who possess a unique, and sometimes highly sensitive, familiarity with the relevant subject matter. This person may be a former employee no longer employed by the company. These sorts of people are not specially retained. This protection would apply where the attorney-client privilege leaves off. It would probably be possible to "specially retain" these people and make them eligible for protections (response to question). It could also be true that similar concerns apply to purely fact witnesses, and that there would be complications in dealing with witnesses whose information consisted of a blend of factual and expert knowledge (response to question)

Daniel J. Herling, Esq. (testimony and 08-CV-129). I favor extending protection to employees who are not required to prepare a report. The problems come up with employees who have expertise; this is a gray area about whether they are "testifying experts." We know that under the current view anything we say to retained experts is open to discovery. But with others things are not so clear. For example, suppose an IP opinion letter was written ten years ago. I need to find somebody to tell me whether the assumptions made in the letter are correct. If I choose to vet this through the same person I use as a nonretained expert, I may open up discovery inappropriately. You should think more about this issue.

Thomas A. Packer, Esq.: The protection should apply to all expert employees, whether or not they have to prepare a report. The rule should not disadvantage a company just because the experts are in-house. According work product protection is important to attorney interaction with these employees. The attorney-client privilege should apply for all lawyer interaction with the employee about purely factual matters, and also for expert opinion testimony they might give about those factual matters. But it is not clear that the privilege would also apply when these employees are instead doing extra work -- beyond the factual information they received as employees from involvement in the underlying events That's where expanded the protection the rule provides for communications between the expert and employee is important.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): Employees of a party who may offer minimal expert opinion testimony should be excused from the report requirements, and work product protection should extend to them under proposed Rule 26(b)(4)(C).

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The 2002 New Jersey rule providing work product protection for lawyer-expert communications provides protection only for communications with experts "retained or specially employed." This limitation has not caused difficulty in New Jersey.

Written comments

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061) and Supplemental Comments (08-CV-181): We believe that there should be protection for communications between counsel and the expert's staff, researchers, and assistants. Although these people are not expected to testify, they provide input into the expert's report. Often an expert bases a report and resulting testimony on the work of a team of individuals Therefore, we think that the Note should mention this possibility and provide protection for the attorney's communications with these important people. Supplemental comments: Protection should be extended to those disclosure experts who are employed by the party making the disclosure. The assumption seemingly made that they would not be involved as deeply in the development of case strategy as retained experts is not consistent with our members' experience. Instead, in-house scientists, engineers, and technical personnel are often the most knowledgeable individuals regarding the matters at issue. The initial education of trial counsel therefore comes from employee experts, and these experts are very important in helping trial counsel to winnow down important concepts from a mass of documents and theories, as well as explaining the reasonableness of a party's conduct. The current Committee Note is clear that no attempt was made to exclude protection of communications between disclosure experts and counsel, but the amendments should explicitly extend work product protection to disclosure experts who are employees of the party making the disclosure (but not to other disclosure experts) Such experts are likely to be viewed by the jury as having a degree of bias in favor of the party, while nonemployee experts (such as police officers, federal investigators, government officials and treating physicians) are more likely to be viewed as uninfluenced by counsel. With investigators, for example, full discovery of conversations between them and counsel may bear on whether "the sources of information or other circumstances indicate lack of trustworthiness" under Fed. R Evid. 803(8). Moreover, communications between the disclosure expert and counsel are not likely to fall within any of the three exceptions to proposed Rule 26(b)(4)(C). The protection should also be extended explicitly to communications between the attorney and the expert's staff. Staff members can play an integral role in the research, development, and preparation phases of the expert report and opinion, which may often ben a collaborative effort of a group of individuals. The solution to this issue would be to add a few words to the Committee Note to clarify that the work product protection extends to an expert's staff, including individuals that assist the expert in developing the expert report and the overall provision of expert services. Earlier cases treated experts as "agents" of the attorney. As the Committee has heard, the question of discovery from these people has come up in litigation, and the handling of it should be clarified in the Committee Note. All members of the litigation team, including experts and their staff, must have the ability to examine the facts, reach conclusions, and speak freely in order to render effective legal services. We therefore urge that the Committee Note at lines 59-62 be amended as follows: "The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney expert communications between attorneys and experts, including staff working at their direction."

Charles Miers, Esq (08-CV-112): I believe that the comment to the rule should make clear that protection is provided for communications between the lawyer and the expert's staff, researchers, or assistants who are not expected to testify, but who may provide input to or assist with certain portion of the expert's report. For example, in an environmental clean-up case, one expert may be expected to testify, but she may have received assistance from a team of experts (hydrologists, environmental engineers, chemical engineers, etc.).

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We have considered the question raised by the invitation for comment on whether the protection for communications should be limited to communications between counsel and an expert required to make a report. We believe the answer is "it depends." If, for example, the testimony comes from someone who is essentially a fact witness -- the archetype being a treating physician -- then communications between counsel and that witness should be discoverable. If the witness is more akin to a retained expert -- for example on employee of a party, such as an in-house mechanical engineer whose opinion is sought on a matter within her scientific expertise -- then the rationale for maintaining traditional work product protection for communications between counsel and the witness would seem to apply.

John A.K. Grunert, Esq. (08-CV-159): I am concerned about three things. First, the Committee Note discussion of extending protection to "oral" draft reports and communications introduces uncertainty. Rule 26(b)(3), by its terms, applies only to documents and tangible things, so either proposed Rules 26(b)(4)(B) and (C) do not mean what they say, or Rule 26(b)(3) does not mean what it says, or the Committee Note is wrong. It is unwise to promulgate a rule that will generate disputes. One solution would be to strike the statements in the Committee Note on this topic. This Note discussion seems to be about "oral draft" reports, but that is a phrase not found in ordinary English usage. The language of the proposed rules accomplishes the goal without the need for mention in the Note. Another solution would be to redraft the proposed rules to remove the language about form of communication and substitute (as to proposed Rule 26(b)(4)(C)) the statement that the protection "applies to oral communications between the party's attorney and any such witness." There would be no need to mention oral drafts in (B) because "draft" does not include anything oral. Second, the protection for communications should apply also to some experts not required to prepare reports. The attorney's communications with some "nonretained" experts -- treating doctors or police accident reconstructionists, for example -- should not be protected. But communications with a corporate defendant's employee should be protected. Third, The rule should explicitly provide protection for communications with non-testifying experts whenever they might be deposed. This could be done by amending current Rule 26(b)(4)(B), now to be redesignated 26(b)(4)(D), to add such protection there.

Rule 26(b)(4) -- Effect on *Daubert* Decisions

Washington, D.C.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): I know that some have suggested that the adoption of these discovery changes will have an impact on *Daubert* decisions. I see no reason to expect that to happen. I regularly litigate *Daubert* issues, and can think of no instance in which attorney-expert communications or draft reports played a role in making a decision whether a given witness could offer opinion testimony. For purposes of discrediting the opposing expert's testimony, I don't care about what the lawyer said to the expert; I only need to be able on cross examination to challenge the opinion as given If somebody wants to improve the handling of expert witnesses on this front, one should be dealing more aggressively with speaking objections and nonresponsive "answers" from expert witnesses. Often I come out of a seven-hour expert deposition with about an hour and a half of real testimony.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ members see no reason for wanting access to attorney-expert communications or draft reports to do a thorough job preparing for *Daubert* issues. Probing interaction between the experts and opposing counsel does not really matter. What matters is challenging the opinions on their merits

Rule 26(b)(4)(C) -- Exceptions to protection provided

Washington, D C.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45). The exceptions further fairness in the discovery process while the rule affords appropriate protection for attorney-expert communications.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The three exceptions show that these amendments are not really anti-disclosure provisions. The three exceptions cover all an attorney would sensibly want or need to challenge an opposing expert. Going further would raise risks of rekindling the squabbling that was produced by the 1993 amendments. For example, maybe there would be some value to know about assumptions the lawyer told the expert to make that the expert did not rely on in reaching the opinion to be presented, but that is really not important. And enabling discovery would increase the risk of the sort of squabbling about unimportant points that has become so pervasive and that these amendments are seeking to end.

Alfred W. Cortese, Jr., Esq.: The exceptions permit adequate inquiry to get at the validity of the expert opinion.

San Antonio

Wayne Mason (Fed. of Def. & Corp. Counsel) (testimony and 08-CV-125): The three exceptions to protection of attorney-expert communications are generally sufficient to permit needed inquiry.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): The three exceptions provide significant ability to inquire about pertinent matters even when the protections afforded by the amended rule apply.

Written Comments

Norman W. Edmund (founder of Edmund Scientific Co.) (08-CV-005): The exception permitting discovery regarding communications that "identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed" should be revised to "and identify how they have applied the steps or stages of the scientific method in forming the opinions " This change would respond to the directive in *Daubert* that "scientific knowledge" is information "derived by the scientific method." The comment attaches research reports from the commentator's website www.scientificmethod.com on the nature and operation of the scientific method. Included is a 14-step set of stages or ingredients for scientific testimony that may be used for expert witnesses and an analysis of the Supreme Court's treatment of the methodology and the scientific method.

Patrick Allen, Esq. (08-CV-041): Because there are exceptions to the protection provided, it still may happen that attorney-expert communications are subject to discovery. I now find myself using the telephone to avoid creating electronic records of my communications with expert witnesses. Avoiding the costs of unearthing such electronic communications, which can be considerable, would be desirable

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We find it difficult to understand the exception to the protection provided for situations in which the party shows that it has a substantial need and cannot obtain the substantial equivalent without undue hardship. Taking the ordinary work product attitude toward this question, it seems to us that it will always be true that the information shielded by the amendment is necessary, since the amendment bars discovery and the expert will rarely be free to speak with opposing counsel. So it would seem that discovery would always be available through this exception.

Committee on Civil Litigation, U.S. Dist. Ct., E.D.N.Y. (08-CV-098): We endorse the goal stated on p. 7 of the Advisory Committee's report supporting questioning of an expert on why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions, even if the answers to such questions involve communications with counsel. In our experience, such questions and answers are important elements of expert discovery and inquiry at trial. But the language of the proposed rule does not appear to allow for such questions. Only three exceptions are carved out of proposed Rule 26(b)(4)(C), and it is not clear to us that these three exceptions allow for the types of questions discussed on p. 7 of the report. For example, a party attempting to elicit deposition testimony regarding counsel's directions to an expert to use a certain approach or not to draw a certain conclusion would not appear to fall within any of those three specified conclusions. We therefore think a fourth exception should be added: "(iv) relate to matters such as why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions." We believe that this addition is important to ensure the opportunity to make these important inquiries.

Joan Harrington, Esq. (08-CV-151): I support the Committee on Civil Litigation of the U.S. District Court in the E.D.N.Y. regarding the need to revise the proposed rule to clarify that questioning will be allowed on why the expert considered (or did not consider) certain factors.

American Institute of Certified Public Accountants (08-CV-185): The exceptions allow for discovery to an extent that provides assurances that appropriate information will continue to be available. We believe, however, that Rule 26(b)(4)(C)(ii) and Rule 26(a)(2)(B)(ii) should be rewritten to limit disclosure and discovery to information "relied upon" rather than "considered by" the expert witness

Rule 26(b)(4) -- Use at Trial; Rules Enabling Act

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The proposed Committee Note properly indicates that cross-examination at trial about matters protected under the amendment should not be allowed. The "cf." citation to United States v. Nobles, 422 U.S. 225 (1975) gives some guidance on the point The Note could not give more guidance without exceeding the Committee's proper role under the Rules Enabling Act. We note that *Nobles* has been followed in both civil and criminal cases. It would be good for the Note also to address the interaction of proposed Rule 26(b)(4)(C) and Fed. R. Evid. 612. In addition, it would be desirable for the Note to address the possibility of discovery or use of such material in subsequent litigation. In our view, protection should be extended, and the Note should encourage courts to give the protection the greatest reasonable effect.

San Antonio

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): I have seen the Committee Note about use at trial, and expect that most judges would honor it. At the same time, work product protection is not a privilege. It is not likely that attorneys will often ask questions at trial they don't know the answer to, so providing a protection through discovery is likely, as a practical matter, to be significant. But I would expect some attorneys to try to do it, and would file a motion in limine if I saw this coming. I would not hire consulting experts just to avoid the risk that inquiry at trial might be allowed. But if the Committee Note discussion were removed I would be concerned about this problem. It would almost be better -- if the draft Note discussion were dropped after the public comment period -- that it had never been there.

San Francisco

Peter S. Pearlman, Esq (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The argument that the proposed amendment cannot be made without an act of Congress is misdirected. The proposed amendment does not modify an evidentiary privilege. In fact, it addresses the work-product doctrine, not the attorney-client privilege. The work-product doctrine is not among the privileges codified in the Federal Rules of Evidence. Case law has recognized from the doctrine's inception in Hickman v. Taylor that it was not a privilege. The sorts of privileges involved in the Federal Rules of Evidence were different. Case law has therefore specifically recognized that work product protection is not a "privilege" and therefore is outside the scope of Fed. R. Evid. 501. In fact, the 1993 amendments were adopted through these same Rules Enabling Act mechanisms. To the extent those amendments are seen as having removed an evidentiary privilege, they suffer from the same infirmity as is suggested with regard to the current amendments. All these proposed amendments do is to return us to where we were before 1993.

Written Comments

Kenneth A. Lazarus, Esq. (08-CV-008). There is presently no privilege that prevents inquiry at trial into the matters sought to be protected by this amendment. But unless this information is excluded at trial, the proposed amendments may be counter-productive. If, however, the goal is to prevent inquiry at trial, the right way to address the question is head-on by amending the Federal Rules of Evidence. Indeed, by attempting to create what arguably amounts to a qualified privilege in Rule 26, you may inadvertently invite an eventual constitutional challenge on the Rules Enabling Act under the *Chadha* principle

Patrick Allen, Esq. (08-CV-041): I believe it would be appropriate to include protection from disclosure whether in discovery or in trial. If draft opinions are not discoverable before trial, the subject of draft opinions should not be raised at trial.

Gregory P. Joseph, Esq. (08-CV-055): Academic commentators (08-CV-070) argue that this amendment would somehow run afoul of the Rules Enabling Act because it is effectively "modifying a privilege." This argument proves too much. If returning the state of discovery to essentially where it was prior to the adoption of the 1993 amendments does that, the argument actually proves that the 1993 amendment itself violated the Rules Enabling Act. For discussion of that possibility, see Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97 (1996). It is impossible to argue that the proposed amendment can run afoul of the Act without conceding that the 1993 amendments -- which created the problems now being corrected -- did so first.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): The purpose and effect of the amendment are to extend the attorney client privilege to cover a broad range of communications between lawyers and testifying experts, and it therefore may be subject to 28 U.S.C. § 2074(b)'s requirement for affirmative adoption by Congress. The amendment is plainly meant not only to forbid discovery on these topics, but also to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its declared goals. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds of the amendment are precisely the same as those relied on to support most privileges: the asserted value of a class of private communications, and the fear that they will be discouraged if outsiders can inquire into them. This concern about the role of Congress is reinforced by the recent experience with Evidence Rule 502, which Congress did adopt as written, but only with a lengthy explanatory Statement of Congressional Intent.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): There is no problem with rulemaking authority here. The current provisions in Rule 26 were adopted in 1993 through the normal Rules Enabling Act mechanism. No one suggested at that time that this required an Act of Congress. To the extent that courts interpreted those 1993 changes as removing an attorney's communications with a testifying expert from work-product protection, there is no reason why a further rule amendment cannot make clear that these communications are now protected as attorney work product. All this amendment does is return the rule to its pre-1993 status. If the argument were correct, the 1993 amendment itself would have been invalid because it "abolished" an evidentiary privilege. By the same token, we do not anticipate these issues to be raised at trial, because work product objections would properly prevent inquiry there too, and keep the trial focused on the issues that matter -- in this situation the substance of and support for the expert's opinion.

Prof. Stephen D. Easton (08-CV-169): If the proposed amendments are adopted, a civil attorney conducting a cross-examination would almost never ask an expert about the extent to which a retaining attorney influenced her opinion, because the cross-examiner would not know the answer to that question.

TAB - 5

Item 5 will be an oral report from Judge Koeltl
on the 2010 Conference

TAB - 6

RULE 8(c): DISCHARGE IN BANKRUPTCY

In August 2007 the Standing Committee published for comment a proposal to amend Civil Rule 8(c) by deleting "discharge in bankruptcy" from the list of affirmative defenses. The Committee Note explained the proposal:

> "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.

This proposal originated in suggestions by bankruptcy judges that statutory amendments adopted many years ago have made it wrong to describe discharge in bankruptcy as an affirmative defense. If a debt actually has been discharged, the protection of the discharge is not waived by failure to plead the discharge when a post-discharge action is brought on the debt. Any judgment on the debt is void. The Department of Justice memorandum attached to this Note questions that proposition, although the question is buried in footnote 3. The Bankruptcy Rules Committee, after a presentation by the author of the Department memorandum, voted to support the proposal to delete "discharge in bankruptcy" from Rule 8(c). Judge Wedoff has provided a memorandum, also attached, that explains the Bankruptcy Rules Committee's position and responds to the Department position.

It is awkward to ask the rules committees to resolve a dispute of substantive law. The Department of Justice position provides arguments that awkward problems may confront a creditor claiming on a debt that has not been discharged by the debtor's general discharge. The creditor may not even have had notice of the bankruptcy proceeding. The defendant debtor is in a much better position to raise the question by protesting that the claim has been discharged — that puts the creditor in a position to explore the question by orderly litigation procedure. The Department also is probably right in part on the res judicata question — if the discharge question is raised by any party, it is actually litigated, and the court rules, as a matter necessary to judgment, that there was no discharge, issue preclusion may well override the statutory provision that the judgment is void if the court was wrong on the discharge issue. Finally, the Department correctly points out that the final sentence of the proposed Committee Note is misleading — a determination of discharge may be made by the court entertaining the action on the claim that may or may not have been discharged. The final sentence should be deleted.

Those observations, however, do not speak to the central question. The statute plainly says that a judgment on a discharged debt is void. Courts that have recognized the statute agree. Failure to plead the discharge does not make the judgment valid. The continuing presence of "discharge in bankruptcy" in Rule 8(c)'s list of affirmative defenses is inappropriate and may mislead both discharged debtors and courts. No one has yet suggested a plausible middle ground that might alleviate the predicament of the creditor whose debt was not discharged but who cannot rely on the debtor's failure to raise the discharge issue as a defense. Suggesting relief by way of motion to vacate the judgment under Civil Rule 60(b) if the debt in fact had been discharged is not persuasive. The published amendment should be recommended for adoption. If a new pleading method can be devised for this particular situation, it will be considered in due course.

It is recommended that the Committee recommend that the Standing Committee approve for adoption this amendment of Rule 8(c)(1) and approve the accompanying Committee Note:

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: * * *

~~• discharge in bankruptcy;~~

* * *

COMMITTEE NOTE

"[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. These consequences of a discharge cannot be waived. ~~If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.~~

MEMORANDUM

To: The Advisory Committee on Rules of Civil Procedure

From: The Advisory Committee on Rules of Bankruptcy Procedure

Re: Discharge in Bankruptcy in Fed R. Civ. P 8(c)

Date: March 27, 2009

In December 2005, the Advisory Committee on Rules of Civil Procedure recommended for publication a proposal to remove "discharge in bankruptcy" from the list of affirmative defenses in Fed. R. Civ. P. 8(c). The recommendation was published in August 2007, and the Department of Justice submitted the only comment opposing the proposed rule change. In connection with further consideration of questions raised by the DOJ, the Civil Rules Committee asked for a recommendation from the Advisory Committee on Bankruptcy Rules. At its March 26, 2009 meeting, the Bankruptcy Committee considered the issue, aided by a memorandum (dated March 4, 2009) from the DOJ, detailing its arguments against the proposed change to Rule 8(c). After a full discussion of the matter, the Bankruptcy Committee determined to recommend adoption of the proposed change. This memorandum sets out the basis for the Bankruptcy Committee's recommendation and responds to the arguments made by the DOJ.

A. The central issue: whether discharge in bankruptcy is a waivable defense

Rule 8(c) sets out a list of affirmative defenses that "a party must affirmatively state." The rule "require[s] the defendant to plead any of the listed affirmative defenses

that it wishes to raise or risk waiving them." 5 Charles Alan Wright & Arthur R Miller, Federal Practice and Procedure § 1270 (3d ed. 2008). Among the listed defenses subject to waiver if not affirmatively stated is "discharge in bankruptcy." The proposal to eliminate this defense from Rule 8(c) is based on § 524(a) of the Bankruptcy Code (Title 11, U.S.C.) which provides as follows:

> (a) A discharge in a case under this title —
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . .

In proposing the change to Rule 8(c), the Civil Rules Committee determined that § 524(a) prevents the bankruptcy discharge of a particular debt from being waived and voids any judgment obtained on a discharged debt, despite a procedural default by the debtor. The DOJ has responded with arguments raising issues of statutory construction and policy, contending that § 524(a) is consistent with the Rule 8(c) requirement that a party plead discharge as an affirmative defense.

As discussed below, the DOJ's statutory construction arguments conflict with the language and history of § 524(a) and are unsupported by any case law. Moreover, contrary to the DOJ's policy arguments, eliminating "discharge in bankruptcy" from Rule

8(c) will not creat procedural difficulties, but rather correct what is now a misleading provision.

B. The language of § 524(a)

The DOJ makes three arguments in support of its position that § 524(a) allows a waiver of discharge by failure to assert the discharge as an affirmative defense. Two appear on page 6 of its memorandum:

> [1] New Code § 524(a)(1) . . . provides that a discharge "voids any judgment at any time obtained, to the extent that such judgment" is for a discharged debt. [I]t uses the present tense verb "voids." Under the plain language rule of statutory construction, the present tense verb suggests that the "at any time obtained" language is referring to judgments entered either pre- or post-petition but prior to the discharge and not to future judgments.
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> [2] At the same time, the injunctive provision in § 524(a)(2) proscribes the continuation of a pre-discharge suit on a debt [only] if the debt was clearly discharged, and similarly forbids a new action unless the creditor had a colorable claim to an exception.

The third argument is set out in footnote 3 on page 3: "The invalidation of waivers in the final clause of § 524(a) . . . addresses contractual waivers, and not the failure of a debtor to plead a discharge in a future lawsuit . . . ."

None of these arguments can be reconciled with the actual language of § 524(a). First, the provision that a bankruptcy discharge "voids any judgment at any time obtained" necessarily affects judgments obtained after discharge as well as before; otherwise, instead of applying to judgments obtained "at any time," the statute would refer

to judgments obtained "before the entry of discharge." Similarly, the use of the present tense "voids" simply reflects the continuing effect of the discharge: it both "voids" judgments previously obtained and "voids" judgments obtained thereafter. The DOJ's suggestion that a future tense is somehow required has no basis in grammar.

Second, the suggestion that § 524(a) applies only to debts that are "clearly" discharged, and not to debts subject to a "colorable claim" of nondischargeability, contradicts the statutory language. No such limitation appears in the statute; if a debt is discharged, it cannot be subject to an enforceable judgment. Nothing in the statute dictates a different result depending on the degree to which a debt might be subject to nondischargeability claims. Statutes should not be read to include unexpressed limitations. *See Felder v Casey*, 487 U.S. 131, 148 (1988) (noting the Court's refusal to add exhaustion requirements to civil rights legislation); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (observing that the Supreme Court "has counseled against adding extra-legislative requirements to statutory text"); *cf. Gardenhire v. United States Internal Revenue Serv. (In re Gardenhire)*, 209 F.3d 1145, 1148 (9th Cir. 2000) ("Close adherence to the text of the relevant statutory provisions and rules is especially appropriate in a highly statutory area such as bankruptcy.").

Finally, nothing in the statutory language suggests that the anti-waiver provisions of § 524(a) apply to contractual waivers but not to waivers resulting from procedural default. The term "waiver" plainly encompasses the bar resulting from a defen-

dant's failure to plead an affirmative defense *See, e.g., Jakobsen v. Mass. Port Authority,* 520 F.2d 810, 813 (1st Cir. 1975) ("The ordinary consequence of failing to plead an affirmative defense is its forced waiver . . . ."). In providing that the debtor may not waive discharge, § 524(a) draws no distinction between contractual and procedural waivers, and again, it is improper to engraft limitations on a statute's general provisions. However, even if the DOJ's argument on this point were correct, it would not limit the principal effect of § 524(a), which is to void any judgment on a discharged debt.

Thus, none of the DOJ's arguments effectively challenges the reading that the Civil Rules Committee suggested in proposing the change to Rule 8(c): "A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. . . . Section 524 has superseded the role of discharge as an affirmative defense."[1]

C. The legislative history of § 524(a)

Since the language of § 524(a) plainly provides that a discharge in bankruptcy cannot be waived, there is no need to explore its legislative history. However, if

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[1] The DOJ does not argue that Rule 8(c) could somehow supersede § 524. That argument would be foreclosed by the fact that the Bankruptcy Code was enacted after the rule was in place. The more recent enactment, of course, is controlling. *See Mitchell v. Farcass,* 112 F.3d 1483, 1489 (11th Cir. 1997) (holding that "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts" (quoting and adopting the holding of *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir. 1996))).

the arguments in the DOJ memorandum were sufficient to raise some question about the meaning of § 524(a), its legislative history could properly be consulted. *See Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 737 (1985) (when a statute is ambiguous, the court may seek guidance in the relevant legislative history): *United States v Yellin (In re Weinstein)*, 272 F.3d 39, 48 (1st Cir. 2001) (where the Bankruptcy Code is ambiguous, the courts look to "its historical context, its legislative history, and the underlying policies that animate its provisions").

The history of § 524(a) clearly demonstrates the nonwaivable character of discharge under the Bankruptcy Code. That history unfolds in four steps:

1. Before 1937, courts interpreted the Bankruptcy Act of 1898 to provide that a debtor's discharge was indeed an affirmative defense. If a debtor did not raise a bankruptcy discharge in response to a collection action brought after the discharge was granted, the debtor waived that defense. *See In re Evans*, 289 B.R. 813, 826 (Bankr. E.D. Va. 2002) (discussing practice under the Bankruptcy Act).

2. Consistent with then-existing bankruptcy law, Rule 8(c), as originally enacted in 1937, made discharge in bankruptcy an affirmative defense. *See Francis v. Humphrey*, 25 F. Supp. 1, 3 (E.D. Ill 1938) (setting out the original text of the rule). The substance of the rule has not changed since.

3. In 1970, Congress amended the Bankruptcy Act to include a new § 14f, making the discharge in bankruptcy self-effectuating and so eliminating the need for its asser-

tion as an affirmative defense.[2] The House Report accompanying the amendment made this point emphatically:

> [T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

H.R. Rep. No 91-1502, at 1-2 (1970), as reprinted in 1970 U.S.C.C.A.N. 4156, 4156.

4. With the adoption of the Bankruptcy Code in 1978, § 524(a) replaced former § 14f. New § 524(a) employed different terminology, but it did not contract the scope of the § 14f discharge. To the contrary, the legislative history indicates that Congress in-

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[2] Former § 14f stated:

> An order of discharge shall—
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> (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and
>
> (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Bankruptcy Act of 1898, § 14f, codified at 11 U.S.C. § 362(f), enacted by Pub.L. 91-467, § 3, 84 Stat. 990, 991 (1970).

tended the Bankruptcy Code to expand the discharge, with an absolute prohibition against enforcing any waiver of a particular debt:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action . . . to collect . . . any discharged debt as a personal liability of the debtor. . . whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect . . . . The change is . . . intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language "whether or not discharge of such debt is waived" is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section.

H.R. Rep. No. 95-595, at 365-66 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6321-22; S. Rep. No. 95-989, at 80 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

D. Decisions interpreting § 524(a)

The DOJ has argued that the "considerable majority of courts have applied Rule 8(c)." (Memorandum at 2.) The meaning of this assertion is unclear. Although, as discussed below, a number of courts have enforced waivers of the bankruptcy discharge under Rule 8(c), they have done so without considering whether § 524(a) required a different result. The decisions actually addressing the impact of § 524(a) have all held that failure to assert a bankruptcy discharge as an affirmative defense does not result in a waiver.

The leading case is *Lone Star Sec & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 170 (B.A.P. 9th Cir 2005), which details the history of § 524(a) summarized above and holds "that the defense of discharge in bankruptcy is now an absolute nonwaivable defense." Thus, the decision notes, "Since 1970, [discharge in bankruptcy] has not been an affirmative defense." Id. *Gurrola* has been cited with approval both in judicial opinions and in secondary sources, most recently in *In re Jones*, 389 B.R. 146, 161-65 (Bankr. D. Mont. 2008), and 4 Collier on Bankruptcy ¶ 524.02 [2] at 524-15 & n.6A (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing *Gurrola* in observing that "Section 524(a)(1) is meant to operate automatically, with no need for the debtor to assert the discharge to render the judgment void," so that "a creditor cannot claim that the voidness of the judgment was waived under a theory of estoppel when a debtor fails to raise the discharge as a defense").

Even before *Gurrola*, the impact of § 524(a) was widely recognized. See, for example, *Braun v. Champion Credit Union (In re Braun)*, 141 B.R. 133 (Bankr. N.D. Ohio 1992), *aff'd and remanded*, 152 B.R. 466 (N.D. Ohio 1993), which both rejected a waiver argument based on the debtor's failure to assert discharge as an affirmative defense and imposed sanctions for the creditor's pursuit of its action. Recently, the Sixth Circuit cited Braun in holding that § 524(a) makes it unnecessary for a debtor to take any action in response to a post-discharge collection suit. *Hamilton v. Herr et al. (In re Hamilton)*, 540 F.3d 367, 373 (6th Cir. 2008) (stating that "a debtor need not raise his discharge in bank-

ruptcy as an affirmative defense, because thanks to § 524(a), such an affirmative defense is unnecessary and has been since 1970" (internal quotations omitted)) Many other decisions have reached the same conclusion.[3]

The decisions cited by the DOJ in no way contradict this interpretation of § 524(a). The first decision the DOJ cites is illustrative. *Bauers v. Board of Regents of Univ. of Wisconsin*, 33 Fed. Appx. 812, 2002 WL 486062 (7th Cir. 2002), an unsigned, non-precedential order, involved a debtor who brought suit against her former employer and failed to assert her bankruptcy discharge in response to counterclaim by the employer The Seventh Circuit did indeed affirm the district court's ruling that the debtor waived the defense of discharge in bankruptcy as a result, citing Rule 8(c). However, the decision does not discuss or even mention § 524(a), and so does not support of the

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[3]*See, e.g., Rooz v. Kimmel (In re Kimmel)*, 378 B.R. 630, 638 (B.A.P. 9th Cir. 2007) (holding that "the Chapter 7 discharge is absolute and, in light of the anti-waiver provisions of § 524(a), does not admit of an equitable exception that would permit it to be waived by postdischarge conduct"); *Pavelich et al. v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 781-82 (B.A.P. 9th Cir. 1999) ("The affirmative nature of the defense of discharge in bankruptcy . . . was effectively outlawed in 1970. It became an absolute defense that relieved a discharged debtor from the need to defend a subsequent action in state court."); *Gilberston v. PEI/Genesis, Inc.*, No. 06-3341, 2007 WL 2710437, at *2 (Bankr. D. Or. Sept. 12, 2007) ("[A]s a matter of federal bankruptcy law, debtor's failure to raise the defense of discharge in the post-discharge state court fraud action did not constitute a waiver of that defense."); *In re Bock*, 297 B.R. 22, 332 (Bankr. W.D.N.C. 2002) (finding that the debtor did not waive her discharge by failing to plead her bankruptcy discharge as an affirmative defense in a state court collection action); *Bishop v. Conley (In re Conley)*, Nos. 98-30339, 98-6363, 1999 WL 33490228, at *8 (Bankr. D. Idaho Dec. 10, 1999) (holding that "a Debtor need not assert the discharge injunction as an affirmative defense in order to later pursue the argument that the judgment is void under § 524").

DOJ's position that § 524(a) allows waiver of discharge through non-assertion of an affirmative defense. The same is true of each of the decisions cited by the DOJ. None of them offers any analysis of § 524(a); each simply applies Rule 8(c) without considering the effect of § 524(a) on waiver of discharge.

It does not appear that any court has published an opinion construing § 524(a) in the manner that the DOJ advocates.

E. Practical considerations

The proper interpretation of § 524(a)—voiding all judgments that contradict a bankruptcy discharge and prohibiting waivers of the discharge—makes it clear that Rule 8(c)'s inclusion of discharge in bankruptcy as an affirmative defense has been superseded. But because the rule still includes the defense, a number of courts—as reflected in the decisions cited by the DOJ—have been misled into finding that debtors have waived their bankruptcy discharges by failing to plead them affirmatively in subsequent collection actions. The fact that the rule's present form causes erroneous rulings presents a powerful practical reason to adopt the change proposed by the Civil Rules Committee.

The DOJ suggests that practical problems will arise if discharge in bankruptcy is no longer listed in Rule 8(c). The simple answer is that changing the rule will not change the law: whatever practical problems the non-waivable discharge creates will exist whether or not the rule is changed. The only effect of changing the rule will be to

eliminate confusion by making the rule consistent with § 524(a), which is in fact the governing law.

Nevertheless, it is worth noting that § 524(a) does not cause significant difficulties in practice. The problems mentioned by the DOJ arise either from the nondischargeability of certain debts or from the failure of a debtor to give notice of the bankruptcy filing to a creditor pursuing collection. The general response to the DOJ's concerns is that questions of dischargeability can usually be determined by a non-bankruptcy court with no violation of the discharge injunction, and a creditor who inadvertently takes action that violates the discharge, without knowledge of the bankruptcy filing, will not be sanctioned for the violation.

The DOJ offers five scenarios to illustrate the effect of eliminating discharge in bankruptcy from Rule 8(c). Since each involves post-discharge collection actions by creditors, the simplest response is to lay out the three possibilities that exist in connection with any such action.

1. *The creditor obtains a determination of dischargeability before pursuing a collection action.*

Section 524(a) only applies to actions to collect a discharged debt, not to actions to determine whether a debt is excepted from discharge. Thus, a creditor may seek a determination of dischargeability without violating the discharge injunction. Certain types of debts—for fraud, breach of fiduciary duty, and willful and malicious injury, as defined in § 523(a)(2),(4), and (6) of the Bankruptcy Code—can only be excepted from

discharge during the bankruptcy case itself. All other kinds of nondischargeability—for student loans, domestic support obligations, and certain tax debts, among others—can be determined by any court of competent jurisdiction. If a creditor raises the question of dischargeability in an appropriate forum, and if the debtor defaults or if there is a ruling on the merits that the debt is in fact excepted from discharge, the creditor may proceed with collection. Rule 8(c) has no application in this situation.

2. *The creditor pursues collection activity without a prior determination of dischargeability and the debtor never raises the discharge*

For several reasons, a creditor might pursue collection activity without first obtaining a ruling that the debt is excepted from the debtor's discharge. The creditor may not know the bankruptcy was filed; the creditor may be confident that the debt is in fact excepted from discharge; or the creditor may simply hope that the debtor will not assert the discharge. If the debtor knows that a particular debt is excepted from discharge—for example, a tax obligation that has previously been found to arise from a fraudulent return or a student loan that the debtor can clearly pay without undue hardship—it is unlikely that the debtor will raise the discharge in response to a collection action. Regardless of the reason, if the creditor pursues collection and the debtor never raises the discharge, the creditor will obviously be able to complete the proceeding with no application of § 524(a) or Rule 8(c).

3 *The creditor pursues collection activity without a prior determination of dischargeability and the debtor asserts the discharge.*

The final possibility is that the creditor pursues a collection action after the debtor's bankruptcy, and the debtor does raise the discharge, either as an affirmative defense at the beginning of the action or later, perhaps when the creditor seeks to enforce a judgment in the collection action. It is in this situation that § 524(a) and Rule 8(c) have their effect

As discussed above, the effect of § 524(a)—like former § 14f—is that debtors cannot waive discharge and that all judgments on discharged debts are void, eliminating the possibility of debtors losing their discharge by failing to respond promptly to a collection action. This imposes no substantial additional burden on creditors or the courts. A debtor who has received a discharge in bankruptcy is unlikely to incur the expense and inconvenience of contesting a collection action on the merits without raising the discharge. Therefore, most collection judgments subject to collateral attack as violations of a bankruptcy discharge will be default judgments. Addressing the question of dischargeability of the debt after such a judgment will involve the same issues and impose the same costs as if the question had been addressed before the judgment was entered.

On the other hand, the effect of current Rule 8(c) has been to cause some courts to overlook § 524(a), allowing creditors to obtain judgments on potentially discharged debts simply because the debtor did not plead the discharge affirmatively. In such cases, Rule 8(c) may persuade the debtor—incorrectly—that there was in fact an effec-

tive waiver. But if the debtor seeks to challenge the finding of waiver, there will be substantial additional costs for all of the parties, in post-judgment motions or appeals, before the question of dischargeability can be addressed on the merits. There are no legitimate cost-savings as a result of retaining the misleading rule provision.

Finally, there is the question of sanctions. It would indeed be unfair to assess sanctions for violation of the discharge injunction against a creditor who pursues a collection action without knowing of the debtor's bankruptcy or otherwise in good faith. However, Rule 8(c) waivers are unnecessary to avoid this result. In ruling on debtors' requests to enforce the discharge, courts have consistently declined to sanction creditors acting in good faith. "[A]s long as a creditor has a good faith basis for believing that its debt was excepted from discharge or . . . had no knowledge of any such discharge, the creditor is not subject to sanctions for violating the discharge injunction when it proceeds in state court." *In re Everly*, 346 B.R. 791, 797-98 (B.A.P. 8th Cir. 2006).

Conclusion

Discharge in bankruptcy is not a waivable affirmative defense. The inclusion of the bankruptcy discharge in Rule 8(c) is incorrect as a matter of law and misleading in practice. Accordingly, the Advisory Committee on Bankruptcy Rules recommends adoption of the proposed amendment removing discharge in bankruptcy from Rule 8(c).

MEMORANDUM

To: Advisory Committee on Bankruptcy Rules

From: J. Christopher Kohn

Re Proposed Elimination of "Discharge in Bankruptcy" from Affirmative Defenses Listed in Fed. R. Civ. P. 8(c)

Date: March 4, 2009

Introduction

The Advisory Committee on Rules of Civil Procedure has published for comment a proposal to eliminate discharge in bankruptcy from the list of affirmative defenses which, under current Rule 8(c), Fed.R.Civ.P., a party responding to a pleading must assert. The Department of Justice opposes this proposal. At our Fall, 2008 meeting, Judge Rosenthal asked our committee to consider the subject and provide its views This memorandum explains why the proposal to delete discharge in bankruptcy from Rule 8(c) should not be adopted.

The draft Committee Note explains the rationale for the proposed change: "[u]nder 11 U S.C § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt," operates as an injunction against actions "to collect, recover, or offset a discharged debt," and "[t]hese consequences cannot be waived."[1] We believe that this rationale does not support a change for the vast majority of post-discharge actions in which the issue of dischargeability would be within the non-bankruptcy jurisdiction of a district (or state) court In enacting the modern Bankruptcy Code, Congress explicitly provided that both non-bankruptcy courts and bankruptcy courts have non-exclusive jurisdiction over "all proceedings arising under title 11." 28 U.S.C. § 1471 (enacted in 1978 and repealed in 1984); 28 U.S.C § 1334(b) (enacted in 1984). A determination of whether one of Code § 523(a)'s exceptions to discharge applies to a debt "arises under title 11," and is thus within the jurisdiction of district courts (and state courts) in ordinary debt collection actions Given that § 524(a)(1) only voids judgments for *discharged* debts, we submit that discharge logically remains an affirmative defense to a post-discharge debt collection complaint in a federal

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[1] Section 524(a)(1) and (2) provide

> (a) A discharge in a case under this title
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived,
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived,

district (or state) court, where no colorable exception to discharge exists.

Furthermore, in those (we believe rare) instances in which the proposed Committee Note's rationale could be apposite (*i e* , when no colorable exception to discharge exists), Rule 60(b) already provides adequate protections to insure conformance with § 524(a). Given the long history of discharge in bankruptcy being identified as an affirmative defense, we believe its deletion now could result in harmful, unintended consequences that outweigh any reason for change. Finally, while we think that no change should occur, if it is deemed necessary, we believe narrower, more focused alternatives exist and we suggest some at the end of this memorandum. Finally, we are attaching, as an appendix, a set of hypothetical fact situations to compare results arising with "discharge in bankruptcy" retained versus removed from Rule 8(c)'s list of affirmative defenses. We believe those examples will help reveal the problems that could be created by deleting discharge from Rule 8(c).

Discussion

We first note that no compelling need for the amendment has been identified. A considerable majority of courts have applied Rule 8(c) *See, e.g., Bauers v. Board of Regents of University of Wisconsin*, 33 Fed. Appx. 812, 817 (7th Cir. 2002) (because chapter 7 debtor-employee did not raise her discharge in bankruptcy as an affirmative defense to her employer's counterclaim for misspending academic study funds, debtor was deemed to have waived the defense); *In re Kahl*, 240 B.R 524, 530 (Bankr. E.D. Pa. 1999) ("undue hardship" exception to general nondischargeability of student loan is not self-effectuating; rather, it is up to the debtor either to bring an adversary proceeding to determine whether student loan debt is dischargeable, or to plead and prove dischargeability of debt as affirmative defense in action brought by creditor in state court); *In re Sunbrite Cleaners, Inc* , 284 B.R 336, 342 (N.D N.Y. 2002) (affirming bankruptcy court's refusal to consider creditor's post-confirmation assertion of nondischargeability due to lapse of jurisdiction, holding that the issue could be raised by the debtor as a defense in post-bankruptcy litigation, whether before a federal district or state court); *Allender v Fields*, 800 N.E.2d 584, 585 (Ind App. 2003) (reversing state court order granting post-judgment relief to debtor who failed to plead discharge as affirmative defense required by Indiana trial rule, where claim was arguably not discharged due to failing to list creditor on bankruptcy schedule); *see also Sparks v Booth*, 232 S.W 3d 853, 870 (Tex. App Dallas 2007); *Systrends, Inc v Group 8760, LLC*, 959 So.2d 1052, 1064 (Ala. 2006), *McWherter v Fischer*, 126 P.3d 330, 331 (Colo. App. 2005). And, if necessary, courts have found other means (primarily Rule 60(b)) if needed, to address a problem when a discharge clearly should have been recognized. *E g* , *Briley v Hidalgo*, 981 F 2d 246 (5th Cir 1993), *aff'g*, 1992 WL 91903 (E D.La 1992)(Rule 60(b) used to vacate a default judgment because the creditor/plaintiff was shown to have had notice of the bankruptcy in time to have filed a § 523(c) dischargeability complaint in the bankruptcy case).

The impetus for change may have been a recent Ninth Circuit Bankruptcy Appellate Panel decision which held that a debtor is not equitably estopped from raising his discharge due to his failure to timely raise the defense in a collection action *In re Gurrola*, 328 B R. 158 (B A P 9th Cir 2005) There, a post-petition default judgment was rendered on a counterclaim filed in violation of the automatic stay (*i e* , prior to discharge). The default was also entered pre-

discharge, although the default judgment was entered after discharge. The creditor conceded that the debt was discharged and that no relevant exception to discharge existed (it was not listed but the bankruptcy was a "no-asset, no-bar-date" chapter 7 case to which § 523(a)(3)(A) was thus inapplicable).[2] The creditor nevertheless argued that the debtor's failure to timely raise the defense estopped him from raising it later. The court recounts the history leading up to the 1970 change in the language of the old Bankruptcy Act's discharge provision which laid the groundwork for the language in the current § 524(a). It notes that Congress was concerned in 1970 that a discharge in bankruptcy was not self-executing and had to be raised affirmatively and that unscrupulous creditors who knew of the bankruptcy case were filing collection suits after the bankruptcy case closed in the hopes of obtaining binding judgments (by default or through the debtor's ignorance) on otherwise dischargeable debts. The opinion also recounts Congress's further expansion of § 524(a) in 1978 to include an anti-waiver provision.[3] Based on these

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[2] Section 523(a)(3)(A) of the Bankruptcy Code provides an exception to discharge if a creditor does not have notice or actual knowledge of the bankruptcy in time to file a claim. If the case is a no-asset chapter 7 case, however, § 523(a)(3)(A) is inapplicable because claims need not be filed and, therefore, the creditor suffers no prejudice from its lack of notice. *See In re Madaj*, 149 F 3d 467, 468-70 (6th Cir. 1998). But § 523(a)(3)(B) does except from discharge, even in a "no-asset, no-bar-date" chapter 7 case, claims identified in § 523(a)(2), (4), or (6)(generally, claims where bad acts, such as fraud, defalcation or an intentional tort is involved) because in those instances, under § 523(c), a creditor must timely file a complaint to have claims declared non-dischargeable before the bankruptcy case is closed. If the creditor does not have notice or actual knowledge in time to meet the deadline for filing such a complaint, it does suffer prejudice and thus is allowed to rely upon the discharge exception in a later action, provided it can demonstrate the applicability of § 523(a)(2), (4) or (6) in that later action As discussed later, the vast majority of courts has held that such § 523(a)(3)(B) claims are within the concurrent jurisdiction of bankruptcy and non-bankruptcy courts

[3] The invalidation of waivers in the final clause of § 524(a) does not justify eliminating discharge as an affirmative defense under Rule 8(c) The phrase "whether or not discharge of such debt is waived" addresses contractual waivers, and not the failure of a debtor to plead a discharge in a future lawsuit, reflecting the traditional definition of "waiver" as a voluntary relinquishment of a known right. *See Kontrick v. Ryan*, 540 U S. 443, 458 n.13 (2004) (distinguishing between "forfeiture" and "waiver"), *Black's Law Dictionary* 1611 (8th ed 2004) The House and Senate Reports explain that the provision operates as an injunction against the collection of a discharged debt "whether or not the debtor has waived discharge of the debt involved," and that "[t]he change is consonant with the new policy forbidding binding reaffirmation agreements . . and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. " H R Rep. No 95-595 at 365-66 (1977), S Rep No 95-989 at 80 (1978), *reprinted in* 1978 U S.C.C.A N , at 5787, 5866 The reports further explain that "[t]he language 'whether or not discharge of such debt is waived' is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section It is directed at waiver of discharge of a particular debt, not waiver of discharge *in toto* as permitted under section 727(a)(9) " *Ibid.* A waiver of discharge *in toto* under § 727(a)(9) requires an explicit statement of waiver By analogy, the reports contemplate precluding limited express

changes, the opinion concludes: "It follows, that the defense of discharge in bankruptcy is now an absolute, nonwaivable defense. Since 1970, it has not been an affirmative defense."[4]

If *Gurrola* is confined to its facts, where the debt was unquestionably discharged, the assertion that a discharge in bankruptcy is no longer an affirmative defense might be unremarkable but, in the vast majority of cases (at least the cases filed since 1970, and even more so since 1978), the existence of the discharge is almost never clear-cut. Indeed, given the prospect of an award of damages and attorneys fees or even a contempt citation facing a party which now brings an action to collect a clearly discharged debt,[5] such cases involving

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waivers (unless the reaffirmation procedure is followed). No indication exists that Congress was referring other than to express waivers, or that it meant to alter the longstanding practice of requiring a debtor to plead discharge in defense to a subsequent action to collect a debt that in fact might not be discharged. Finally, we note that the Supreme Court recently observed in respect to a different bankruptcy provision that "[a] statutory provision protecting a borrower from waiver is not a shield against forfeiture " *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 374 (2007) (holding that the provision precluding waiver of debtor's right to convert bankruptcy case from chapter 7 to chapter 13 did not preclude loss of right due to abuse of process).

[4] In expressing this view, *Gurrola* relies in part on a prior decision of the Ninth Circuit BAP that raises a concern that the BAP's approach logically could extend even to fully litigated judgments where a colorable basis for non-dischargeability exists. In *Pavelich v McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 781-84 (B.A.P. 9th Cir. 1999), the court concluded that even if dischargeability is actually litigated in a non-bankruptcy court, a bankruptcy court can entertain a collateral attack and the judgment is only entitled to *res judicata* effect if it is "correct." *See id* at 783 ("While the power to decide an issue ordinarily connotes the power to decide it incorrectly, with any erroneous result being enforceable unless corrected on appeal, § 524(a)(1) statutory voidness commands a different result") We would respectfully agree with *In re Toussaint*, 259 B R 96 (Bankr E D N.C 2000), that "this logic is flawed " *Id* at 102 (criticizing *Pavelich*); *see also In re Ferren*, 203 F.3d 559 (8th Cir 2000)(per curiam)(rejecting *Pavelich* insofar as it suggests that § 524(a) provides an exception to the *Rooker-Feldman* doctrine, permitting review of final state court judgments regarding dischargeability).

[5] *See, e g , In re Zilog, Inc* , 450 F 3d 996, 1007 (9th Cir. 2006), *In re Pratt*, 462 F.3d 14, 17 (1st Cir. 2006), *Bessette v Avco Financial Services, Inc* , 230 F.ed 439, 445 (1st cir. 2000), *Matter of Rosteck*, 899 f 2d 694, 698 (7th Cir 1990); *but see Pertuso v Ford Motor Credit Co* , 233 F 3d 417, 423 (6th Cir 2000)(holding that no private damages action exists under § 524). In *Walls v Wells Fargo Bank, N A* , 276 F 3d 502, 507 (9th Cir 2002), the Ninth Circuit indicated its agreement with *Pertuso* with respect to the existence of a statutory action, but held that courts could nevertheless use the compensatory civil contempt remedy *Cf In re Rivera Torres*, 432 F 3d 20 (1st Cir. 2005) (although First Circuit recognizes a private damages remedy under § 524, court held that the requirement to strictly construe statutory waivers of sovereign immunity compels the conclusion that, in contrast to § 362's explicit "damages" action for stay violations,

indisputably discharged debts are rare indeed. In the other cases, where the discharge issue is legitimately at issue, Rule 8(c) should be retained as the vehicle for insuring that the issue is timely raised by the party in the best position to know that it exists and, indeed, the party who decides if it will even be raised. Moreover, as *Gurrola* demonstrates, in those very few cases in which the discharge is manifestly clear, relief is available.

Because the discharge there was undisputed, *Gurrola* may not have explored the full extent of the changes Congress made in 1978, that make it inappropriate to continue to rely today on the 1970 Act's different language and intent, and its different jurisdictional premises. The language of the 1970 amendment to § 14f of the old Bankruptcy Act referred only to debts "not excepted from discharge" – similar to the way that current § 524(a) refers only to "any debt discharged under" the Bankruptcy Code's various discharge provisions. Thus, the old Act, like the current one, begged the question of whether any particular debt was excepted from discharge. But the 1970 Act was intended to place dischargeability determinations – or at least certain ones – within the exclusive subject matter jurisdiction of the bankruptcy courts. *See In re Danns*, 558 F 2d 114, 115-16 (2d Cir. 1977) ("Congress gave the federal courts exclusive jurisdiction over dischargeability questions in 1970."); *Chernick v U S*, 492 F.2d 1349, 1351 n.4 (7th Cir. 1974) ("before 1970 . . . the bankruptcy court did not have exclusive jurisdiction to determine dischargeability."). The House Report accompanying the 1970 Act referred to perceived abuses by creditors suing debtors in the hope of winning a default judgment on clearly discharged debts and stated that, "Under [S. 4247], the matter of dischargeability of the type of debts commonly giving rise to the problem . . . will be within the exclusive jurisdiction of the bankruptcy court. The creditor asserting nondischargeability will have to file a timely application in the absence of which the debt will be deemed discharged."

Consistent with this, § 14f(1) of the old Act, as amended in 1970, stated that an order of discharge shall "declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act." Significantly, paragraph (2) of § 17c was analogous to modern § 523(c), requiring timely applications by creditors to preserve certain kinds of debts, while paragraph (3) of § 17c referred to bankruptcy court determinations pursuant to paragraph (2). Accordingly, at least certain kinds of dischargeability determinations could no longer be made by non-bankruptcy courts – *i e*, those requiring timely applications. Moreover, there was no analogue to modern § 523(a)(3)(B), which provides that if a creditor does not have notice in time to file a § 523(c) complaint, then non-bankruptcy courts may determine dischargeability of the kinds of debts listed in § 523(c) as well Additionally, when § 14f was amended in 1970, the jurisdictional provision, 28 U.S C § 1334, provided simply that "[t]he district courts shall have, exclusive of the courts of the States, jurisdiction of all matters and proceedings in bankruptcy"

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neither § 524 nor § 105, through its listing in § 106, waived sovereign immunity for a "damages" action against the United States)

In 1978, Congress materially changed the discharge and dischargeability provisions and explicitly gave concurrent jurisdiction to non-bankruptcy courts in the arena of dischargeability. Thus, it repealed 28 U.S.C. § 1334 and enacted 28 U.S.C § 1471. Section 1471(b) gave the bankruptcy courts "not exclusive" jurisdiction of "all civil proceedings arising under title 11 or arising in or related to case under title 11." In 1984, while § 1471 was repealed, language identical to § 1471(b) was placed in the now current version of § 1334(b). The Senate Report to the 1978 enactment of § 1471 explains that the phrase "arising under title 11" refers to "any matter under which a claim is made under a provision of title 11." S.Rep. 95-989 at 154. The House Report confirms the same, and adds, as examples, claims created by § 522 (exemptions) and § 525 (anti-discrimination rules), among others. H.Rep. 95-595 at 445. Dischargability is plainly a matter "arising under title 11" – specifically § 523 – and thus is within the concurrent jurisdiction of non-bankruptcy and bankruptcy courts.[6] Congress also enacted § 523(a)(3)(B) which effectively enables non-bankruptcy courts to determine the applicability of the § 523(a)(2), (4) or (6) exceptions to discharge if a creditor did not have notice in time to timely seek a determination in the bankruptcy case under § 523(c).

Additionally, new § 524(a)(1) uses considerably different language than old § 14f(1). The old provision, as noted, declared "null and void" any judgment "theretofore or thereafter entered" if the debt at issue was not excepted under one of the self-executing exceptions to discharge and no timely application under old § 17c(2) was filed or, if one was filed, the bankruptcy court had determined the debt to be discharged. New Code § 524(a)(1), on the other hand, provides that a discharge "voids any judgment at any time obtained, to the extent that such judgment" is for a discharged debt It does not make any distinctions among various grounds for nondischargeability or refer to the need to file a timely § 523(c) complaint the way that old § 14f(1) referred to old § 17c(2). And, it uses the present tense verb "voids." Under the plain language rule of statutory construction, the present tense verb suggests that the "at any time obtained" language is referring to judgments entered either pre- or post-petition but prior to the discharge and not to future judgments At the same time, the injunctive provision in § 524(a)(2) proscribes the continuation of a pre-discharge suit on a debt if the debt was clearly discharged, and similarly forbids a new action unless the creditor had a colorable claim to an exception.

In any event, in light of the change from exclusive jurisdiction to concurrent jurisdiction for issues of dischargeability – even the issue of whether an exception under § 523(a)(2), (4) or

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[6] That bankruptcy and non-bankruptcy courts have concurrent jurisdiction over dischargeability determinations is widely recognized *Whitehouse v LaRoche*, 277 F.3d 568, 576 (1st Cir 2002); *In re Doerge*, 181 B.R. 358, 364 n.9 (Bankr S D Ill 1995) (citing *In re Canganelli*, 132 B R 369, 385 n 3 (Bankr. N.D Ind 1991)); *see also Erspan v Badgett*, 647 F.2d 550, 556 (5th Cir 1981), *BCCI Holdings (Luxembourg), S A v Clifford*, 964 F.Supp 468 (D D.C 1997); *In re Fucilo*, 2002 WL 1008935, *7 (Bankr. S D.N Y. 2002); *In re Massa*, 217 B.R. 412, 421 (Bankr W D N Y. 1998), *aff'd*, 187 F 2d 292 (2d Cir 1999); *In re Taibbi*, 213 B R 261, 273 (Bankr. E D N.Y 1997); *Adam Glass Service, Inc v Federated Dep't Stores, Inc* , 173 B.R 840 (E.D N Y 1994) *But see In re Padilla*, 84 B R 194 (Bankr D.Colo. 1987)(holding that the bankruptcy court has exclusive jurisdiction to determine dischargeability under § 523(a)(2), (4), or (6))

(6) applies, at least in cases where the creditor lacked notice in time to file a § 523(c) complaint – the 1970 enactment of old § 14f and its legislative history do not undercut the propriety of the affirmative defense in the context of applying the current Bankruptcy Code. Whatever the situation was prior to 1978, issues concerning the dischargeability of a given debt clearly now come within the jurisdiction of and may be decided by a non-bankruptcy court where a complaint is filed subsequent to the discharge.[7]

A debtor's subsequent assertion of a discharge is based upon facts which may be entirely extrinsic to those giving rise to the claim alleged in the creditor's complaint, and those facts may be uniquely known to the debtor. Indeed, the decision even to *raise* the issue lies solely within the discretion of the debtor. For example, in a post-bankruptcy suit on a student loan, which § 523(a)(8) specifically excepts from the bankruptcy discharge unless the debtor affirmatively establishes that a continuation of the debt would cause an "undue hardship," the creditor in the post-discharge district court action would allege the debt, the default and the obligation to repay. Assuming, as we do for this example, that the debtor never sought the required "undue hardship" determination during the bankruptcy case, the creditor would have no reason (or duty) to allege facts demonstrating a lack of undue hardship. Instead, the debtor would retain the responsibility for affirmatively raising the issue. *In re Kahl*, 240 B.R. 524, 530 (Bankr. E.D. Pa 1999) ("undue hardship" exception to general nondischargeability of student loan is not self-effectuating; rather, it is up to the debtor either to bring an adversary proceeding to determine whether student loan debt is dischargeable, or to plead and prove dischargeability of debt as affirmative defense in action brought by creditor in state court). This is fully consistent with § 524(a), even if one does not accept that the present tense verb "voids" cannot apply to a post-discharge complaint, because judgments are void and collection is enjoined only for *discharged* debts.

The above example involves one of the "self-executing" discharge exceptions. Other such exceptions, all of which can involve fact-intensive inquires regarding issues extraneous to the *prima facie* merits of the creditor's claim and will not be presented in the case unless the debtor/defendant decides they should be raised, include certain kinds of taxes as well as any tax that a debtor has "willfully attempted in any manner to evade or defeat" (§ 523(a)(1)), alimony or child support ((a)(5)), fines or penalties ((a)(7)), personal injury liabilities caused by drunk driving ((a)(9)), FDIC claims against bank directors and officers ((a)(11)), restitution orders in favor of victims in criminal cases ((a)(13)), money borrowed to pay nondischargeable taxes or fines or penalties ((a)(14), (14A), or (14B)), and debts associated with securities law violations ((a)(19)).

The same result should occur for "non-self-executing" discharge exceptions if the creditor's lack of notice is the basis for the exception to discharge If the creditor for a debt other that of a kind identified in § 523(a)(2),(4), or (6) lacks any notice of the bankruptcy and the

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[7] Notably, to our knowledge, neither in 1970 or 1978, when Congress was strengthening the protection of a discharge, did Congress express a need for a change in Rule 8(c) nor has it expressed such a need since 1978 (notwithstanding exhaustive studies and extensive amendments of the bankruptcy laws in the last decade, including recent amendments to enhance debtors' closely-related rights in connection with reaffirmation agreements)

bankruptcy was a "no-asset, no-bar-date" chapter 7 case in which the lack of notice does not provide an exception to discharge under 11 U S.C. § 523(a)(3)(A), judicial economy is greatly enhanced if the debtor raises the issue at the outset of the case. (This seems especially fair if the debtor's own failure to provide notice of the bankruptcy caused the creditor to believe its claim was still viable and, as a result, to incur the expense of seeking to enforce it.) The creditor can then decide whether to dismiss its case (to avoid sanctions for violating the discharge injunction) or, if it believes its debt is excepted from discharge because it actually is of a nature controlled by § 523(a)(3)(B), proceed (perhaps after amending its complaint to address more clearly why the debt falls within the § 523(a)(2), (4) or (6) discharge exceptions). A well reasoned opinion in this regard is *National Ass'n of System Administrators, Inc v Avionics Solutions, Inc.*, 2008 WL 140773 (S.D. Ind. Jan. 10, 2008), in which the court held that non-bankruptcy courts have concurrent jurisdiction to determine dischargeability under § 523(a)(3)(B), including to determine whether the debt was "of a kind" described in § 523(a)(2), (4), or (6). *Id.* at *10; *accord In re Serge*, 285 B.R. 632, 635 n.2 (Bankr. M.D.N.C. 2002) (describing the "several ways to litigate" the matter of dischargeability under § 523(a)(3)(B) where a creditor was not notified of a no-asset case, including reopening the case to file a dischargeability complaint or raising the matter as an affirmative defense to an action on the debt in a non-bankruptcy forum); *see also In re Beezley*, 994 F 2d 1433, 1434 (9th Cir. 1993).[8] The *Avionics Solutions* court further held that discharge in that context was appropriately an affirmative defense. *See also Mickowski v Visi-Trak Worldwide, LLC*, 415 F 3d 501 (6th Cir. 2005) (purpose of Rule 8(c)'s requirement to plead discharge affirmatively is to give plaintiff notice of a defense and a chance to try to prove that it lacks merit). If the debtor is ignorant or sloppy and either fails to raise the issue or defaults, and no colorable basis exists for the debt's being excepted from discharge under § 523(a)(3)(B), Rule 60(b) will still provide a safety net. But eliminating discharge from Rule 8(c) may well increase the instances in which a debtor ignores the issue at the outset and thus increase the incidence of requests for Rule 60(b) relief.

The need for retaining discharge in bankruptcy as an affirmative defense logically follows from the concurrent jurisdiction of bankruptcy and non-bankruptcy courts to determine the issue Because a judgment on a debt, by either a bankruptcy or non-bankruptcy court, is a judicial decree that the debt is in fact owing, a judgment based on a post-discharge complaint logically includes a determination (whether or not actually litigated) that the pre-petition debt was not

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[8] Most courts agree with this view, although a small number have disagreed *See, e g , In re Aiello*, 2007 WL 2363818 (D N.J. 2007) (reversing sanctions for violating discharge injunction by commencing state court action after no-asset chapter 7 where creditor not listed claimed a debt that may have fit § 523(a)(2) and thus (a)(3)(B)); *In re Candidus*, 327 B.R. 112 (Bkrtcy E D.N Y 2005) (denying motion to reopen bankruptcy because state court judgment that § 523(a)(3)(B) applied was within its concurrent jurisdiction); *In re Rollinson*, 273 B R 352 (Bkrtcy D Conn. 2002) (refusing to reopen bankruptcy to schedule debt the dischargeability of which would depend upon whether it was under § 523(a)(2), (4), or (6) since it was not listed, and this could be determined by state court), *see Zachery v Whalen*, 1994 WL 411526 (N D N.Y 1994) (listing other cases agreeing). *But see In re Padilla*, 84 B R 194 (Bankr D Colo. 1987)(holding that the bankruptcy court has exclusive jurisdiction to determine dischargeability under § 523(a)(2), (4), or (6)).

discharged. Defendants with a viable discharge defense should, and most defendants no doubt would, assert it at the earliest possible time if suit is brought on the disputed debt. But if discharge in bankruptcy is eliminated from Rule 8(c), the change could be interpreted to mean that the defendant no longer should raise the defense or, worse, that defendants may ignore post-discharge complaints entirely. This would be a dangerous choice because Rule 8(c) is a non-exclusive list of affirmative defenses. It provides: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including. ." those listed (emphasis supplied). Removing "discharge in bankruptcy" from the list, by itself, will not necessarily effect a change because discharge could still be found to be "[an] avoidance or affirmative defense " Thus, elimination could result in great prejudice to the debtor.

The proposed change could also incorrectly influence principles of *res judicata* If removal of "discharge in bankruptcy" from Rule 8(c) is based on a theory that a judgment in such an action may be "void," as the draft Committee Note suggests, this could improperly imply that the dischargeability of the debt is not an issue within the jurisdiction of the state or federal district court, such that principles of *res judicata* would not preclude subsequent litigation of the issue in a collateral attack on a judgment holding the debtor personally liable for the debt notwithstanding the prior discharge. In addition, the change improperly suggests that, even if jurisdiction existed, the debtor did not have a full and fair opportunity for litigation and thus the judgment is subject to collateral attack.

Additionally, eliminating discharge as a Rule 8(c) affirmative defense may generate unnecessary and wasteful damages litigation by causing practitioners and some courts to assume that suits to obtain judgment on prepetition debts are invariably violations of the discharge injunction in § 524, whenever the debt is ultimately determined to have been discharged. In fact, as long as a good faith claim that a debt was not discharged exists, a suit for a judgment, as a predicate to any effort to collect the debt, should not be viewed as a violation of § 524. *See In re Massa*, 217 B R. 412, 421 (Bankr. W.D N Y. 1998) (because creditor could raise § 523(a)(3)(B) dischargeability issue in collection suit, "until such a determination was made, further proceedings to collect the [claim for fraud which was arguably non-dischargeable under § 523(a)(2)] and have the issue of dischargeability determined pursuant to § 523(a)(3)(B) were not in violation of § 524(a) or the Discharge Order"), *aff'd*, 187 F.2d 292 (2d Cir 1999) [9]

Relief exists where the debt sued upon was unquestionably discharged A judgment on a post-discharge complaint can be considered void, and subject to correction under Rule 60(b)(4),

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[9] One of the problems that can result is reflected in the trial court decision that was reversed in *Chanute Production Credit Ass'n v Schicke*, 9 P 3d 561 (Kan App 2000) The trial judge sanctioned the creditor in that case for not informing the court of the bankruptcy, despite a good faith dispute over dischargeability. The appellate court affirmed the trial court's deferral of the merits of the dischargeability issue while the bankruptcy court determined dischargeability in response to a complaint by the debtor, but reversed the imposition of sanctions, holding that the discharge of the debt was an affirmative defense If the defense is removed from Rule 8(c), decisions like those of the *Chanute* trial court could proliferate, and reversal could become more problematic

and possibly even to collateral attack in a bankruptcy court, if a debtor can show that a creditor had no colorable claim to nondischargeability, so that the court that entered the judgment could not possibly have determined that an exception applied [10] In addition, Rule 60(b)(3) is available if a creditor obtains a judgment through "misconduct," which arguably could include a deliberate violation of § 524(a)'s injunction against filing a complaint for a debt for which the creditor knows that no colorable exception to discharge exists. And "mistake" and/or "excusable neglect" under Rule 60(b)(1) may relieve debtors of default judgments, and allow them to reopen the issue of dischargeability, if the debtor mistakenly believed that the discharge entitled the debtor to ignore the summons and complaint. Even Rule 60(d)(3), which permits avoidance for "fraud on the court," might be available. Thus, in our example above, if the debtor had previously obtained a determination of undue hardship in the bankruptcy case and the creditor nevertheless brought a collection action in which the debtor failed to raise the prior discharge, Rule 60(b) and possibly a collateral attack would provide adequate relief and fully effectuate § 524(a).

In sum, we do not think that § 524(a) was intended to apply to judgments in respect to post-discharge complaints for debts where a good faith basis exists for the creditor's belief that the debt is not discharged, much less where a creditor is not yet even aware of the discharge. Given that view, we do not believe that retaining the affirmative defense in Rule 8(c) results in the rule superseding the statute, or makes valid a judgment that the statute proscribes Rather, under § 524(a), a discharge "voids," when it is entered, existing judgments for discharged debts and enjoins future judgments for discharged debts, but leaves to the concurrent jurisdiction of bankruptcy and non-bankruptcy courts whether a future judgment is or is not proscribed. In such a future action, the issue is most naturally considered an affirmative defense because it is not an element of the plaintiff's claim and the plaintiff may not even be aware of the bankruptcy or, if it is, of the fact that the debtor contests the creditor's understanding that an exception to discharge exists.

For these reasons, the proposal to eliminate discharge in bankruptcy from Fed.R.Civ P. 8(c) should not be adopted.

Possible Alternative Rule Amendments

If the Committee believes that a change is needed some 35 to 40 years after Congress enacted statutory changes to strengthen the discharge provision, when no appreciable harm from the intervening status quo has been demonstrated and Congress has not expressed a need for a change in Rule 8(c), and is willing to accept the uncertainty and at least temporary confusion that

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[10] An analogy to measuring the jurisdictional amount in diversity cases may be useful. In that context, "the sum claimed by the plaintiff controls if the claim is apparently made in *good faith* " *St Paul Mercury Indem Co v Red Cab Co* , 303 U S 283, 288 (1938) (emphasis added) Thus, it may be argued that a judgment on a post-discharge complaint is not void unless the creditor lacked a "good faith" argument for nondischargeability within the jurisdiction of the court that entered the judgment

a change could entail – a step we do not recommend – then it could consider alternatives which are more narrowly focused on the perceived problem and are less likely to cause unintended, collateral effects. They may be considered alternatively or in any combination.

First, to assure that bankruptcy courts are not disinclined to grant collateral relief from default judgments obtained in clear violation of § 524(a), the Committee might consider amending Rule 60(d) by inserting a new paragraph between (2) and (3) as follows (and renumbering (3) as (4)):

> **(d) Other Powers to Grant Relief.** This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
>
> (2) grant relief under 28 U.S.C § 1655 to a defendant who was not personally notified of the action;
>
> (3) grant relief from the judgment under 11 U.S C. § 105(a) if the judgment was obtained in violation of 11 U S.C. § 524(a); or
>
> (4) set aside a judgment for fraud on the court

This is consistent with paragraph (1)'s reference to an independent action and confirms that such an action may be brought under the jurisdiction conferred by 28 U.S C. § 1334(b), and thus be in a bankruptcy court pursuant to 28 U S.C. § 157(b)(2)(I) or (O). This kind of amendment, however, should be accompanied by a Committee Note clarifying that it "is not intended to enable a debtor to ignore a complaint on a debt for which a creditor has a colorable claim that the debt was not discharged under 11 U S.C § 523." Otherwise, the amendment may encourage debtors to ignore potentially valid complaints.

Second, to clarify that Rule 8(c)'s inclusion of "discharge in bankruptcy" is not meant to limit relief from default judgments if no reasonable argument exists that the debt was excepted from discharge, a parenthetical could be added after "discharge in bankruptcy" as follows: "(but this shall not prevent a court from granting relief under Rule 60(b)(4) from a default judgment if the complaint in respect to which the default judgment was entered in violation of 11 U S C. § 524(a)) " This kind of amendment too, however, should be accompanied by a note clarifying that the amendment "is not intended to enable a debtor to ignore a complaint on a debt for which a creditor has a colorable claim that the debt was not discharged under 11 U.S C § 523 "

Third, an alternative way to qualify Rule 8(c)'s inclusion of "discharge in bankruptcy" would be to add "(unless the party stating a claim for relief on a debt is precluded from asserting an exception to discharge by a prior judgment of dischargeability or by 11 U S C. § 523(c))." This amendment would address the fact pattern presented by *Gurrola*. Such an amendment should be accompanied by a note clarifying that "bankruptcy and nonbankruptcy courts generally have concurrent jurisdiction to determine if a debt is excepted from a bankruptcy discharge, except that a debt of a kind specified in 11 U.S C § 523(a)(2), (4) or (6) is discharged unless the creditor timely commences an action to preserve the claim. This requirement does not apply if the creditor does not have notice or actual knowledge of the bankruptcy case in time to file such a

proceeding. A creditor that has failed to comply with § 523(c), or whose claim has been adjudicated by the bankruptcy court to be dischargeable, should not be able to revive a claim through a debtor's failure to recognize the need to plead the discharge in defense, as the complaint would violate 11 U.S.C. § 524(a)." The Committee Note could also indicate that neither the designation of "discharge in bankruptcy" as an affirmative defense nor the addition of this new, clarifying parenthetical, affects the burden of proof existing under otherwise applicable law concerning the application of exceptions to discharge.

Finally, to the extent the primary concern is default judgments, Rule 55(c) might be amended by adding the following sentence: "Good cause may include that a defendant reasonably believed that 11 U.S.C. § 524 made it unnecessary to respond to the complaint." Alternatively, Rule 55(c) could be amended by adding, "The court shall set aside a default if the complaint was filed or the default entered in violation of 11 U S.C. §§ 362 or 524." Either amendment should, in our view, be accompanied by a note clarifying that it "does not apply where a party who received a bankruptcy discharge had notice that the party stating a claim for relief on a debt maintains that an exception to discharge under 11 U.S.C. § 523 is applicable."

Although we posit these alternatives, we urge that no changes in the Federal Rules of Civil Procedure, including Rule 8(c), be made

Examples of Problems That May Arise From Eliminating "Discharge In Bankruptcy" as an Affirmative Defense Under Rule 8(c)

Scenario #1: A Contractual Creditor, Knowing of the Prior Discharge of Its Claim, Sues, Hoping The Debtor Will Default

a Current Rule 8(c)

We assume here that a private creditor with an ordinary, discharged claim deliberately sues in the hope the debtor will default. The problem posed is unrealistic because a creditor without a plausible claim of non-dischargeability would be risking a damages or contempt action in the bankruptcy court for a deliberate violation of § 524(a). Moreover, Rule 60(b), as it currently reads, would justify relief. Although concerns about actions such as this apparently prompted the 1970 amendments to the predecessor of § 524(a), we are unaware of widespread reports of such misconduct occurring in the context of the modern Bankruptcy Code, notwithstanding the continued inclusion of the affirmative defense in Rule 8(c)

b Discharge Defense Eliminated from Rule 8(c)

A creditor willing to risk sanctions for violating § 524 as well as Rule 11 might devise a feigned claim of an exception to discharge, e.g., by claiming lack of notice and, if the case were a no-asset case, by invoking § 523(a)(2), (4), or (6). If the creditor pleads those provisions in its non-bankruptcy complaint, or even if it just pleads *facts* that would establish an exception to discharge, the creditor can hope that the debtor will default What then occurs depends on one's view of whether a discharge defense may be lost through a default, or whether § 524 alters the normal rules that bind a defendant who is served with process and fails to appear, as long as the court had jurisdiction to enter the judgment.

If, regardless of whether the defense is "de-listed" from Rule 8(c), it may still be lost through default because it is intrinsically an affirmative defense, then deleting the defense could be harmful if it prompts debtors or their attorneys to conclude, incorrectly, that they may ignore complaints On the other hand, if the law settles on a view that only actual litigation of the dischargeability issue can insulate a judgment from collateral attack as "void," it will create substantial inefficiencies and uncertainties about the finality of judgments It would remove Rule 8(c)'s current effect of discouraging debtors from ignoring complaints, and may thus increase the likelihood that some debtors will ignore complaints and generate unnecessary collateral litigation.

Scenario #2 An Ordinary Creditor Without Notice of an "Asset Bankruptcy" Files Complaint and the Debtor Defaults

a Current Rule 8(c)

Under current Rule 8(c), if a creditor without notice of an "asset bankruptcy" files a complaint, the claim is not discharged In light of the claim's survival, if the debtor is served

with process personally and defaults, under current Rule 8(c), the judgment would almost certainly be considered valid – putting aside a circumstance that might entitle the debtor to relief for excusable neglect under Rule 60(b)(1).

b Discharge Defense Eliminated from Rule 8(c)

If the defense is "de-listed," theoretically, the result should not differ because the debt "in fact" is *not* discharged (in light of the lack of notice), and the default judgment should therefore still be valid. But the de-listing could well result in more defaults by causing debtors to assume, incorrectly, that they may ignore a complaint just because they *believe* that the creditor had notice. If the creditor did not receive notice, it cannot be expected to plead that "negative fact." The debtor may have failed completely to list the creditor or listed the creditor incorrectly, such that notice was ineffective due to no fault of the creditor. Since the debt is "in fact" not discharged, the default judgment should not be "void" under § 524(a).

Moreover, notice is not always a simple issue. For example, in cases in which a debtor claims that an unlisted creditor had actual notice and the creditor denies that notice, issues will arise as to whether a default judgment in a non-bankruptcy forum may be collaterally attacked in the bankruptcy court. Removing discharge from the list of affirmative defenses may lead debtors and perhaps courts to believe that a debtor who ignored a non-bankruptcy complaint remains entitled at any time to either collaterally attack the judgment as "void" or seek to vacate it pursuant to Rule 60(b) (or a state court procedural analogue), without having to provide any excuse for the debtor's failure to respond to the complaint.

To promote fairness to litigants and judicial economy, a debtor *should* be required to answer a complaint regarding even a presumptively discharged debt because of the ever-present possibility that the creditor did not receive notice, unless the creditor's receipt of notice is manifest in the bankruptcy case record (*e g*, because the creditor participated). As noted earlier, the latter event is highly unlikely given the possibility of sanctions but, in any event, the debtor should not ignore the complaint, but rather he/she should be able to file a motion in the bankruptcy court to enjoin its prosecution and, if appropriate, recover attorney's fees. Nevertheless, even with the affirmative defense rule, courts are likely to accord a debtor some leeway under Rule 60(b) to obtain relief from default judgments, particularly if a creditor is shown to have had notice of the bankruptcy [11]

Scenario #3 Creditor Without Notice in a No-Asset Case Files Post-Discharge Complaint Where a § 523(a)(2), (4) or (6) Claim is Potentially At Issue

a Current Rule 8(c)

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[11] *Briley v Hidalgo*, 981 F 2d 246 (5th Cir 1993), *aff'g*, 1992 WL 91903 (E D La. 1992), is an example of a case in which Rule 60(b) was used to vacate a default judgment because the creditor/plaintiff was shown to have had notice of the bankruptcy in time to have filed a § 523(c) complaint

Since no filing deadline exists for claims in no-asset chapter 7 cases, the inability to file a claim usually does not affect dischargeability under § 523(a)(3) because no prejudice is suffered by not knowing the time within which to file a claim; however, § 523(a)(3)(B) excepts from discharge claims of creditors who lacked notice in time to file a request under § 523(c) for a nondischargeability determinations pursuant to § 523(a)(2), (4), or (6). A creditor without notice of a bankruptcy will have no expectation of a discharge defense; its complaint, therefore, may not include tailored factual assertions pertinent to these provisions.

We note that it is not always clear from the factual averments of a complaint whether the § 523(a)(2), (4), or (6) exceptions apply. While § 523(a)(2) depends essentially on material misrepresentations and other affirmative fraud, a complaint can be unintentionally vague about whether the defendant (debtor) incurred a debt while acting as a fiduciary (see § 523(a)(4)). There is even more potential for vagueness about whether a property damages claim reflects "willful and malicious injury" to property under § 523(a)(6). If a creditor claims that a debtor committed libel or slander, or claims a patent infringement, it is not hard to imagine the claim qualifying as one for willful injury to the creditor or to the creditor's property rights. If the debtor affirmatively raises the discharge issue, the creditor is notified of the defense early in the case and then, informed by that knowledge, can decide how (or even whether) to proceed.

b Discharge Defense Eliminated from Rule 8(c)

In contrast to the 3(a) scenario, if the defense has been "de-listed," debtors could assume that they may ignore an ordinary tort complaint by a creditor that did not receive notice of the bankruptcy. But if it turns out the creditor's claim potentially involved willful injury to person or property, ignoring the complaint could be unwise as the debt may not be discharged and the resulting judgment to that effect might be binding *See* 11 U.S.C § 523(a)(6) Whether ignoring the complaint will prove improvident is not easy to predict, but de-listing the defense will create uncertainty, particularly if the theory for its de-listing indicated in a Committee Note includes the premise that the "voids" or anti-waiver language in § 524(a) extends to all defaults in respect to post-discharge pleadings even where the claim is ultimately shown not to be dischargeable

Scenario #4 A Creditor with Notice of the Bankruptcy Discharge Files A Post-Discharge Complaint Based on a Debt Expressly Excepted from Discharge, e g , § 523(a)(5) (domestic support obligation)

a Current Rule 8(c)

Under § 523(a)(5), a claim for an unpaid domestic support obligation is not discharged, but a related claim for money under a property settlement would be discharged Under current Rule 8(c), if a debtor is served with process, including a complaint by a spouse that pleads "domestic support," the courts would almost certainly hold that a default judgment is valid The *facts* pled (*i e* "domestic support") would suffice to establish non-dischargeability if proved, and thus a default judgment should be presumed to reflect that such proof was possible, regardless of whether the complaint expressly asserts non-dischargeability, or even mentions the defendant's bankruptcy Indeed, even if "domestic support" was not pled explicitly, most courts would probably hold, under current Rule 8(c), that if the debtor wished to claim that the debt was

actually for a property settlement and thus discharged, then it was the debtor's affirmative obligation to so plead. The problems begin only if the defense is de-listed, as discussed next.

b Discharge Defense Eliminated from Rule 8(c)

If the defense is removed, a debtor may be more likely to assume that if a spouse files a post-discharge complaint and the debtor reasonably believes the claim is for a property settlement, the debtor may ignore the complaint because any judgment will be void. The debtor might even send the spouse's attorney a letter taking the position that the debt is discharged, and then may decide to ignore the complaint because he understands that the bankruptcy discharge no longer needs be raised. If the law settles such that the elimination of the defense does not alter the debtor's responsibility to appear, because the creditor properly has invoked the jurisdiction of the non-bankruptcy court, the proposed rule change may mislead debtors by causing them to assume, incorrectly, that they may ignore the complaint.

On the other hand, if the law settles on the view that the de-listing of the defense means that, unless the matter is "actually litigated," it remains appropriate for the debtor to collaterally attack the judgment in bankruptcy court, this will foster unnecessary cost, uncertainty, delay and judicial inefficiency because creditors will not be able to rely on judgments obtained in non-bankruptcy courts. Perhaps even worse would be the situation in which the debtor does appear and litigates for years over the correct amount of the debt and, only after a final judgment, claims that the debt is for a property settlement rather than domestic support and that an adverse judgment may still be collaterally attacked.

Scenarios #5(a) & (b) The IRS claims nondischargeability under § 523(a)(1)(C)

The discussion of scenarios 4(a) and 4(b) above applies equally to tax claims excepted from discharge under § 523(a)(1)(C). Like domestic support claims, the tax exception is "self-executing;" either the claim is or is not discharged, and nothing requires that an adversary proceeding be filed to preserve it. If the result of de-listing the affirmative defense would be a rule that only if dischargeability is "actually litigated" will the debtor be precluded from raising the issue in a future, collateral attack, the government could litigate the merits of a tax claim for years, win, and obtain a judgment, only then to be faced by the debtor's filing a subsequent dischargeability complaint collaterally attacking that judgment. There could even be litigation over the collection of the judgment unrelated to the discharge issue and, after the judgment is collected, the debtor could still file a refund suit and then raise discharge for the first time. If the de-listing does not result in changing the normal rule that a judgment may not be reopened on a ground that could have been asserted before its entry, then debtors may incorrectly assume that it does so That would cause improvident defaults to the detriment of debtors who thereafter may *not* be able to dispute the ground for dischargeability or the merits of the underlying claim

TAB - 7

SUPPLEMENTAL RULE E(4)(f)

Supplemental Rule E(4)(f) provides:

> (f) *Procedure for Release From Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

Professor David J. Sharpe, in 07-CV-D, wrote for an MLA working group that the two statutes have been repealed. (The "official" edition of the Rules, 110th Congress, 1st Sess., Committee Print No. 2, for use of the Committee on the Judiciary of the House of Representatives, notes the repeal of these statutes in 1983.) Deletion of the reference to these statutes seems warranted; publication should flush out any arguments that other statutes should be invoked.

The question is somewhat more complicated as to civil forfeiture actions. New Supplemental Rule G, added in 2006, "governs a forfeiture action in rem arising from a federal statute." But if it does not address an issue, "Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply." Under Rule G(3)(a) and (b) some civil forfeitures are begun by arrest, but others are not. Rule G(8)(d) provides a petition for release of property held for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f). The Department of Justice has noted that "[b]ecause there never have been post-arrest hearings in forfeiture cases," thanks to Rule E(4)(f), there was no reason to say more in Rule G. All of this leaves the possibility that arguments will be made to apply Rule E(4)(f) after an arrest of property for forfeiture if the exception in E(4)(f) for forfeiture actions is deleted. It seems likely that most courts would find in Rule G an evident purpose to provide a generally comprehensive procedure for forfeiture actions. But it is not clear that all courts will reach this result. Nor is it clear what policy arguments might be made for applying Rule E(4)(f), apart from the broad argument that there always should be an opportunity to seek a hearing when a court order deprives a person of ordinary control of property. It may be better to recommend publication in a form that offers an alternative stating explicitly that Rule G excludes Rule E(4)(f), inviting comment on the need for this statement.

The amendment could be framed like this:

> **Rule E. Actions in Rem and Quasi in Rem: General Provisions**
>
> * * * * *
>
> (4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.
>
> * * * * *
>
> (f) *Procedure for Release From Arrest or Attachment* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show

why the arrest or attachment should not be vacated or other relief granted consistent with these rules. ~~This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.~~ [Supplemental Rule G governs the right to a hearing in a forfeiture action.]

COMMITTEE NOTE

Paragraph 4(f) is amended by striking the final sentence. The sentence referred first to statutory provisions applying to suits for seamen's wages; those provisions have been repealed. The sentence also stated that this "subdivision" — apparently referring to paragraph (f) — did not apply to actions by the United States for forfeitures for violating a United States statute. Supplemental Rule G, added in 2006, provides a comprehensive procedure for forfeiture actions in rem. [Supplemental Rule E applies only to the extent that Rule G does not address an issue. Rule G measures rights to a hearing in a forfeiture action. It is no longer necessary to state an exception in Rule E(4)(f).]

U.S. Department of Justice

Civil Division

March 3, 2009

TO: Professor Edward Cooper
Reporter
Civil Rules Advisory Committee

FROM: Ted Hirt
Civil Division
U S. Department of Justice

RE: Proposed amendment to Supplemental Rule E(4)(f)

I have consulted several experts in the areas of admiralty and asset forfeiture practice in the Department of Justice concerning a suggestion submitted to the Civil Rules Advisory Committee – to strike from Supplemental Rule E(4)(f) the following phrase: "This subdivision shall have no application . . . to actions by the United States for forfeitures for violations of any statute of the United States." The author of the proposal has suggested that with the advent of Rule G, it is clear that all forfeiture-related rules are to be found in that new Rule, not in Rule E, rendering obsolete the reference to forfeiture cases in Rule E(4)(f).

I have received several comments in response, which I summarize below.

One attorney noted that the language at issue was intended to reflect the understanding that no post-arrest hearing was required in forfeiture actions brought by the United States. The concern is how courts might interpret the relationship between Rule E(4)(f) and Rule G(1). That Rule provides that Rule G "governs a forfeiture action" but that "[t]o the extent that this rule does not address an issue, Supplemental Rules C and E . . . also apply." Because there never have been post-arrest hearings in forfeiture cases, there has been no reason to refer to them in Rule G. Striking the language at issue could lead to misinterpretations of the meaning of these provisions. One might read Rule G(1) and conclude that there is no provision regarding post arrest hearings in Rule G, therefore that is an issue that the Rule "does not address," so Rule E applies, and Rule E(4)(f) provide the right to a hearing. While that argument would be incorrect in our view, it might gain some credibility if the "non-application" clause in Rule E(4)(f) were stricken

We recommend a variation on the "alternative approach" noted in the parenthetical below the draft Committee Note on page 7 of the Agenda Review from the November 2008 Agenda Book. The final sentence of the Rule would state: "Supplemental Rule G governs proceedings regarding property subject to a forfeiture action in rem." The revised Note can explain that the amendment is not intended to create a right to a hearing in forfeiture cases.

TAB - 8

RULE 45 ISSUES

During the November, 2008, Advisory Committee meeting, there was initial discussion of issues that had been raised about Rule 45 in submissions received by the Committee, and the entire topic of considering Rule 45 changes was assigned to the Discovery Subcommittee for initial review. This discussion is included in the minutes for the November meeting, elsewhere in this agenda book. During the April, 2009, meeting, there will be a further opportunity to discuss Rule 45 issues.

Since the last meeting, the Discovery Subcommittee has been mainly occupied with reviewing and evaluating the testimony and commentary on the published proposed amendments to Rule 26, which are an action item on the Committee's agenda for this meeting. It has not spent a substantial amount of time on Rule 45, but it has considerably amplified the available information about possible issues with the rule. On Dec. 19, 2008, the Subcommittee held a telephone conference to explore issues raised by Rule 45. That conference call included consideration of a brief canvass of what the leading treatises said about Rule 45, and concluded that a second literature search would be useful in identifying and evaluating possible issues for amendment. Since then, Andrea Kuperman, Judge Rosenthal's Rules Clerk, has prepared an extensive memorandum on the considerable secondary literature on the rule.

This memorandum introduces the Rule 45 topics, and raises some of the questions that initially have arisen in connection with the Rule 45 issues that have surfaced so far. Considering those questions may suggest some of the issues that would arise if possible amendments were given serious consideration.

Included with the memorandum in the agenda book should be the following things:

(1) Notes on the Dec. 19 Conference Call

(2) A Dec. 12, 2008, memorandum on treatise discussions of Rule 45

(3) Andrea Kuperman's extensive memorandum on secondary literature on Rule 45 that has appeared since the rule was last amended in a significant way in 1991

During its Dec. 19, 2008, conference call, the Subcommittee identified the following 17 possible issues for consideration in relation to Rule 45:

(1) Use of Rule 45's 14-day objection deadline to get around the 30 days allowed in Rule 34 for producing documents.

(2) Use of Rule 45 to conduct discovery outside the discovery period.

(3) Place of resolution of a discovery dispute. A Rule 26(c) motion may be resolved either by the court presiding over the underlying case or the court that issued the subpoena, but a Rule 45 objection seemingly must be heard by the court that issued the subpoena.

(4) Time for producing a privilege log in response to a subpoena. Is it only 14 days?

(5) Whether a motion to quash must be filed within 14 days even if the return date for the subpoena is a longer time.

(6) Whether Rule 45's 100-mile radius should be reconsidered.

(7) Use of Rule 45 to force corporate party witnesses to travel long distances to testify at trial. (In some recent instances, particularly with corporate parties located outside the district and more than 100 miles from the courthouse, judges have held that Rule 45 permits them to compel corporate officers to attend and testify at trial.)

(8) Whether the length and intricacy of Rule 45 could be modified to simplify the task of using it.

(9) Issues raised during restyling process.

(10) Whether the rule should provide some directions about how motions to quash or compel compliance with a subpoena can be brought before the court when the subpoena is issued by a court other than the one in which the underlying case is pending. (This issue was promoted by an article in the S.F. Recorder discussing the problems that face lawyers who want to get a dispute about a subpoena before a judge in the N.D. Cal. but have no direction from the rules on how to do so.)

A review of practice treatises suggested some additional possible issues:

(11) Whether hand delivery of the subpoena should be required. Comments received in the Committee's inbox had initially raised this issue. Although service of a summons and complaint may be made in any manner permitted by Rule 4, Rule 45 requires personal hand delivery to the person subpoenaed. Should the provisions for service be the same?

(12) Expert subpoena problems. In 1991, Rule 45 was amended to provide protections for unaffiliated witnesses who were subpoenaed. Has this been effective? And do subpoenas sometimes cause problems with expert witnesses regarding discovery seemingly not allowed by ordinary party discovery means? For example, in Plymovent Corp. v. Air Technology Solutions, Inc., 243 F.R.D. 139 (D.N.J. 2007), defendant served a subpoena on an expert consultant retained by plaintiff seeking results of testing done by the consultant. It contended that the protections of Rule 26(b)(4)(B) did not apply because those protections only restrict discovery by deposition or interrogatory and it was seeking production of documents. The court rejected this argument and held that the protections of Rule 26(b)(4)(B) applied.

(13) Effect of an order denying a motion to quash. There may be uncertainty about whether an order denying a motion to quash also commands compliance with a subpoena. It may be that parties serving subpoenas normally move to compel in response to a motion to quash, but if that is not done the rule could possibly address the consequences of denial of the motion to quash.

(14) Subpoenas in arbitration proceedings. The relation between Rule 45 and arbitration proceedings has produced some uncertainties, particularly when subpoenas are used for purposes of discovery as opposed to requiring testimony during the hearing. For example, Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (Alito, J.), addresses such issues.

(15) Whether there are adequate requirements that notice be given to the other parties of service of the subpoena before it is served

(16) Whether the 100 mile limit might be modified only for document subpoenas, which are likely to result in delivery of the responsive materials in a manner that makes a place of production irrelevant.

(17) Whether the protection Rule 45 provides against "significant expense" should be clarified regarding what costs it covers. For example, would it include the attorney time required to review materials before production?

Several of these issues were already discussed initially during the November meeting. A number of additional issues may emerge from Andrea Kuperman's memorandum.

For present purposes, it would be helpful for the Subcommittee to receive initial input from the full Committee on whether the various issues identified seem to warrant further attention, and whether additional issues should be added to the list. Trying to identify all the issues that might emerge from the Kuperman memo seems too daunting, but some more general observations might appropriately set the scene for the discussion in Chicago.

A basic question will relate to the aggressiveness of the Subcommittee's approach to Rule 45. As should be apparent from the above listing, and will become apparent from consideration of the Kuperman memo, there is a large supply of possible issues. On some of those, moreover, disagreements among courts have been reported, although there has not yet been an effort to find out whether that disagreement exists in each instance in which the secondary sources say that it exists.

Whether to credit many of the proposals for rule change depends in large measure on whether there is a serious problem with Rule 45. It is one of the longest rules in the rule book. But that seems, in considerable measure, because it is designed to do many things. Rules 26 through 37 regulate party discovery, while Rule 45 is the only rule that regulates nonparty discovery. In a sense, then, it attempts to include all of the sorts of topics that one finds regarding party discovery in Rules 26 through 37. But Rule 45 also moves beyond pretrial discovery; it is the main tool for requiring a witness to attend and testify at trial, or requiring delivery of documentary or other evidence for use at trial. Given the variety of important matters that Rule 45 must address, it is not surprising that it is long.

There has been some discussion of the possibility of trying to shorten and simplify Rule 45. Much as brevity and simplicity are desirable goals, it may not be possible to shorten or simplify the present rule much. Indeed, as the Kuperman memo shows, criticism frequently takes the form of objecting that the current rule (or its pre-styled version) appeared ambiguous or left questions unanswered. Solving such problems through amending a rule rarely makes the rule shorter or simpler. To the contrary, the existence of "ambiguity" in a rule may result from its brevity and simplicity.

Under these circumstances, a basic question is whether there is a need to change Rule 45. That cannot be answered in a vacuum, of course, and will be answered only after the various specific issues are examined with care But it is worth quoting what one of the experienced lawyers the Subcommittee asked for reactions to changing Rule 45 said about it -- "I don't generally find Rule 45 problematic." In somewhat the same vein, the Magistrate Judges Association Rules Committee (which the Subcommittee invited to comment on whether the rule needed revision) recommended that the rule not be amended, with the following observations: "All felt that the Rule, though very long, provides sufficient guidance as it is presently drafted All agreed that the biggest problem encountered is that counsel or parties dealing with the Rule fail to carefully read and follow the procedures spelled out there."

As the volume of commentary on the rule described in the Kuperman memo shows, others do find aspects of the rule problematic in a variety of ways. But it may be helpful to approach those problems with some general considerations about the topics the rule addresses.

The basic commitment to party control of evidence: Rule 45 (and state-court equivalents) is an extraordinary thing when considered in comparison to how such issues are handled in the legal systems of other countries. In most other countries, party discovery is not allowed, although judges can command parties to turn over specifically identified documents. But even that requirement is often hedged with a notion that a party need not do so if the document will harm its case, something like a Fifth Amendment objection to producing inculpatory documentary evidence. And deposition discovery is rarer still; even in England it is now rare.

Rule 45, as now written, goes far beyond the practice in most other countries. It enables parties unilaterally (acting through the issuing attorney who signs the subpoena) to command nonparties to appear for depositions, to turn over documentary and other evidence, to provide access to premises, and -- occasionally -- to undertake burdensome tasks of gathering responsive material. This is certainly not to say there is something wrong with providing parties with the subpoena power. One might even argue that it is basic to the American attitude toward law enforcement:

> Private litigants do in America much of what is done in other industrialized states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

Carrington, Renovating Discovery, 49 Ala. L. Rev 51, 54 (1997).

There may be genuine challenges to, or at least questions about, this vision of private law enforcement via civil litigation. If so, those questions bear on this vision of the subpoena power, but the basic orientation of the Rule 45 project is not to tackle those questions. Instead, this introduction may explain why the subpoena power would be constrained by limitations not applicable to party discovery and why Rule 45(c) makes such a point of protecting the nonparty served with a subpoena.

Cost and burden of responding to the subpoena: It seems that some regard all expenses incurred by the nonparty in responding to the subpoena as reimbursable, even including attorney time spent reviewing gathered materials to determine whether they are responsive and whether they are subject to a claim of privilege. On the other hand, reportedly failure to object to the subpoena waives this right of reimbursement. But objection -- no matter how trifling the objection may be -- can bring benefits, because it may suspend the duty to respond to the subpoena in any way, even by providing production to which no objection has been made.

The rule now addresses these issues in several places. Rule 45(c)(1) insists that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," adding that when this duty is violated the issuing court may impose a sanction -- including attorneys fees -- on the party or attorney who violated this duty. Rule 45(c)(3)(A)(iv) also directs the court to quash the subpoena when it "subjects a person to undue burden." Rule 45(c)(2)(B)(ii) says that an order enforcing a subpoena "must protect [a nonparty] from significant expense resulting from compliance." All of that seems to be focused on improperly overburdening a nonparty served with a subpoena, and to ensure that such overburdening will not happen, not that the nonparty will be able to recover all costs of compliance with even a reasonable subpoena. Assuming that

there is not improper overreaching, should there be an automatic requirement that the response costs be paid by the party serving the subpoena? Should that reimbursement right apply even when the court ordered compliance? Since the court is to protect against "significant expense" in making such an order, should enforcement routinely direct cost-shifting? Do the current provisions adequately deal with these issues? Could they be helpfully sharpened to identify ways to handle costs of production?

Somewhat related is the problem of production of "inaccessible" electronically stored information. Rule 45(d)(1)(D) provides -- in parallel with Rule 26(b)(2)(B) for party discovery -- that production is not initially required "from sources that the person [subpoenaed] identifies as not reasonably accessible because of undue burden or cost " Also as under Rule 26(b)(2)(B), the burden remains on the recipient of the subpoena to show that these sources are inaccessible within the meaning of the rule, and the court may order discovery nonetheless in light of the limitations of Rule 26(b)(2)(C), and may "specify conditions for the discovery" if it so orders. Those conditions could -- again as under Rule 26(b)(2)(B) -- include partial or complete cost-shifting. To the extent courts are treating all costs as recoverable, this provision is curious. It says that the court should order discovery of "inaccessible" electronically stored information only for good cause, which is not needed to justify a subpoena in the first instance (although every subpoena is governed by the obligation to avoid unduly burdening the recipient). To say that the court *may* condition production on cost-shifting does not say that it *must* do so. Should there be a different approach to requiring cost-shifting when the production is pursuant to a subpoena?

The provision regarding production of "inaccessible" electronically stored information has itself been characterized as inconsistent with other portions of Rule 45 (see Blakely, et. al, 9 Sedona Conf. J. 197 (2008), summarized in Kuperman memo). This article asks whether the standards for inaccessibility are the same with subpoenas as under Rule 26(b)(2)(B), and whether the cost of attorney review may be imposed on the party serving the subpoena. Certainly the generalized expectation with the E-Discovery amendment package in 2006 was that there would be relative parity of treatment between party and nonparty discovery, in the sense that the rule provisions are meant to be parallel. But perhaps they should not be, or have not been so interpreted. Has Rule 45(d)(1)(D) presented serious problems in practice? Should there be "automatic" cost-shifting when a court finds good cause to order production from "inaccessible sources." Should that cost-shifting be affected by whether the nonparty has appropriately preserved "accessible" electronically stored information (see next topic)?

The assertion that "routine" cost-shifting includes the costs of attorney review suggests further issues. Should there be a difference between the cost of attorney review for responsiveness and privilege review? That latter is, by definition, designed to identify materials that will *not* be turned over to the party that served the subpoena. Should it have to pay for being denied production of such allegedly privileged materials? One reaction is that this is a cost resulting from the service of the subpoena, but this result seems somewhat ironic. If reimbursement is required for privilege review, is it still required if the court determines that materials are not privileged and were improperly withheld? It may be that no satisfactory overarching rule can be designed.

Overall, then, the question of allocation of expenses of compliance and what is "significant expense" are important. These expenses can add up. For example, in United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (9th Cir. 1982), defendant TV networks served subpoenas on five producers of TV programming. The producers later sought $2.3 million (in 1980 dollars) from the networks for the cost of responding to the subpoenas. That clearly was a "significant expense," but whether it was reasonably incurred might have been debated.

Preservation by nonparties: Preservation is a major concern, particularly with electronically stored information. In some situations, attorneys write to potential adversaries before suit is filed notifying them of the prospect of suit and demanding that pertinent materials not be discarded. More generally, courts have held (see Judge Scheindlin's rulings in Zubulake v. UBS Warburg) that an obligation to preserve may arise before suit is filed, even without such a demand. In all these situations, the person or organization subject to a litigation-apprehension duty to preserve is a "nonparty" at the time the duty to preserve attaches in the sense that it is not then a party to a pending suit about the matter.

Once a litigation is filed against certain parties, how should those not sued react in terms of preservation? One reaction would be "We don't have to preserve any longer; we were not sued." But that seems somewhat at odds with Rule 15(c)'s provision that in some instances a nonparty may be sued even after the statute of limitations has expired if it knew of the suit and should have realized that but for a mistake it would have been sued. Although a number of courts have ruled that the "mistake" provision can't be used by a plaintiff who was manifestly aware of the existence of the nonparty sought to be added, those rulings are only about whether that nonparty should be deprived of the protections of the statute of limitations. Suppose instead that the nonparty received notice of the probable suit, instituted a litigation hold, and then learned that it had not been sued after all. Could it then immediately discard all (or the potentially inculpatory portion) of the information it had preserved? Would its decision to do that at least support an order that it restore "inaccessible" backup tapes in an effort to locate the discarded information? Should the plaintiff have to pay the cost of that restoration of backup tapes?

Alternatively, to the extent that a nonparty makes an effort to destroy material that is likely to be subpoenaed (or that has already been subpoenaed), should there be a question about whether it was under a duty to preserve the material? On that score, note that Rule 45(b)(1) directs with regard to subpoenas only for documents or electronically stored information that "before [the subpoena] is served, a notice must be served on each party." (There is more discussion of this provision below.) At least in the abstract, it could happen that a party served with this notice could contact the target of the subpoena, and file purging could then occur before service of the subpoena. Has this sort of thing ever actually happened? (Note that the discussion below shows concern about whether the advance notice requirement is being observed.)

The point of this speculation is to illustrate preservation issues that might arise, and the sequence of reasoning that might be employed to support an argument that nonparties have a duty to preserve. The Civil Rules do not regulate preservation (except for the specialized situation under Rule 26(b)(5)(B) where a party has inadvertently produced privileged material and must retain the material pending a ruling by the court on whether it was or remains privileged). Venturing into the area presents a variety of difficulties. Have there been problems that warrant serious consideration of the preservation duties of nonparties? If so, is Rule 45 a place to address those issues?

Location of production or testimony: Rules 45(a)(2), 45(b)(2), and 45(c)(3)(ii) provide specifics about the geographical limitations on subpoenas. We have already seen that there is a conflict on whether Rule 45(b)(2)'s provisions are modified by Rule 45(c)(3)(A)(ii) regarding orders that corporate officers attend trials (as in the Vioxx litigation). (On that score, it is noteworthy that Rule 45(b)(2)(D) says that service may be "at any place * * * that the court authorizes on motion and for good cause, *if a federal statute so provides*." That seems to imply the court may not so authorize in the absence of a "federal statute," but perhaps Rule 45(c)(3)(A)(ii) could be regarded as equivalent to a "federal statute" for these purposes. As noted in prior agenda materials, the interpretation of Rule 45(c)(3)(A)(ii) to permit such commands seems strained.)

The literature review and consideration since the last meeting has identified a variety of other issues regarding location For example, under Rule 45(c)(2)(A), when the subpoena seeks only production of documents or electronically stored information, the person subpoenaed need not appear in person. That being the case, it has been asked, why not permit a subpoena to produce anywhere in the U.S.? The reality reportedly is that "production" will almost always consist of delivery to counsel who served the subpoena via mail, another system of delivery of tangible material, or email. (Note that this reality has produced the suggestion from the ABA Section of Litigation, described below, that the party receiving such production notify the other parties of the fact production has occurred.) Why not say that a production subpoena can direct delivery anywhere in the country? If the rule were so amended, should such flexibility affect our attitude toward the "automatic" shift of costs of production?

Another possible issue has to do with the provision in Rule 45(b)(2)(B) that service is allowed "within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection." Some have asked how this 100 mile standard should be applied. Should it be as the crow flies? According to the actual overland route used? If so, should the court look to the shortest or the fastest (i.e. freeway) overland route? Note that similar directives exist elsewhere in the rules. Rule 4(k)(1)(B), for example, permits service of a summons on a Rule 14 or Rule 19 party anywhere outside the court's judicial district "not more than 100 miles from where the summons was issued." Should the Committee get into the specifics of determining how the 100-mile standard should be applied? If so, only for Rule 45?

Reflection on the various locational provisions in the rule suggests additional questions. Rule 45(b)(2)(B)'s provision regarding place of service raises the question why that should matter given the other limitations on location in the rule. As noted below, we are told that the majority rule is that the person subject to the subpoena must receive in-hand service. Rule 45(c)(3)(A)(ii) requires that the subpoena be quashed or modified if it requires that the person subject to the subpoena "travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." With that limitation on where performance can be required, it is not entirely clear why there should also be a (somewhat different) limitation on where the subpoena can be served. Moreover, Rule 45(c)(3)(A)(ii) seems to require three separate 100-mile calculations; if one of these locations is within 100 miles of the place of performance, does it matter whether the others are located more than 100 miles from the place of performance?

Rule 45(a)(2)(B), meanwhile, requires that a subpoena to attend a deposition issue from the court for the district where the deposition is to be held. If the court presiding over the underlying action is located in a district different from the district in which the witness resides, but within 100 miles of the witness's place of residence, should it matter that the deposition is to occur closer to the witness's home, in the district where the witness resides? Under Rule 45(b)(2)(B), it would seem that in such a situation the court in which the action is pending could by subpoena require the witness to attend a deposition in the courthouse, but not one in the witness's own house because the witness resides outside the district in which the court sits. Perhaps Rule 45(a)(2)(B) is designed to ensure that the witness can contest the subpoena in a nearby court (a topic discussed below), but sometimes these provisions would seem to require that a subpoena issued by the court presiding over the main action require a witness to travel outside her own district. Why not let that court issue a subpoena that requires the witness to appear for deposition at a place that is more convenient to the witness, providing it satisfies Rule 45(c)(3)(A)(ii)?

In sum, reflection on the multiple provisions regarding location in Rule 45 suggests that some reconsideration might be in order. But does the actual operation of the rule suggest that these issues arise in cases?

Yet another issue concerning the 100-mile standard is whether it is passe. This possibility is reflected in the suggestion mentioned above that the rule be revised to permit a document-production subpoena to require production anywhere in the U.S. But should the 100-mile limitation be relaxed more generally? That limitation has evidently been in place and the same since 1789. Changes in the ease and cost of travel since the 18th century may indicate that this territorial limitation should at least be changed, as some have suggested to the Committee. If it should not be changed for discovery purposes, perhaps it should be changed for purposes of trial subpoenas. (This might be a way of dealing with the temptation to distend Rule 45(c)(3)(A)(ii) to permit a subpoena for corporate officers to attend a trial across the country.) If this rule is changed, should there be a change to the handling of tender of fees and mileage (see Rule 45(b)(1))? Should an individual plaintiff have to pay the air fare of a corporate executive subpoenaed to testify at trial? If so, at first class or coach rates?

Issues of service and notice: As noted above, one concern is whether the directive of Rule 45(b)(1) that prior notice be given to the other parties of service of a document-production subpoena has been obeyed since it was added in 1991. The goal was clearly to make pre-service notice mandatory. The 1991 Committee Note explained:

> A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Was this addition a good idea? One fanciful possibility imagined above is that a notified party could contact the nonparty and prompt it to discard the material that would be sought under the subpoena. The suggestion was not meant to suggest that such things are likely to happen. A more realistic possibility is that involving the other parties will stiffen the resolve of the nonparty to resist the subpoena. As noted in relation to costs above, there is some literature saying that the nonparty must object to the subpoena to obtain the benefit of the allegedly "automatic" cost award. Could it be that involving the other parties will stiffen the nonparty's resolve to resist the subpoena? In a similar vein, if the purpose is partly to give the other parties a chance to think about demanding additional production, how should that additional request affect the allocation of costs of production if they are to be shifted from the nonparty?

The ABA Section of Litigation has suggested a related possibility -- that there should be some requirement that the party serving the subpoena give additional notice of receipt of materials obtained via production-only subpoena Such notice could provide some information about the materials so obtained and permit inspection or copying by the other parties. As things now stand, the production can occur without any further notice to the other parties (by delivery to counsel who served the subpoena, we are told), and there seems no formal way to notify the other parties this has occurred or what it produced.

Another issue in the literature (already raised by submissions to the Committee) is whether the rule requires in-hand service and whether it should require in-hand service. Rule 45(b)(1) says "[s]erving a subpoena requires delivering a copy to the named person." We are told that the "majority position" is that this provision requires in-hand service, but one law student urged that the word "personally" be added to the rule as written in 1999 to make it clear that in-hand service is required if this is the desired result. Note that this interpretation of the rule raises

the question mentioned above about why the place of service matters so long as the place of testimony or production is within the 100-mile limit allowed; perhaps in-hand service anywhere (or anywhere in the U S.) should suffice providing that the place of performance is an acceptable one.

This law student writing in 1999 preferred, however, that the in-hand service requirement be written out of the rule and that instead methods of service like those permitted for a summons in Rule 4 be substituted in Rule 45. Alternatively, one could add (as in Rule 4) that service of a subpoena for federal court may be done in any way allowed for service of a subpoena in state court of the state in which the service is made. Because service of a subpoena imposes a duty that can be enforced by contempt (see Rule 45(e)), it may be appropriate to require in-hand service. Is the rule presently unclear about requiring in-hand service so that an amendment might make that explicit? Is the "majority position" a bad idea, so that relaxing the requirement of in-hand service should be considered?

Issues of timing: Subpoenas may permit parties to speed up cases or to sidestep otherwise applicable limitations on when things can be done. They may also impose response duties on nonparties that are unduly abrupt. Should consideration be given to changing those timing provisions?

It does not seem that a subpoena allows a party to jump Rule 26(d)(1)'s gun on early discovery, for that rule says that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."

At the other end of the time spectrum, Rule 45 arguably impairs the discovery cutoff if it permits parties to engage in discovery after the cutoff that would otherwise be forbidden by the cutoff. On one level, that seems not to be a problem of rules, but of the form of court orders. For example, if a Rule 16(b) scheduling order says "The parties must complete all discovery, including discovery by subpoena, by [date]," it would seem that serving a subpoena for discovery after that date is forbidden by the order. Beyond that, Rule 16(b)(3)(A) says that the scheduling order "must limit the time * * * to complete discovery." That seems pretty clear; a Rule 16(b) order that says "The parties must complete discovery by [date]" would seem to include discovery done using a subpoena. It is not clear that a rule amendment (either to Rule 45 or to Rule 16) is necessary to deal with this problem.

A complicating factor is that a subpoena may be necessary to obtain attendance of witnesses or production of documents or electronically stored information at trial Obtaining attendance of witnesses or production of exhibits for trial, of course, is not limited by a Rule 16 order setting a time limit for pretrial discovery (although the listing of the witnesses and/or exhibits may be required by Rule 26(a)(3) or the court's local orders for final pretrial statements). A change to Rule 45 therefore would have to build in an exception for use of a subpoena to obtain witnesses or documents for use at trial. Is there reason for concern that "trial" subpoenas are really disguised discovery? Have genuine trial subpoenas been used in an abusive manner? Should the attitude toward costs be different for genuine trial subpoenas? (If there is "automatic" cost-shifting, should that be applied as to exhibits for use at trial?)

Regarding discovery during the time between the Rule 26(f) conference and the discovery cutoff, the question is rapidity of response. For conventional party discovery, a Rule 30(b)(1) deposition notice must "give reasonable notice." A party may also demand production of documents under Rule 30, but only as provided under Rule 34, which allows 30 days to respond. It seems that Rule 45 allows shorter response times, at least as to document production. Rule 45(c)(2)(B) says that the person subpoenaed for documents may object, but that the objection

"must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." That implies that the time for compliance could be less than 14 days. And given the requirement (discussed above) of giving advance notice of serving the subpoena to all the parties, there may be a temptation to shave days off the nonparty's response time to the subpoena. Is this fair to nonparties who may be served, out of the blue, with a subpoena? Even parties are assured no formal discovery will occur until the Rule 26(f) conference and then, under Rule 34, that they will not have to produce for 30 days On the other hand, in reality is there always considerable delay before any actual production, so that building in more delay is undesirable?

Can a subpoena be used to hurry up production by a party? Evidently a party may be served with a subpoena. Rule 45(c)(3)(A)(ii) refers, for example, to a subpoena on a party. Perhaps serving a subpoena is the only way to assure that a party will appear to testify at trial. Should it be permissible to serve a subpoena on a party to speed up document production so it is required before it would be under Rule 34? Initially, it would not seem unfair to do that if it is fair to require a nonparty to respond within 14 days. Parties should be better equipped to respond than nonparties, and Rule 45 requires that they get advance notice of impending service of a document subpoena, presumably even if it is to be served on them. But do parties really use subpoenas this way? If so, should the rule forbid using a subpoena to obtain production from another party? Would that include entities related to a party (parent or subsidiary corporations, for example)? How would that treatment of related entities affect the application of the Rule 34 concept that the party is obliged to produce whatever is within its "possession, custody, or control," which is often held to include materials within the actual possession of related entities? And wouldn't it then be important to preserve the right to serve a trial subpoena on a party?

Privilege objections: Somewhat related to issues of timing is the handling of privilege objections. There has been some concern with party discovery about the timing for provision of the privilege log that most courts treat as necessary to satisfy Rule 26(b)(5)(A). Are privilege logs due at the time the Rule 34(b) response is due, or can they be delivered later? Rule 45(d)(2)(A) imposes similar requirements in relation to a subpoena, but the stated time to respond (14 days or less) is shorter than under Rule 34. On its face, it seems potentially unfair to a nonparty to say that the log must be supplied by that time. Some literature has addressed these issues. Are they a serious practical problem? Should this problem be addressed independently of the question whether the Rule 26 should be changed to specify when a party's privilege log should be served?

Authority to resolve disputes about enforcement of subpoena: As noted in the list of issues identified during the Subcommittee's conference call, courts may find themselves thrust into the details of litigation from a distant court when asked to enforce a subpoena. This possibility results from at least two related features of subpoenas. First, Rule 45(c)(3) directs the "issuing court" to quash or modify the subpoena under certain circumstances, and authorizes it to do so in other situations. Second, when that court is not the court in which the main action is pending, it may become entangled in issues that bear importantly on the resolution of the main action -- "merits" issues. Beyond that, it may encounter issues that seem dependent on the supervision of the action by the court in which the main action is pending, such as sequence or time requirements for discovery, which might be called "management" issues.

Presently, it seems there is some disagreement on whether the issuing court must decide such issues. There may be some authority for it to transfer or defer to the court in which the main action is pending. The subject of the subpoena surely should have the option to submit the issue to that court. But the subpoenaed nonparty may prefer to have a local resolution. Should the rule guarantee such a right? If so, is there a need to amend the rule to make it clear there is

such a right to local resolution? Would it matter whether the subpoenaed party (e.g , a corporation that operates nationwide) is -- for some purposes, at least -- subject to jurisdiction in the district where the main action is pending? Should the issuing court be required to resolve a dispute about a subpoena served on a party?

To the extent the geographical limitations on enforcement of subpoenas are relaxed by amendment (as discussed above), should that relaxation affect the attitude toward requiring resolution of disputes about enforcement of subpoenas at home? To the extent it seems appropriate to require people to travel 1,000 miles rather than 100 miles to attend and give testimony, should that willingness to require travel to testify lead to a willingness to require the person to travel 1,000 miles to contest the subpoena?

If there is reason to relax the requirement that the issuing court resolve the nonparty's objections to the subpoena, should that be at the discretion of the issuing court rather than a matter of right of the party that served the subpoena? How should the issuing court decide whether to defer to the court handling the main action? It may be that there is a useful dividing line between issues that are enmeshed in the main action and those that are not. For example, if the witness asserts that submitting to a deposition would pose a health risk, that seems something the issuing court could handle as well as the court in which the main action is pending.

But there may often be difficulties determining whether the issue is more suitable for reference to the court in which the main action is pending -- whether it is in some important sense a merits issue or a management issue. Consider, for example, a dispute under Rule 45(d)(1)(D) about production of "inaccessible" electronically stored information. Initially, that would seem similar to the medical objection to a deposition and suitable for resolution by the issuing court based on information about the burden of compliance. But weighing the Rule 26(b)(2)(C) factors might well entail consideration of the importance of the evidence sought to the resolution of the underlying claims. So the question whether many objections to subpoenas will in some categorical sense be more suitable to resolution by the issuing court seems debatable.

If that's true, the policy issue regarding Rule 45 involves balancing the convenience of the person served with the subpoena who wants a local resolution against the convenience for the judicial system of permitting reference of the matter to the judge presiding over the main action. There may also be issues of statutory or rule-based authority, to the extent the notion would be that the court presiding over the main action could "enforce" the subpoena. Does that court have jurisdiction to hold the nonparty in contempt? For present purposes, the key issue seems to be whether the need to create an option for reference to the court where the main action is pending is strong enough to justify addressing these possible complications.

Sanctions for disobedience of subpoenas: On its face, Rule 45 provides the only sanction for disobedience -- contempt under subdivision (e). That raises the potential issues of jurisdiction mentioned above with regard to referring issues to the court in which the main action is pending, if different from the issuing court. The limitation to contempt is presumably due to the impossibility of "merits sanctions" (e.g., default, dismissal, etc.) with regard to a nonparty. Rule 45(e) says the court should impose contempt sanctions only when the nonparty "fails without adequate excuse to obey the subpoena." This provision seems to afford the court sufficient latitude to decline sanctions when appropriate. Is there any reason to consider modification of the sanctions provision in Rule 45?

Subpoenas to government agencies: This topic has received a good deal of attention in the literature, and generated some possibly divergent decisions. The D.C. Circuit has held that "the United States is a 'person' within the meaning of Rule 45." Yousuf v. Samantar, 451 F.3d 248, 250 (D.C. Cir. 2006). Should rule changes to address this issue be considered?

Subpoenas issued by arbitrators: Secondary literature presents a number of issues about subpoenas issued by arbitrators. For example, whether such subpoenas may be used for prehearing discovery, or only for attendance at an arbitral hearing, seems to be in dispute. When they may be used is unclear. To date, it does not seem that anyone has proposed that this Committee attempt to address these issues in the Civil Rules, and it may be that the real questions are governed by the Arbitration Act. Under the Supersession Clause, it could be that a revision to Rule 45 would supersede any contrary interpretation of the Arbitration Act. Is there any reason presently for giving serious consideration to issues that solely relate to issuance of subpoenas by arbitrators?

* * * * *

The foregoing identifies a number of areas of inquiry and reflects on issues that may arise should possible amendments be considered in relation to those areas of inquiry. The Subcommittee has not yet given serious consideration to whether any rule amendment should be considered regarding any of these areas of concern, but it would benefit from learning the Committee's initial attitude towards the importance of rule change to address these areas. Perhaps some can be regarded as "back burner" concerns as the Subcommittee proceeds. The Subcommittee also intends to examine the questions about Rule 45 that surfaced during the Style Project.

DRAFT Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Dec. 19, 2008

On Dec. 19, 2008, the Discovery Subcommittee of the Advisory on Civil Rules held a conference call on Dec. 19, 2008, to discuss possible issues with Rule 45 practice. Participating were Judge David Campbell (Chair, Discovery Subcommittee), Judge Mark Kravitz (Chair, Advisory Committee), Daniel Girard, Anton Valukas, Prof. Edward Cooper, and Prof. Richard Marcus.

Identification of possible issues

The call began with an effort to identify all issues that might warrant attention. Before the call a listing was circulated including a number of issues:

(1) Use of Rule 45's 14-day objection deadline to get around the 30 days allowed in Rule 34 for producing documents.

(2) Use of Rule 45 to conduct discovery outside the discovery period.

(3) Place of resolution of a discovery dispute. A Rule 26(c) motion may be resolved either by the court presiding over the underlying case or the court that issued the subpoena, but a Rule 45 objection seemingly must be heard by the court that issued the subpoena.

(4) Time for producing a privilege log in response to a subpoena. Is it only 14 days?

(5) Whether a motion to quash must be filed within 14 days even if the return date for the subpoena is a longer time.

(6) Whether Rule 45's 100-mile radius should be reconsidered.

(7) Use of Rule 45 to force party witnesses to testify at trial. (In some recent instances, particularly with corporate parties, judges have held that Rule 45 permits them to compel corporate officers to attend and testify at trial.)

(8) Whether the length and intricacy of Rule 45 could be modified to simplify the task of using it.

(9) Issues raised during restyling process.

(10) Whether the rule should provide some directions about how motions to quash or compel compliance with a subpoena can be brought before the court if the subpoena is issued by a court other than the one in which the underlying case is pending. (This issue was promoted by an article in the S.F. Recorder discussing the problems that face lawyers who want to get matter before a judge in the N.D. Cal. but have no direction from the rules on how to do so.)

A review of practice treatises suggested some additional possible issues:

(11) Whether hand delivery of the subpoena should be required. Comments received in the Committee's inbox had initially raised this issue. Although service of a summons and complaint may be made in any manner permitted by Rule 4, Rule 45 requires personal hand delivery to the person subpoenaed. Should the provisions for service be the same?

(12) Expert subpoena problems. In 1991, Rule 45 was amended to provide protections for unaffiliated witnesses who were subpoenaed. Has this been effective? And do subpoenas sometimes cause problems with expert witnesses regarding discovery seemingly not allowed by ordinary party discovery means? For example, in Plymovent Corp. v. Air Technology Solutions, Inc., 243 F.R.D. 139 (D.N.J. 2007), defendant served a subpoena on an expert consultant retained by plaintiff seeking results of testing done by the consultant. It contended that the protections of Rule 26(b)(4)(B) did not apply because those protections only restrict discovery by deposition or interrogatory and it was seeking production of documents. The court rejected this argument and held that the protections of Rule 26(b)(4)(B) applied.

(13) Effect of an order denying a motion to quash. There may be uncertainty about whether an order denying a motion to quash also commands compliance with a subpoena. It may be that parties serving subpoenas normally move the compel in response to a motion to quash, but if that is not done the rule could possibly address the consequences of denial of the motion to quash.

(14) Subpoenas in arbitration proceedings. The relation between Rule 45 and arbitration proceedings has produced some uncertainties, particularly when subpoenas are used for purposes of discovery as opposed to requiring testimony during the hearing. For example, Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (Alito, J.), addresses such issues.

The reactions of lawyers on the Standing Committee suggested some possible additional issues:

(15) Whether there are adequate requirements that notice be given to the other parties of service of the subpoena at the time it occurs.

(16) Whether the 100 mile limit might be modified only for document subpoenas, which are likely to result in delivery of the responsive materials in a manner that makes a place of production irrelevant.

(17) Whether the protection Rule 45 provides against "significant costs" should be clarified regarding what costs it covers. For example, would it include the attorney time required to review materials before production?

The last listing prompted the reaction that failure to give notice was a common problem "So-and-so served a subpoena and nobody told us" is a common complaint. Often the other parties find out about the subpoena only after there has been lengthy negotiation about the proposed production and specifics are settled. The other parties are not allowed to be heard on this topic. But that prompted the further reaction that the other parties may obstruct the negotiation process. The nonparty served with the subpoena probably does not want to provide discovery, but may not care enough to fight the subpoena. Adding the other parties to the mix muddies the waters. If the adversary of the party that served the subpoena is willing to fight it, the nonparty is happy to go along. True, the other party usually does not have standing to move to quash, but that does not always prevent motions to quash, and the nonparty could file a motion and leave the laboring oar to the obstructive party. Even short of a motion, the obstructive opposing party could gum up the works on arranging discovery in significant ways.

Another comment was that the cost-shifting issues may raise important concerns about access to justice.

It was asked what was raised during restyling, but nobody presently is sure. One issue was whether Rule 45's reference to "significant expense" and "substantial expense" in different places should be changed to use one phrase, generating discussion about whether different things were really meant.

Another observation was that a review of Rule 45 showed that it was long but also impressively complete. It really provides a comprehensive set of directives for subpoena practice. "There's enough there to make up quite a few rules." This observation prompted the further reaction that simplifying and shortening the rule may not really be possible. It tries to do in one place all the things that Rules 26-37 do for party discovery. And many of the suggestions for considering modifications probably would result in adding provisions to the rule. Making the rule shorter and simpler is probably not consistent with the other ideas we have discussed.

Where to Go From Here

The discussion turned to next steps. One was to canvas secondary literature. Although the treatises have been reviewed, we do not know what may be out there in the law reviews and other secondary literature. Similarly, it may be that research will identify circuit splits or other conflicts about interpretation of Rule 45 in the published caselaw On the circuit split question, it was noted that it is very difficult for Rule 45 issues to obtain appellate review because that usually can happen only if the nonparty is held in contempt. But it would be worthwhile to know about whatever there is on this score.

Another possibility would be further inquiries to bar groups or specific lawyers. Bar groups include the ABA Section of Litigation, the American College of Trial Lawyers, and the American Association for Justice. Another possible source of ideas and information is the Magistrate Judges' Association.

This raised the question whether we would be inviting suggestions only about issues deserving attention or also about solutions to reported problems. Another question was whether we are seeking to be comprehensive in our examination of Rule 45, or just to focus on issues that have been raised so far. The more we raise issues by canvassing lawyers, the more we need some method to screen out those that are "some lawyer's one-off experience." The general consensus was that if we were to go forward with considering Rule 45 it would make sense to be comprehensive so that there is no need to revisit the rule to deal with something else for at least ten years.

In addition, there is the question whether in our outreach to bar groups and lawyers we identify issues that we've already heard about or solely invite suggestions about issues to be considered. Identifying specific issues we've already heard about can provide feedback on whether others think these are serious issues. But specifying some issues may make the presentation of new issues less likely. It may also suggest that we are more serious about possibly considering rule amendments to deal with these issues than is really the case at this very preliminary point. It is important that we not send the signal that we have such intentions, for we have not made a decision about whether to give serious thought to any amendment ideas. The consensus was not to suggest certain issues in the outreach.

The most attractive solution to the research objective on secondary literature and circuit conflicts would be to obtain assistance from Andrea Kuperman, Judge Rosenthal's rules law clerk. Her assistance on issues raised by the published Rule 26(b)(4) amendment proposals was exemplary. Although we can't monopolize her time, it would be ideal if she could help out on this topic also.

For the outreach effort, Judge Kravitz would contact Jeff Greenbaum of the ABA Section of Litigation, Chris Kitchens of the ACTL, and Greg Joseph. Daniel Girard would similarly contact the AAJ.

Time frame: Discussion turned to the time frame for gathering this information. It was noted that the published proposed rule changes will likely occupy significant amounts of Committee time during the first quarter of 2009. So responses by the end of March would be timely. It was noted also that the Committee's Spring meeting is on April 20-21, and that an in-person discussion of Rule 45 then might be very productive. That would seem to fit well with asking for reactions to be back by the end of March, as those responses could then be considered during the April meeting

Restyling issues: For restyling materials, the first place to turn is the A.O. repository of restyling materials. This is a very large quantity of information, and hopefully can be mined to produce the Rule 45 issues raised during the entire process. Of possibly most interest would be the issues raised initially by the style consultants. Probably that initial review was done by Prof. Rowe (not Prof. Marcus) on Rule 45. James Ishida of the A.O. is the person to approach on this subject.

In sum, the next steps are:

(1) Judge Kravitz will contact Jeff Greenbaum, Chris Kitchens, and Greg Joseph by e-mail to solicit Rule 45 issues from them.

(2) Daniel Girard will similarly contact AAJ.

(3) Judge Campbell will inquire of James Ishida about Rule 45 restyling material.

(4) Judge Rosenthal will be approached about whether Andrea Kuperman will be available to do Rule 45 research.

(5) The goal for responsive materials will be the end of March.

(6) The plan is for the material received to be reviewed and to discuss the Rule 45 issues in Chicago in conjunction with the full Committee's April meeting.

MEMORANDUM

To: Discovery Subcommittee, Advisory Committee on Civil Rules
CC: Mark Kravitz, Ed Cooper
From: Rick Marcus
Date: Dec. 12, 2008
Re: Rule 45 issues

It occurred to me that preparation for our Dec. 19 conference call might profitably include a review of the pertinent coverage of Rule 45 in Fed. Prac. & Proc. and Moore's Federal Practice. I'm writing to report on that review. Although it did not raise much of immediate interest, it may offer some thoughts on where to go from here.

Below, I'll report on a few things in these treatises, both bearing on the issues that have already arisen and raising some other possible issues that we might want to have in mind. In part, I'll be offering observations about issues raised by Dave Campbell in his Dec. 2 e-mail about scheduling this conference call.

Issue 1: Use of Rule 45's 14-day objection deadline to get around the 30 days allowed in Rule 34 for producing documents. This sort of technique has been a longstanding difficulty. Consider the following:

> Prior to 1970 there were some differences between Rule 45 and the procedure for the pretrial production of documents in Rule 34 that tempted litigants to seek to avoid the restrictions on the use of Rule 34 by resorting to Rule 45. This stemmed from the fact that, until 1970, the inspection of documents and things under Rule 34 could be had only on court order, after a motion and a showing of good cause. A subpoena duces tecum, on the other hand, could be issued without court order from 1948 on and an argument was made that the burden was then on the person subpoenaed to establish that the subpoena was unreasonable and oppressive . . . . (9A Fed. Prac. & Pro. § 2452 at 389-90)

Issue 3: The difference between Rule 26(c), which allows a deposition dispute to be resolved either in the court presiding over the case or the court where the deposition is occurring, and Rule 45(c)(2)(B) and (c)(3)(A) and (B), which state that a dispute arising from a subpoena must be heard in the court that issued the subpoena. Consider the following:

> The 1991 amendments to Rule 45(c) make it clear that motions to quash, modify, or condition the subpoena are to be made in the district court of the district from which the subpoena issued. This makes considerable sense. It is the issuing court that has the necessary jurisdiction over the party issuing the subpoena and the person served with it to enforce the subpoena. The decision whether to quash, modify, or condition a subpoena is within the district court's discretion. In multidistrict litigation, the court in charge of the consolidated proceedings has the power to rule on a motion to quash subpoenas. (9A Fed. Prac. & Pro. § 2463.1 at 485-87)
>
> A motion to quash or modify a subpoena is to be granted by "the issuing court." If a subpoena is issued by a district court other than the one in which the case is pending, the proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending. As the Advisory Committee has noted, only the issuing court has the power to grant a motion to quash or modify the subpoena.

In many cases in which the issuing court is different from the court in which the action is pending, the subpoena is the issuing court's only connection with the case. Accordingly, there is authority that a motion to quash or modify a subpoena may be transferred from the issuing court to the court in which the action is pending. This interpretation contravenes the text of Rule 45, and is problematic because the requirement to seek relief in the issuing court is designed to serve the convenience of the person subject to the subpoena, who is presumably in the forum of the issuing court. Transferring the dispute to the district court in which the underlying action is pending undermines that convenience rationale, and may effectively require the subpoenaed person to litigate the issues in a distant forum. Accordingly, there is contrary and preferable authority that a motion to quash or modify may not be transferred, at least not over the objection of the person subject to the subpoena, and instead must be heard and resolved by the issuing court. (9 Moore's Federal Practice at 45-81 to 82)

4. Whether a privilege log must be produced when objections are made in 14 days under Rule 45.

This fourteen-day objection period only applies to subpoenas demanding the production of documents, tangible things, electronically stored information, or the inspection of premises; the time period is not meant to apply to subpoenas ad testificandum. A failure to object within the fourteen-day period usually results in waiver of the contested issue. However, the district court, in its discretion, may entertain untimely objections if circumstances warrant. (9A Fed. Prac & Pro. § 2463 at 479-82)

The description of the withheld materials is required so that the party serving the subpoena can judge the validity of the claim of privilege or work product protection, and can challenge it by a motion to compel when the claim appears unjustified. The description of the withheld materials is therefore a required element, and a claim of privilege made without the description of the materials is insufficient. The claim of privilege, however, need not be contemporaneous with the description of the withheld materials. When a subpoena is broad in its scope, has a brief response time, or both, it may be impractical to require the recipient to conduct a full privilege review before complying. In these circumstances, the express claim of privilege may be made initially, and the description of the materials to support the claim may follow within a reasonable time. (9 Moore's Federal Practice at 45-99)

Besides the passages quoted above, the treatises identify some additional possible issues:

Requiring hand delivery. One comment discussed during the Nov. 17-18 meeting was about whether to permit service in the same manner as permitted by Rule 4. Consider the following:

The longstanding interpretation of Rule 45 has been that personal service of subpoenas is required. The use of the word "delivering" in subdivision (b)(1) of the rule with reference to the person to be served has been construed literally. Under this construction, contrary to the practice with regard to the service of a summons and complaint, it is not sufficient to leave to copy of the subpoena at the dwelling place of the witness. Moreover, unlike service of most litigation papers after the summons and complaint, service on a person's lawyer will not suffice. * * *

> In recent years a growing number of courts have departed from the view that personal service is required and alternatively have found service of a subpoena under Rule 45 proper absent personal service. This emerging minority position could cause confusion and may prompt clarification of the rule. Until that happens, however, personal delivery of the subpoena is the safest course for counsel to follow. (9A Fed. Prac. & Pro. §2454 at 397-401)

Subpoenas served on experts. In 1991, Rule 45(c)(3)(B) was added. "The subpoena provision responds to the growing problem of litigants using subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony." (9A Fed. Prac. & Pro. §2463.1 at 516.) The rule change was designed to respond to these concerns. The question is whether there is an ongoing problem despite the rule change.

Effect of an order granting or denying a motion to quash. Whether this is a concern might be considered:

> Rule 45 does not explicitly address the effect of an order granting or denying a motion to quash or modify a subpoena. For example, is denial of the motion the equivalent of an order compelling compliance with the subpoena? Because cross-motions to quash and to compel compliance are often brought, this issue is infrequently encountered. The limited authority on point, however, holds that an order denying a motion to quash does not constitute an order compelling compliance; the party serving the subpoena must move for a separate order compelling compliance. The authority cited [Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492 (9th Cir. 1983)] is of limited value, however, because the district court issued its order "without prejudice to the question of . . . producibility of the documents." The better view is that, because subpoenas are self-executing, an order denying a motion to quash, unless it indicates otherwise, should be deemed an order granting enforcement. Wise counsel, however, should take the precaution of filing a cross-motion for enforcement. (9 Moore's Federal Practice at 45-85)

Subpoenas for arbitrations. This is not a topic that has been raised by anyone. But both treatises examine the handling of subpoenas issued under authority of the Federal Arbitration Act. See 9A Fed. Prac. & Pro. § 2455.1; 9 Moore's Federal Practice §45.04[3]. A number of issues have arisen in this context, but whether they are governed by Rule 45 is not entirely clear. The topic is mentioned here only because it may be worth considering.

MEMORANDUM

DATE: March 14, 2009

TO: Professor Richard Marcus

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal

SUBJECT: Survey of Issues Regarding Federal Rule of Civil Procedure 45

This memorandum addresses issues that have been raised in commentary regarding Federal Rule of Civil Procedure 45. The Discovery Subcommittee of the Civil Rules Advisory Committee is currently exploring potential amendments to Rule 45. The Subcommittee requested that I survey the commentary that has been published since the last amendments to Rule 45 became effective in 1991. The goal is to determine what issues have developed so that when the Subcommittee is considering revisions to the Rule, it can address all issues that have come up regarding the Rule's application. In researching the secondary literature, I have focused largely on publications directed to practitioners rather than law review articles, because publications directed to practitioners seem more likely to identify difficulties that have come up in practice regarding application of Rule 45 [1] Below is a list of topics that were discussed in the secondary literature I reviewed. Under each topic,

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[1] A search for law review articles and other secondary publications citing Rule 45 since the 1991 amendments became effective reveals thousands of citations Many of these documents merely cite the Rule without containing substantive discussion It is difficult to determine the extent of discussion of the Rule in each citation without reviewing all of the documents individually Because of the large number of secondary sources citing the rule, I have conducted searches for more specific topics within Rule 45, searched in various Westlaw databases for documents containing Rule 45 in the title, and reviewed a large sample of documents citing the rule in different Westlaw databases I believe these searches have uncovered most of the articles with substantial discussion of Rule 45's application since the 1991 amendments, but I can continue to search for additional articles if the Subcommittee would like further review of secondary literature

I have listed the articles that discuss that topic, followed by quotations or summaries of the Rule 45 discussion in the article.

Cost-Shifting Under Rule 45(c)(2)(B)

- William R. Maguire, *Current Developments in Federal Civil Litigation Practice: Setting Reasonable Limits in the Digital Era*, 772 PLI/LIT 205 (2008).
  - This article notes that cost-shifting protections in Rule 45(c)(2)(B) are mandatory, but that "a subpoenaed non-party has to object to the subpoena first to preserve its right." *Id.* at 250 (citations omitted). The article explains that "[a]lthough the decisions are somewhat inconsistent, many courts hold that indemnification under Rule 45(c)(2)(B) includes the reasonable cost of the labor expended to gather and review documents for production, which may include attorneys fees for privilege review, in addition to the actual costs of photocopying." *Id.* (citations omitted).
  - "Although the affirmative cost protections afforded under Rule 45(c)(2)(B) are technically not triggered until the subpoenaed non-party has objected to production and the party seeking discovery has made a motion to compel, the subpoenaed non-party's written response may properly include an objection on the ground that the subpoena will impose an undue burden unless the party is indemnified for full costs and expenses. Once a written objection is served, the party seeking disclosure can either negotiate or make a motion to compel, knowing that the court hearing such a motion must grant full costs and expenses to the responding party." *Id* at 253 (citing FED. R. CIV. P. 45(c)(2)(B)(ii)).
  - "It is therefore proper and effective for a non-party to demand that the party seeking disclosure undertakes to reimburse the full costs of compliance, including attorneys' fees, before the non-party will go forward with production." *Id.*
  - "It should be noted that some courts have been reluctant to apply Rule 45(c) literally For example, judges have declined to order reimbursement of a non-party's costs where the non-party was implicated in the events that gave rise to the lawsuit or could otherwise be considered to have an interest in the outcome." *Id.* at 254. "Courts have sometimes looked at three factors to address this point: 'whether the nonparty actually has an interest in the outcome of the case, whether the nonparty can more readily bear the costs than the requesting party, and whether the litigation is of public importance.'" *Id* at 255 (quoting *Linder v Calero-Portocarrero*, 180 F.R.D. 168, 177 (D.D.C. 1998)).

- Don Zupanec, *Discovery Subpoena – Nonparty – Attorneys' Fees*, 19 NO. 8 FED. LITIGATOR 12 (2004).
  - This article discusses *McCabe v. Ernst & Young, LLP*, 221 F.R.D. 423 (D.N.J. 2004), which held that "[a] nonparty who fails to timely object to a discovery subpoena is not entitled to reimbursement of attorneys' fees incurred in responding to the subpoena." 19 NO. 8 FED. LITIGATOR 12.
  - In the "Litigation Tips" section, the article notes: "Significant here is the district court's assumption that attorneys' fees incurred by a nonparty in complying with a court order compelling production of subpoenaed documents are reimbursable under

Rule 45(c)(2)(B). This is not a universally held view. *See United States v. CBS, Inc* , 103 F.R.D. 365 (C.D. Cal. 1984). Moreover, there may be a distinction between legal fees incurred for a nonparty's own benefit or for the benefit of the subpoenaing party: the former may not be reimbursable while the latter may *See Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp* , 2002 WL 1020777 (W.D.N.Y. 2002), *order vacated in part by, Florida Software Systems, Inc v Columbia/HCA Healthcare Corp.*, 2002 WL 31022885 (W.D.N.Y. 2002)." *Id*

- "Relevant factors in determining what costs the subpoenaing party should absorb include: (1) the nonparty's interest, if any, in the outcome of the litigation; (2) whether the nonparty can more readily bear the costs than the subpoenaing party; and (3) whether the litigation has 'public importance.'" *Id* (citing *In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M 19-96(JSM), 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001)).

- Don Zupanec, *Discovery Subpoena – Compliance Costs – Reimbursement*, 21 NO. 6 FED. LITIGATOR 6 (2006).
  - This article discusses *Angell v. Kelly*, 234 F.R.D. 135 (M.D.N.C. 2006), which held that "[o]bjecting to a discovery subpoena does not entitle a nonparty to reimbursement of costs incurred in complying with the subpoena where compliance is voluntary." 21 NO. 6 FED. LITIGATOR 6. Although the third party had objected to the subpoena and stated its intention to claim reimbursement for attorney time spent reviewing the documents, the court held that by voluntarily complying with the subpoena, the third party had waived its right to recover costs. *Id.* The court concluded that the expense of objecting is not a usual Rule 45(c) cost, but is compensable under Rule 37(a), which authorizes awarding costs, including attorneys' fees, incurred in opposing a motion to compel. With respect to the cost of complying with the subpoena, the court held that a nonparty voluntarily complying with a subpoena is not entitled to reimbursement of costs under Rule 45. *Id.* The court found that any recovery had to be based on a voluntary agreement and that the defendants had only agreed to compensate the third party for copying costs. *Id.*
  - The article concludes: "To avoid forfeiting a right to reimbursement, object, and wait for a court order before producing subpoenaed documents." *Id.*

- Alan Blakley, *Sharpen Your Discovery from Nonparties*, 43-APR TRIAL 34 (2007).
  - This article contains general discussion regarding obtaining electronic discovery from nonparties. The article notes that one case has set out factors to consider in determining whether to shift costs to the requesting party, including: the request's scope, the request's invasiveness, the need to separate privileged material, the nonparty's financial interest in the litigation, whether the party seeking production ultimately prevails, the relative resources of the party and the nonparty, the reasonableness of the costs sought, and the public importance of the pending litigation. *Id.* at 37 (citing *Tessera, Inc v Micron Technology, Inc.*, No. C06-80024MISC-JW(PVT), 2006 WL 733498, at *10 (N D. Cal. Mar. 22, 2006)). "The [*Tessera*] court took the factors from William W. Schwarzer et al., *Federal Civil Procedure Before Trial* ¶¶ 11:2308-2309 (the Rutter Group 2004), which notes that

'ordinarily, attorney fees and overhead costs will not be allowed.' However, if the subpoena is quashed, the court may impose sanctions that could include attorney fees." *Id* at 37 n.14 (citing Schwarzer et al , at ¶ 11:2311).

- *Document Production from Non-Parties – Trade Associations – Costs*, 8 NO. 2 FED LITIGATOR 46 (1993).
  - This article examines a subpoena at issue in *In re The Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992), where the court held that "[a]lthough new Rule 45(c) requires the discovering party to bear the major portion of a non-party's costs of producing and copying subpoenaed documents, a non-party trade association may have to bear that portion of its costs that equals the percent of its income attributable to dues paid by the parties opposing the discovering party." *Id.* at 46. "The court stated that the new rule's mandatory language represented a clear change from former Rule 45(b) which gave district courts discretion to condition the enforcement of a subpoena on the discovering party's paying the costs of production. The court also stated, however, that protection from 'significant expense' does not necessarily mean that the discovering party must bear the entire cost of compliance, particularly where, as here, doubt has been cast on the subpoenaed party's status as a non-party." *Id.* at 47. The article further notes: "The court stated that while it was clear that drafters of new Rule 45 intended to expand the protection for pure non-parties such as disinterested expert witnesses, there was no indication that they also intended to overrule prior Rule 45 case law, under which a non-party could be required to bear some or all of its expenses where the equities of a particular case demanded it. Under that case law, it is relevant to inquire whether the putative non-party actually has an interest in the outcome of the case, whether it can more readily bear its costs than the discovering party, and whether the litigation is of public importance." *Id* (internal citation omitted).

- *Subpoena – Compliance Costs – Reimbursement*, 14 NO. 7 FED. LITIGATOR 173 (1999).
  - This article discusses *In re First American Corp.*, 184 F.R.D. 234 (S.D.N.Y. 1998), where the court found that "[l]egal fees incurred by nonparties in complying with an order to produce documents or other materials in response to a subpoena are reimbursable under F.R.C.P. 45(c)(2)(B)." 14 NO. 7 FED. LITIGATOR at 173. The court granted a third-party's request for reimbursement of certain expenses incurred in complying with a subpoena, including legal fees, but found that "[p]rotection from significant expense does not mean that the subpoenaing party necessarily must bear the entire cost of compliance," and that "[f]actors that are relevant in determining how much of the cost is recoverable include the nonparty's interest, if any, in the outcome of the case, whether it can bear the cost more readily than the subpoenaing party, and whether the litigation is of public importance." *Id* at 174 (citations omitted).
  - In the "Litigation Tips" section, the article notes: "Typically, reimbursement covers the cost of inspection and copying – the functions specifically referred to in the rule. But nothing in the rule necessarily limits recovery to these costs. As the court pointed out, the Advisory Committee Note states that nonparties ordered to comply

with a subpoena are protected against 'significant expense resulting from involuntary assistance to the court.'" *Id*

- Alan Blakely et al., *The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas*, 9 SEDONA CONF J 197 (2008) [hereinafter *Sedona Commentary*].
  - "Rule 45 contains a potential internal inconsistency that no court has yet addressed. Well before the 2006 amendments, Rule 45(c)(2)(B)(ii) was amended to protect a non-party under an order to compel from 'significant expense' related to the production. There is a significant body of case law applying that requirement in the pre-2006 amendment context. Rule 45(d)(1)(D) now has been amended to allow a non-party to object to discovery that is 'not reasonably accessible because of undue burden or cost.' The interplay between these two provisions has not yet been examined. Must a non-party first object and show that the material sought by a subpoena is not reasonably accessible due to undue burden or cost, and then when opposing a motion to compel based on the same subpoena, plead 'significant expense?' Are these standards the same? Will courts automatically protect a non-party from 'significant expense' if, during the process, the non-party has shown 'undue burden or cost?'" *Id.* at 199.
  - "Whether a non-party will be able to shift the cost of attorney review is an open question, but some courts have allowed such shifting." *Id.* at 200 (citing *In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M. 19-96, 2001 WL 345233, at *3 (S.D.N.Y Apr. 9, 2001); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 496 (E.D. Pa. 2005)).
  - "In *Tessera*[, *Inc. v Micron Tech , Inc* , No. C06-80024MISC-JW(PVT), 2006 WL 733498 (N.D. Cal. Mar. 22, 2006)], the Northern District of California sets forth eight factors in determining whether to shift cost to the requesting party: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party's financial interest in the litigation; (5) whether the party seeking production of documents ultimately prevails; (6) the relative resources of the party and the non-party; (7) the reasonableness of the costs sought; and (8) the public importance of the litigation." *Id.* (footnotes omitted). The Sedona Commentary suggests as a Best Practice that these factors be considered in connection with cost-shifting discussions. *Id* at 202.

- John K. Villa, *The Subpoena Surprise Cost-Shifting in Discovery Requests*, 24 NO.6 ACC DOCKET 76 (2006).
  - "[T]he failure to timely object can constitute a waiver of the nonparty's right to reimbursement: a prerequisite to the nonparty's invoking these protections is service of written objections or conditioning compliance on the reimbursement of expenses within the 14-day period. Thus a nonparty cannot first comply with a subpoena and later seek reimbursement for the costs of compliance." *Id* at 77 (footnote omitted).
  - "As construed by one court, there are only two inquiries under subsection (c)(2)(B): 'whether the subpoena imposes expenses on the non-party, and whether these

expenses are 'significant.'' What is 'significant expense'? In making this determination the court has discretion and may consider factors such as the nonparty's interest in the outcome of the litigation or even the nonparty's superior ability to bear the costs of production." *Id* (footnotes omitted).

- "Even if the subpoenaed party does not object, the court may as a matter of discretion grant costs in ruling on the nonparty's motion to quash claiming undue burden It does so by conditioning enforcement of the subpoena on the issuing party's payment of these costs In making this determination courts have considered. the scope of discovery; the depth of the invasion involved in the request; the extent to which the producing nonparty must separate responsive information from privileged or even irrelevant material; and the reasonableness of the expenses. Also relevant is the nonparty's interest in the outcome of the litigation." *Id.* at 77–78 (footnotes and internal bullet points omitted).

- John F. Baughman & H. Christopher Boehning, *Amended Rule 45, Shifting Non-Party Attorney's Fees*, 10/24/2006 N.Y. L.J. 5, (col. 1) (2006).
  - This article discusses uncertainty in whether attorneys' fees can be shifted after the electronic discovery amendments, noting that "[i]t is clear that courts have the authority to shift attorney-review costs from non-party subpoena recipients onto requesting parties, and [that] in the world of paper discovery, such shifting did happen." *Id* The article notes that a three-factor test was developed for shifting attorneys' fees in *In re Application of the Law Firms of McCourts & McGrigor Donald*, No. M. 19-96, 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001), including "(1) whether the non-party actually had an interest in the outcome of the litigation, (2) whether the non-party could more readily bear the costs than the requesting party, and (3) whether the litigation was of public importance." 10/24/2006 N.Y. L.J. 5
  - The article notes that "cost-shift of attorney's fees has been slow to manifest itself in the world of e-discovery," but suggests that the factors used by the *Zubulake* decisions for cost-shifting, although outside the context of nonparty subpoenas, would provide a useful framework for considering cost-shifting of attorneys' fees for reviewing electronically stored information. Those factors include: (1) "The extent to which the request is specifically tailored to discover relevant information"; (2) "The availability of such information from other sources"; (3) "The total cost of production, compared to the amount in controversy"; (4) "The total cost of production, compared to the resources available to each party"; (5) "The relative ability of each party to control costs and its incentive to do so"; (6) "The importance of the issues at stake in the litigation"; and (7) "The relative benefits to the parties of obtaining the information." *Id* The article argues that the first two factors have particular relevance to the nonparty context. *Id.* Finally, the article argues that "because the presumption that producing parties must bear their own review costs does not necessarily hold true in the non-party context, the *Zubulake* court's outright rejection of attorney-review cost shifting in the circumstances of that case need not be a bar to shifting such costs in favor of non-parties once amended Rule 45 takes effect." *Id*

Sanctions (Against Either the Requesting Party or the Subpoenaed Party)

- *Document Production from Non-Parties – Trade Associations – Costs*, 8 NO. 2 FED. LITIGATOR 46 (1993).
  - This article explains that the only sanction available under Rule 45 is contempt: "Plaintiffs sought sanctions under F.R.C.P. 37 (discovery sanctions). The court held, however, that Rule 37, by its terms, applies only to a motion to compel production from a party under Rule 34. Rule 34, in turn now provides that motions to compel production from non-parties are governed by Rule 45. The only sanction provided by Rule 45 is contempt. Contempt was not available here because API had timely objected to the subpoena, and plaintiffs had not attempted to obtain an order compelling production for more than a year." *Id* at 48.

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - "If the serving party fails to provide other parties to the lawsuit with the requisite notice that the document subpoena has been served, the likely remedy is preclusion from offering the produced documents into evidence at trial." *Id.* (citing *BASF Corp. v. Old World Trading Corp* , No. 86 C 5602, 1992 WL 24076 (N.D. Ill. Feb. 4, 1992)).
  - "If the recipient should decline to produce properly subpoenaed documents, Rule 45 specifies a contempt remedy. A new second sentence added to subdivision (e) of the rule in 1991 eliminates contempt power, however, if the third party is required to travel more than 100 miles to produce the documents or attend a deposition." *Id.* (footnote omitted).
  - "Rule 37 sanctions are applicable only to motions to compel brought for violation of Rule 34. Rule 34(c) was amended in December 1991 to provide that nonparty document production is compelled not pursuant to Rule 34 but, rather, pursuant to Rule 45. Accordingly, no Rule 37 sanctions are available for third-party noncompliance with a document subpoena." *Id* (footnotes omitted).

Nonparties' Duty to Preserve

- Alan Blakley, *Sharpen Your Discovery from Nonparties*, 43-APR TRIAL 34, 39 (2007) (noting that "[n]o rule requires a party or nonparty to enter a litigation hold – to preserve any materials that may be relevant to potential or pending litigation," but that such a duty "has developed from the law of spoliation and sanctions as a common law duty").
- *Sedona Commentary, supra.*
  - "Some courts place a burden on the party to have the non-party preserve the evidence. And at least one court has ruled that the issuance of a subpoena to a third party imposes a legal obligation on the third party to preserve information relevant to the subpoena including ESI, at least through the period of time it takes to comply with the subpoena and resolve any issues before the court." *Id.* at 199 (footnotes omitted). "Case law does not require a non-party to continue to preserve materials after they have taken reasonable measures to produce responsive information." *Id*

- Among the suggested Best Practices is the suggestion that "[a]bsent a contractual or other special obligation, the non-party's duty to preserve typically begins upon receipt of a subpoena." *Id* at 202

Service of Subpoenas

- Alan N. Greenspan, *Process and Subpoenas in Federal and Texas State Courts*, 46 BAYLOR L. REV. 613 (1994)
  - "No rules or case law in either federal or state court address service of subpoenas on corporations, partnerships, or other business entities. In federal court, the court in *Matter of Electric & Musical Industries, Ltd.*, [155 F. Supp. 892 (S.D.N.Y. 1957)], implied that service may be accomplished by the methods provided in Rule 4. It would seem logical to rely on the method most likely to provide actual notice to the witness " *Id.* at 630 (footnotes omitted).

- Orlee Goldfeld, Note, *Rule 45(b)· Ambiguity in Federal Subpoena Service*, 20 CARDOZO L. REV. 1065 (1999).
  - "[H]istorically, most courts have held that Rule 45 requires personal service, which mandates that the person serving the subpoena must physically hand the subpoena to the witness. These courts have held other types of service invalid. However, . . . some courts have recently held that substituted service satisfies the Rule's service provision." *Id.* at 1065–66 (footnotes omitted).
  - "Rule 45's service requirement is ambiguous and has led to conflicting holdings in different jurisdictions, leaving practitioners unable to rely on the Rule's language. These holdings have caused a state of confusion regarding which methods of service attorneys may employ to properly serve witnesses with subpoenas. Until there is some clarification as to Rule 45's service provision, practitioners will remain uncertain as to whether they have choices regarding service of subpoenas." *Id* at 1066 (footnotes omitted).
  - "The position adopted by most courts ('majority position') is that Rule 45 limits 'delivering' to personal, in-hand service. At the time of the Rule's last amendment in 1991, no court had deviated from such a position. Since that time, however, a few courts have begun a new trend of allowing other methods of subpoena service ('minority position'). Many other courts have not yet spoken on this issue, leaving practitioners and commentators uncertain as to the Rule's requirements." *Id.* at 1071 (footnotes omitted)
  - "In addition, unlike service of papers other than a summons[,] some courts have not permitted service of a subpoena on a witness's attorney or any other person." *Id.* at 1072 (footnotes omitted).
  - "Courts have articulated several grounds for holding that Rule 45(b) permits only personal service. First, courts have looked at the language of the Rule and have found that it does not authorize any other method of service. Because the Rule's language states only that service shall be made by 'delivering' a copy of the subpoena to the witness, courts have found that, when the drafters of the Rule used the word

'delivering' without any elaboration, they intended personal delivery only and rejected any other method of service." *Id* at 1073 (footnotes omitted). "In addition, courts have reasoned that Rule 45 exclusively requires personal service because its language does not provide courts with any discretion to authorize other methods of service, leaving the courts' proverbial hands tied." Goldfeld, *supra*, at 1073. "Apart from language, courts have cited precedent as a reason for not permitting any other type of service." *Id* at 1074 (footnote omitted). The article notes that courts have also relied on treatises and commentators that "summarily maintain, without any explanation, that Rule 45(b)'s service provision requires personal service." *Id.* (footnote omitted).

- "[A] strong policy reason justifies the minority position, since permitting substituted service helps dovetail subpoena service with the overriding spirit of efficiency of the Federal Rules as detailed in Rule 1 of the Federal Rules . . . ." *Id.* at 1077.
- "If Rule 45 only allows personal service, as courts in the majority position hold, a requirement of specifying the manner of service when filing proof of service [as provided in FED. R. CIV. P. 45(b)(3)] would be superfluous and unnecessary." *Id.* (footnotes omitted).
- The article also notes differences between Rule 4 and Rule 45: "For example, Rule 45 does not include a provision on how service is to be effectuated upon a corporation. Thus, courts have adopted the requirements of Rule 4(h) to determine how to serve a corporation with a subpoena. . . Rule 45 incorporates state law only with regard to the place of service. Rule 45 provides that a subpoena may be served 'at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. Rule 45 does not include state provisions on the method of service. Thus, while a plaintiff may serve a summons in any way permitted by both federal and state law, that same plaintiff is limited with regard to service of a subpoena. Although the subpoena may only be served by the method or methods authorized by federal law—which itself is unclear—the location for service may be governed by the law of the state in which the federal district court sits." *Id* at 1081–82 (footnotes omitted). The author argues that the methods of service permitted in Rules 4 and 45 should be consistent. Goldfeld, *supra*, at 1082.
- "All states have provisions for subpoenas that include service requirements. An examination of the states' subpoena service rules reveals that, although they based their rules on the Federal Rules, many states have deviated from Rule 45. This deviation suggests that states have rejected the language of Rule 45 because it does not adequately meet the states' requirements for subpoena service." *Id* at 1082–83 (footnotes omitted).
- "Methods of substituted service that are reasonably calculated to reach the witness should be embraced as alternatives to personal service. These methods of service afford reliable means of transmitting a subpoena to witnesses and are less costly and less time-consuming than personal service. The alternative means of service

permissible under Rule 4 and state subpoena provisions provide a good starting point from which to explore those substituted service methods that Rule 45 should permit." *Id.* at 1086–87 (footnotes omitted).

- The author suggests that the following alternative methods of service be permissible under Rule 45: "registered or certified mail with return receipt requested . . .", "abode service"; and service "on a nonparty's agent." *Id* at 1087–88.
- "A motivation for clarifying Rule 45's service requirement is the elimination of courts' adjudication of what constitutes proper service under Rule 45. Litigants would conserve judicial resources if they no longer burdened courts with this issue. A hearing or motion practice relating to service of a subpoena shifts the parties' and the court's focus from the merits of the case to an ancillary issue, incurs additional expenses for litigants, and expends the court's resources." *Id* at 1088.
- "To obviate the need for judicial determination of Rule 45's requirements, the drafters of the Rule should clarify its service provision. This may be achieved by amendment to the language of Rule 45(b). If the drafters of the amendment wish to follow the majority position, they should insert the word 'personally' into the text of the Rule. The language of the Rule should then read: 'Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such individual personally . . . .' Alternatively, and preferably, the service provisions of Rule 45 should mimic Rule 4's service provision, which provides several different modes of service. Rule 45 should permit varied methods of service that are reasonably calculated to reach nonparties and provide them with notice of litigants' requests for information. The proposed language of the revised Rule 45(b) should therefore state:

> Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to the individual personally; or by leaving a copy thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing an additional copy thereof by first class mail to the individual at the dwelling house or usual place of abode; or by mailing a copy of the subpoena by certified or registered mail, return receipt requested; or by delivering a copy thereof to an agent authorized by appointment or by law to receive service of process."

Id at 1089 (footnotes omitted).

- John E. Bowerbank, *Do's and Don'ts About a Nonparty's Response to Federal and State Court Deposition Subpoenas Involving Civil Litigation*, 48-JUN ORANGE COUNTY LAWYER 38, 41 (2006) ("Unlike a summons and complaint, there is no substitute service of a subpoena. In both federal and [California] state court, the subpoena must be personally served on the nonparty.").

- Don Zupanec, *Subpoena Duces Tecum – Service*, 20 NO. 11 FED. LITIGATOR 12 (2005).
  - This article examines the decision in *Hall v Sullivan*, 229 F.R.D. 501 (D. Md. 2005), which held that "[a] subpoena requiring production of documents by a nonparty need not be served personally." 20 NO. 11 FED. LITIGATOR 12 The court noted that "delivering" in Rule 45 is not defined, that Rule 45(b)(1) says nothing about personal service, and that Rule 4(e) states that a summons and a complaint may be served "personally," pointing out that "personally" could have been included in Rule 45(b)(1) if personal service was required. *Id.*
  - The article explains: "This is an issue on which agreement remains elusive. The traditional (and probably still predominant) position is that a subpoena must be served personally, *i e.*, by delivering it in-hand to the person served. However, a number of recent rulings reject the personal service requirement and allow service by other means. These include certified mail, Federal Express, or substituted service as provided for by F.R.C.P. 5(b). Service as provided for by state rules may also be permissible." *Id.* (internal citations omitted).

- *Only Personal Service Permissible for Subpoena; Mail Service Quashed*, 24 SIEGEL'S PRAC. REV. 4 (1994) ("Personal delivery is the only method specified for a subpoena, which is a contrast to service of a federal summons under Rule 4, for which a variety of methods are available."; noting one case that upheld certified mail as proper service of a subpoena, but that New York federal cases have held that mail service is not sufficient).

- *Need to Serve a Subpoena? Put It in the Mail*, 9 NO 8 FED. LITIGATOR 240 (1994) (noting that in *Doe v Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994), the court found that a subpoena could be served by certified mail and that hand delivery is not always required).

- *State Methods Also Apply to Federal Subpoena, so State Substituted Service Is Available for Subpoenas, Too*, 72 SIEGEL'S PRAC. REV. 4 (1998).
  - This article notes that in *King v. Crown Plastering Corp.*, 170 F.R.D. 355 (E.D.N.Y. 1997), the court held that despite the majority position requiring personal service of subpoenas, Rule 4(e), which adopted state methods for summons service, should also apply to subpoenas. 72 SIEGEL'S PRAC. REV. 4. The court noted that "by requiring proof of service to refer to the 'manner of service', Rule 45(b)(3) necessarily implies that several methods are possible " *Id.* The article states· "While this seems to us a supportable construction, the mere fact that the majority view is to the contrary suggests that it is best, if at all possible, to effect the service of the subpoena by in-hand delivery." *Id.*

- Richard G. Placey, *Developing Evidence from Nonparties*, 25 NO. 3 LITIGATION 32 (1999) (noting that subpoenas must be personally served under FED. R CIV. P. 45).

- Jason A Grossman, *Federal Court Discovery*, 642 PLI/LIT 331 (2000).
  - "Service of a subpoena, however, is not governed by FRCP 5, but rather by FRCP 45 FRCP 45 provides that a subpoena must be served by delivering a copy of the document to the person named therein (*i e* , personal in-hand delivery) . . . . As such, substitute service is not an option for the service of a subpoena. However, required notice of the subpoena that must be served upon all parties to the action may be served in accordance with FRCP 5." *Id.* at 339 (footnote omitted)

- Adrienne B. Koch, *Service of Subpoenas Under Rule 45 and the Influence of Treatises*, 7/1/2004 N.Y. L.J. 4, (col. 4) (2004).
  - This article argues that there is confusion in the treatises and case law as to whether personal service of subpoenas is required. It argues that Rule 5 defines "delivering" and distinguishes it from other methods of service. *Id* The article points out that the language in Rule 45 can be contrasted with the language in Rule 4, providing methods for service that include personal delivery, which, according to the article, "suggests that the drafters understood how to provide for personal delivery when they intended to do so." *Id.* The article further argues that any doubt about the meaning of "delivering" in Rule 45 should have been dispelled in 1991 when Rule 45(b)(3) was added to provide that proof of service would include an indication of the manner of service. *Id.*
  - The article argues that the issue has been resolved by a Second Circuit decision that has largely been ignored. It points out that in *First City, Texas – Houston, N.A. v Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002), the Second Circuit affirmed a district court holding that service was valid under the parties' agreement and Rule 45 when the subpoena had been left in a conspicuous place at the bank's agent's place of business. The article argues that "[b]y holding that this manner of service – which did not involve personal delivery, but did involve 'delivery' in a manner expressly included in Rule 5's definition of the term [specifically, in Rule 5(b)(2)(A)] – satisfied the requirements of Rule 45, the Second Circuit appears to have resolved an issue that had been the subject of a conflict among the lower courts." *Id* The article laments that "the Second Circuit did not mention that it was resolving such a conflict," and states that "the extent to which the potential import of this decision will be recognized remains to be seen," and that "[t]he treatises have continued to express the view that personal delivery is required as a matter of law in the Second Circuit." *Id* The article also notes that the treatises and case law have relied on *Federal Trade Commission v. Compagnie de Saint-Gobain-Point-a-Mousson*, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980), to find a personal delivery requirement in Rule 45, but argues that that case considered only whether a Federal Trade Commission subpoena was properly served on a foreign corporation by registered mail and only looked to Rule 45 by way of analogy. *Id*
  - The article contends that "Rule 5 provides a workable and clear standard in its definition of 'delivery' as a subset of the types of 'service' it describes," but notes that "no court has adopted it," and that "some courts that have rejected a personal

service requirement under Rule 45 have permitted service in ways inconsistent with Rule 5's definition of 'delivery.'" *Id* (footnote omitted).

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D 197 (1992).
  - "No change is made in method [of service], alas. The method is still by 'delivering' the subpoena to the person to be served. Subdivision (b)(1). The substituted methods available for summons service under Rule 4 are not available for a subpoena, such as by delivery to a person of suitable age and discretion at the witness's dwelling house under Rule 4(d)(1). The word 'delivering' has been rigidly construed." *Id.* at 207 (citing *Fed. Trade Comm'n v Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980)).

Requirement of Notice to Other Parties

- Henry L. Hecht, *How to Prepare and Serve a Federal Notice of Deposition or Subpoena (with Forms)*, 18 No. 6 Prac. Litigator 9 (2007).
  - "A party noticing a deposition of any person must give 'reasonable notice' in writing to every other party to the action. Rule 30(b)(1). The Rule for issuance of a Subpoena does not specify a statutory notice period, but the rule does refer to 'reasonable time for compliance.'" *Id* at 11 (citing FED. R. CIV. P. 45(c)(2)).

- *Subpoena – Notice – Service*, 14 NO. 2 FED. LITIGATOR 44 (1999).
  - This article discusses *Biocore Medical Technologies, Inc v. Khosrowshahi*, 181 F.R.D. 660 (D. Kan. 1998), which held that "'[p]rior notice' of a nonparty subpoena for production or inspection is notice prior to service, not notice prior to the return date." 14 NO. 2 FED. LITIGATOR at 44.
  - In the "Litigation Tips" section, the article notes: "Rule 45(b)(1) requires 'prior notice' to each party. The purpose is to give parties an opportunity to object to the subpoena. Objection would not be possible if notice were sufficient as long as it is given prior to the return date. Since service by mail is complete upon mailing (Rule 5(b)), notice could be mailed as late as one day before the return date. Obviously, this would effectively eliminate any opportunity to object." *Id* at 45.

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992) ("If the serving party fails to provide other parties to the lawsuit with the requisite notice that the document subpoena has been served, the likely remedy is preclusion from offering the produced documents into evidence at trial.") (citing *BASF Corp v Old World Trading Corp.*, No. 86 C 5602, 1992 WL 24076 (N.D. Ill. Feb. 4, 1992)).

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R D. 197 (1992).
  - "[T]he party who has to rely on a subpoena under Rule 45 to get those papers, or for that matter on any other judicial process, can't do it without notice to all other parties

to the action. Under the last sentence of subdivision (b)(1) of Rule 45, the party who seeks pretrial production of documents from a non-party through use of a subpoena duces tecum must serve notices on all the other parties. This requirement of notice of a pretrial subpoena duces tecum is analogous to what Rule 30(b)(1) requires when it is a deposition that is sought of a person (party or nonparty): all the other parties must be given notice of the time and place of the examination and of all related particulars." *Id* at 207.

- Roger W. Kirst, *Filling the Gaps in Federal Rule 45 Procedure for Nonparty Nondeposition Document Discovery*, 205 F.R.D. 638 (2002).
  - This article discusses what the author views as a gap in Rule 45 regarding protection for the party who is the subject of the documents to be produced by a nonparty. "The single mention of an undefined period of prior notice in Rule 45(b)(1) creates a risk that the party who is the subject of the documents will be harmed by improper disclosures before that party has a chance to object or seek a protective order." *Id.* at 638. "Since the period of notice is not defined, every party can only guess about how watchful they must be for a nondeposition subpoena seeking their records from a nonparty. A growing list of reported decisions that document instances in which prior notice was not given provides a reason to reexamine the details of Rule 45." *Id.* The author laments that "the 1991 amendment [to Rule 45] created a procedure that appears to require no cooperation at all. Counsel does not have to coordinate schedules with anyone, does not have to arrange for a court reporter or a location for a deposition, and does not have to ask anyone else to issue the subpoena." *Id* at 640.
  - "The courts that have written opinions have consistently held that the party serving the subpoena must provide prior notice, but they have not answered all of the questions about Rule 45(b)(1). Recent trial court opinions hold that the prior notice must precede issuance of the subpoena, but have not tried to define the period of notice." *Id* at 641 (citing *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 411 (S.D.N.Y. 2000); *Murphy v. Bd of Ed* , 196 F.R.D. 220 (W.D.N.Y. 2000)).
  - "Other reported cases have shown where the language of Rule 45(b) is incomplete. For example, some courts have borrowed the 14-day time limit in Rule 45(c)(2)(B) during which the nonparty is required to comply with the subpoena and held that a later objection from the party who is the subject of the documents is untimely " *Id* (citations omitted). "The only way to be sure a party who is the subject of the documents will have time to object is to provide notice to all parties before the subpoena is served on the custodian. The courts have agreed with that conclusion when the issue has been raised, but they have not defined the amount of notice that is required or suggested where a party might turn for an authoritative definition of an adequate time." *Id* at 642.
  - One proposal suggested in the article is that state rules requiring notice to other parties of nonparty document subpoenas could be adopted in federal court. "The most common state adaptation has been a definition of a specific period of notice to all other parties in order to allow them to object or take other action." *Id* "[T]he

consensus of the state adaptations of Rule 45 is that the best rule would require notice to all parties for the defined period before the subpoena is served," and "that an objection should be sufficient to stop issuance and service of a nonparty nondeposition subpoena." *Id.* at 644.

- Another suggestion in the article is that the scheduling order can address gaps in Rule 45. *Id.* at 643–45.
- "The language of Rule 45 does not address the procedure to follow if an objection prevents a party from using the nonparty nondeposition subpoena to obtain documents. The most direct procedure under the current rules may be a motion by the party seeking the documents for an order under Rule 26(c). While the catchline refers to a protective order, the language of the rule permits the court to decide whether the material is discoverable and the methods by which it may be obtained. The cross reference in Rule 26(c) to Rule 37(a)(4) also permits the court to assess expenses and attorney's fees for bad faith efforts to obstruct a proper discovery request." *Id.* at 644.
- "At present[,] Rule 45 does not define how or whether the other parties can get duplicate copies of the documents provided by the nonparty in response to the subpoena. The emphasis in Rule 45(c)(1) on protecting the non-party from burdens and expense suggests that a single production should be sufficient and that the parties should be able to share the additional copying and distribution, but cooperation among counsel to reduce the burden on a nonparty may not happen in a contentious case. This may be a less frequent problem when a deposition is used to obtain records because the court reporter is responsible for producing the transcript and exhibits, but the use of a nondeposition subpoena means there is no court reporter. The details of the cooperation required by Rule 45(c) could also be addressed in the scheduling order." *Id*

Resisting Subpoenas – Burden Shifting

- John E. Bowerbank, *Do's and Don'ts About a Nonparty's Response to Federal and State Court Deposition Subpoenas Involving Civil Litigation*, 48-JUN ORANGE COUNTY LAWYER 38 (2006).
  - "A common misconception about nonparty deposition subpoenas is that a responding nonparty (or party other than the subpoenaing party) can always file written objections to any subpoena to shift the burden to the demanding party to move to compel compliance with the subpoena. Beware: simply serving written objections is insufficient in certain cases." *Id.* at 43.
  - "Whether a nonparty can merely serve written objections depends on the type of subpoena. In federal court a nonparty (or litigant) challenging a subpoena for 'testimony only' must bring a motion to quash, motion to modify the subpoena, or motion for a protective order prior to the date of production. However, a nonparty responding to subpoenas involving production of documents can merely serve written objections to shift the burden to compel production to the subpoenaing party." *Id.* (citing FED R. CIV. P 45(c)(2)(B)).

- Jason A. Grossman, *Federal Court Discovery*, 642 PLI/LIT 331 (2000).
  - "A person commanded to produce documents may, within 14 days after service of the subpoena (or before the time specified for compliance if such time is less than 14 days after service), serve upon the party designated in the subpoena a written objection to inspection or copying of any or all of the designated materials. (see FRCP 45(c)(2)). If such an objection is made, the party serving the subpoena is not entitled to inspect and copy the materials (or inspect the premises) except pursuant to an order of the court by which the subpoena was issued. It is important to note that this 14-day time limit for objections does not apply to deposition subpoenas." *Id.* at 339.

- Michael Traynor & Lori Ploeger, *Hot Topics in Electronic Discovery*, 712 PLI/PAT 51, 61 (2002) ("If the subpoenaed party objects [to a subpoena requesting electronic information], the burden is on the requesting party to seek an order compelling production.") (footnote omitted).

- Gregory P Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992) ("A timely objection [to a subpoena for documents] frees the subpoenaed person from any obligation to make production under subdivision (c)(2)(B). The burden is on the issuing party to obtain an order compelling production.").

- John P. Woods, *Basics of Accounting for Lawyers 2008 : What Every Practicing Lawyer Needs to Know*, 1684 PLI/CORP 165, 187 (2008) (citing *Bouwkamp v. CSX Corp.*, 2007 U.S. Dist. Lexis 2834, at *5–6 (N.D. Ind. Jan. 12, 2007), for the proposition that the "'objecting party must show with specificity that the request is improper[']").

- David D Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - Where the subpoenaed party feels there is inadequate time to respond to the subpoena, "the subpoenaed person need only serve on the party or attorney designated in the subpoena a 'written objection' to the production of the documents, and that mere service of the objection shifts the initiative to the party in whose behalf the subpoena was issued to move to compel compliance." *Id* at 208. "But the cited provision [Rule 45(c)(2)(B)] doesn't apply to the testimonial witness. If that witness has some excuse for not appearing, the witness for its own protection, does best either to appear or to move to quash before an appearance is due." *Id.* at 238.

Return Time for Subpoena

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 207 (1992) (noting that no specific time period is set forth in Rule 45 for when a subpoena is returnable, but that "[t]he bar understands the rule to be that a 'reasonable' time must be allowed," and "[w]hat is reasonable is not defined," but "depends on the circumstances").

- Jason A. Grossman, *Federal Court Discovery*, 642 PLI/LIT 331, 338 (2000) ("There is no fixed time limit for service of a subpoena under FRCP 45, as the same 'reasonable' notice standard of FRCP 30 is a guideline ")

Effect of Motion to Quash

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 239 (1992) ("While technically there is no automatic stay of compliance upon the mere making of a motion to quash a subpoena, there is a general understanding that compliance may be withheld until the court rules on the motion.").

Electronic Discovery Issues Regarding Subpoenas

- John M. Barkett, *E-Discovery Help May Be on the Way . . Sort of· Civil Rules Advisory Committee Proposal*, 72 DEF. COUNS. J. 37 (2005).
  - The article notes that under the proposed electronic discovery amendments, "the respondent [to a subpoena] is protected *ipso facto* if the respondent 'identifies' electronically stored information 'as not reasonably accessible,'" but questions whether "the subpoena respondent has to advise anyone of this determination." *Id.* at 44. The article notes that "[b]ecause the proposed rules say the third-party respondent 'need not' provide e-discovery that the person 'identifies as not reasonably accessible,' one could argue that the standard is subjective and once the determination of inaccessibility is made by the subpoena recipient, a written objection is not required because the respondent is then not obligated to provide discovery." *Id*
  - "Assuming that the requesting party learns that an inaccessibility claim is being made by the subpoena recipient, that party must then file a motion. It would appear that the proposed rule contemplates that the mere filing of the motion challenging the claim is enough to trigger a showing by the subpoena recipient that the information sought is not reasonably accessible. Will the costs of addressing this motion be included among those that the third party might recover to receive the 'protection' afforded by Rule 45(c)(2)(B)? The case law will have to unfold before this question is answered." *Id.* at 44–45.
  - "How much of a showing of inaccessibility must a subpoena recipient make? The proposed rule sets no standard. The proposed Advisory Committee note to Rule 45 offers no guidance. Instead, the note focuses on the broader question of expense, stating that the protections in Rule 45(c) should 'guard against undue impositions on nonparties.'" *Id.* at 45.

- Don Zupanec, *Stored Communications Act – Discovery*, 23 NO. 11 FED. LITIGATOR 12 (2008).
  - This article discusses *Flagg v City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008), which found that "[t]he Stored Communications Act does not preclude production in civil litigation of electronic communications stored by a nonparty electronic service provider." 23 NO. 11 FED. LITIGATOR 12. In *Flagg*, the plaintiff served a

nonparty with a subpoena seeking text messages sent or received by City officials, some of whom were defendants. *Id.* Some of the defendants moved to block the subpoena, arguing that the Stored Communications Act, 18 U.S.C. § 2701 et seq., barred production by a nonparty service provider absent the defendants' consent. *Id* The court assumed that the plaintiff sought disclosure pursuant to a Rule 34 request to the City rather than through a subpoena to the nonparty, and found that the City had the obligation and ability to obtain the requisite consent for disclosure by the service provider. *Id*

- The article notes that the Eastern District of Virginia had recently found that the Stored Communications Act does not include an implicit exception for disclosure of protected electronically stored communications in response to a civil subpoena *Id* (citing *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008)). "So, when protected communications are sought from a nonparty electronic service provider and consent that would permit disclosure is denied (*see* § 2702(b)(3)), disclosure is barred." *Id.* "The key is to keep disclosure pursuant to a Rule 34 request for production, directed to a party to the litigation, rather than a Rule 45 subpoena to the nonparty electronic service provider. Assuming the party's ability to provide, expressly or implicitly, or to obtain, the consent necessary for the service provider to divulge the requested communications, there is a way around the obstacle." *Id*

Subpoenas in Arbitration

- Timothy C. Krsul, *The Limits on Enforcement of Arbitral Third-Party Subpoenas*, 57-JAN DISP. RESOL. J 30 (2003).
  - "A two-step analysis helps to understand how the geographic limitation on the enforcement of an arbitral subpoena works. The first step is to identify the proper district court in which to file a petition to enforce the arbitrator's subpoena. . . . [T]he FAA requires the petition to be filed in the 'district in which such arbitrators, or a majority of them, are sitting.' This is the only federal court that can legally enforce the arbitrator's subpoena, no matter where the witness works or resides.

    The second step is to identify the jurisdictional limitations of the particular court. Rule 45 of the Federal Rules, specifically, Rule 45(b)(2) and (c)[(3)](A)(ii), delineate the court's territorial jurisdiction with respect to subpoenas. These provisions restrict the district courts' ability to enforce a subpoena to the area within 100 miles of the courthouse or within the state in which the trial or the hearing is being held. Because Section 7 [of the FAA] invokes Rule 45, this limitation applies to the court's authority to compel a witness to attend an arbitration hearing. Thus, if a third party receives an arbitral subpoena to appear at the hearing but fails to show up, the remedy the FAA provides is to petition the district court in the district in which the panel is sitting for an order to compel compliance with the subpoena. Alternatively, Section 7 authorizes the district court to punish the non-complying party for contempt." *Id* at 31–32 (footnotes omitted)

- The author defines the problem: "In arbitration proceedings involving complex commercial disputes, third parties often possess material records and other evidence that are highly material to the issues in dispute. If they happen to reside and work outside the territorial jurisdiction of the district court in which the arbitration is pending, they cannot be compelled to comply with an arbitral subpoena. Therefore, unless the third party agrees to cooperate, important evidence may not be obtained." *Id.* at 32.
- The article summarizes the case law: "In general, it appears that a third-party subpoena for a deposition in an arbitration is not enforceable unless the parties have specifically agreed to the deposition or to full discovery or have provided in their arbitration agreement that the Federal Rules will apply. The enforceability of a subpoena for documents is unclear if the witness resides outside the federal district court where the arbitration is pending. Some courts have held that Rule 45's territorial limits do not apply to document subpoenas, but recently one court has held that it does." *Id*
- "Assuming Rule 45 applies to document subpoenas as well as deposition subpoenas," the author believes that "arbitrators [should] be able to issue enforceable subpoenas for documents from third parties, regardless of where they live." *Id* at 34. "Since an arbitrator can subpoena documents of a person working or residing within 100 miles of the district court in the district where the arbitrator is sitting, the territorial limit on enforcement is purely arbitrary." *Id*
- The author also believes that arbitrators should be able to issue subpoenas for the deposition of a third party in the district where the witness works or resides, without requiring the parties to agree to broad discovery or to arbitrate under the Federal Rules. The author proposes an amendment to Section 7 of the FAA to achieve this result. *Id.*

- *2nd Circuit Limits Court's Jurisdiction to Enforce Third-Party Subpoenas*, 61-OCT DISP. RESOL. J. 4, 4 (2006) (noting that in *Dynegy Midstream Services, LP v Trammochem, A.P Moller & Igloo Shipping, A/S*, 451 F.3d 89 (2d Cir. 2006), the court held that "'the Federal Rules governing subpoenas to which Section 7 [of the FAA] refers do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations.'").

- Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S Law and Practice*, 14 AM. REV. INT'L ARB. 197 (2003).
  - "While it is well-established that arbitrators may order discovery as between the *parties*, there is a recently articulated divergence of opinion at the federal appellate level as to whether pre-hearing discovery is available in relation to *non-parties*. At the time of this writing, the Sixth Circuit has indicated a willingness to enforce non-party arbitral discovery subpoenas, the Eighth Circuit has enforced arbitral subpoenas to non-parties for pre-hearing document production provided that the non-party is sufficiently connected with the underlying dispute, the Fourth Circuit will enforce

such subpoenas only if a 'special need' is shown, and the Third Circuit will not enforce such subpoenas under any circumstances." *Id* at 205.

- The authors propose: "Arbitrators should be empowered to issue judicially enforceable pre-hearing discovery subpoenas to non-parties when (i) either the non-party is sufficiently connected with the underlying dispute or (in the absence of such a connection) there is a demonstrated 'special need' for the documents, and (ii) the order will not impose undue burden on the non-party. Under this approach, arbitrators retain flexibility to dispose of disputes as efficiently as possible, and courts would be empowered to protect non-parties from over-reaching arbitral orders." *Id* at 214.
- "[A] federal district court has no jurisdiction to compel compliance with an arbitral order or subpoena served on a person (party or non-party) who resides outside of the forum of the arbitration, or at least more than 100 miles from the place of the hearing. One way for an arbitral panel to overcome this territorial jurisdictional obstacle is temporarily to relocate the arbitration hearing to within 100 miles of the subject of the subpoena. The alternative to the contrivance of a temporary hearing is for the arbitrator to issue the subpoena and for the requesting party to see if that suffices; if not, the party can then seek assistance in the relevant jurisdiction." *Id.* at 227 (footnotes omitted).
- "Under the FAA, in the Eighth Circuit, the Sixth Circuit, the Southern District of New York, the Southern District of Florida and the Middle District of Tennessee, courts will enforce arbitral subpoenas to non-parties for *pre-hearing document discovery* (although at least in the Eighth Circuit and in the Middle District of Tennessee the non-party must be sufficiently connected to the underlying dispute). In the Fourth Circuit, such an order will be enforced under the FAA only upon a showing of special need. In the Third Circuit, such an order will not be enforced under any circumstances." *Id.* at 228.
- "Under the FAA, courts in the Fourth Circuit and the Southern District of New York have to date refused to enforce arbitral orders of *discovery depositions of non-parties*. The issue has not been tested elsewhere, although such orders are probably not enforceable in the Third Circuit. Case law in the Eighth Circuit, the Sixth Circuit, the Southern District of Florida and the Middle District of Tennessee suggests that arbitral orders of discovery depositions of both parties and non-parties would be enforced in those jurisdictions under certain circumstances." *Id.* at 229

- Dean W. Sattler, Note, *Is There a Compelling Interest to Compel? Examining Pre-Hearing Subpoenas Under the Federal Arbitration Act*, 27 PACE L. REV. 117 (2006)
  - "Because the FAA contains no such limiting language [on the power of arbitrators to issue subpoenas], some courts have held that an arbitrator's subpoena power should be no greater than that of the federal district courts set forth in Rule 45 of the Federal Rules of Civil Procedure. Using Rule 45 as a yardstick to measure an arbitrator's subpoena power on non-parties is both logical and fair. It uses a set of rules that is tried, true and familiar. It specifically defines the discovery power

parties will have in a future arbitration, and places a lid on extreme or malicious tactics. Alarmingly, however, there are some cases in which the courts have held that Section 7 [of the FAA] vests the arbitrator with broad and unlimited subpoena power, beyond that set forth in Rule 45." *Id* at 134–35.

- This article also argues that the 100-mile boundary in Rule 45 should be broadened in certain circumstances in arbitration. The author suggests a modification of a five-part test that had previously been proposed by Cathleen A. Roach regarding amendments to Rule 45. *Id.* at 138. "Roach suggests that even for litigation, Rule 45 and its 100-mile boundary is archaic in the modern world. She notes that strict adherence to Rule 45 can lead to absurd results, decreased judicial efficiency, outrageous costs and unwarranted burdens upon the federal district courts . . . ." *Id.* The five-part test proposed by Roach was:

> "1) To distinguish between types of witnesses (party or non-party) and types of litigation (complex single district and multidistrict litigation or simpler diversity actions); 2) to acknowledge that certain types of litigation may benefit more from live testimony and cross-examination than other types of litigation; 3) to provide federal courts with nationwide trial subpoena power for three categories of witnesses—multidistrict litigation party witnesses, multidistrict litigation non-party witnesses, and single district litigation party witnesses; 4) to retain satellite testimony as an option for any of the four categories of witnesses, subject to a proper showing of necessity; and 5) to maintain a fairness element by authorizing the court to conduct a balancing test in order to deny or vacate a subpoena when undue hardship to the witness is shown."

Id. at 138–39 (quoting Cathleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 113 (1990)).

- *Subpoena – Arbitration Proceeding – Pre-Hearing Document Discovery*, 15 NO. 12 FED. LITIGATOR 302 (2000)
  - This article summarizes the decision in *In re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000), where the court allowed a prehearing subpoena for documents in arbitration to be issued to a third party. The article notes that "[t]his result conflicts with the position recently taken by the Fourth Circuit that the FAA does not authorize prehearing discovery from nonparties to arbitration." 15 NO. 12 FED. LITIGATOR at 303 (citing *COMSAT Corp. v. Nat'l Sci Found.*, 190 F.3d 269 (4th Cir. 1999)).
  - In the "Litigation Tips" section, the article explains: "While the availability of nonparty discovery in arbitration proceedings is not entirely certain, it should be possible, assuming the arbitrators can be convinced to issue a subpoena, to obtain

prehearing disclosure of documents from nonparties." *Id.* (citing *Brazell v Am Color Graphics, Inc.*, No. M-82 AGS, 2000 WL 364997 (S.D.N.Y Apr 7, 2000); *Integrity Ins Co v Am Centennial Ins. Co*, 885 F. Supp. 69 (S.D.N.Y. 1995);[2] *Meadows Indemnity Co, Ltd. v. Nutmeg Ins. Co*, 157 F.R.D. 42 (M.D. Tenn 1994); *Stanton v Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S D. Fla. 1988)). "What's less likely is the possibility of subpoenaing a nonparty to appear for a deposition *COMSAT Corp* finds no authority in the FAA for doing so. Nor does *Integrity Insurance* So this is a longshot at best." *Id.*

- The article notes that the Eighth Circuit in *Security Life Insurance* "said that a subpoena for production of documents does not require compliance with Rule 45(b)(2)'s territorial limit. The reason? The burden of producing documents does not increase appreciably with an increase in distance. In other words, there is no territorial limitation on an arbitration panel's authority to order production of documents." *Id*
- A similar discussion of the *Security Life Insurance* case is presented in Susan A. Stone & Patricia M. Petrowski, *The More We Learn the Less We Know: The Continuing Uncertainty Regarding Nonparty Discovery in Arbitration*, 16 NO. 21 ANDREWS INS. INDUS. LITIG. REP. 21 (2001), which notes that *Security Life Insurance* failed to address the competing line of authority regarding subpoenas in arbitration in *COMSAT*. The article also notes that "[t]he Eighth Circuit also sidestepped the territorial reach [of subpoenas in arbitration] issue, acknowledging that it presented a 'thorny question indeed' as respects witness testimony, but holding that the territorial limit did not apply to an order for production of documents." *Id.* at n.2.

- *Third Circuit Differs on Arbitration Production*, 22 ALTERNATIVES TO HIGH COST OF LITIG. 74 (2004).
  - This article discusses the holding in *Hay Group Inc. v. E B S Acquisition Corp*, 360 F 3d 404 (3d Cir. 2004), which held that Section 7 of the FAA cannot be used to issue nonparty document subpoenas. 22 ALTERNATIVES TO HIGH COST OF LITIG. at 74. The article notes that the *Hay Group* court disagreed with the Eighth Circuit view in *Security Life Insurance* that there was implicit power to subpoena documents, and disagreed with dicta by the Fourth Circuit in *COMSAT* that suggested

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[2] The holding in *Integrity Insurance Co* was recently abrogated by *Life Receivables Trust v Syndicate 102 at Lloyd's of London*, 549 F 3d 210 (2d Cir 2008), which held that the FAA does not authorize arbitrators to compel prehearing document discovery from nonparties The *Life Receivables Trust* court recognized a circuit split as to whether Section 7 of the FAA allows prehearing document discovery from nonparties. "The Eighth Circuit has held that it does, *see In re Arbitration Between Sec Life Ins Co of Am*, 228 F 3d 865, 870–71 (8th Cir 2000); the Third Circuit has determined that it does not, *see Hay Group, Inc v E B S Acquisition Corp*, 360 F.3d 404, 407 (3d Cir 2004); and the Fourth Circuit has concluded that it may – where there is a special need for the documents, *see COMSAT Corp v Nat'l Sci Found*, 190 F 3d 269, 275 (4th Cir 1999) Like the Third Circuit, we hold that section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding " *Life Receivables Trust*, 549 F 3d at 212

that third-party subpoenas could be enforced under special circumstances. *Id* at 74–75.

- The article also notes that *Hay Group* rejected the argument that the subpoena was improper because production was sought beyond the district court's jurisdiction. "The consulting firm's argument revolved around F.R.C.P. 45(b)(2), which says that if a document request is separate from a subpoena for a witness's attendance, then the materials' subpoena must be issued from a federal district court 'in which the production or inspection is to be made.' The panel disagreed that this applies to arbitration, where it said that witnesses can be directed to bring documents that are beyond the federal rule's territorial limits." *Id* at 75

- Don Zupanec, *Arbitration – Nonparties – Pre-Hearing Document Discovery*, 19 NO. 5 FED. LITIGATOR 10 (2004).
  - This article also discusses the holding in *Hay Group*. The article notes that the court's "interpretation of § 7 is consistent with the way similar language in the pre-1991 version of F.R.C.P. 45 was interpreted. Prior to 1991, Rule 45(a) stated that a subpoena 'shall command each person to whom it is directed to attend and give testimony' at a specified time and place. A subpoena 'may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.' *See* Rule 45(a). This language was interpreted not to grant courts power to issue document-only subpoenas to nonparties." *Id.* (citing FED. R. CIV. P. 45 Advisory Committee Notes (1991 amendments)).
  - The article notes a split of authority regarding the availability of document subpoenas in arbitration: "The availability of compelled pre-arbitration nonparty document discovery remains a question in search of a definitive answer. This interpretation [in *Hay Group*] of § 7 is consistent with the Fourth Circuit's. *See COMSAT Corp*, *supra*. The Eighth Circuit takes the position that arbitrators have implied power under § 7 to order nonparties to produce documents for review prior to a hearing. *See In re Security Life Insurance Co of Am*, 228 F 3d 865 (8th Cir. 2000), 00 Fed Lit 302. So do a number of district courts. *See, e g*, *Brazell v. American Color Graphics, Inc.*, 2000 WL 364997 (S.D.N.Y. 2000); *Meadows Indemnity Co., Ltd v. Nutmeg Insurance Co*, 157 F.R.D 42 (M.D. Tenn 1994)." *Id*

- *Discovery Subpoena Issued by Arbitrator – Enforceability*, 10 NO. 6 FED. LITIGATOR 172 (1995).
  - This article discusses *Amgen Inc. v. Kidney Center of Delaware County, Ltd*, 879 F. Supp. 878 (N.D. Ill. 1995), which held that "[w]here the parties had agreed to arbitrate pursuant to the Federal Rules of Civil Procedure, a discovery subpoena issued by the arbitrator to a nonparty was valid, and was enforceable through the procedures provided for in F.R.C.P. 45(a)(3)(B)." 10 NO. 6 FED. LITIGATOR at 172. The court dealt with a discrepancy between FAA § 7 and Rule 45. The court found that there is no territorial limitation on an arbitrator's subpoena power under Section 7 of the FAA, but that there was an issue with where the subpoena could be enforced.

While Section 7 provides for enforcement in the district where the arbitrator is located, Rule 45 requires a subpoena to issue from the district where the deposition is to take place. The difficulty was that the nonparty's deposition was to be taken in the Eastern District of Pennsylvania, but under Section 7, only the Northern District of Illinois could determine the enforceability of the subpoena. *Id* at 173. The court held that the arbitrator's subpoena was enforceable because the parties had agreed to arbitrate under the Federal Rules, which provide for liberal, nationwide discovery. *Id.* However, attempts to enforce the subpoena in the Eastern District of Pennsylvania would fail because the Northern District of Illinois was the only place for enforcement under the FAA. *Id* The court solved this dilemma by directing the requesting party's attorney to issue a subpoena under Rule 45(a)(3)(B) that would be enforceable in the Eastern District of Pennsylvania under Rule 45(a)(2). *Id.*

- The article notes: "The language of [§] 7 limiting enforceability to the district court for the district where the arbitrator is located is in fact incompatible with the requirement of Rule 45(a)(2) that a discovery subpoena issue from the court for the district where discovery is to take place. So if discovery is to occur in a district other than the one where the arbitrator is located, there does appear to be a crack through which enforceability falls." *Id.*

- Sean T. Carnathan, *Discovery in Arbitration? Well, it Depends* . . , 10-APR BUS. L. TODAY 22 (2001).
  - This article notes conflicting authority as to whether FAA § 7 provides arbitrators with authority to compel pre-hearing discovery from third-party witnesses, but notes that "the weight of authority interprets the section to authorize subpoenas to compel pre-hearing document production." *Id.* at 22 (citing *Am. Fed'n of Television & Radio Artists AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999)). The article notes that the primary authority to the contrary is in the Fourth Circuit, which has found that "'a federal court may not compel a third party to comply with an arbitrator's subpoena for pre-hearing discovery, absent a showing of special need or hardship,'" but also notes that "[t]he Fourth Circuit has not developed a clear definition of 'special need or hardship.'" *Id.* at 23–24.
  - With respect to deposition subpoenas, the article notes that "[g]iven the unsettled state of the law, you cannot be confident of your right to enforce a deposition subpoena during an arbitration proceeding." *Id.* at 24–25. The author argues that "[a]s a policy matter, a rule declining to enforce such subpoenas seems unwise. It is easy for a court to recite the generalized bromide that an arbitration is designed for faster, less expensive dispute resolution and, therefore, refuse to enforce a subpoena. But not all arbitrations lend themselves to such a rule. Better judicial policy is to leave to the arbitrators the decision whether to issue the subpoena, then stand behind them once issued." *Id* at 25.
  - This article also discusses the *Amgen* case, which devised a remedy for enforcing subpoenas where witnesses are located outside the state of the arbitration In *Amgen*, the arbitrator, who was located in Chicago, issued a deposition subpoena to a

nonparty in Pennsylvania. When the nonparty refused to comply, Amgen moved to compel in Pennsylvania, but the Pennsylvania district court rejected the motion because the FAA requires that motions to compel be brought in the district where the arbitration is located. After the action was transferred to the Northern District of Illinois, Amgen again moved to compel compliance with the subpoena. The district court recognized the dilemma that the FAA requires enforcement of subpoenas in the district where the arbitration is located, but Rule 45(a)(2) requires that a subpoena issue from the district where the deposition is to be held. To get around this, the court ordered Amgen's lawyer to issue a subpoena under FED. R. CIV. P. 45(a)(3)(B), which allows "an attorney authorized to practice in the court in which the trial is being held [to] issue and sign a subpoena on behalf of a court for a district in which a deposition or production is to take place." *Amgen*, 879 F. Supp. at 883. The article explains: "Rule 45 would then permit Amgen to seek enforcement of the subpoena in Pennsylvania, if necessary, even though the Pennsylvania court had declined to enforce the arbitrator's subpoena. Although under the FAA the Pennsylvania district court could not directly enforce a subpoena issued by the arbitrator, under the Federal Rules of Civil Procedure, the court could enforce a subpoena issued by a lawyer based on an FAA enforcement action in Illinois." Carnathan, *supra*, at 25 (internal citation omitted). The article argues that "[t]here is at least one major flaw in this reasoning" because "[t]he 'problem' the *Amgen* court identifies – a conflict between the procedure under FAA Section 7 and the procedure under Rule 45 – disappears if the court interprets the FAA to authorize the arbitrator to issue subpoenas for hearings only. If arbitration subpoenas are available only for hearings, the 100-mile enforcement limitation in Rule 45 harmonizes with the FAA provision that enforcement actions must be brought in the same district as the arbitration." *Id.*

- Nonetheless, the article recognizes that "the modern trend clearly permits at least some discovery in arbitration," and notes that "[o]ne commentator has suggested that the solution is to move the arbitration temporarily to the district where the discovery is sought." *Id* The article further notes that it is unclear how temporary transfer of the arbitration would occur and that it would likely require consent of all parties and the arbitrators. *Id.* The article concludes that "[o]n balance, the *Amgen* approach is likely the best alternative presented, and *Amgen* remains the leading case."[3] *Id.* at 25–26.

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[3] Not all courts have agreed with the *Amgen* approach *See, e g , Dynegy Midstream Servs v Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006) ("We see no textual basis in the FAA for the *Amgen* compromise Indeed, we have already held that Section 7 'explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses '") (quoting *NBC v Bear Stearns & Co* , 165 F 3d 184, 187 (2d Cir. 1999)). The *Dynegy* court continued "Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law " *Id*

In addition, it is notable that the *Amgen* case was dismissed on appeal for lack of subject-matter jurisdiction because "[t]he FAA grants the federal courts powers to assist arbitration only where the district court would have jurisdiction over the underlying dispute " Jerold S Solovy & Robert L Byman, *Arbitration Discovery*, 9/8/03 NAT'L L J 24, (Col 1) (2003) (citing *Amgen Inc v Kidney Ctr of Del County Ltd* , 95 F 3d 562 (7th Cir 1996))

- The article also notes that the *Amgen* case presents a potential jurisdictional issue regarding enforcement of arbitration subpoenas in federal courts, explaining that the Fourth Circuit has held that FAA Section 7 provides jurisdiction to the federal court in the district where the arbitration is located, but the Sixth Circuit had found that the FAA does not confer an independent basis for jurisdiction and that even the federal nature of underlying claims submitted to arbitration does not confer federal question jurisdiction in a suit to confirm an arbitration award. *Id* at 26. The article concludes that "[t]he Fourth and Second Circuits likely have the right [view] of this issue," finding that FAA Section 7 clearly confers jurisdiction. *Id*

- Leslie Trager, *The Use of Subpoenas in Arbitration*, 62-JAN DISP RESOL. J. 14 (2008).
  - This article notes a split of authority as to whether FAA § 7 allows nationwide service of process, explaining that while some earlier cases had approved of nationwide service of process, "[t]he more recent cases have held that documents can only be subpoenaed to a hearing at which one or more of the arbitrators are present, even though this hearing does not need to be on the merits but only on the admissibility of the documents." *Id.* at 16. The article notes that the Eighth Circuit has held that arbitrators have the power to issue subpoenas for documents without holding a hearing and that there is nationwide jurisdiction to enforce this type of subpoena. *Id* (citing *In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 878 (8th Cir. 2000)). In addition, the article notes that "[t]he 4th Circuit has held that there is nationwide process in extraordinary circumstances – meaning that the party seeking the subpoena has shown special need or hardship." *Id* (citing *COMSAT Corp. v Nat'l Sci Found*, 190 F.3d 269 (4th Cir. 1999)). However, the article notes that the Third Circuit has held that arbitrators do not have power to issue prehearing document subpoenas, but did find that "arbitrators could subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them to this hearing." *Id* (citing *Hay Group, Inc. v. E B.S Acquisition Corp.*, 360 F 3d 404 (3d Cir. 2004)). The article also notes that the *Hay Group* case held that "a document subpoena could be enforced only so long as the person being subpoenaed was subject to the district court's jurisdiction." *Id* at 16–17. The article further notes that the Second Circuit held, "following *Hay Group*, that arbitral subpoenas do not have to be made returnable at a hearing on the merits," and found that "a subpoena issued under § 7 could be made returnable before the arbitrators at a hearing for document production and authentication purposes only." *Id* at 17. The article also states that *Hay Group*'s holding on the territorial limits of a court in enforcing a subpoena was followed by the Second Circuit in *Dynegy Midstream Services, L P v Trammochem*, 451 F.3d 89 (2d Cir. 2006), which held that "subpoenaed persons must be subject to the enforcing district court's jurisdiction." *Id*
  - The article concludes that "[t]he better reasoned and more recent cases hold that the FAA does not authorize nationwide service of subpoenas." *Id* The author proposes a solution: "To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that

location to enforce the subpoena and for purposes of § 7 of the FAA, the arbitrators would be 'sitting' in that district." *Id.* The author suggests that the American Arbitration Association consider whether it is necessary to provide for such authority in the AAA Rules *See id* at 19.

- Mark D. Colley & Laura E. Gasser, *Federal, State Laws Govern Arbitration Subpoenas, Parties Located Elsewhere Must Follow a Myriad of Rules*, 11/18/96 NAT'L L.J. D7, (col. 1) (1996).
  - "Although the Federal Rules of Civil Procedure implicitly apply [to arbitration subpoenas], including Rule 45's provision for attorney-issued subpoenas, the FAA does not articulate the specific procedures for obtaining enforceable deposition subpoenas in an arbitration when the witnesses are located outside of the arbitrator's jurisdiction." *Id.* (footnotes omitted).
  - The article discusses the *Amgen* case, where "the defendant challenged the validity of the Illinois arbitrators' subpoena ordering a deponent to appear in Pennsylvania," and the court found that "Section VII [of the FAA] does not provide for extraterritorial service or extraterritorial enforcement." *Id* (citing *Amgen*, 879 F. Supp. at 883). "To cure this enforceability problem, the court directed the plaintiff to have an attorney issue a district court subpoena in the district of the deposition, per Federal Rule of Civil Procedure 45. That district court subpoena, rather than the arbitrator's subpoena, would be enforceable by that district court." *Id.*

- Jerold S. Solovy & Robert L. Byman, *Arbitration Discovery*, 9/8/03 NAT'L L.J. 24, (Col. 1) (2003).
  - This article notes many splits of authority regarding enforcement of arbitration subpoenas. The article explains that some courts allow a party to subpoena documents from nonparties prior to the arbitration hearing (*In the Matter of the Arbitration Between Security Life Ins. Co. of Am* , 228 F.3d 865, 870 (8th Cir. 2000)); others do not allow such subpoenas except on a showing of special need or hardship made in a petition to the district court (*COMSAT Corp. v Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)); and others allow it where the arbitrators find it appropriate, without the need for a federal court to determine special need (*Hay Group, Inc. v E.B.S. Acquisition Corp* , 2003 U.S. Dist. Lexis 4909 (E.D. Pa. 2003)).[4] The article notes that some courts allow subpoenas for documents, but not depositions (*In the Matter of the Arbitration Between Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F Supp. 69, 73 (S.D.N.Y. 1995));[5] and others find that the "FAA grants the implicit power to compel both testimony and documents prior to hearing" (*Amgen, Inc v Kidney Ctr of Del County Ltd* , 879 F. Supp. 878, 880 (N.D. Ill. 1995)).

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[4] The district court's holding in *Hay Group* was later reversed by the Third Circuit *See Hay Group, Inc v E B S Acquisition Corp* , 360 F 3d 404 (3d Cir 2004) (holding that the FAA does not give arbitrators authority to issue document subpoenas to nonparties without summoning the nonparty to appear as a witness)

[5] The *Integrity Insurance Co* holding was later abrogated by the Second Circuit *See* note 2, *supra*

- As for enforcement, the article notes that "[a] witness has no obligation to move to quash an arbitrator-issued subpoena, since the FAA imposes no such requirement. If the witness simply ignores the subpoena, you have to find a court to enforce it." *Id.* (citing *COMSAT*, 190 F.3d at 276).

Use of Subpoenas After Discovery Deadline

- Randolph Stuart Sergent, *Federal Document Subpoenas and Discovery Deadlines*, 34-OCT MD B.J 54 (2001).
  - This article notes that there is a divergence of views as to whether document subpoenas may be used to obtain documents from third-parties after the discovery deadline has passed, but finds that "the most recent decisions show an emerging consensus in favor of the most restrictive approach. This approach, which will be called the 'majority rule,' consists largely of cases decided since 1995, limits the use of pre-trial document subpoenas to the discovery period, and only allows documents to be sought by means of a trial subpoena where a 'non-discovery' purpose can be articulated for those documents. In contrast, a few cases have adopted a 'minority rule,' and have held that a subpoena for documents from a third-party is not covered by the discovery deadlines." *Id.* at 54.

- *Subpoena Duces Tecum – Nonparties – Discovery*, 18 NO. 3 FED. LITIGATOR 65 (2003).
  - This article discusses *Mortgage Information Services, Inc. v. Kitchens*, 210 F.R.D. 562 (W.D.N.C. 2003), which held that "[a] Rule 45 subpoena duces tecum may be used to obtain documents from parties as well as nonparties," and that "a document subpoena is a discovery device and is subject to discovery deadlines." 18 NO. 3 FED. LITIGATOR at 65. The court in *Mortgage Information Services* noted that Rule 45 does not expressly limit the use of subpoenas to nonparties and that subjecting Rule 45 subpoenas to discovery deadlines follows "from Rule 26's inclusion of subpoenas in its definition of discovery." *Id.*
  - The article notes that "Rule 45 subpoenas are sometimes viewed as limited to nonparties. Generally, however, they are considered a proper means of requesting documents from parties as well as nonparties." *Id.* (internal citations omitted).
  - "There are also differing views as to whether document subpoenas constitute discovery and are subject to discovery deadlines. Some courts say no. Most say yes." *Id.* at 66 (internal citations omitted).
  - "Depending on the purpose for seeking documents, a Rule 45 subpoena may be a way of obtaining documents even after the discovery cut-off date. Where copies of documents were produced during discovery, the originals may be subpoenaed to ensure their availability at trial. A trial subpoena may also be used to obtain documents to be used at trial for memory refreshment." *Id* (internal citation omitted).

- *Subpoenas – Discovery Deadline*, 11 NO. 5 FED. LITIGATOR 117 (1996).
  - This article discusses *Rice v United States*, 164 F.R.D. 556 (N.D Okla. 1995), where "[e]xpiration of the deadline for discovery precluded issuance of a subpoena duces tecum to obtain documents from a nonparty." 11 NO. 5 FED LITIGATOR at 117.

- In the "Litigation Tips" section, the article states: "*Rice* does not mean that a subpoena can never issue to obtain information after a discovery deadline has expired. Whether a subpoena can issue will depend on the intended application of the discovery deadline. If the deadline is not intended to shut off all attempts to obtain information, it is possible that a subpoena may properly issue after the deadline has passed. If, however, as was the case here, the deadline is intended to bring an end to all attempts at obtaining information, it will apply to post-deadline subpoenas, at least if the subpoenaed documents were available during the discovery period." *Id.* at 118 (internal citations omitted).

- *Subpoena Duces Tecum – Discovery Deadline*, 13 NO. 7 FED. LITIGATOR 194 (1998).
  - This article discusses *Marvin Lumber & Cedar Co. v PPG Industries, Inc.*, 117 F.R.D. 443 (D. Minn. 1997), which held that "[a] Rule 45 subpoena duces tecum directed to a nonparty is subject to a scheduling order discovery deadline." 13 NO. 7 FED. LITIGATOR at 194. The court held that formal discovery after the discovery deadline would detract from post-discovery case preparation and that the burden and cost of monitoring an opposing party's use of subpoenas can be high. *Id*
  - The article notes: "Not all courts look at the use of subpoenas this way. Some do not consider discovery deadlines to apply to subpoenas duces tecum directed to nonparties. In these jurisdictions subpoenas can be issued even after the deadline has passed. Post-deadline issuance may also be possible if the deadline applies to other forms of discovery but not specifically to subpoenas." *Id.* (internal citation omitted). "The more typical view is *Marvin's*: discovery deadlines apply to attempts to obtain information from nonparties by subpoena, therefore subpoenas cannot be used to circumvent discovery deadlines." *Id* "Any subpoena issued before the discovery deadline with a return date prior to the deadline's expiration is timely, even if the return does not actually occur until after the deadline due to delay resulting from an attempt to have the subpoena quashed." *Id* at 195.

- Don Zupanec, *Subpoena – Parties – Discovery Deadline*, 23 NO. 5 FED. LITIGATOR 11 (2008).
  - This article discusses *Thomas v. IEM, Inc* , No. 06-886-B-M2, 2008 WL 695230 (M.D. La. Mar. 12, 2008), which held that "[a] Rule 45 subpoena may not be used to avoid the deadline for party discovery." 23 NO. 5 FED. LITIGATOR 11. In *Thomas*, the plaintiff served the defendant with a subpoena for documents and requested production within 15 days so that production would be within the discovery deadline. *Id.* The court denied a motion to compel, agreeing with the defendant that subpoenas are generally used to obtain discovery from nonparties, that the preferred means of obtaining documents available from parties is Rule 34, and that "[h]owever used, subpoenas are clearly not meant 'to provide an end-run around the regular discovery process under Rule[s] 26 and 34.'" *Id* (citing *Burns v Bank of Am.*, No. 03 Civ. 1685 (RMB)(JCF), 2007 WL 1589437 (S.D.N.Y. June 4, 2007)).
  - The "Litigation Tips" section of the article explains. "Nothing in the Federal Rules explicitly precludes use of Rule 45 subpoenas to obtain documents from parties. While courts sometimes limit subpoena use to nonparties, there is a good argument

that document subpoenas can properly be served on parties as well as nonparties." *Id.* (internal citation omitted). A subpoena "must be served early enough to allow a response before the deadline. If a subpoena served on a party and seeking production of a document is viewed as functionally analogous to a Rule 34 discovery request, service must be made at least 30 days before the deadline because this is the time period for responding to a Rule 34 request." *Id.*

- Roger W. Kirst, *Filling the Gaps in Federal Rule 45 Procedure for Nonparty Nondeposition Document Discovery*, 205 F.R.D. 638, 645 (2002) ("[C]ases in which counsel attempted to use a nondeposition subpoena after the discovery deadline show that it may be wise to specifically state that this is a discovery procedure that cannot be used after the discovery deadline.") (citing *Grant v. Otis Elevator Co.*, 199 F.R.D 673 (N.D. Okla. 2001); *Alper v United States*, 190 F.R.D. 281 (D. Mass. 2000); *Integra LifeSciences I, Ltd v Merck KGaA*, 190 F.R.D. 556 (S.D. Cal. 1999)).

Court's Authority to Transfer Motions to Quash or Compel

- Victoria E. Brieant, *Techniques and Potential Conflicts in the Handling of Depositions (Part 1)*, 19 NO. 6 PRAC. LITIGATOR 27 (2008).
  - "The issuing court may transfer the motion to quash a subpoena to the trial court only when the non-party consents to transfer. The Federal Rules of Civil Procedure do not confer authority on a federal district court to transfer a motion to quash a subpoena issued from that court where the non-party has not consented to the transfer. *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). Indeed, no rule of civil procedure authorizes a transferee court to 'enforce or modify' a subpoena issuing from a sister court." *Id* at 46–47. The article explains that "[a]ny controversies regarding discovery 'from nonparty witnesses shall be decided in the court which issued the subpoena, unless the nonparty consents to determination elsewhere.'" *Id.* at 47 (quoting *Highland Tank & Mfg. Co. v PS Int'l, Inc.*, 227 F.R.D. 374, 381 (W.D Pa. 2005)).
  - "The language of Rule 45 strongly suggests that only the issuing court has the power to act on its subpoenas." *Id* at 47 (citing *Byrnes v. Jetnet Corp* , 111 F.R D. 68, 69 (M.D.N.C. 1986)).
  - However, the article notes that if the motion is filed in the presiding court, rather than in the court that issued the subpoena, the presiding court may hear the motion in certain circumstances: "In contrast, in *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001), the plaintiff subpoenaed the defendant's trial counsel in the case. The non-party lawyers did not move to quash in the issuing court, but instead the defendants moved to quash in the presiding court. Over the objection of the plaintiff, who wanted to litigate the subpoena it issued in the issuing court, the presiding court ruled that it could resolve the issue because it had jurisdiction over the defendants, who made the motion to quash, and over the subpoenaed attorneys, who were admitted to the court pro hac vice in the underlying case." *Id*

- "Even where the non-party consents to a transfer, the issuing court possesses unfettered discretion to deny the motion to transfer." *Id* (citing *United States v. Star Scientific, Inc* , 205 F. Supp. 2d 482, 485 n.3 (D. Md. 2002)).
- "District courts would much prefer to have the trial judge, who has more complete knowledge of the underlying case, decide whether the non-party discovery sought should proceed. Whether this is done by transfer or request for an advisory opinion, you should be prepared to present your positions with two courts in mind: the non-party's home court and the trial court." *Id.* at 48.
- The article also notes that "it is axiomatic that the duty to minimize the burden imposed on a non-party under FED. R. CIV P. 45(c)(1) requires a party to seek discovery materials from other parties in the litigation before seeking those materials from a non-party." *Id* at 46 (citations omitted).

- *Subpoena – Motion to Compel – Transfer*, 17 NO. 8 FED. LITIGATOR 203 (2002).
  - This article discusses the holding of *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482 (D. Md. 2002), which held that "[a] district court issuing a discovery subpoena may transfer a motion to enforce the subpoena to the court where the underlying action is pending." 17 No. 8 Fed. Litigator at 203. The court relied at least in part on the fact that the nonparty preferred to have the court where the case was pending decide the motion and on comity concerns *Id.* at 204.
  - In the "Litigation Tips" section, the article notes: "Some courts recognize that nonparty discovery disputes may be transferred from the court where a subpoena issues to the court where an action is pending. Where this is the case, a nonparty who prefers raising objections to discovery in the court where the litigation is underway may simply move to transfer " *Id.* (internal citations omitted). "Some courts, however, reject transfer of nonparty discovery disputes." *Id* "A nonparty preferring that court [where the case is pending] to decide [subpoena disputes] should move for a protective order in the issuing court and request a stay pending the filing of a similar motion in the court where the action in underway. A ruling by the latter court can be filed in the first court, which then issues its own consistent ruling." *Id* (citation omitted). "Another possibility, albeit more cumbersome, is to move the issuing court to request that the judge presiding over the underlying litigation be temporarily assigned to the district where the issuing court is located for the limited purpose of deciding the dispute." *Id* (citing 28 U.S.C.A. § 292(d)).

- *Subpoena – Motion to Quash – Transfer*, 13 NO. 6 FED. LITIGATOR 167 (1998).
  - This article discusses *In re Sealed Case*, 141 F 3d 337 (D.C. Cir. 1998), which held that "[a] district court from which a subpoena has issued does not have authority to transfer a motion to quash to the district where the underlying action is pending." 13 NO. 6 FED. LITIGATOR at 167. The court found no authority in Rule 45 authorizing transfer, and that the direction in 45(c)(3)(A)(ii) to the issuing court to quash or modify a subpoena requiring a party to travel more than 100 miles would be inconsistent with a rule that would allow the issuing court to transfer the motion to quash to another district. *Id* The court concluded that it could be true that "the court where an action is pending will be better able to handle discovery disputes," but

concluded that "the rules clearly sacrifice some efficiency in order to provide territorial protection for nonparties." *Id* The court also rejected the lower court's reliance on the advisory committee note to Rule 26, which states that "'[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.'" *Id.* at 167–68

- The "Litigation Tips" section of the article states: "The argument that the Advisory Committee Note implies transfer authority is not entirely far-fetched. In fact, some courts have suggested that the Note implies authority to transfer discovery disputes involving non-parties, including motions to quash subpoenas. But nothing in Rule 45 either directly or indirectly authorizes transfer. Hence the conclusion that a motion to quash must be decided by the court from which the subpoena issued." *Id* at 168 (internal citations omitted).

- Don Zupanec, *Subpoena – Motion to Quash – Transfer*, 22 NO. 2 FED. LITIGATOR 12 (2007).
  - This article discusses *WM High Yield v. O'Hanlon*, 460 F. Supp. 2d 891 (S.D. Ind. 2006), which held that "[m]otions to quash subpoenas duces tecum issued in connection with litigation pending in a different district should not be transferred to that district for decision." 22 NO. 2 FED. LITIGATOR 12.
  - In the "Litigation Tips" section, the article states: "Whether the district court that issued a nonparty discovery subpoena must rule on a motion to quash or compel compliance, or, when the underlying litigation is pending in a different district, may transfer the motion is unclear. There is a good reason for transfer: the transferee court's familiarity with the litigation, which the issuing court presumably lacks. But nothing in Rule 45 authorizes transfer. Just the opposite in fact. Rule 45(c)(3)(A) states that the court with power to quash or modify a subpoena is 'the court by which a subpoena was issued.' Rule 45(c)(2)(B) allows enforcement of a subpoena following objections 'pursuant to an order of the court by which the subpoena was issued.' Rule 45(e) provides that failure to obey a subpoena may be deemed contempt 'of the court from which the subpoena issued.'

    Nevertheless, a transfer request is not necessarily doomed. If the subpoenaed nonparty or the party serving the subpoena can make a convincing argument to the issuing court that the court presiding over the underlying litigation is in a better position to decide whether to enforce or quash the subpoena, the issuing court may be receptive to a transfer request.

    Some courts categorically reject transfer of nonparty discovery disputes as lacking authority under Rule 45. So there is no assurance that even a strong argument for transfer will get very far

    A decision by the court where the underlying litigation is underway becomes a better possibility where, in response to a discovery subpoena, a nonparty moves for a protective order."

Id. (internal citations omitted). The article notes that "[a]nother way of obtaining a decision on a subpoena by the court where an action is underway is to move for a protective order in the issuing court and request a stay pending the filing of a similar motion in the court overseeing the action. A decision by this court can be filed in the issuing court, which then issues a consistent decision." *Id.* (citation omitted).

- Alan R Friedman & Stephen M. Sinaiko, *When a Non-Party Moves to Challenge Discovery Subpoena*, 7/20/98 N.Y. L.J S4, (col. 3) (1998).
  - This article notes a circuit split regarding whether a court may transfer a motion to quash to the district where the underlying action is pending. The article notes that the Seventh, Eighth, and Tenth Circuits, and a number of district courts, have allowed such transfers, but the D.C. Circuit has not. *Id.* The article discusses the D.C. Circuit's decision in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. Apr. 14, 1998)).
  - The article argues that not allowing transfer results in inefficiencies because the judge in the district from which the subpoena issued sees only a small slice of the case, and because piecemeal resolution of discovery disputes involves many judges, rather than one, and may result in inconsistent discovery decisions in a single case. 7/20/98 N.Y. L.J. S4
  - The article notes that courts allowing transfers usually rely on the Advisory Committee Notes to Rule 26(c), which state that "[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." *Id.* The article explains that *In re Sealed Case* rejected reliance on that Note, and was concerned that transfer could force nonparties to litigate motions to compel before courts lacking jurisdiction over them. *Id.*
  - The article asserts that *In re Sealed* reached the wrong decision, arguing that there are other contexts in which parties litigate rights before courts that do not have personal jurisdiction over them; that given that parties have the option to bring a motion for protective order in the court where the action is pending, it makes little sense to not allow transfers of motions to quash; that disallowing transfer is wasteful of judicial resources; and that disallowing transfer encourages forum shopping for discovery practice. *Id.*

Expert Issues

- George James Bagnall, Comment, *Notes of the 1991 Advisory Committee for the Amendment of Federal Rules of Civil Procedure 45 Is the Compulsion to Testify of an Unretained Expert Witness a Taking?*, 83 OR. L. REV. 763, 793 (2004) ("The discretionary language of Rule 45(c)(3)(B)(ii) should be modified from may to shall to match that of Rule 45(c)(3)(A). As the advisory committee's notes to the 1991 amendment of Rule 45 suggest, forcing an expert to testify amounts to a taking of his property.").

- Don Zupanec, *Subpoena – Unretained Expert – Factual Information – Past Opinion*, 19 NO. 3 FED. LITIGATOR 11 (2004).
  - This article discusses *Statutory Committee of Unsecured Creditors v. Motorola, Inc.*, 218 F.R.D. 325 (D.D C. 2003), which held that "F.R.C.P. 45(c)(3)(B)(ii)'s protection

for unretained experts applies to subpoenas seeking factual information and past opinions from such persons." The article explains that "[a]ssuming the expert is able to show that the material does not describe 'specific events or occurrences in dispute' and is not the result of research undertaken at the request of a party to the litigation (*see* Rule 45(c)(3)(B)(ii)), the burden is on the subpoenaing party to establish a substantial need, the material's unavailability from other sources without undue hardship, and, importantly, that the expert will be 'reasonably compensated' for producing it (*see* Rule 45(c)(3)(B)(iii))." *Id.* The article discusses the factors relevant to making this showing.

- *Deposition Costs – Treating Physicians*, 13 NO. 6 FED. LITIGATOR 171 (1998) (discussing *Fisher v Ford Motor Co* , 178 F.R.D. 195 (N.D. Ohio 1998), which held that treating physicians who are subpoenaed under Rule 45 are entitled to the statutory rate of compensation as fact witnesses, not as expert witnesses).[6]

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - "The extent to which a Rule 45 document subpoena may be used to obtain an adverse expert's files is not entirely certain. In a recent case, the U.S. District Court for the Western District of Virginia held that Rule 45 cannot be used to obtain an opposing expert's files because Rule 26(b)(4) now limits expert discovery to interrogatories, and that limitation evinces a policy judgment that expert disclosure is otherwise off limits." *Id.* (citing *Marsh v. Jackson*, 141 F.R.D. 431 (W.D. Va. 1992)). However, this was before the 1993 amendments to Rule 26 regarding expert disclosures. "One might query whether that analysis [in *Marsh*] will retain vitality if the pending amendments to Rule 26 are adopted. Under proposed Rule 26(a)(3), which has been approved by the Judicial Conference, expert discovery in the future will include extraordinarily detailed expert reports and depositions as of right. That would appear to evince a different policy judgment – one that might be compatible with future use of Rule 45 document subpoenas to obtain adverse experts' files." *Id*

Trade Secrets/Confidential Information

- Curtis Scribner, Note, *Subpoena to Google Inc. in* ACLU v. Gonzales. *"Big Brother" Is Watching Your Internet Searches Through Government Subpoenas*, 75 U. CIN. L. REV. 1273 (2007)
  - This article is focused on problems created by subpoenas for requests for information revealed on the internet, but most of the issues raised do not necessarily relate to Rule

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[6] Other courts have disagreed with this holding *See, e g , Wirtz v Kan Farm Bureau Servs , Inc* , 355 F Supp 2d 1190, 1211 (D Kan 2005) ("To be certain, a number of courts have held that a treating physician testifying solely to his or her treatment of the patient is not entitled to anything above the fact witness fee However, a more common view is that a treating physician responding to discovery requests and testifying at trial is entitled to his or her 'reasonable fee' because such physician's testimony will necessarily involve scientific knowledge and observations that do not inform the testimony of a simple 'fact' or 'occurrence' witness ") (footnotes omitted); *Coleman v Dydula*, 190 F R D 320, 323 (W D N Y 1999) (noting a split of authority, and determining that treating physicians were entitled to a "reasonable" fee for their deposition testimony, rather than the statutory rate)

45. However, with respect to trade secret protection, the article notes that "[t]he language of FRCP 45 states that the court 'shall' modify or quash a subpoena if it creates an undue burden. On the other hand if the subpoena requires exposure of a trade secret, the court 'may' modify or quash a subpoena. Obviously, the Rule's use of the language 'may' gives the court discretion when deciding upon a subpoena which endangers trade secrets." *Id.* at 1283.

- Don Zupanec, *Subpoena – Confidential Information – Reasonable Compensation*, 20 NO. 11 FED. LITIGATOR 11 (2005).
  - This article discusses *Klay v. All Defendants*, 425 F.3d 977 (11th Cir. 2005), which held that "[w]hether a subpoenaed party is entitled to reasonable compensation for disclosure of confidential information, and the amount of compensation, if any, depend on whether disclosure causes a loss to the party." 20 NO. 11 FED. LITIGATOR 11. The court noted that "Rule 45(c)(3)(B) protects subpoenaed parties from unnecessary expense in responding to a subpoena, and also from 'unnecessary or unduly harmful disclosures of confidential information.'" *Id.* (quoting FED. R. CIV. P. 45 Advisory Committee Notes (1991 amendments)). "The Eleventh Circuit said that Rule 45(c)(3)(B) requires reasonable compensation for compelled use of confidential intellectual property." *Id.* (citing FED R CIV. P. 45(c)(3)(B)(ii)). "The Eleventh Circuit said that compensation is required only when disclosure of confidential intellectual property or other confidential information causes 'actual property loss' to a subpoenaed party. The amount of compensation is measured by loss to the subpoenaed party from disclosure of the information, not by any gain to the subpoenaing party from obtaining the information. If disclosure causes no loss, the amount of compensation reasonably owed is zero. If loss is substantial, the amount of compensation will be, too, even if gain to the subpoenaing party is slight." *Id.*
  - In the "Litigation Tips" section, the article states: "This decision recognizes that under Rule 45(c)(3)(B)(i), (iii), the compensation requirement extends to compelled disclosure of intellectual property and confidential information by other than unretained experts. Assuming the subpoenaing party makes the threshold showing, it is up to the subpoenaed party to establish a basis for compensation and the amount of compensation that is reasonable. Under the approach adopted here – which is analogous to the method of determining 'just compensation' for the compelled taking of nonrivalrous real property – the subpoenaed party must (1) demonstrate that disclosure will result in a loss, and (2) quantify the loss. Compensation is not automatic." *Id.*

- Don Zupanec, *Subpoena – Copying Computer Hard Drives – Trade Secrets*, 23 NO. 9 FED. LITIGATOR 9 (2008).
  - This article discusses *Daimler Truck North America LLC v Younessi*, No. 08-MC-5011RBL, 2008 WL 2519845 (W.D. Wash. June 20, 2008), which found that "[t]he presence of trade secrets or similar proprietary information on computer hard drives supports quashing a subpoena for copying the drives." 23 NO. 9 FED. LITIGATOR 9. The court found that discovery was warranted, but that a protective order was

appropriate to allow the producing party to search for relevant documents that would not disclose trade secrets, rather than requiring production of the full hard drives *See id.*

- The article notes that while nonparties subject to subpoenas are not required to produce electronically stored information that is not reasonably accessible, sometimes information may be reasonably accessible but still place an undue burden on the subpoenaed party. The article explains: "Addition of Rule 45(d)(1)(D) expanded the possible protective responses to nonparty subpoenas for electronically stored information. But the Rule's 'not reasonably accessible' requirement limits its applicability. Other responses, not specific to requests for ESI, may provide a better chance of resisting a subpoena." *Id.*

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - "Rule 45(c)[(3)](B)(i) authorizes, but does not require, the court to protect a person whose trade secrets or other proprietary information have been subpoenaed. Two recent cases . . . conclude that once the competitive sensitivity of the information has been demonstrated, the burden shifts to the party issuing the subpoena to demonstrate a need for the information that is greater than the harm caused by its disclosure." *Id* (citing *Stanley Works v Newell Co.*, No. 92 C 20157, 1992 WL 229652 (N.D. Ill. Aug. 27, 1992), *Westinghouse Elec. Corp. v. Carolina Power & Light Co* , Civ. A. No. 91-4288, 1992 WL 300796 (E.D. La. Sept. 22, 1992)).

Requirement to Meet and Confer

- *Certification Requirement – Nonparty Discovery – Applicability*, 18 NO. 2 FED. LITIGATOR 42 (2003).
  - This article discusses *Medical Components, Inc. v. Classic Medical, Inc* , 210 F.R D 175 (M.D.N.C. 2002), which found that "a local rule requiring that a motion to compel discovery be accompanied by an attestation that an attempt was made to resolve the dispute informally applies to discovery from nonparties as well as parties." 18 NO. 2 FED. LITIGATOR at 42.
  - "A mandatory attempt to settle discovery disputes informally before requesting court intervention is implicit, the court said, in Rule 45(c)'s requirement that subpoenaing parties take 'reasonable steps to avoid imposing undue burden or expense' on nonparties served with discovery subpoenas." *Id.* at 43.
  - In the "Litigation Tips" section, the article notes: "Many districts have local rules comparable to M.D.N.C. Local R. 26.1(c). While they may not explicitly require a movant to certify that an effort was made to resolve a discovery dispute with nonparties, their applicability to Rule 45 discovery should be assumed. In some districts, the certification requirement explicitly applies to all discovery, including discovery from nonparties." *Id.*

- *Sedona Commentary, supra*
  - "[C]ourts have not resolved such questions as whether the party and non-party must meet and attempt to resolve disputes prior to proceeding to court for a motion to compel or motion to quash. Nothing in Rule 45 requires such a conference. Nor

does anything in Rule 45 require the parties to confer with each other or with the nonparty prior to serving a subpoena. Furthermore, courts have not addressed the question of whether cost shifting would be allowed for the costs imposed on the non-party during the preservation process." *Id* at 200 (footnotes omitted).

- Under suggested Best Practices, the *Sedona Commentary* states: "While the Federal Rules do not require that the parties 'meet and confer' with the non-party recipients of a subpoena, local rules or judges' personal rules may contain broad requirements encompassing all parties – even non-party recipients of subpoenas. Even in the absence of such a requirement, prior to issuing a subpoena to a non-party, the issuing party should, when feasible, contact the non-party to discuss burden, form of production, cost, retention of important information, scope, and duration of a litigation hold. This is particularly important if the party and the non-party have a preexisting business relationship." *Id* at 201.
- Another suggested Best Practice is that "[w]henever possible, parties and non-parties should consider stipulating to extend the 14 days in Rule 45(c)(2)(B) for the non-party to serve an objection to facilitate and allow meaningful dialogue." *Id.*
- Another suggested Best Practice is: "[I]f the parties anticipate serving non-party subpoenas that may call for production of privileged ESI, the parties should address, as part of the Rule 26(f) conference, a reasonable timetable for a party to assert a Rule 45(d)(2)(B) objection. In the absence of such an agreement, the reasonableness of the timing of any such objection will likely simply be another matter for dispute." *Id* at 202.

Privilege Claims and Privilege Logs

- Thomas M. Cunningham, *Impact the Discretion of the Court, Examining Privilege Log Descriptions in Federal Litigation*, 46 No. 10 DRI FOR DEF 51 (2004).
  - "Persons responding to a subpoena *duces tecum* must act more quickly in asserting the person's claim of privilege on a privilege log. Under Federal Rule 45(c)(2)(B), a person commanded to produce and permit inspection of documents must comply within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days after service of the subpoena. Alternatively, the responding person must serve any written objections to the subpoena within that time. The text of the rule expressly conditions the service of an objection to a subpoena *duces tecum* upon compliance with the rule requiring express claims of privilege. FED. R. CIV. P. 45(c)(2)(B). In other words, a person objecting to compliance with a subpoena *duces tecum* on grounds of privilege must produce a privilege log at or within the time the person serves objections to the subpoena under the literal terms of the rules.

    Some courts have characterized the language of Rule 45(d)(2) as unclear as to when the privilege log must be produced, *e.g.*, *Goodyear Tire & Rubber Company v Kirk's Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 661 (D. Kan. 2003) (citing cases). Some courts have permitted a subpoenaed non-party to produce the information requested by Rule 45(d)(2) after filing objections under Rule 45(c)(2)(B) or a motion to quash, *e.g* , *Minnesota Sch Bds. Ass'n Ins Trust v Employers Ins. Co*

of Wausau, 183 F R D. 627, 629 (N.D. Ill. 1999). Several circuits hold that a full privilege log under Rule 45(d)(2) will be considered timely if provided within a 'reasonable time' as long as objections are asserted within the 14-day time frame, including an objection on the grounds that certain specified documents will be withheld on the basis of an articulated privilege. *In re DG Acquisition Corp* , 151 F.3d 75, 81 (2d Cir. 1998); *Tuite v Henry*, 98 F.3d 1411, 1416 (D.C. Cir. 1996)."

Id

- *Subpoena – Privilege Objection – Timeliness*, 12 NO. 3 FED. LITIGATOR 78 (1997).
  - This article discusses *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996), which held that "[t]o raise a privilege objection to a subpoena requiring production of documents, a written objection stating the claim of privilege must be made within 14 days after the subpoena is served," but that a privilege log can be served within a reasonable time. 12 NO. 3 FED. LITIGATOR at 78. The *Tuite* court held that "Rule 45(c)(2)(B)'s 14-day requirement applies to both the objection itself and the privilege claim." *Id.* at 79. "In the court's view, Rule 45(c)(2)(B)'s 'subject to' language does not relieve the objecting party from asserting the privilege claim within 14 days of being served. The language, it said, merely clarifies the type of information that eventually must be provided to support a privilege claim." *Id.* While the claim of privilege must be made within 14 days, a privilege log can be provided within a "reasonable time," which "will depend on the amount of time the subpoenaed party needs to evaluate the documents fully, and the amount of time the subpoenaing party needs to contest the claim if it chooses to do so." *Id.*
  - In the "Litigation Tips" section, the article notes. "It is possible to interpret Rule 45(c)(2)(B) and 45(d)(2) as permitting a privilege objection to be delayed until the deadline for complying with the subpoena. The prudent procedure, though, is the one described here: assert the privilege claim at the same time objection is made to the subpoena. Do this within 14 days of the date the subpoena is served, or before the time for complying with the subpoena, if this is less than 14 days after service." *Id*

- *Subpoena – Privilege Objection – Timeliness*, 13 NO. 11 FED. LITIGATOR 309 (1998).
  - This article discusses *In re DG Corp.*, 151 F.3d 75 (2d Cir. 1998), where it was held that "[a] privilege objection to a subpoena requiring production of documents must be made within 14 days after the subpoena is served," but that when a constitutional privilege is involved, such as the 5th Amendment privilege against self-incrimination, the court has discretion in determining whether later assertion constitutes a waiver. 13 NO. 11 FED. LITIGATOR at 309.
  - The article summarizes the law in the "Litigation Tips" section: "One, privilege claims should be asserted at the same time objection is made to a subpoena calling for production of documents. Written objection should be made, and the privilege claim asserted, within 14 days after the subpoena is served, or before the time specified for compliance, if less than 14 days after service. It's not necessary to provide a privilege log at the time the objection is made. The log may be furnished after the subpoenaed documents have been examined and a determination is made

regarding which ones are privileged, as long as this is done within a reasonable time." *Id* at 310.

- *In Camera Inspection of Documents Claimed To Be Privileged Requires No Showing of Need*, 15 NO. 4 FED. LITIGATOR 89 (2000).
  - This article discusses *Avery Dennison Corp. v Four Pillars*, 190 F.R D. 1 (D.D.C. 1999), where parties served with a subpoena *duces tecum* objected on privilege grounds, did not produce a privilege log, and then refused to produce the documents for in camera inspection by the magistrate judge, arguing that the subpoenaed party had not made a showing of need for the documents. 15 NO. 4 FED LITIGATOR at 89. The magistrate judge held: "To require the party seeking enforcement to prove need before the court is even permitted to order the material produced for in camera inspection would . . . add to Rule 45 a requirement it does not contain." *Id.* at 90.

Timeliness of Motion to Quash

- *Privilege Against Disclosing Subpoenaed Data Is Waived When Documents Are Furnished for Inspection Even If No Copies Made*, 36 NO. 8 GOV'T CONTRACTOR P 120 (1994).
  - This article discusses *Tutor-Saliba Corp. v U S.*, 30 Fed. Cl. 155 (1993), which evaluated the timeliness of a motion to quash under Court of Federal Claims Rule 45, which was similar to Federal Rule 45. The court found that "(a) its Rule 45(c)(2)(B) states that a person ordered to produce and permit inspection and copying may file a written objection to that order within 14 days after service of the subpoena, and (b) Rule 45(c)(3)(A) states that a subpoena requiring disclosure of privileged material shall be quashed in response to a 'timely motion.'" 36 NO. 8 GOV'T CONTRACTOR P 120. "Reading these two rules together, the Court holds that requests to quash a subpoena must be filed within the specified 14-day period. Because the subcontractor's request did not meet this requirement, it must be denied as untimely." *Id*
  - The article notes that the "timely motion" language in the Court of Federal Claims Rule 45(c)(3) was adopted shortly after a similar modification went into effect in Federal Rule 45 in 1991. "In view of the recent nature of the change [in FED. R. CIV. P. 45], there have not yet been many decisions interpreting it. Of these few, one that takes a position similar to that of the Court in *Tutor-Saliba* is *In re Ecam Publications, Inc.*, . . . 131 [B.R.] 556 (Bankr. S.D.N.Y 1991). But compare *Winchester Capital Management Co v. Manufacturers Hanover Trust Co.*, 144 F.R.D. 170 (D Mass. 1992), ruling that a claim of attorney-client privilege may be asserted at the time for compliance with a subpoena, even if that time is more than 14 days after the subpoena was served." *Id*

Waiver of Objections

- Don Zupanec, *Subpoena – Motion to Quash – 100-Mile Rule – Waiver*, 21 NO. 11 FED. LITIGATOR 9 (2006).
  - This article discusses *Estate of Ungar v. Palestinian Authority*, 451 F. Supp. 2d 607 (2006), where the court found that "[f]ailing to raise F.R.C.P. 45(c)(3)(A)(ii)'s 100-mile rule in a timely motion to quash a subpoena does not waive asserting it as a

defense with the subpoena." 21 NO. 11 FED. LITIGATOR 9. In *Ungar*, the subpoenaed witnesses timely moved to quash, but did not raise their 100-mile rule objection until after the return date. "Because no timely motion raising violation of the [100-mile] rule had been made, the court was not bound by Rule 45(c)(3)(A)'s requirement that the subpoenas be quashed or modified. In the court's view, the appropriate action was nevertheless to order their modification – but not entirely eliminate the testimonial aspect." *Id*

- In the "Litigation Tips" section, the article states: "Failing to object on a timely basis, or omitting grounds from an objection, ordinarily operates as a waiver." *Id* (citation omitted). "There are two possible exceptions to the waiver rule. One applies where circumstances are unusual and good cause exists for failing to make a timely objection. This is generally limited to the following circumstances: (1) a subpoena is overbroad on its face; (2) the person subpoenaed is a nonparty acting in good faith; or (3) counsel for the person subpoenaed and counsel for the party serving the subpoena were in contact concerning compliance with the subpoena prior to the time objection was made.

  The other exception applies to privilege objections. Failing to object on the basis of privilege before Rule 45(c)(2)(B)'s 14-day deadline does not result in waiver, as long as objection is made within a 'reasonable period.' This is a narrowly recognized exception."

  Id (internal citations omitted).

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 231 (1992) ("It has been held that a post-compliance application for costs is permissible, at least when the nonparty has reserved, in the course of the earlier proceedings, the right to make the later application; that to hold otherwise might very well interrupt the parties' discovery proceedings by compelling costs motions before costs can even be reasonably estimated; and that the seeking of costs should therefore not be restricted to the pre-compliance context of a motion to compel or quash.") (citation omitted).

Subpoenas to Unnamed Plaintiffs in a Class Action

- *Current Decisions Survey*, 26 NO. 5 CLASS ACTION REP. 73 (2005).
  - This article summarizes *In re Publication Paper Antitrust Litigation*, No. 3:04 MD 1631(SRU), 2005 WL 1629633 (D. Conn. July 5, 2005). The article notes that "[t]he general rule is that discovery is not permitted from absent class members as 'parties,'" but that some courts have allowed discovery against absent class members under Rule 23(d). The article explains that Rule 45 cannot be used to avoid the limitations of Rule 23(d): "The source of discovery requested in this case is Rule 45, not Rule 23, in that the defendants are not seeking []party discovery but third-party discovery pursuant to subpoena. This procedural difference does not, however, have any practical effect. Under both Rules, courts are permitted to deny discovery under the 'undue burden' standard Otherwise, proponents could use Rule 45 to avoid the limitations of Rule 23(d)."

Subpoenas to Government Agencies

- Don Zupanec, *Subpoena – "Person" – Federal Government*, 21 NO. 1 FED. LITIGATOR 10 (2006).
  - This article discusses *Robinson v. City of Philadelphia*, 233 F.R.D. 169 (E.D. Pa 2005), which held that "[f]ederal agencies and employees are not 'persons' under F.R.C.P. 45, authorizing subpoenas for discovery from nonparties." 21 NO. 1 FED. LITIGATOR 10.
  - In the "Litigation Tips" section, the article states: "This is the latest in a recent series of rulings that the federal government and federal agencies are not 'persons' within the meaning of Rule 45(a)(1)(C)." *Id* (citing *Lerner v District of Columbia*, No. CIV. A. 00-1590 GK, 2005 WL 2375175 (D.D.C. 2005); *United States ex rel. Taylor v. Gabelli*, 233 F.R.D 174 (D D C. 2005); *Yousuf v Samantar*, No. MISC. 05-110 (RBW), 2005 WL 1523385 (D.D.C. May 3, 2005)[7]) However, the article notes that a party is not precluded from seeking discovery from a nonparty government agency by issuing a subpoena, but because enforcement may be limited under Rule 45, "[t]he likely means of enforcement, assuming denial was pursuant to an agency regulation, is an action against the agency under the Administrative Procedures Act (APA)." *Id.* (citations omitted). The article notes that "[a] simple motion to enforce may also be possible." *Id* (citing *United States Envtl. Prot. Agency v. Gen. Elec Co.*, 197 F.3d 592 (2d Cir. 1999)). "What's significant is the standard of review under the APA of an agency's decision not to respond to a subpoena. The decision will be upheld unless 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id* (citations omitted).

- Don Zupanec, *Appellate Jurisdiction – Judicial Review – Federal Agency Subpoena*, 22 NO. 5 FED LITIGATOR 18 (2007).
  - This article discusses *Watts v Securities and Exchange Commission*, 482 F.3d 501 (D.C. Cir. 2007), where it was held that "[a] decision by the Securities and Exchange Commission not to comply with a subpoena issued in a civil lawsuit is not initially reviewable in an appeals court."
  - In the "Litigation Tips" section, the article explains: "There are two procedures for obtaining judicial review [of an agency's decision not to comply with a subpoena]: a motion to compel under F.R C.P. 45 or an independent action against the agency under the APA (*see* 5 U.S.C.A. 702). In the D.C. Circuit's view, a motion to compel is the proper procedure. . . . The D.C. Circuit said that a challenge to an agency's refusal to comply with a subpoena may proceed as a Rule 45 motion to compel. The Second Circuit agrees." 22 NO. 5 FED. LITIGATOR 18 (citing *United States Envtl. Prot. Agency v Gen Elec Co.*, 197 F.3d 592 (2d Cir. 1999)) "While the D.C. and Second Circuits agree on this, they part company with respect to the appropriate

[7] The district court's decision in *Yousuf* was overruled on appeal *See Yousuf v Samantar*, 451 F 3d 248, 250 (D C. Cir 2006) ("[W]e hold the United States is a 'person' within the meaning of Rule 45 – as it has been held to be under every Rule thus far litigated ")

standard of review. The APA requires upholding agency decisions unless they are arbitrary, capricious, or in excess of the agency's authority. Under Rule 45, a subpoena may be quashed if complying would cause an 'undue burden.' The Second Circuit applies the APA's 'arbitrary and capricious' standard. The D C. Circuit opts for Rule 45's 'undue burden' standard – but emphasizes that in determining whether a subpoena is unduly burdensome on an agency, district courts must be particularly sensitive to both the fact that the agency is not a party to the litigation and the effect that complying with third-party subpoenas will have on its operations." *Id* (internal citations omitted)

- Don Zupanec, *Discovery Subpoenas – "Person" – United States*, 21 NO. 7 FED. LITIGATOR 13 (2006).
  - This article discusses *In re Vioxx Products Liability Litigation*, 235 F.R.D. 334 (E.D La. 2006), which held that "[t]he United States is a 'person' within the meaning of F.R.C.P. 45(a)(1)(C), authorizing issuance of discovery subpoenas, even though not a party to litigation." 21 NO. 7 FED. LITIGATOR 13. The court concluded that the presumption that the government is not a person does not apply to Rule 45. *Id* The court noted that the government is considered a "person" when it is a party and that Rule 45 contains no language distinguishing between when the government is a party or nonparty, and found that "person" in Rule 45 should include the government. *Id.* The court also found that Rule 30(a)(1) "allows taking the testimony of any 'person' by deposition," and that "Rule 30(b)(6) permits naming a government agency as a deponent in a notice of deposition and a subpoena," and concluded that "read in conjunction, these two rules allow deposing a governmental agency, whether a party or not, and compelling attendance at a deposition by means of a Rule 45 subpoena." *Id* The court found that "[i]nterpreting 'person' as used in Rule 45 to exclude governmental agencies would conflict with Rule 30." *Id* The court also noted that "Rule 4(i)(3)(A) refers to federal agencies and corporations as 'persons required to be served' in actions governed by Rule 4(i)(2)(A)," and concluded that "[u]nder a consistent construction of 'person' as used in Rule 45 and 'persons' as referred to in Rule 4(i), federal agencies are persons." *Id.*
  - In the "Litigation Tips" section, the article states: "As we recently noted . . . , a series of decisions, principally in the District of Columbia Circuit, have construed the term 'person' as used in Rule 45(a)(1)(C) not to include the federal government and federal agencies. The conclusion reached [in *Vioxx*] – that the United States is a 'person' – treats governmental and nongovernmental entities the same even when the government or a federal agency is not a party to litigation." *Id*
  - "The construction of 'person' does not necessarily shortcut the discovery process when information is sought from a nonparty federal agency. What it does is maintain the possibility of a motion to compel as a way of enforcing a subpoena. Otherwise, enforcement presumably requires an action against the agency under the Administrative Procedures Act, at least where a decision not to comply with a subpoena is pursuant to agency regulation." *Id.*

- Taxpayers Against Fraud Education Fund, *Recent False Claims Act &* Qui Tam *Decisions*, 42 FALSE CL. ACT AND QUI TAM Q. REV. 7 (2006)
  - This article discusses *U.S ex rel. Pogue v. Diabetes Treatment Centers of America, Inc*, 235 F.R.D. 521 (D.D.C. 2006), in which the "court refused to grant a defendant's motion to compel the United States to respond to a subpoena in a non-intervened FCA qui tam action." 42 FALSE CL. ACT AND QUI TAM Q. REV. 7. "Dissecting the language of Rule 45, the court ruled that the government was not a 'person' within the meaning of the rule, for the government was not a real party in interest when, as in this case, the government had elected not to intervene." *Id* "[T]he court noted that any dispute that the agency's response to the subpoena was not in conformity with its own regulations must be brought under the Administrative Procedure Act (APA)." *Id* (citing 5 U.S.C. §§ 701 *et seq* ; *Yousuf v. Samantar*, No. MISC. 05-110 (RBW), 2005 WL 1523385, at *4 n.10 (D.D C. 2005)).

- Thomas L. McGovern III, Daniel P. Graham & Stuart B. Nibley, *A Level Playing Field: Why Congress Intended the Boards of Contract Appeals To Have Enforceable Subpoena Power Over Both Contractors and the Government*, 36 PUB. CONT. L.J. 495 (2007).
  - "DOJ . . . began to raise and litigate the issue [of whether the United States is a "person" under Rule 45] and obtained a number of district court rulings that found that the United States was not a 'person' under Rule 45. . . . [T]hese courts based their rulings on the 'longstanding interpretative presumption that person does not include the sovereign.' Other decisions, however, rejected the Government's position and held that the United States is a 'person' under Rule 45." *Id.* at 504 (footnotes omitted).
  - The article then discusses the case of *Yousuf v. Samantar*, 451 F.3d 248 (D.C. Cir. 2006), which concluded that Rule 45 does apply to the Government, finding that its application to the government "would work no 'obvious absurdity,'" that "'[t]he Rules were designed to provide a 'liberal opportunity for discovery,'' and that 'there is no indication the Government should be exempt from the obligation of a nonparty to provide its evidence pursuant to subpoena.'" *Id* at 505 (footnotes omitted). The court also "observed that the term 'person' in Federal Rules of Civil Procedure 4 and 30 expressly includes the Government and that the term as used in Rules 14, 19, and 24 has been interpreted to include the Government." *Id.* at 506 (footnote omitted). Finally, the court noted that "DOJ has a long history of complying with Rule 45 subpoenas and this was strong evidence of a consistent and longstanding 'executive interpretation' of Rule 45." *Id.* "[T]he *Yousuf* court concluded that 'the 'purpose, the subject matter, the context, [and] the . . history [of Rule 45] . . . indicate an intent, by the use of the term ['person'], to bring [the government] within the scope' of the Rule.'" *Id* (footnote omitted).

- *Discovery from Federal Government – Authority of Agency Head To Deny Discovery Request*, 10 NO. 1 FED. LITIGATOR 11 (1995).
  - This article discusses *Exxon Shipping Co. v United States Dept. of Interior*, 34 F.3d 774 (9th Cir 1994), which found that "[f]ederal discovery rules apply to requests for discovery from the federal government, whether the government is a party to the

action or not, and federal agency heads may not conclusively determine whether government employees may refuse to comply with proper discovery requests." 10 NO. 1 FED. LITIGATOR at 11. The court "expressed confidence, however, in the ability of district courts to balance the interest in full and complete discovery reflected in the discovery rules with the government's interest in ensuring the efficiency of its operations." *Id* at 12. The article notes that the case "provides grounds for arguing that discovery requests to government officials, when the government is not a party to the underlying litigation, should not be treated any differently than other discovery requests." *Id*

- Robert R. Vieth & Tara M. Lee, *Can a Third Party Subpoena the Feds? D.C Circuit Concludes that an Agency Is a "Person" Under Rule 45*, 8/21/2006 LEGAL TIMES 40 (2006).
  - This article notes a circuit split as to whether a government agency is required to comply with a subpoena. The article notes the D.C. Circuit's decision in *Yousuf v Samantar* that the government is a "person" under Rule 45 and subject to the federal subpoena power of federal courts, but explains that other circuits have reached different results. *See id* "The 4th Circuit, for example, has stated that 'when an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources. In another case the 3rd Circuit reasoned that the Environmental Protection Agency 'did not abuse its discretion or otherwise err in preventing [an agency employee] from using agency time to give deposition testimony, . . . in private litigation.' The 7th Circuit has construed [*United States ex rel*] *Touhy* [*v Ragen*, 340 U.S. 462 (1951)] as 'part of an unbroken chain of authority that supports the Department's contention that a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid agency regulations.' Although each of these quotations is arguably dicta, a party would be well served to try to avoid serving a document subpoena in these circuits." *Id.*
  - The article argues that the government's argument that it is not subject to federal subpoenas is flawed for several reasons. The article asserts that "it is not clear that the APA supplies the applicable waiver of sovereign immunity," and argues that the suggestion that refusal to comply with a subpoena is subject only to arbitrary and capricious review is erroneous because "the APA empowers a court to decree unlawful agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* The article notes that "[f]or these and other reasons, the 9th and D.C. circuits have rejected the government's traditional argument and reasoned that the government is subject to a valid federal court subpoena." *Id.* (citing *Houston Business Journal, Inc. v. Office of Comptroller of the Currency, United States Dep't of Treasury*, 86 F.3d 1208 (D.C. Cir. 1996)).
  - The article notes that in one case, the D C. Circuit ruled that the government is not a "person" under a federal statute authorizing district courts to issue subpoenas to any "person" in connection with foreign judicial proceedings, and that the D.C. Circuit later stated in *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), "that although many courts had long 'assumed' that the government was subject to a subpoena, that 'assumption may need to be re-examined in light of *Al-Fayed* [*v. CIA*,

229 F.3d 272 (D.C. Cir. 2000)].'" 8/21/2006 LEGAL TIMES 40. The article notes that "[b]y January 2006, a number of district judges within the circuit had declined to enforce subpoenas against federal agencies on the grounds that the government is not subject to a [Rule 45] subpoena," but that "[f]or now, at least, *Yousuf* has put an end to this trend, as the D.C. Circuit rejected the government's argument that it is not a 'person' under [Rule 45]." *Id.*

- The article argues that the result in *Yousuf* is correct for several reasons, including that the government has not previously raised the objection that it is not a "person" in many decades of practice under the federal rules; that many other civil rules use the term "person" and have been interpreted to include the government; that "countless agency regulations recognize that subpoenas may be served on the agencies"; that there is a need to enforce separation of powers; and that practical reasons support the decision. *Id.*

- *Civil Procedure – Subpoena Power – Ninth Circuit Rejects Authority of Non-Party Federal Agencies To Prevent Employees from Testifying Pursuant to a Federal Subpoena* – Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir. 1994), 108 HARV. L. REV. 965 (1995).
  - This article discusses *Exxon Shipping*, which "held that neither [*United States ex rel.*] *Touhy* [*v. Ragen*] nor the [Federal] Housekeeping Act itself allows non-party federal agencies to forbid agency employees from complying with a court's subpoena." *Id* at 965. "The [*Exxon Shipping*] court asserted that *Touhy* stood only for the narrow proposition that an individual agency employee cannot be held in contempt for his or her refusal to produce papers in response to a subpoena *duces tecum* when the employee is acting pursuant to valid agency 'housekeeping' regulations," *id.* at 966, but that it had not reached "the ultimate 'question of the agency head's power to withhold evidence from a court without a specific claim of privilege,'" *id.* (quoting *Exxon Shipping*, 34 F.3d at 776). "*Exxon Shipping* is the first decision in which a U.S. court of appeals has held that the Housekeeping Act does not grant agency officials the authority to withhold subpoenaed documents or employee testimony in a civil action to which the government is not a party," but "its holding does not deprive the Housekeeping Act of all significance in the area of employee subpoenas" because "[t]he legitimate governmental interest in centralizing decision-making can still justify regulations that preclude individual employees from testifying or from producing records until a determination whether to assert an evidentiary privilege or claim of burdensomeness is made by responsible officials within the agency." *Id* at 967–68 (footnotes omitted).
  - The article recognizes a circuit split regarding applying subpoenas to government agencies: "The Ninth Circuit's approach differs significantly from the deferential standard of review applied by other circuits in similar cases. For example, in *Davis Enterprises v EPA*[, 877 F.2d 1181 (3d Cir. 1989)] and *Moore v. Armour Pharmaceuticals Co* [,927 F.2d 1194 (11th Cir 1991)], the Third and the Eleventh Circuits, respectively, approved agency decisions not to comply with subpoenas for employee testimony under an 'arbitrary, capricious, or abuse of discretion' standard of review. In large part, those courts measured the degree of arbitrariness or

capriciousness of each agency's conduct with reference to the agency's own housekeeping standards, which plainly seek to promote the agency's own interests without regard for a litigant's need for disclosure " *Id.* at 968 (footnotes omitted).

- The article also notes that even after *Exxon Shipping*, there are difficulties in directing subpoenas to government agencies because "under *Touhy*, agency employees who refuse compliance with a subpoena until given permission by a superior are still immunized from contempt proceedings," *id* at 969, and that even in a subpoena directed to the agency, a litigant who "is refused testimony must pursue a costly and time-consuming collateral suit to obtain relief" under the APA, *id* The article further notes that while the *Exxon Shipping* court thought its decision would solve these problems, "[t]hat assumption . . . may not be fully borne out, because, under the Federal Rules, it is the employee and not the agency who would be required by a subpoena to appear initially at a deposition or before a court and at any subsequent contempt proceeding." *Id* The article concludes that "the agency would remain, absent an independent action, beyond the court's reach, and *Touhy* immunity from contempt would protect an unresponsive employee." *Id* (footnote omitted).

Territorial Reach of Subpoenas - Generally

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - "Rule 45 speaks at one point about serving the subpoena 'within 100 miles' from the site of the trial or of a deposition. Subdivision (b)(2). At another point, however, it insists that subpoena take the subpoenaed person no farther than 100 miles from that person's residence or place of employment. Subdivision (c)(3)(A)(ii). And at yet another it imposes a 100-mile restriction without prescribing at all the point from which the 100 miles is to run. Subdivision (c)(3)(B)(iii). These provisions, moreover, are not independent ones governing different things; they interplay, and dependence on one may create difficulty if not negotiated alongside the other. In some situations when one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited, the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues." *Id.* at 209
  - "If the witness's residence or employment is more than 100 miles from the place of trial but nevertheless within the state in which the trial court sits, the court can 'command' the witness, pursuant to subdivision (c)(3)(A)(ii), to appear for the trial. But that takes a court order. If the subpoena is simply ignored by the witness, it would appear that no contempt punishment would lie under subdivision (e).

    For these reasons, the geographical reaches of 'service', as prescribed in subdivision (b)(2), may be misleading. If the subpoena is captioned out of the district court of the trial district, and is served on a transient witness within the district, all in conformity with subdivision (b)(2), the subpoena can apparently be disregarded by the witness nevertheless, and safely, if it turns out that the witness lives and works more than 100 miles from the courthouse. The reason once again is that if the witness disobeys the

subpoena, contempt will apparently not lie under subdivision (e) And if a motion is made under subdivision (c)(3)(A)(ii) to 'quash or modify' the subpoena, the court, according to that provision, 'shall' grant the motion

Perhaps the 'shall', if used in conjunction with the 'modify' in that situation, would give the court, even in a district more than 100 miles away from the witness's residence or employment, at least some measure of leverage to exact performance from the witness with a court order (If a court order issues and is disobeyed, presumably the order will not be subject to the restrictions on the contempt punishment that subdivision (e) imposes on direct disobedience of the subpoena.)"

Id

- "Dwelling on subdivision (c)(3)(A)(ii) for a moment, note that it speaks of the witness having to travel more than 100 miles 'from the place where that person resides, is employed or regularly transacts business'. The word 'or' in that quotation was probably intended to be 'and'. It was probably intended to say that if the courthouse is within a 100-mile radius of any of those places, compliance is mandatory." *Id* at 213.
- "Rule 45 is a daily fundamental in civil trial practice, and yet it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena 'from' and where to effect its service with some assurance that the subpoena will be backed by the contempt sanction if it should be disobeyed." *Id.* at 214; *see also id.* (discussing multiple cross-references within Rule 45 to determine the proper place for issuance and enforcement of a trial subpoena addressed to a witness). "The attorney who effects service of the subpoena within the surroundings of the trial court instead of the witness's residence or employment, or who has any uncertainty for any other reason about whether the witness will show up at the courthouse, had best have taken the precaution of deposing the witness before trial. And if the witness is truly a key one, but also an uncooperative one, the attorney, even before commencing the action, would do well to consider, under 28 U.S.C.A. § 1391, whether the venue of the action might be set in a district in which, or within 100 miles of which, the witness's residence or employment lies." 139 F.R.D. at 214.
- The article argues that for pretrial subpoenas, Rule 45 must be construed to allow service on the witness anywhere, when the site for deposition or production has been set within the boundaries of subdivision (b)(2) as measured from the witness's home and employment. *See id.* at 216. "Any other construction would stultify Rule 45 and its geography altogether by enabling a peripatetic witness to avoid the subpoena just by remaining outside the witness's home state and beyond 100 miles from the witness's own residential and employment base. That was manifestly not the intention of subdivision (c)(3)(A)(ii), which is referred to explicitly by subdivision (b)(2)." *Id* at 216–17. "A balancing of all relevant provisions together, in other words, suggests that it is really not subdivision (b)(2) that sets the boundaries for service. In reality, there are no boundaries on service, at least not as long as service is made in the United States. The most meaningful boundaries are the residential and business boundaries that enclose the site of the deposition or production – the

boundaries contained in subdivision (c)(3)(A)(ii). If that site is properly selected, it should make little difference where the witness may be reached with the subpoena. A construction any more rigid than that would allow subdivision (b)(2) to undermine rather than implement the aims of subdivision (c)(3)(A)(ii)." *Id* at 217 "Trying to set the site so as to pick out the issuing court under subdivision (a)(2), figure out where to make the service under subdivision (b)(2), and satisfy the ultimate requirement of seeing to it that the site selected does not exceed the witness's convenience limitations set by subdivision (c)(3)(A)(ii), creates a circle from which escape is difficult." *Id* The article further argues that subdivision (b)(2) may be superfluous, noting that subdivision (b)(2)'s cross-reference to subdivision (c)(3)(A)(ii) "seems to do nothing so much as cancel out subdivision (b)(2)'s own pronouncement in deference to the geographical pronouncement of subdivision (c)(3)(A)(ii)." *Id* at 219

- James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33 (1992).
  - This article proposes that "Rule 45(b)(2) should be amended to eliminate the 100 mile Rule in favor of national subpoena power with built-in protections against possible abuses." *Id.* at 34
  - The proposed revision of Rule 45(b)(2) is: "At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the District Court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial and production of documents or other materials in the possession of the witness may be served at any place within the United States. The court may condition the enforceability of such subpoena upon the payment to the witness of fair and reasonable expenses for travel, lodging and adequate payment for time spent by the witness in giving testimony, including lost compensation, prior to the date upon which the witness has been required to attend. The court may also enter such other orders, including protective orders under Rule 26(c), as may be just and reasonable to prevent abuses in the pretrial or trial process. On timely motion, or on the court's own motion, the court may quash or modify the subpoena if it fails to allow reasonable time for compliance." *Id* at 40.
  - The article suggests that the proposed amendment will have many benefits, including that it would: "[e]liminate arbitrary distinctions based upon the geographical location of the witnesses"; "[e]liminate any artificial distinctions between the federal government and any other civil litigants"; "[c]larify the ability of parties to compensate witnesses for any adverse economic impact of their being compelled to testify"; "[c]onfer upon the trial court the power to dramatically limit the breadth of deposition discovery, without a procedural due process issue arising over lack of effective trial subpoena opportunities"; and "[e]nable the court to limit depositions for both sides of the litigation to the extent to which specific depositions serve the interests of justice and may be expected to expedite the cases." *Id.* at 41.
  - The article recognizes that there are several possible objections to elimination of the 100-mile rule for trial witnesses, including the potential for abuse of witnesses, the promotion of a return to the traditional trial with more risks for both sides, and the

encouragement of trials at a time when courts are attempting to advance mediation of disputes. However, the article argues that these concerns do not outweigh the benefits of the proposal and that "[t]he federal courts already have substantial power to prevent abuses by rule as well as their inherent power to control the proceedings." *Id.* at 44 (footnote omitted). The article also recognizes that the proposed change to Rule 45 would have a collateral impact on other rules of procedure, which would need to be worked out. *Id* at 44–46.

- Don Zupanec, *Subpoena – Issuing Court – Documents Located in Another District*, 19 NO. 1 FED LITIGATOR 11 (2004).
  - This article summarizes the decision in *Crafton v U.S Specialty Insurance Co.*, 218 F.R.D. 175 (E.D. Ark. 2003), where the court held that "[a] subpoena served on a nonparty corporation's registered agent in one state is not effective to require production of documents located in another state simply because the corporation has sufficient contact with the state where the agent is located to be subject to jurisdiction there."
  - The article notes that a subpoena should issue from the court in the district where the documents apparently are located for two reasons: "Rule 45(a)(2) requires that a subpoena for production or inspection issue from the court for the district 'in which production or inspection is to be made.' A court in the district where an action is pending does not have authority to enforce a subpoena requiring a nonparty to produce documents located in another district. The other reason is that a subpoena is subject to being quashed or modified if it creates an 'undue burden.' A subpoena requiring production in one district of documents located outside the district may be viewed as creating an undue burden on the subpoenaed party. This leaves it vulnerable to being quashed or modified." *Id.*

- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT'L L.J. S11, (col. 1), at n.5 (1992) ("Interestingly, the jurisdictional limitations on trial subpoenas, issued per Rule 45, seldom are litigated to a reported decision.").

Designation of Issuing Court

- *Subpoena for Attendance at Deposition – Designation of Issuing Court*, 9 NO. 7 FED. LITIGATOR 204 (1994).
  - This article discusses *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84 (E.D. Pa. 1994), where it was held that "[a] subpoena directing attendance at a deposition is invalid if the court designated on the subpoena form as the issuing court is not the court for the district in which the deposition is to be taken." 9 NO. 7 FED. LITIGATOR at 204. In *Kupritz*, the requesting party had listed the Southern District of Georgia as the issuing court on a subpoena for a deposition to take place in Pennsylvania. "The court said that under the express language of Rule 45(a)(2), the subpoena was required to issue from the District Court for the Eastern District of Pennsylvania. Since the District Court for the Southern District of Georgia was designated as the issuing court, the court held that it lacked jurisdiction to enforce the subpoena or hold the witness in contempt for failing to appear." *Id.*

- In the "Litigation Tips" section, the article states: "Usually, a motion to quash a subpoena requiring attendance at a deposition should be made in the court for the district in which the deposition is to take place, because that is the court in whose authority the subpoena should issue. Where, as here, another court is designated as the issuing court, the motion may be made in the issuing court, and probably in the court in the district where the deposition would occur." *Id* at 205 (citation omitted)

Measuring 100 Miles

- Jerold S. Solovy & Robert L. Byman, *Discovery Measuring a Subpoena's Reach*, 4/12/99 NAT'L L.J. B19, (col. 1) (1999).
  - This article discusses the question of whether the 100-mile limit in Rule 45 is "measure[d] by crow or by car," and concludes that "[t]he weight of authority appears to favor the crows, but that authority is neither voluminous nor overwhelmingly persuasive." *Id*
  - The article discusses *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214 (D. Conn. 1977), which adopted "a straight-line, crow's-flight approach to Rule 45," noting that "since 1963, when Federal Rule of Civil Procedure 4(f) was adopted, every court interpreting the 100-mile limit for service of process has used a straight line, crow's-flight measurement," and that "it would be anomalous for there to be different standards for the territorial reach of the court for jurisdiction over the parties and for the power to compel nonparties to attend discovery and trial." 4/12/99 NAT'L L.J. B19. The article disagrees with the *SCM Corp* court's holding because: "Rule 4 was not designed to be, and clearly is not, coextensive with Rule 45," and because "Rule 4 addresses the court's reach as to parties while Rule 45 addresses the inconvenience to nonparties[, a]nd if it was not already questionable, the logic of treating parties and nonparties equally was seriously undercut with the 1991 amendments to Rule 45." *Id.* Although the *SCM Corp.* court had "observed that the 100 mile limit dates back all the way to 1789, when modern phenomena such as traffic jams were not an issue," the article notes that "[w]hen the 100-mile provision was adopted in the 18th century, 100 miles was a formidable distance, which likely could not be traversed in a single day." *Id* The article argues: "Clearly, when the limit was originally imposed, no one was thinking about straight-line or crow's-flight measurements, since the technology did not exist to make such measurements meaningful. The drafters of the 100-mile limit clearly intended that the distance be measured by the actual route of travel because there was no other way to travel." *Id.*
  - The article further notes a lack of clarity as to whether the burden rests with the nonparty to object to a subpoena violating the 100-mile limit or the subpoenaing party to move for enforcement. "Rule 45(c)(3)(A)(ii) states that a court may, on timely motion, quash or modify a subpoena that requires a person not a party to travel more than 100 miles. So the rule puts the burden on the subpoenaed individual to seek relief But not so fast. There is a structural anomaly in Rule 45. Rule 45(e) provides a contempt remedy against any person who without adequate excuse fails to obey a subpoena. But 'an adequate excuse for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the [100-mile] limits.' So subsec. (e) trumps the requirement of the filing of a motion

to quash seemingly required by subsec. (c). A nonparty who is served with a subpoena requiring production beyond the territorial limits can simply ignore the subpoena and need not file a motion." *Id.* (citing *McAuslin v Grinnell Corp* , No. Civ. A. 97-775, 97-803, 1999 WL 24617 (E.D La. Jan. 19, 1999)) (internal paragraph structure omitted).

- The article further points out an issue with the time for measuring the 100-miles, arguing that the difference between the time for measurement in Rule 4 and the time for measurement in Rule 45 is another reason that the *SCM Corp.* court's reasoning is flawed. "Under Rule 4, the 100 miles is measured at the time service is made. A served defendant cannot defeat jurisdiction by moving. But the 100-mile measurement for nonparty witnesses is not made at the time of the service of the subpoena, but rather at the time for compliance with the subpoena." *Id* The article notes one case that found that where a subpoenaed party was served while he lived within the district, but moved to Hong Kong before the return date, the nonparty was not required to comply with the subpoena. *Id* The authors caution, however, that a nonparty may not simply avoid a subpoena by moving before the return date, noting that in the case that had excused compliance, the move had been previously scheduled and had nothing to do with avoiding the subpoena. *Id.*
- Finally, the article notes that if the subpoenaing party wins the case, the travel expenses for nonparty subpoenas may be included in the bill of costs, and further notes that a party "may even be able to recover costs beyond the 100-miles limit (no matter how it's measured)." *Id.* (citing *Smith v Bd. of Sch Comm'rs of Mobile County*, 119 F.R.D. 440 (S.D. Ala. 1988); *Oetiker v Jurid Werks GmbH*, 104 F.R.D. 389 (D.D.C. 1982)).

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - "When subdivision (c)(3)(A)(ii) seeks to have the court relieve a nonparty from having to travel 'more than 100 miles from the places where that person resides [etc.]', what exactly does it mean? Does it mean to assume that the person will be starting out from home to go to the site of the deposition (production, etc.)? That is apparently its assumption, or else we have another calculus to go through, measuring distances not from residence or employment, as the cited provision does, but from the point of actual service or from yet some other point." *Id* at 220.

- David D. Siegel, Practice Commentaries, in FED R. CIV. P. 45 ("The better rule is that the 100 miles should be measured by air rather than by surface transportation with its twists and turns, *i.e.*, that it should be measured 'as the crow flies'. The more recent decisions so hold.").

Using Rule 45 to Compel Officers to Testify in Distant Fora

- *Second Federal Vioxx Trial Underway Before MDL Judge in LA*, 10 NO. 3 ANDREWS DRUG RECALL LITIG. REP. 3 (2006).
  - This article notes that the judge in the Vioxx litigation denied a request to quash a subpoena forcing one of Merck's former officers to testify at trial. The court rejected

Merck's theory that the subpoena was improper because it required the officer to travel more than 100 miles from his home to testify. "Judge Fallon said he agreed with the PSC's inverse argument that Rule 45(b)(2) 'empowers the court with the authority to subpoena Mr. Anstice, an officer of a party, to attend a trial beyond the 100 mile limit.'" The article also notes: "Judge Fallon said the [100-mile] limit is based on a centuries-old British law designed to prevent witness harassment in a time when such a journey could be an onerous task." In addition, the article notes: "Enforcement of the rule in today's era of global travel and multidistrict litigation, the judge said, 'actually inhibits the truth-seeking purpose of litigation.'" Finally, the article notes that the judge explained that "'the majority of courts that have been faced with the same issue have ruled likewise.'"

- *Depositions – Corporate Officer*, 12 NO. 7 FED. LITIGATOR 200 (1997).
  - This article discusses *Stone v. Morton Int'l, Inc* , 170 F.R.D. 498 (D. Utah 1997), where the court held that "[a] party who wants to take the deposition of a particular officer, director, or managing agent of a corporate party must first attempt to obtain information from a representative designated by the corporation under F.R.C.P. 30(b)(6), or by some other form of discovery." 12 NO. 7 FED. LITIGATOR 200. The court found that "[w]hile Rule 45 requires an officer of a corporate party to appear for a deposition in a distant location, it does not expressly state that a subpoena is the way to obtain the attendance of a nonparty officer of a corporate party for deposition." *Id* "In the court's view, these rules provide neither direct nor concrete support for Stone's contention that a corporate party is obligated, if given specific Rule 30(b)(1) notice of another party's wish to depose a particular nonparty corporate officer, director, or managing agent, to produce that person for a deposition. The court considered the rules to be 'inconsistent' or at least 'blurred.'" *Id*
  - Despite the court's holding, the article notes: "Utilizing the procedure provided for in Rule 30(b)(6) is not generally viewed as a prerequisite to noticing the deposition of a particular corporate officer, director, or managing agent. A party seeking to depose a corporation has two alternatives. One is to notice the deposition of a specific officer, director, or managing agent pursuant to Rule 30(b)(1). The other is to follow the Rule 30(b)(6) procedure by naming the corporation as the deponent and allowing it to designate someone to testify on its behalf." *Id.* (citation omitted)

- Don Zupanec, *Subpoena – Appearance at Trial – Officer of Party*, 21 NO. 9 FED. LITIGATOR 11 (2006).
  - This article discusses *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La 2006), which held that "[a] district court has authority under F.R.C.P. 45 to compel attendance at trial of a party or an officer of a party served by subpoena more than 100 miles from the place of trial." 21 NO. 9 FED. LITIGATOR 11. "Rule 45(b)(2)'s 100-mile restriction is expressly limited by Rule 45(c)(3)(A)(ii), which mandates quashing a subpoena requiring 'a person who is *not a party or an officer of a party*' to travel more than 100 miles to attend a trial." *Id* The language of Rule 45(c)(3)(A)(ii) supported the "inference that Rule 45(b)(2) authorized subpoenaing the witness, an officer of a party, to attend trial more than 100 miles from where he

resided." *Id* "The court acknowledged that nothing in the history of either Rule 45(b)(2) or Rule 45(c)(3)(A)(ii) suggests any intention to alter the 100-mile rule Nevertheless, in its view, they allowed subpoenaing the witness to appear at trial." *Id.*

- The article notes that the court's ruling "is the predominant interpretation of Rule 45(c)(3)(A)(ii)'s 'a person who is not a party or an officer of a party' language and its consequences for a district court's subpoena power under Rule 45(b)(2)." *Id* "A 1991 amendment to Rule 45 added paragraph (c), as well as the reference in Rule 45(b) to subparagraph (c)(3)(A). The Advisory Committee Notes describe subparagraph (c)(3)(A) as essentially restating 'the former provisions with respect to the limits of mandatory travel.' However, prior to the amendment, Rule 45 did not distinguish between parties and nonparties." *Id*
- The article notes a split of authority: "In making Rule 45(b)(2)'s 100-mile limitation applicable to 'a person who is not a party or an officer of a party,' subparagraph (c)(3)(A) may reasonably be interpreted as excluding parties and officers of parties from the limitation. Quite a few courts have so interpreted it, at least implicitly, in finding that parties and officers of parties may be subpoenaed to appear at trial more than 100 miles from where they are located. . . . Not unexpectedly, there are a few courts whose interpretation differs." *Id.* (citations omitted).
- The article also points out that "the reason for the [100-mile] limitation no longer makes much sense, given the relative ease of travel." *Id*

- Don Zupanec, *Subpoena – Attendance at Trial – Geographic Limitation – Parties and Officers*, 23 NO 9 FED. LITIGATOR 13 (2008).
  - This article discusses *Johnson v Big Lots Stores, Inc* , 251 F.R.D 213 (E.D. La. 2008), which held that "F.R.C.P. 45(c)(3)(A)(ii) does not expand courts' power to subpoena attendance at trial of parties and officers of parties beyond Rule 45(b)(2)'s geographical limits." 23 NO. 9 FED. LITIGATOR 13. The court found that "[t]o read the 'subject to Rule 45(c)(3)(A)(ii)' clause [in Rule 45(b)(2)] as *expanding* the geographical scope of subpoena authority ignores the ordinary meaning of 'subject to.' (court's emphasis). That a rule or statute defining judicial power or a legal right is 'subject to' some other rule or statute ordinarily means that the power or right is *limited* by the referenced provision (court's emphasis)." *Id* The court concluded that "[t]he better reading of Rule 45 is to view subdivision (b)(2) as defining the geographical scope of a court's subpoena power, subject to the limitations described in subdivision (c)(3)(A)(ii). Thus, to compel attendance at trial, a subpoena must be served in one of the places listed in Rule 45(b)(2) *and* not be entitled to the protection of Rule 45(c)(3)(A)(ii), which applies to nonparty witnesses but not parties or party officers " *Id* "The court did not view the 1991 amendments to Rule 45, which added subdivision (c) as well as the reference in Rule 45(b) to subdivision [(c)(3)(A)], as authorizing nationwide service The amendment did not alter the geographical limitations on proper service but subjected courts' subpoena power to subdivision (c)'s protections Nothing in the Advisory Committee's Notes to the amendments suggests a scheme of nationwide service. The Notes make clear that subdivision (c) enlarges and clarifies protections for subpoenaed persons. In light of

the widespread pre-1991 understanding that courts' subpoena powers are geographically limited, if the amendments created a system of nationwide service, it would be reasonable to expect they would say so directly." *Id*

- In the "Litigation Tips" section, the article states: "This is not the predominant view of the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii). These provisions are generally interpreted as authorizing compelled attendance at trial by means of subpoena served on a party or an officer of a party outside the district where the issuing court is located and beyond Rule 45(b)(2)(B)'s 100-mile limit." *Id.* (citations omitted). "Interestingly, while this remains the predominant view, several courts have recently rejected it, concluding instead that Rule 45(b)(2) specifies requirements for proper service of a subpoena to compel attendance while Rule 45(c)(3)(A)(ii) sets forth circumstances under which a subpoena must be quashed, but does not alter the requirements for proper service." *Id.* (citations omitted). "Under the predominant view, a subpoena to compel trial attendance of a party or party officer need not be served in accordance with Rule 45(b)(2)'s geographical limitations. Under the minority interpretation, it is necessary to serve the subpoena in one of the places listed in Rule 45(b)(2). The subpoena is effective only if Rule 45(c)(3)(A)(ii) does not apply, *i e.*, only if the person subpoenaed does not reside or work more than 100 miles from the district court's location – unless the person is a party or a party officer " *Id*
- The article notes that "[n]o appeals court has yet weighed in on the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii). The proper interpretation remains an open question." *Id*

International Issues

- Christopher Joseph Borgen, *International Legal Developments in Review 1998*, 33 INT'L LAW. 424, 428 (1999) (noting that in *First Am. Corp. v Price Waterhouse LLP*, 1998 WL 474196 (S.D.N.Y Aug. 13, 1998),[8] the court had "concluded that the fact that the foreign non-party did business in New York through an agent was insufficient to permit a deposition in New York" because "'the place' where [Price Waterhouse U.K.] and its partners and employees 'reside,' are 'employed,' or 'regularly transact[s] business in person' is not New York,'" but that if "the deposition were to be conducted in England, the subpoena could not be issued from New York, as Rule 45 contemplated that the subpoena issue from the district in which the witness was and that [the] district be no more than 100 miles from the witness's residence, employ, or place in which he or she regularly transacts business") (footnote omitted).

- Lawrence W Newman & Michael Burrows, *Extraterritorial Reach of Rule 45 Subpoena*, 4/16/92 N.Y. L.J 3, (col. 1) (Apr. 16, 1992)
  - This article addresses "whether a subpoena duces tecum issued pursuant to Rule 45 and served on a domestic branch of a corporation with branches outside the United

[8] This particular citation does not appear to be available on Westlaw, but I believe the referenced case is also located at *Price Waterhouse LLP v First American Corp* , 182 F R D 56 (S D N Y 1998)

States may properly reach documents in the custody or control of the corporation located outside the United States," and concludes that the answer is uncertain under the text of Rule 45. The article notes that prior to the 1991 amendments to Rule 45, there was a split of authority as to the extraterritorial reach of a subpoena. The Fifth Circuit, in *Cates v. LTV Aerospace Corp* , 480 F 2d 620, 624 (5th Cir 1973), held that "'a court cannot order production of records in the custody and control of a non-party located in a foreign judicial district.'" 4/16/92 N.Y. L.J. 3 (quoting *Cates*, 480 F.2d at 624). However, the article notes that while some courts agreed with the *Cates* holding, others determined the issue differently. For example, in *Ghandi v. Police Dept. of City of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977), the court held that "pursuant to 45(d)(1) a deponent must 'produce for inspection and copying the documents within its custody named in the subpoena regardless of where the documents are actually located.'" 4/16/92 N.Y. L.J. 3 (citing *Ghandi*, 74 F.R.D. at 120–22). The article notes that "[t]he reach of a subpoena duces tecum issued pursuant to old Rule 45 was extended oversees in *In re Jee*[, 104 B.R. 289 (Bankr. C.D. Cal. 1984)]." *Id.*

- The article finds that amended Rule 45(a)(2) has not yet been clarified by the courts. "The sole guide available is the Notes of the Advisory Committee that declare with regard to Rule 45 that 'Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served.'" *Id.* The article argues that the text of Rule 45(a)(2) is unclear: "Unfortunately, the actual language of subparagraph (a)(2) does not 'make clear' that this amendment stands for the proposition attributed to it by the Advisory Committee. There is no logical connection between the words of Rule 45(a)(2) and the power attributed to it: No cases are cited, no explanation is given by the Advisory Committee, and no mention is made of the dispute between the *Cates* and *Ghandi* courts." *Id* The article notes that a court faced with deciding this issue will have three choices. "the narrow position set forth in *Cates*, the 'expansionist' position set forth in *Ghandi* or a wholly new course, perhaps a compromise between the aforementioned extremes." *Id.* The article concludes that "[i]n light of what appears to be a conscious, long-term effort to pattern Rule 45 discovery procedures after those in Rule 34, it is logical that subparagraph (a)(2) authorizes the production of documents and other tangibles located overseas, since some courts have held that such documents come within the scope of a document request made pursuant to Rule 34." *Id* The article notes that a court faced with this issue might come up with an entirely new approach, concluding that the wholesale revision of Rule 45 in 1991 renders previous case law less persuasive *See id*

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - "The person subpoenaed for documents under Rule 45 must produce all documents that are in his or her custody or control, even if they are outside the district in which the subpoena is served . . . [For] example, the lawyer appearing before the District of Minnesota is empowered to subpoena a New York company for documents that the company controls in Africa or Europe." *Id* (footnote omitted).

- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT'L L.J. S11, (col. 1) (1992).
  - This article examines this question: "Can a civil litigant, be it a private party or a federal agency, compel a U.S. subsidiary of a foreign corporation to produce documents of its parent company, or produce its parent company's officers to give testimony, when there is no jurisdictional authority over the parent or its officers?" *Id.* The article concludes that "[t]he answer relates to the ability of the subsidiary to control its parent," citing to one case that had found that a U.S. subsidiary was not required to produce information in the possession of its parent company because it did not control the parent and did not have possession, custody, or control of the information, and to another case that held that a plaintiff was required to produce a former officer for deposition because the former officer continued to be associated with corporate entities in which the plaintiff had a majority controlling interest and the plaintiff had the power to produce him. *Id.*
  - Noting that often a foreign parent will place one of its officers as a director of its U.S. subsidiary, and that this subjects these individuals to being called to testify in civil litigation, the article suggests that this can be avoided by seeking protective orders under Rule 26(c) or by relying on certain courts' standing orders, such as one that provides that "any officer, director or managing agent of a corporate party can submit an affidavit in response to a deposition notice or subpoena, stating that he or she has no knowledge regarding the dispute or controversy." *Id.*

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 215 (1992) ("Service of a U.S. subpoena on an alien outside the country is a nullity, but service outside the country on a United States citizen is permissible under a special, albeit rarely used, statute, 28 U.S.C.A. § 1783.").

Production Format

- *Sedona Commentary*, *supra*, at 204 ("Although Rule 45 was amended to clarify the right to ask for a specific production format, it is not yet clear that those serving subpoenas are taking advantage of this change.").

Necessity of Subpoena for Party Deposition

- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT'L L.J. S11, (col. 1) (1992) ("To compel a person to be a deponent, *regardless of party or non-party status*, a subpoena under Rule 45 is necessary.") (emphasis added).

TAB - 9

APPELLATE-CIVIL RULES PROJECTS

The Appellate Rules occasionally intersect with the Civil Rules in ways going beyond the common event that parallel provisions appear in Appellate, Bankruptcy, Criminal, and even Evidence Rules. A recent example is provided by proposed Civil Rule 62.1 and Appellate Rule 12.1, now pending before Congress. Appellate Rule 4(a), governing the time to appeal in civil actions, has inspired several joint projects to adopt integrated amendments. At least two Rule 4 projects now before the Appellate Rules Committee have prompted appointment of a joint Subcommittee designed to facilitate communication and coordination. The Civil Rules Committee members of the Subcommittee are Judges Colloton and Walker, along with Peter Keisler.

Memoranda on these two projects to the Appellate Rules Committee from Reporter-Professor Struve are attached. This Note provides only a brief description.

The first project springs from Civil Rule 58, which says that judgment need not be entered on a separate document when the court disposes of any of five enumerated post-judgment motions. The problem is that the order disposing of the motion may lead to an altered or amended judgment. That in turn implicates the Appellate Rule 4 time to appeal. One approach would be to amend Rule 58 to require a separate document when disposition of the motion alters or amends the judgment. Appellate Rule 4 still would need to be considered to determine whether a new or amended notice of appeal should be required if the judgment is altered or amended. One possibility would be to adopt for civil actions the approach taken by Appellate Rule 4(b) for criminal cases — a new or amended notice of appeal is not required

The second project presents a far more complex set of issues. Only the simplest are sketched here. The starting point is 28 U.S.C. § 2072(c), which authorizes rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291 * * *." Litigants disappointed with a district-court ruling that disposes of part of an action may attempt to "manufacture" finality. Unconditional dismissal of all remaining parts of the action with prejudice is accepted by most circuits as establishing a final judgment. Fancier strategies have produced mixed results. The leading candidate for consideration — although not the only one — is the approach that conditionally dismisses all remaining parts of the action with prejudice. The condition is that dismissal is with prejudice unless the court of appeals reverses the ruling that displeased the appellant; then the parts dismissed with conditional prejudice can be revived. If this practice were to be addressed in the Civil Rules, the most likely places would be Rule 41 or 54, or perhaps a new Rule 41.1 or 54.1. There are many challenges, including framing a rule that accommodates multiparty or multiclaim cases, deciding how far to involve the district court in determining whether finality can be manufactured in this way, and resolving such issues as the need to ensure that revival of the conditional-prejudice dismissal can be accomplished as part of a continuing action so as to avoid limitations problems.

Quiet moments seldom appear on the Appellate Rule 4 front. It may be that some other Rule 4 question will arise so soon as to make additional work for the joint Subcommittee and eventually for both advisory committees. However that may be, the two pending projects will present the opportunity for fine-grained work in ways that do not often occupy the Civil Rules Committee.

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-D, 08-AP-E, and 08-AP-F

The Appellate Rules Committee has been discussing a number of items that are also of interest to the Civil Rules Committee. The two Committees are moving forward with joint efforts on these items. This memo discusses one such cluster of issues, concerning tolling motions; another memo, on Item No. 08-AP-H, discusses the other set of issues (which relates to "manufactured finality").

The tolling-motion items arise from comments[1] submitted on the amendment to Appellate Rule 4(a)(4)(B)(ii).[2] One comment, from Peder Batalden, points out that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden suggests, the judgment might not be issued and entered until well after the entry of the order. Mr. Batalden suggests that Rule 4(a)(4)(B)(ii) be amended by deleting "or a judgment altered or amended upon such a motion." The other two comments are from Public Citizen Litigation Group ("Public Citizen") and the Seventh Circuit Bar Association Rules and Practice Committee (the "Bar Association"); these two commenters suggest that Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. (Such an approach would parallel that taken in Rule 4(b)(3)(C) for notices of appeal in *criminal* cases.)

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[1] The full text of the comments is available at http://www.uscourts.gov/rules/2007_Appellate_Rules_Comments_Chart.html.

[2] That amendment has been approved by the Supreme Court and will take effect, absent contrary action by Congress, on December 1, 2009. Rule 4(a)(4)(B)(ii) would then read:

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Part I of this memo summarizes research[3] and discussions to date concerning Mr. Batalden's suggestion. Part II does the same with respect to the suggestions by Public Citizen and the Bar Association. The memo incorporates insights from Judge Kravitz and Professor Cooper as well as from the Appellate Rules Committee's fall 2008 discussions.

I. The potential time lag between the order and the amended judgment

Mr. Batalden's insight is an astute one: there may indeed be some instances when more than 30 days elapses between the entry of an order disposing of a postjudgment motion and the entry of any amended judgment pursuant to that order. A possible way to fix the problem would be to amend Civil Rule 58 to follow the approach taken by the Seventh Circuit, which has read Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions. *See Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008).

One situation in which Mr. Batalden's concern may arise involves remittitur.[4] Suppose that the district court conditionally grants a new trial unless the plaintiff agrees to accept a reduced award within 40 days from the date of entry of the court's order. Suppose further that as of Day 30 the plaintiff has not decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. In this scenario, the defendant's options appear to be:

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[3] A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee's fall 2008 meeting, which are available at http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf.

[4] Another such situation might occur in a case involving a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which (1) grants the motion and (2) directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. This scenario, however, seems likely to be relatively rare. When the court grants injunctive relief, Civil Rule 58(b)(2)'s directive that "the court must promptly approve the form of the judgment, which the clerk must promptly enter" will apply. And a background principle – reflected in Civil Rule 58 until 2002 – has been that attorney submission of a suggested form of judgment should occur only in rare cases. Moreover, a persuasive argument can be made that in such a situation there is no final and appealable judgment until the parties have submitted, and the court has approved, the wording of the proposed amended judgment. *See, e.g., Goff v. Nix*, 113 F.3d 887, 889-90 (8th Cir. 1997); *Bradley v. Milliken*, 468 F.2d 902, 902-03 (6th Cir. 1972).

(1) file the notice of appeal by Day 30, and then either withdraw the notice of appeal (if the plaintiff rejects the reduced award) or amend the notice of appeal (if the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced award);

(2) point out the timing problem to the district court and seek an extension of time to file the notice of appeal under Rule 4(a)(5); or

(3) wait to file the notice of appeal until the judgment has become final by virtue of the plaintiff's acceptance of the reduced award.

The risks and benefits of Option 3 depend in part on whether a separate document is required for the order "disposing of" – in this instance, conditionally granting – the new trial motion. If a separate document is required and has not been provided, then the litigant can select Option (3) without concern, because the time to take an appeal from the order has not yet commenced to run. However, if a separate document is not required, Option (3) seems riskier. Granted, even if a separate document is not required a strong argument can be made that choosing Option (3) results in a timely notice: It would make little sense to penalize a litigant for waiting to appeal until there exists an appealable final judgment. But Rule 4(a)(4)(B)(ii) might be read to require a contrary result: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

During the fall 2008 Appellate Rules Committee meeting, one attorney member noted that he had seen this situation arise in his practice. And a judge member noted that even if problems in this area turn out to be rare overall, such problems are very serious when they do arise. However, it is questionable whether Mr. Batalden's proposed amendment would solve the problem. Under Mr. Batalden's proposal, Rule 4(a)(4)(B)(ii) would be amended to read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A)~~, or a judgment altered or amended upon such a motion,~~ must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenario described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day. Moreover, the proposed change might be undesirable in that it would remove from the Rule text which currently serves to remind would-be appellants of the need to file a notice of appeal that encompasses the amendment or alteration of the judgment (if the appellant wishes to challenge that alteration or amendment).

Discussions with Judge Kravitz and Professor Cooper have identified an alternative possibility. If Civil Rule 58 were amended to expressly require a separate document for orders *granting* tolling motions, then the difficulty described above would be very unlikely to arise.[5] Civil Rule 58(a) currently reads:

> (a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:
>
> (1) for judgment under Rule 50(b);
> (2) to amend or make additional findings under Rule 52(b);
> (3) for attorney's fees under Rule 54;
> (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
> (5) for relief under Rule 60.

Professor Cooper has suggested possible alternatives for revising Rule 58(a):

- "Every judgment and [altered or][6] amended judgment must be set out in a separate document, but a separate document ~~is not required for an order disposing of a motion~~ is required for an order disposing of any of the following motions only if the order directs entry of an altered or amended judgment: * * *."

- "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required[7] for an order disposing of ~~a motion~~ any of the following motions without altering or amending the judgment: * * *."

- "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required for an order ~~disposing of a motion~~ that -- without amending the judgment -- disposes of a motion: * * *."

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[5] The difficulty would arise only if the district court, when entering the order granting the tolling motion, provides the required separate document even though the order itself contemplates further proceedings with respect to the amendment of the judgment.

[6] The argument for adding "altered or" is that this language would fit with Appellate Rule 4(a)(4)(B)(ii), which refers to alteration as well as amendment of a judgment.

[7] In the options that state when the separate document "is not required," a possible variation might add the proviso "– unless the court directs – ".

II. Expanding the scope of an original notice of appeal to encompass dispositions of postjudgment motions

The possible revision to Civil Rule 58(a) – discussed in Part I of this memo – would address Mr. Batalden's concern but would not address the concerns raised by Public Citizen and the Bar Association. An amendment designed to address the latter concerns would sweep more broadly.

Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts."

The Bar Association reports that participants in a discussion of the proposed Rules amendments in December 2007 doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

In assessing these proposals it is worthwhile to note Rule 4(b)'s approach with respect to criminal appeals. Rule 4(b)(3)(C) provides, with respect to criminal appeals, that "[a] valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." The substance of this language came into the Rule in the 1993 amendments, which added, among other features, the following provision: "Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions." Interestingly, the 1993 Committee Note to Rule 4(b) does not explain this addition. Instead, the Committee Note focuses its explanation on the addition of language designed to make clear that certain types of post-verdict motions in criminal cases did not nullify a previously-filed notice of appeal.

The 1993 amendments also added Rule 4(a)'s language specifying that one wishing to

challenge the disposition of a postjudgment motion in a civil case must amend a previously-filed notice of appeal. (Prior to 1993, such an admonition would have been unnecessary as a technical matter, because from 1979 to 1993 Rule 4(a) provided that a tolling motion nullified any previously-filed notice of appeal.) As shown in the April 1991 Appellate Rules Committee Minutes, the substance of both these changes was adopted in the course of the same meeting. At that meeting, the Committee decided both (1) to adopt language in Rule 4(a) stating that a challenge to the disposition of a post-judgment motion in a civil case requires a new or amended notice of appeal[8] and (2) to adopt in Rule 4(b) language stating that a previously-filed notice of appeal encompasses the disposition of tolling motions.[9]

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[8] The minutes state in relevant part:

> Judge Keeton asked whether the intent of the motion was to eliminate the requirement of a new notice of appeal. Judge Williams stated that the rule should not add any more requirements as to notices of appeal than those already in Fed. R. App. P. 3. He suggested that the Committee Note make reference to Fed. R. App. P. 3(c) and state that in order to appeal from disposition of a post trial motion a party may need to file a new notice of appeal or amend the original notice.
>
> Judge Keeton suggested a revision of the sentences in question to read as follows:
>
> > An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure ("April 1991 Minutes"), at 14-15.

[9] The minutes state in relevant part:

> Judge Logan suggested eliminating the language at lines 33 through 41 of the draft requiring a new notice or amended notice of appeal in order to bring an appeal from denial of a post trial motion. Judge Logan moved, and the motion was seconded by Judge Ripple, substitution of the following language for lines 33 through 41 of the draft:
>
> > Notwithstanding the provision of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.

April 1991 Minutes at 18.

The April 1991 Minutes do not explain why the Committee decided to take these differing approaches with respect to civil and criminal appeals. One reason might be that members were more concerned about criminal defendants' appeals due to the particularly serious nature of the stakes in criminal cases. Another reason might be that in most criminal cases the potential for confusion (as to what the defendant-appellant is likely to be appealing from) is relatively small; thus, providing that the initial notice of appeal encompasses challenges to subsequent dispositions of tolling motions probably does not make it difficult for the government to discern the nature of the orders being appealed. In complex civil cases, by contrast, there may be multiple postjudgment motions involving various parties, which might make it harder for the appellee to discern, in the first instance, which orders are being appealed if Rule 4(a) were to provide that an initial notice of appeal encompasses challenges to subsequent orders disposing of tolling motions.

Relevant questions, then, include whether current practice under Rule 4(a)(4)(B)(ii) poses undue difficulties for practitioners, and, if so, whether the benefits of a provision directing that an initial notice of appeal be read to encompass any challenges to subsequent dispositions of tolling motions would outweigh the possible downsides of such a provision. As Public Citizen's comments suggest, a key question might be whether, under such a regime, the notice of appeal would provide sufficient information to the appellee, and if not, whether other filings early in the course of the appeal would supply the missing specificity.

If the decision were taken to change Rule 4(a)'s approach so as to provide that an initial notice of appeal encompasses challenges to any subsequent dispositions of post-judgment motions, it would be necessary to consider how to implement that change. It seems unlikely that 28 U.S.C. § 2107(a)'s general requirement that the notice of appeal be filed "within thirty days after the entry of such judgment, order or decree" would pose a barrier to providing that a previously-filed notice of appeal could encompass a later-issued order disposing of a tolling motion; one could read the statutory language as setting an outer time limit, not as requiring that the notice of appeal be filed "after" the entry of the judgment, order or decree. That reading would be consistent with the treatment accorded notices of appeal filed after announcement but before entry of a judgment, see Appellate Rule 4(a)(2).

However, the details of the drafting might be challenging. If one were to simply mirror, in Rule 4(a)(4), the Rule 4(b)(3)(C) language – "A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in [Rule 4(a)(4)(A)]" – that language could reach somewhat broadly in complex cases. Also, in the civil-appeal context[10] there is a fair amount of caselaw stating that a notice of appeal that

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[10] Though I have not specifically studied the question, my casual impression is that the "expressio unius" question concerning notices of appeal arises more rarely in the criminal-appeal context. This impression might, however, be mistaken. For examples of decisions addressing this question in the criminal context, *see United States v. Adrian*, 978 F.2d 486, 489 (9th Cir. 1992), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008),

enumerates fewer than all the possible issues for appeal fails to encompass the other issues (applying the "expressio unius" canon).[11] Questions might arise whether such a narrowly-drafted notice of appeal should qualify for the new treatment, or whether the fact that it specified only particular orders would prevent it from encompassing the later disposition of the postjudgment motions.

III. Conclusion

At the Appellate Rules Committee's fall 2008 meeting, a member asked whether an amendment addressing Mr. Batalden's concerns would also address the other two commenters' concerns, and vice versa. The answer appears to be no. Though the issues treated in Parts I and II of this memo concern the same general topic – the treatment of challenges to the disposition of post-judgment motions – it is easy to envision an amendment that would address one of those issues without addressing the other. The possible amendment to Civil Rule 58(a) – discussed in Part I – would address Mr. Batalden's concern but would not address the questions raised by Public Citizen and the Bar Association: Even if Civil Rule 58(a) were amended to require a separate document for orders granting tolling motions, that would simply affect the *timing* for filing a notice of appeal from such an order. Public Citizen and the Bar Association suggest eliminating the *requirement* for such a notice of appeal in instances where the would-be appellant has already filed a notice of appeal from the original judgment. Conversely, amending Appellate Rule 4(a) as suggested by Public Citizen and the Bar Association would not fully address Mr. Batalden's timing concern, because a litigant who had not previously filed a notice of appeal from the original judgment – but who wished to challenge the disposition of the tolling motion – would still face the timing question Mr. Batalden describes.

At a higher level of generality, however, commonalities emerge: Both suggestions concern the need to ensure a fair procedure for preserving appellate rights. For that reason, both suggestions merit careful consideration.

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and *United States v. Oberhauser*, 284 F.3d 827, 833 (8th Cir. 2002).

[11] *See, e.g., Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 585 (1st Cir. 2007); *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007); *Constructora Andrade Gutierrez, S.A. v. American Intern. Ins. Co. of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2006); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002). Some cases take a more forgiving approach. *See, e.g., Satterfield v. Johnson*, 434 F.3d 185, 190–91 (3d Cir. 2006); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 122–23 (1st Cir. 2003).

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No 08-AP-H

At its fall 2008 meeting, the Appellate Rules Committee discussed the possibility of amending the Rules to respond to the circuit split on the viability of "manufactured finality" as a means of securing appellate review. "Manufactured finality" describes instances when the district court dismisses with prejudice fewer than all of the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in the hopes of achieving a final – and thus appealable – judgment.[1] The Appellate Rules Committee noted the importance of seeking the views of the Civil Rules Committee, and the two committees are now proceeding to address the issue jointly.

Part I of this memo briefly reviews the nature of the problem[2]; Part II discusses some possible ways of responding to it. The memo incorporates insights from the Appellate Rules Committee's fall discussion and from discussions since then with Judge Kravitz and Professor Cooper.

I. The "manufactured finality" doctrine

28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the

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[1] See Mark I. Levy, Manufactured Finality, Nat'l L.J., May 5, 2008; Laurie Webb Daniel, Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice, The Appellate Advocate, Issue 2, 2008; Mark R. Kravitz, Creating Finality, Nat'l L.J., July 8, 2002, at B9.

A litigant's desire to manufacture finality may also arise from events other than the dismissal of a claim. This might happen, for example, if the court denies a motion to strike a defense that the plaintiff fears will be dispositive, or grants summary judgment on a central fact without dismissing a claim, or denies the plaintiff's motion for summary judgment. (As to the third of these examples, see the *Helm Financial Corporation* case cited in footnote 25.)

[2] A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee's fall 2008 meeting, which are available at http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf.

Supreme Court has defined final decisions as those that "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment."[3] The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal appeals could cause in the district court.

But there are costs to the final judgment rule, and thus both Congress and the rulemakers have adopted certain safety valves. Of most relevance here, 28 U.S.C. § 1292(b) permits interlocutory appeals – but only if both the district court and the court of appeals grant permission, and only if the district court certifies both that an immediate appeal "may materially advance the ultimate termination of the litigation" and that the challenged order "involves a controlling question of law as to which there is substantial ground for difference of opinion." Civil Rule 54(b) only requires permission from the district court (not the court of appeals); it permits the district court (in cases involving multiple claims or parties) to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." However, Rule 54(b) certification is only proper if the district court certifies "that there is no just reason for delay." This determination lies within the district court's discretion.

These safety valves may not always address a litigant's concerns. If the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims"),[4] the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. The district court may not be willing to enter a final judgment on the central claims under Civil Rule 54(b); for example, the district court may not be convinced that there is "no just reason for delay" in entering the final

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[3] See, e.g., Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (internal quotation marks omitted).

[4] I borrow the terms "peripheral" and "central" from Rebecca A. Cochran, Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979, 982 (1997).

Distinct issues are posed when the district court dismisses the plaintiff's federal-law claims with prejudice and dismisses supplemental state-law claims without prejudice under 28 U.S.C. § 1367(c). See, e.g., Erie County Retirees Ass'n v. County of Erie, Pa., 220 F.3d 193, 202 (3d Cir. 2000) ("While the district court's order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstituted action. Thus, we have jurisdiction over this appeal."); Amazon, Inc. v. Dirt Camp, Inc. 273 F.3d 1271, 1275 n.4 (10th Cir. 2001) ("The district court's decision to decline supplemental jurisdiction over the state law claims effectively excluded the remainder of Amazon's suit from federal court through no action of Amazon, and the order is therefore final as to the federal court proceedings."). I do not address these issues in this memo.

judgment.[5] And, similarly, there may not be strong arguments that the order dismissing the central claims "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"; even if there are good arguments to this effect, a permissive appeal under Section 1292(b) requires both trial court and appellate court permission.[6] But what if the plaintiff voluntarily dismisses the peripheral claims, thus leaving no claims in the suit? Can the plaintiff thereby "manufacture" a final judgment? It should first be noted that in many instances the plaintiff will need either the consent of all parties who have appeared or court permission in order to dismiss the remaining claims.[7]

Several scenarios might then result. Each scenario involves the district court's dismissal of the plaintiff's central claim, followed by the plaintiff's dismissal of the remaining peripheral claims. The circuits vary in their treatment of these scenarios; what follows is not an exhaustive listing of the caselaw, but rather a survey of representative cases.

Peripheral claims dismissed with prejudice.[8] In this scenario, most courts take the view that there exists a final, appealable judgment.[9]

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[5] Even if the district judge is willing to enter a Rule 54(b) judgment, there are some outer limits on the district judge's discretion to do so. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1434 (7th Cir. 1992).

[6] For the transcript of a colloquy in which a district judge criticized the Seventh Circuit for its unwillingness to permit interlocutory appeals and Rule 54(b) appeals, see Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1437-39 (7th Cir. 1992).

[7] The plaintiff may file a notice of dismissal without party consent or court order if the notice is filed "before the opposing party serves either an answer or a motion for summary judgment." Civil Rule 41(a)(1)(A)(i). This might occur, for example, if the plaintiff's most important claims were dismissed on a pre-answer motion to dismiss under Civil Rule 12(b)(6).

Even if all parties consent to the dismissal of the peripheral claims *and* to the plaintiff's attempt to appeal the dismissal of the central claims, it is to be expected that the court of appeals will consider itself bound to raise the question of appellate jurisdiction. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1435 (7th Cir. 1992).

[8] Courts of appeals have permitted the plaintiff-appellant (who had previously dismissed peripheral claims without prejudice) to stipulate on appeal that the dismissal of the peripheral claims is with prejudice – thus providing appellate jurisdiction. See, e.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999).

[9] See John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 107 (1st Cir. 1998); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005);

However, one case from the Eleventh Circuit suggests a different view. In Druhan v. American Mutual Life, 166 F.3d 1324 (11 Cir. 1999), the district court denied plaintiff's motion to remand, holding that her claims were completely preempted by ERISA. The plaintiff then secured a voluntary dismissal of her "ERISA" claim with prejudice. See id. at 1325. The court of appeals held that the order denying remand was unreviewable; it stated both that there was no longer a case or controversy (because the plaintiff herself had requested the dismissal) and that Congress has not authorized appeals from orders denying remand. Id. at 1326. In so holding, the court of appeals recognized the existence of caselaw from other circuits stating "that allowing appeals from voluntary dismissals with prejudice 'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" Id. (citing Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996)). The *Druhan* majority refused to follow such precedents, reasoning that the decision to adopt such a view "rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id.* at 1326. Judge Barkett concurred in the determination that the court of appeals lacked jurisdiction, on the ground that the plaintiff could have continued to press her claim under ERISA, and thus that authorities from other circuits (holding that a voluntary dismissal with prejudice of all remaining claims creates a final judgment) were inapposite. See id. at 1327 (Barkett, J., concurring).

More recently, an Eleventh Circuit panel majority held (over a dissent) that *Druhan* (and another similar case) did not govern the question of appealability in a case where the plaintiff suggested that the district court should dismiss its claims with prejudice after the district court issued an order excluding the testimony of plaintiff's expert witness: "Unlike the remand orders at issue in *Druhan* and *Woodard* that concerned only the forum where the cases would be heard, the sanctions order here excluding plaintiff's legal expert was case-dispositive because it foreclosed Fitel from presenting the expert testimony required to prove professional negligence, which was a core element in all of its claims." OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549 F.3d 1344, 1357 (11th Cir. 2008). The *OFS Fitel* majority viewed *Druhan* as a case in which the plaintiff voluntarily dismissed her claims and was therefore not "adverse" to the judgment; that being so, the *OFS Fitel* court reasoned, the plaintiff could not challenge the judgment by appealing. By contrast, the court viewed the *OFS Fitel* plaintiff as adverse to the judgment and viewed the dismissal as not so much voluntary as invited out of a recognition that the court's prior sanctions order had effectively ended the case. *See OFS Fitel*, 549 F.3d at 1358.

Peripheral claims *conditionally* dismissed with prejudice – i.e., plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of*

Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996); Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 688 (8th Cir. 1999).

appeals reverses the dismissal of the central claims.[10] In this scenario, the Second Circuit has held that there is a final judgment:

> [W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way.... Purdy runs the risk that if his appeal is unsuccessful, his malpractice case comes to an end. We therefore hold that a conditional waiver such as Purdy's creates a final judgment.

Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003). However, the Third and Ninth Circuits have disagreed.[11]

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[10] Judge Easterbrook has noted the possibility that the principle advocated by the plaintiff in such a case might be viewed as analogous to "the principle that allows a dispositive *issue* to come up, when the plaintiff is willing to stake the entire case on its resolution." First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 802 (7th Cir. 2001). But the *First Health Group* court did not need to decide whether the analogy held, because the plaintiff decided to dismiss the relevant claims unconditionally, thus removing the jurisdictional question. Id.

[11] In the Third Circuit, see Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 440 (3d Cir. 2003) ("[T]he Consent Judgment preserved Freddie Mac's right to reinstate Counts Two and Three, if we were to reverse and remand the district court's ruling.... The Consent Judgment thus represented an inappropriate attempt to evade § 1291's requirement of finality."). The original order had stated that the relevant counts were "dismissed, without prejudice, subject to the plaintiffs' right to reinstate Counts Two and Three if the March 19th Order should be vacated and this matter remanded for trial by the Third Circuit Court of Appeals based upon the appeal." Id. at 437. After oral argument, Freddie Mac sought and obtained a district-court order dismissing Counts 2 and 3 "with prejudice," and this rendered the judgment final. Id. at 442.

In the Ninth Circuit, see Dannenberg v. Software Toolworks Inc., 16 F.3d 1073, 1076 (9th Cir. 1994) (stating that "stipulations to dismiss claims with the right to reinstate upon reversal ... implicate identical policy concerns" as dismissals without prejudice). See also Cheng v. C.I.R., 878 F.2d 306, 311 (9th Cir. 1989) ("A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered."). The Ninth Circuit later suggested that the presence of a stipulation permitting reinstatement of the peripheral claims in the event that the dismissal of the central claims is reversed on appeal shows intent to circumvent the final judgment rule, and thus indicates that appellate jurisdiction should be disallowed; in making this observation, the court

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). This scenario ought to be functionally similar to a dismissal with prejudice. The statute of limitations, if it has run, would bar the plaintiff from reinstating the peripheral claims, assuming that the defendant properly asserts the statute of limitations bar in the future proceeding. Panels in the Second, Third and Tenth Circuits have approved such an approach.[12]

The Fourth Circuit took a somewhat similar approach in GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007). The *GO Computer* plaintiffs had asserted a number of antitrust claims, including claims for injuries to another company (Lucent). The district court, expressing serious concerns about the factual basis for the claims based on injuries to Lucent, struck the allegations relating to those claims from the complaint. Plaintiff obtained reconsideration of this order by "offer[ing] to voluntarily dismiss its federal claims for continuing antitrust injuries to Lucent, promising not to seek reinstatement of those claims or to file a new complaint raising them." Id. at 174-75. Ultimately, the district court dismissed the other claims on statute of limitations grounds and permitted the voluntary dismissal without prejudice of the claims based on injuries to Lucent. See id. at 175. Oddly, when GO Computer appealed, its first contention on appeal was that the absence of a final judgment deprived the court of appeals of appellate jurisdiction. Taking a "pragmatic" approach to the final judgment rule, the court of appeals held that it had jurisdiction:

> When the district court dismissed some of GO's claims without prejudice, it was utterly finished with GO's case. The claims in question, of course, are those based on injuries to Lucent that GO never had a right to allege .... GO escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again. And even if another district court by some chance did allow GO to file a new complaint for the Lucent claims, that case would be based on distinct facts from this one; in no sense would GO have saved this action by amending this complaint. The district court thus rendered a final judgment, and we have jurisdiction to consider it.

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distinguished plain dismissals without prejudice, which the court said leave the plaintiff exposed to the risk that the peripheral claims will become time-barred. James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002).

[12] See Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 n.3 (2d Cir. 1996); Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1155 (3d Cir. 1986) (alternative holding, over a dissent); Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006). See also Carr v. Grace, 516 F.2d 502, 503 (5th Cir. 1975) ("Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even 'without prejudice' after the statute of limitations has run is a final order for purposes of appeal. The appealability of an order depends on its effect rather than its language."). *Carr* is not directly on point, for present purposes, because in *Carr* the entire case had been dismissed.

GO Computer, 508 F.3d at 176.

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. In this context, two courts of appeals have held that the dismissal creates a final judgment. The Eighth Circuit panel majority, in so holding, reasoned that cases refusing to permit appeals from the dismissal of a plaintiff's central claim against a defendant where peripheral claims against the same defendant were later dismissed without prejudice "further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff 'unjoins' multiple defendants through a voluntary dismissal without prejudice." State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1106 (8th Cir. 1999). The Ninth Circuit, reaching a similar conclusion in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001), felt the need to distinguish Dannenberg v. The Software Toolworks Inc., 16 F.3d 1073 (9th Cir.1994), which the *Duke Energy* court characterized as holding that the court of appeals "did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal." Duke Energy, 267 F.3d at 1049. The *Duke Energy* court distinguished its ruling in *Dannenberg* on the ground that *Dannenberg* "did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes." *Duke Energy*, 267 F.3d at 1049.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. Panels in the Second,[13] Third,[14] Fifth,[15] Seventh,[16] Tenth[17] and Eleventh[18]

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[13] See Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996).

[14] See LNC Investments LLC v. Republic Nicaragua, 396 F.3d 342, 347 (3d Cir. 2005). See also Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 460 F.3d 470, 477 (3d Cir. 2006).

[15] See Swope v. Columbian Chems. Co., 281 F.3d 185, 192 (5th Cir. 2002).

[16] See Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435-36 (7th Cir. 1992).

[17] See Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998). See also Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992).

[18] In State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999), an Eleventh Circuit panel applied circuit precedent stating that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," id. at 11. A panel member wrote separately to criticize that approach and to advocate en banc

Circuits have concluded that the judgment is not final for appeal purposes in this situation. It should be noted, however, that the Seventh Circuit caselaw on this question is in some disarray.[19]

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reconsideration of it, see id. at 21 (Cox, J., specially concurring). The panel majority suggested that its ruling might be limited to cases involving "an appellant (1) who suffered an adverse non-final decision, (2) who subsequently either requested dismissal without prejudice under Rule 41(a)(2), or stipulated to dismissal without prejudice under Rule 41(a)(1), of the remaining claims." Id. at 15 n.10.

The Eleventh Circuit subsequently followed *Barry*, observing that *Barry* followed this approach as "1. consistent with 28 U.S.C. § 1291; 2. followed by two other circuits; 3. allowing district courts, not litigants, to control when and what interim orders are appealed; 4. forcing litigants to make hard choices and to evaluate seriously their cases; and 5. circuit precedent for 25 years." Hood v. Plantation Gen. Med. Ctr., Ltd., 251 F.3d 932, 934 (11th Cir. 2001).

In a case decided the same year as *Barry*, the Eleventh Circuit refused to extend *Barry* to a situation in which the plaintiff first voluntarily dismissed certain claims, and the district court only later dismissed all other claims on the merits. In such a situation, the court explained, the danger of manipulation of appellate jurisdiction does not exist, and in addition there would be no opportunity, in such a situation, for the district court to enter a judgment under Civil Rule 54(b). Schoenfeld v. Babbitt, 168 F.3d 1257, 1265-66 (11th Cir. 1999).

[19] A Seventh Circuit panel has narrowly interpreted *Horwitz* (discussed supra note 16), as a case that turned on the court's view of the parties' and the district court's intent: "*Horwitz* did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules." United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir. 1993). In *Kaufmann*, the court of appeals had dismissed the defendant's prior appeal from a judgment of conviction on one count because other counts were unresolved. The district court then (on the government's motion) dismissed the other counts without prejudice under Criminal Rule 48. The court of appeals took jurisdiction of this second appeal; it emphasized that its disposition of the prior appeal had explicitly contemplated such a mechanism, and it distinguished *Horwitz* by concluding that in *Kaufmann* that the parties were not attempting to manipulate the court's jurisdiction. *Kaufmann*, 985 F.2d at 891.

On the other hand, a Seventh Circuit panel later followed *Horwitz* after noting the difficulty of reconciling the circuit's divergent precedents: "The recent cases disallowing a sort of manufactured finality like that found in the present lawsuit are consistent with the fundamental policy disfavoring piecemeal appeals. Hence, West's voluntary dismissal without prejudice is under current law insufficient to create a final judgment." West v. Macht, 197 F.3d 1185, 1189-90 (7th Cir. 1999). The *West* court noted a relatively early case, Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976), in which the remaining claims had been voluntarily dismissed without prejudice and the court of appeals

By contrast, panels in the Sixth[20] and Federal[21] Circuits have concluded that a voluntary dismissal of the peripheral claims produces a final judgment. Without explicitly considering the question of jurisdiction, panels in the First[22] and D.C.[23] Circuits have reached the merits of appeals taken after peripheral claims were dismissed without prejudice.

The Eighth Circuit has taken varying approaches to this issue. In Hope v. Klabal, 457 F.3d 784, 789-90 (8th Cir. 2006), the Eighth Circuit panel noted some prior cases in which it had either recharacterized a dismissal without prejudice as a dismissal with prejudice[24] or had

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rejected a challenge to its appellate jurisdiction. The court in *West* noted that "[s]ubsequent cases have, without mentioning *Division 241*, avoided that case's result, though *Division 241* has never been overruled." West, 197 F.3d at 1188.

On still another hand, the Seventh Circuit yet more recently distinguished *West* and followed *Kauffman* in deciding that a prior judgment was final and appealable and thus eligible for res judicata effect. See Hill v. Potter, 352 F.3d 1142 (7th Cir. 2003). The *Hill* court rejected the contention that the prior judgment lacked finality because one of the claims had been voluntarily dismissed without prejudice. The court explained: "[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided.... But, as in United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir.1993), and James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002), that is not the proper characterization of Hill's motion to dismiss his claim of retaliation. The record is clear that the reason for the request to dismiss was to avoid two trials, by joining the claim to the EAS claims that had been dismissed for failure to exhaust, after exhausting those claims." Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). As the court's citation to the *James* case suggests, it is possible to read this as endorsing a test that looks to the intent behind the dismissal of the claim without prejudice.

[20] See Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[21] See Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

[22] See Rymes Heating Oils, Inc. v. Springfield Terminal R. Co., 358 F.3d 82, 87 (1st Cir. 2004).

[23] See Stewart v. District of Columbia Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988).

[24] "Following the district court's grant of partial summary judgment, MPB voluntarily dismissed all its remaining claims for the purpose of making the district court's profits ruling final and appealable. If MPB took this action assuming that it could later revive its claims for other relief, it has badly miscalculated. When entered, the district court's profits order did not resolve all of MPB's claims and therefore was not appealable absent a Fed.R.Civ.P. 54(b)

dismissed for lack of a final judgment. However, the court adhered to other circuit caselaw and held that the voluntary dismissal without prejudice created a final judgment.[25]

The Ninth Circuit has injected an "intent" test into the analysis. In James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir. 2002), the court held that the district court's grant of plaintiff's request under Rule 41(a)(2) to dismiss the peripheral claims created a final judgment. The court distinguished cases where the district court had previously refused a Rule 54(b) request, reasoning that in *James* the district court's grant of the Rule 41(a)(2) request evinced a judgment similar to that which a district court would make under Rule 54(b). See id. at 1069. "[W]hen a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291." Id. at 1070. The Ninth Circuit's intent-to-manipulate test seems somewhat unpredictable in application. For a decision holding – over a dissent – that manipulation foreclosed appellate jurisdiction, see American States Insurance Co. v. Dastar Corp., 318 F.3d 881, 891 (9th Cir. 2003) ("[T]he parties appear to have colluded to manufacture appellate jurisdiction by dismissing their indemnity claims after the district court's grant of partial summary judgment."). For a case noting questions

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determination. A Rule 54(b) determination would have been an abuse of the district court's discretion-the rejection of one form of Lanham Act equitable relief, an accounting of profits, should not be appealed until the court has resolved whether MPB is entitled to Lanham Act injunctive relief.... That being so, MPB may not evade the final judgment principle and end-run Rule 54(b) by taking a tongue-in-cheek dismissal of its remaining claims. Those claims must be deemed dismissed with prejudice." Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

The Eighth Circuit has also suggested that the question could be approached from another angle, by reviewing the propriety of the Rule 41(a)(2) dismissal: "[W]hat Farmland presents as a jurisdictional issue is in fact the question whether the district court abused its discretion when it dismissed the remaining claims without prejudice for the purpose of allowing the class to appeal the court's interlocutory summary judgment orders." Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999). Accordingly, the court indicated, one response could be to review the propriety of the Rule 41(a)(2) order. (The court did not follow this course in *Great Rivers Co-op*, however, because of the case's "unique procedural posture" with respect to dismissal of claims by a plaintiff class. 198 F.3d at 690.)

[25] In another rather unusual situation, the Eighth Circuit held that it had appellate jurisdiction where the district court had denied summary judgment to the plaintiff on certain claims and the plaintiff had then dismissed all other claims (some with prejudice and some without). (The court reasoned that the denial of summary judgment to the plaintiff "had the effect of terminating any further consideration of the" claims on which the plaintiff had sought summary judgment.) Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1080 (8th Cir. 2000).

as to *James*' applicability to a multiple-defendant scenario, *see* Romoland School Dist. v. Inland Empire Energy Center, LLC, 548 F.3d 738, 750 (9th Cir. 2008) ("[T]his case presents such anomalous procedural issues that attempting to fit it within or outside the exception created by *James* – by deciding whether and under what circumstances the principle established in *James* applies to cases involving multiple defendants, for example – is neither necessary nor advisable"). The *Romoland* majority, employing a "pragmatic evaluation of finality," decided to treat the voluntary dismissal of the plaintiffs' claims against a particular defendant (by means of an order that did not state the dismissal was with prejudice) "as being with prejudice." *Id*

II. Possible rulemaking responses

At the Appellate Rules Committee's fall 2008 meeting, the discussion elicited a variety of perspectives. A judge member questioned whether there is a real need for changes directed toward this issue; an attorney member responded by stressing the importance of clarity and uniformity on the question of appealability. Though members acknowledged statutory authority to engage in rulemaking on these matters,[26] some members expressed diffidence concerning the desirability of such a course, and a strong sense was expressed that it was necessary to seek the views of the Civil Rules Committee.

Since the time of the fall meeting, discussions with Judge Kravitz and Professor Cooper have helped to clarify the issues. Part II.A. below discusses general possibilities for responding to the divergent caselaw on manufactured finality; Part II.B. discusses some of the more specific drafting questions that might arise.

A. General possibilities

In contemplating a possible rulemaking response to manufactured-finality questions, it is useful first to consider the broad contours of such a response. The policy choices in this area vary in difficulty depending on the nature of the dismissal.

Dismissal with prejudice. Where the plaintiff dismisses the peripheral claims with prejudice, the best view is that this produces a final judgment that permits appellate review of the central claims. That conclusion makes sense, since there is no danger of a piecemeal appeal. As

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[26] See 28 U.S.C. § 2072(c) (authorizing the promulgation of rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. §] 1291"). See also 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

to the peripheral claims, no further litigation will result under any scenario [27] To the extent that the Eleventh Circuit's decision in *Druhan* indicates that such a dismissal does not create an appealable judgment, the *Druhan* court's reasoning would not bar the adoption of a rule or statute that alters this approach.

Dismissal with de facto prejudice. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted, one might argue that it would make sense to treat the dismissal the same as one that is nominally "with prejudice." This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice; in instances where the peripheral claim clearly cannot be reasserted, such a stipulation provides a way to make clear that the judgment is final. In instances where it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect.

Conditional dismissal with prejudice. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim's dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. If the court of appeals affirms the dismissal of the central claim, the litigation is at an end. If the court of appeals reverses the dismissal of the central claim, the plaintiff can reassert the peripheral claims on remand.[28] But that arguably is efficient, since the litigation will continue in any event with respect to the now-reinstated central claim.[29] And if one pictures the alternative scenario (which would arise if the conditional dismissal with prejudice does not create an appealable judgment), that would be a scenario in which the plaintiff litigates the peripheral claims to final judgment; then appeals the dismissal of

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[27] Because the dismissal of the peripheral claims is voluntary, the plaintiff would be unable to challenge that dismissal on appeal. See, e.g., Chavez v. Illinois State Police, 251 F.3d 612, 628 (7th Cir. 2001); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[28] It is worthwhile to explore the possibility of treating the reassertion of the peripheral claims, on remand, as a situation in which the plaintiff is carrying forward those peripheral claims as they were originally asserted in the action – thus avoiding statute of limitations problems.

[29] It is possible to imagine instances when the judgment is reversed on appeal with respect to the central claims but no proceedings are required on remand with respect to those central claims. It may be worthwhile to consider whether resurrection of the peripheral claims should be permitted in that circumstance even though no further district-court proceedings are needed with respect to the central claims.

the central claim;[30] wins reversal of the dismissal of the central claim; and then litigates the central claim on remand. Either way, there may be more than one appeal; so it seems unclear that permitting conditional dismissals with prejudice to create an appealable judgment would be inefficient. It is true that the delay occasioned by the appeal from the central claim's dismissal might disadvantage the defendant, but an outer limit on the disadvantage posed by such delay would be provided by the duration of the appeal (if not by a statute of limitations on the peripheral claims).[31] As to the other concern embodied in the final judgment rule – maintaining the district court's control over the progress of the litigation – one might argue that if the district court approves a conditional dismissal with prejudice, that indicates the district court's view that the proposed appeal will further efficient resolution of the matters in the district court. (Of course, if the district court holds such a view, then in many instances it may be possible for the district court to enter a partial final judgment under Civil Rule 54(b).)

Dismissal without prejudice. When the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.[32] Admittedly, the plaintiff runs the risk that the peripheral claims might be time-barred by the time the plaintiff attempts to reassert them; but reassertion (after disposition of the appeal from the dismissal of the central claim) seems in general to be a likely enough scenario that this permutation could be seen as an end run around the constraints of Civil Rule 54(b).[33] Not surprisingly, the circuits are split on this question and I will not attempt to argue here in favor of either side of the split. One thing that can be said is that the Ninth Circuit's approach – which in some instances has injected an inquiry concerning the intent behind the dismissal – may be unpredictable in its application.

Resolving these issues would entail difficult choices; and some of the choices would alter practice in a number of circuits. This memo does not attempt to suggest definitively which choices are best; instead, my goal is to sketch some of the relevant questions. Nor does this memo canvass all potentially related issues. For instance, this memo also does not address the related question of appealability that arises when an appellant's remaining claims are dismissed

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[30] This assumes either that the plaintiff either has lost on the peripheral claim or failed to recover as much on the peripheral claim as the plaintiff expects to recover on the central claim.

[31] On the question of limitations periods, see supra note 28.

[32] It would, however, make sense to permit a plaintiff who sought such a dismissal without realizing that it would fail to produce an appealable judgment to stipulate that the dismissal of the peripheral claims is with prejudice, thereby rendering the judgment appealable.

[33] As noted above, the Eighth and Ninth Circuits take the view that a final judgment is created if the claims dismissed without prejudice are against a different defendant than the claims the dismissal of which the plaintiff seeks to appeal. The strength of such a distinction is not entirely clear.

for want of prosecution or as a sanction for failure to comply with court orders, and the appellant seeks to challenge on appeal prior orders dismissing other claims.[34]

B. Logistics and particulars of a rulemaking response

If the decision were taken to amend the Rules to provide for appealability in the event of a conditional dismissal with prejudice,[35] a number of drafting and logistical questions would arise.

Coordination among Advisory Committees. In addition to the joint deliberations by the Civil and Appellate Rules Committees, consultation with other Advisory Committees also makes sense. United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (discussed in note 19) illustrates that similar questions of finality may sometimes arise in criminal cases. I lack any intuitions concerning the likelihood of similar questions arising in bankruptcy matters, but consultation with both the Bankruptcy and Criminal Rules Committees would be advisable as deliberations proceed.

Placement of a provision in the Civil Rules. Appellate Rules Committee members have suggested that a provision addressing manufactured finality might fit more comfortably in the Civil Rules than in the Appellate Rules. Professor Cooper notes that such a provision might be added either to Civil Rule 41 or to Civil Rule 54, and that alternatively the provision might be placed in a new Civil Rule 41.1 or a new Civil Rule 54.1. As he notes, the choice among these placements is best made after the nature of the provision is more precisely delineated.

Events that trigger the conditional dismissal. Professor Cooper points out that there will be a drafting choice concerning the triggers for a conditional dismissal: "It would be possible to specify that the right to dismiss on these terms arises only after a 'claim' has been 'dismissed' on motion under Rule 12 or Rule 56. Drafting might instead be more open-ended, all the way down to allowing use of this ploy after any district-court action that can merge in a final judgment and be reviewed on appeal."

Complex cases and dismissal by agreement or court order. Professor Cooper's comments suggest the intricacy of the situations that may require consideration:

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[34] See, e.g., John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 105 (1st Cir. 1998) (adopting the rule that "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable").

[35] If such a decision were taken, it presumably would logically entail as well a clarification (to the extent such clarification is necessary) that the *unconditional* dismissal with prejudice of all remaining claims results in an appealable judgment.

> Things become more complex when there is a counterclaim, or more than one plaintiff, or more than one defendant (with different combinations of counterclaims and defendants and plaintiffs), third-party claims, and so on. If we were going to establish finality without court action, I suppose we would be looking for agreement by as many parties as required to establish dismissal with "conditional prejudice" of all claims and all parties. If we decide instead to open it up to achieving finality with the district court's consent, we might fall back closer to Rule 54(b). One out of many possible approaches would be to provide that in determining whether to enter a Rule 54(b) judgment the court may take account of (and approve?) a conditional dismissal with prejudice. That would be relatively clean as to a judgment that, subject to the condition, finally resolves all disputes between at least one identified party-pair. It would be a bit trickier as to different parts of a single "claim" as that term is (more or less) defined for Rule 54(b) purposes, but it would make sense.

Discretion in the court of appeals. Professor Cooper also notes that we should consider "whether the court of appeals should be able to reject the reservation of a right to revive the things dismissed with conditional prejudice." One approach might be to provide that the court of appeals' reversal of the district court's disposition of the central claims triggers an unconditional right to revive the conditionally-dismissed peripheral claims, "even in the unlikely event that reversal does not otherwise lead to remand." But it seems useful to consider whether there might "be circumstances in which -- most likely on arguments made by the appellee -- the court of appeals should be able to reject something conditionally preserved so as to focus proceedings on remand."

III. Conclusion

Though Part II does not exhaust the issues that may arise as the committees consider rulemaking responses to the question of manufactured finality, it sketches possible starting places for the discussion. As the input from Judge Kravitz and Professor Cooper demonstrates, collaboration with the Civil Rules Committee on these questions will be indispensable.

AGENDA NOTE: SERVICE ON UNITED STATES OFFICER OR EMPLOYEE

Rule 4(i)(3) provides:

> *(3) Officer or Employee Sued Individually.* To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

A question has been raised about the wisdom of providing for personal service of the summons and complaint on the officer or employee by traditional means. There is indeed something unnerving about personal delivery, or leaving a copy at the defendant's home. But there are real complications in attempting to devise some alternative that better protects the defendant and the defendant's family. This Note sketches the framework and offers a preliminary view of some of the difficulties. Further advice will be sought before making a recommendation whether to pursue amendments of Rule 4.

The methods for serving the United States are prescribed by Rule 4(i)(1). Rule 4(i)(2) provides that if a United States officer or employee is sued only in an official capacity, a party must serve the United States and also send a copy of the summons and complaint by registered or certified mail to the officer or employee. To the extent that the mail may be addressed to the officer's or employee's home, there also may be some discomfort about the "I know where you live" aspect of service.

Rule 4(e)(2) provides for service on an individual served in a judicial district of the United States by delivering a copy of the summons and complaint to an individual personally, by leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or by delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

The present question may involve Rule 4(f), which in (2)(C)(1) contemplates personal delivery in some circumstances of service at a place not within any judicial district of the United States. Probably there is little need to consider Rule 4(g), which authorizes service on a minor or incompetent person according to state law.

(It seems appropriate to focus initially on United States officers or employees because they are singled out for separate treatment in Rule 4. Nonetheless, state officers or employees may face similar concerns. If these service issues take a place on the active agenda, it will be necessary to make a deliberate choice whether to extend any special service provisions to state officers or employees.)

The central questions begin with identifying alternative means of service. Mail addressed to the officer or employee would reduce the risks of confrontation incident to service, but would require information about the employee's home unless the employee adopts a post-office box for the purpose. An e-mail message would avoid that question, at least initially, but we have not yet been willing to adopt e-mail service as a general matter. Service on an agent appointed by the employee works only if all United States officers and employees appoint an agent; requiring appointment by court rule, rather than by statute, might seem questionable, and in any event will work only if there is a central repository that matches the officer or employee with the appointed agent. Service on the United States entity that employs the officer or employee presents obvious problems — the employing agency then becomes responsible for transmitting notice, and former officers or employees may move from one agency to another or leave federal service entirely.

These central questions proliferate. The means of service must be reasonably designed to get actual notice to the employee, considered in relation to reasonable and traditional alternatives. Requiring an employee to provide an authorized agent or e-mail address for service may be outside the scope of the Rules Enabling Act. Authorizing a present or former United States agency to accept service will entail responsibility for transmitting notice, something that again may be outside Enabling Act reach and that in any event may challenge the capacities of at least some agencies

There may be additional complications when the United States does not provide a defense for its present or former officer or employee. It is possible that conflicting interests will arise that pose acute questions about any alternative that would rely on serving the United States or the employing agency.

The immediate impetus for addressing these questions arises from concerns about the privacy of individual federal officers and employees. But consideration of any revised rules also must consider the interests of people who have claims against a federal officer or employee in an individual capacity. An ideal rule would make it easy to accomplish prompt service while protecting the defendant's privacy. The ideal may be hard to reach.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

February 23, 2009

To: Chairs and Reporters of the Advisory Committees

From: Lee H. Rosenthal
Chair, Standing Committee

Re: Privacy Subcommittee

The Executive Committee of the Judicial Conference has agreed to renew the Subcommittee formed after the E-Government Act of 2002, which required new rules "to protect the privacy and security concerns relating to electronic filing of documents" in the federal courts. In accordance with the E-Government Act, the Standing Rules Committee established the E-Government Subcommittee, composed of a representative from each of the Advisory Rules Committees and from the Committee on Court Administration and Case Management. The Subcommittee's work led to the Rules Committees' examination and adoption of the privacy rules that took effect on December 1, 2007. The E-Government Subcommittee's immediate assignment was then completed. The renewed Subcommittee, composed of representatives from each of the Rules Committees and from CACM, will address problems with the privacy rules and examine whether or how the rules or their implementation might be improved.

Since the privacy rules took effect in 2007, members of the public and court officials have raised many questions, complaints, and concerns about the rules and their implementation. This is not surprising. It was recognized that the privacy rules would have to be revisited after seeing how they worked in practice. New questions have arisen with the rules' implementation and with experience under the CM/ECF system. Other questions were present when the privacy rules were adopted but could not be answered then because the CM/ECF system was so new. The renewed Privacy Subcommittee will examine these issues.

Judge Reena Raggi of the Second Circuit, and member of the Standing Committee, has agreed to chair the Privacy Subcommittee. Professor Dan Capra of the Fordham Law School, Reporter for the Evidence Rules Committee, and Reporter for the E-Government Subcommittee, has agreed to serve as Reporter for the Privacy Subcommittee. I ask each Advisory Committee Chair to designate a representative to serve on the Privacy Subcommittee and to advise me and Judge Raggi of your designee no later than March 9, 2009. In addition, I am asking that as with the E-Government Subcommittee, the Advisory Rules Committees' Reporters serve on the Privacy Subcommittee as consultants.

Here are a few examples of issues that have been raised, including some raised by privacy watchdog groups that are increasingly vocal about the need for better privacy protection in the federal courts:

- Should alien registration numbers and driver's license numbers be included among the personal identifiers that must be redacted from court filings?
- Are the names of victims and cooperating witnesses in criminal cases afforded sufficient privacy in court filings?
- Should personal identifier information be redacted from documents attached to bankruptcy notices of claims, which can be voluminous?
- Should mental health records be redacted from court filings?
- What do the courts need to do to ensure effective implementation of the rules, particularly in light of information showing that there are many personal identifiers still appearing in district court filings?

Please let me know if you have any questions. I look forward to hearing from you.

Lee H. Rosenthal

cc: Judge Reena Raggi
Judge John Tunheim
Professor Dan Coquillette
Peter McCabe, Esq.

TAB - 10-11

Calendar for September–November 2009 (United States)

September

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6	7	8	9	10	11	12
13	14	15	16	17	18	19
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October

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November

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29	30					

Holidays and Observances:

Sep 7 Labor Day	Nov 11 Veterans Day
Oct 12 Columbus Day (Most regions)	Nov 26 Thanksgiving Day

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