COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Antonio, TX
January 12-13, 2009

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 12-13, 2009

1. Opening Remarks of the Chair

   A. Report on the September 2008 Judicial Conference session.
   B. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court.

2. **ACTION** - Approving Minutes of June 2008 committee meeting.

3. Report of the Administrative Office

   A. Legislative Report.
   B. Administrative Report.

4. Report of the Federal Judicial Center (oral report)

5. Report of the Civil Rules Committee

   A. Review of proposed amendments to Rule 26 (expert witnesses).
   B. Review of proposed amendments to Rule 56 (summary judgment).
   C. Minutes and other informational items.

6. Report of the Appellate Rules Committee

   A. **ACTION** - Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rule 40(a)(l).
   B. Minutes and other informational items.

7. Report of the Evidence Rules Committee

   A. **ACTION** - Approving publishing for public comment proposed "style" amendments to Evidence Rules 501-706 (publication to be deferred until later date).
   B. Minutes and other informational items.

8. Report of the Criminal Rules Committee

   A. Review of proposed amendments to Rule 15 (videotaped depositions).
   B. Minutes and other informational items.

9. Report of the Bankruptcy Rules Committee

   A. **ACTION** - Approving publishing for public comment proposed amendments to Bankruptcy Rule 6003 and Official Forms 22A and 22C.
   B. Report on Interim Rule 1007-1 and amended Official Form 22A, which were approved to account for requirements in the National Guard and Reservists Relief Act of 2008.
   C. Minutes and other informational items.

10. **ACTION** - Approving and transmitting to the Judicial Conference proposed *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*

11. Panel Presentation on Problems in Civil Litigation and Possible Reforms

   A. Interim report from the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System on problems associated with discovery in civil litigation.
   B. Article on costs and delays in civil litigation.

12. Discussion of Observance of Rules Enabling Act 75th Anniversary

   - Law review articles describing origin and future of Rules Enabling Act rulemaking process.

13. Report on Sealed Cases (oral report)

14. Long-Range Planning Report

15. Next Meeting: June 2009

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

December 17, 2008

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 Rd. 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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair:	**Reporter:**
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	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
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Deputy Attorney General (ex officio) Honorable Mark Filip U.S. Department of Justice 950 Pennsylvania Avenue, N.W., Rm 4111 Washington, DC 20530	Honorable Ronald M. George Chief Justice Supreme Court of California 350 McAllister Street San Francisco, CA 94102
Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101
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Professor Daniel J. Meltzer Harvard Law School 1545 Massachusetts Avenue Cambridge, MA 02138	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONT'D.)

Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146	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 Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102	Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933
Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461	
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
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	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
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James F. Bennett, Esquire Dowd Bennett LLP 7733 Forsyth, Suite 1410 St. Louis, MO 63105	Honorable Kermit Edward Bye United States Circuit Judge United States Court of Appeals Quentin N. Burdick United States Courthouse Suite 330 655 First Avenue North Fargo, ND 58102
Honorable T.S. Ellis III United States District Judge United States District Court Albert V. Bryan United States Courthouse 401 Courthouse Square Alexandria, VA 22314-5799	Acting Solicitor General Honorable Gregory G. Garre (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 5143 Washington, DC 20530
Honorable Randy J. Holland Associate Justice Supreme Court of Delaware 34 The Circle Georgetown, DE 19947	Douglas Letter Appellate Litigation Counsel Civil Division U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530
Mark I. Levy, Esquire Kilpatrick Stockton LLP 607 14th Street, N.W., Suite 900 Washington, DC 20005-2018	Maureen E. Mahoney, Esquire Latham & Watkins LLP 555 11th Street, N.W., Suite 1000 Washington, DC 20004-1304

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Clerk
United States Court of Appeals
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Honorable Harris L Hartz
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Peter G. McCabe
Secretary, Committee on Rules of
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Washington, DC 20544</td><td></td></tr>
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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:	**Reporters:**
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
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Honorable R. Guy Cole, Jr. United States Circuit Judge United States Court of Appeals 127 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215	Honorable Jeffery P. Hopkins United States Bankruptcy Court Atrium Two, Suite 800 221 East Fourth Street Cincinnati, OH 45202
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David A. Lander Thompson Coburn LLP One US Bank Plaza St. Louis, MO 63101	Honorable William H. Pauley III United States District Judge United States District Court 2210 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1581

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONT'D.)

Honorable Elizabeth L. Perris Chief Judge United States Bankruptcy Court 700 Congress Center 1001 Southwest Fifth Avenue Portland, OR 97204-1145	Dean Lawrence Ponoroff Tulane University School of Law Weinmann Hall 6329 Freret Street New Orleans, LA 70118-6231
John Rao, Esquire National Consumer Law Center 7 Winthrop Square, 4th Floor Boston, MA 02110-1245	Honorable Richard A. Schell United States District Court United States Courthouse 7940 Preston Road Plano, TX 75024
Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Judith H. Wizmur Chief Judge United States Bankruptcy Court Mitchell H. Cohen U. S. Courthouse 2nd Floor – 400 Cooper Street Camden, NJ 08102-1570
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Liaison Member: Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146	**Liaison from Committee on the Administration of the Bankruptcy System:** Honorable Joy Flowers Conti United States District Court 5250 United States Post Office and Courthouse 700 Grant Street Pittsburgh, PA 15219-1906
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ADVISORY COMMITTEE ON CIVIL RULES

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ADVISORY COMMITTEE ON CRIMINAL RULES

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ADVISORY COMMITTEE ON CRIMINAL RULES (CONT'D.)

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

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair: Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	**Reporter:** Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023
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ADVISORY COMMITTEE ON EVIDENCE RULES (CONT'D.)

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LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Michael M. Baylson	(Civil Rules Committee)
Judge Jeffery P. Hopkins	(Bankruptcy Rules Committee)
Judge Marilyn Huff	(Standing Committee)
Judge John F. Keenan	(Criminal Committee)

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	Timothy K. Dole Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
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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

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Committee on Rules of Practice and Procedure
To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Da
Lee H. Rosenthal Chair	D	Texas (Southern)	Chair: 2007	2010
David J. Beck	ESQ	Texas	2003	2009
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Mark Filip*	DOJ	Washington, DC	---	Open
Ronald M. George	CJUST	California	2006	2009
Harris L. Hartz	C	Tenth Circuit	2003	2009
Marilyn L. Huff	D	California (Southern)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
William J. Maledon	ESQ	Arizona	2005	2011
Daniel J. Melzer	ACAD	Massachusetts	2006	2009
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2009
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Principal Staff: Peter G. McCabe 202-502-1800
John K. Rabiej 202-502-1820

* Ex-officio

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Da
Carl E. Stewart Chair	C	Fifth Circuit	Member: 2001 Chair: 2005	---- 2009
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Gregory G. Garre*	DOJ	Washington, DC	----	Open
Randy J. Holland	JUST	Delaware	2004	2010
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Stephen R. McAllister	ACAD	Kansas	2004	2010
Jeffrey S. Sutton	C	Sixth Circuit	2005	2011
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open

Principal Staff: John K. Rabiej 202-502-1820

* Ex-officio

Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date	End Da
Laura Taylor Swain Chair	D	New York (Southern)	Member: 2002 Chair: 2007	---- 2010
David H. Coar	D	Illinois (Northern)	2007	2010
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2009
Jeffery Hopkins	B	Ohio (Southern)	2007	2010
J. Christopher Kohn*	DOJ	Washington, DC	----	Open
J. Michael Lamberth	ESQ	Georgia	2005	2011
William H. Pauley III	D	New York (Southern)	2005	2011
Elizabeth L. Perris	B	Oregon	2007	2010
Lawrence Ponoroff	ACAD	Louisiana	2004	2010
John Rao	ESQ	Massachusetts	2006	2009
Richard A. Schell	D	Texas (Eastern)	2003	2009
Eugene R. Wedoff	B	Illinois (Northern)	2004	2010
Jeffrey W. Morris Reporter	ACAD	Ohio	1998	Open

Principal Staff: John K. Rabiej 202-502-1820
Jim H. Wannamaker 202-502-1910

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Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Da
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

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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Da
Richard C. Tallman Chair	C	Ninth Circuit	Member: 2004 Chair: 2007	---- 2010
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Morrison C. England, Jr.	D	California (Eastern)	2008	2011
Matthew W. Freidrich*	DOJ	Washington, DC	----	Open
James P. Jones	D	Virginia (Western)	2003	2009
John F. Keenan	D	New York (Southern)	2007	2010
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FPD	North Carolina	2005	2011
Donald W. Molloy	D	Montana	2007	2010
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

Principal Staff: John K. Rabiej 202-502-1820

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Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End D
Robert L. Hinkle Chair	D	Florida (Northern)	Member: 2002 Chair: 2007	---- 2010
Joseph F. Anderson, Jr.	D	South Carolina	2005	2011
Michael M. Baylson**	D	Pennsylvania (Eastern)	2006	2010
Anita Brody	D	Pennsylvania (Eastern)	2007	2010
Joan N. Ericksen	D	Minnesota	2005	2011
William T. Hangley	ESQ	Pennsylvania	2006	2009
Andrew D. Hurwitz	JUST	Arizona	2004	2010
John F. Keenan**	D	New York (Southern)	2007	2010
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2009
William W. Taylor III	ESQ	Washington, DC	2004	2010
Ronald J. Tenpas*	DOJ	Washington, DC	----	Open
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: John K. Rabiej 202-502-1820

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* Ex-officio

** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Ru

TAB

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 16, 2008
****

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

****

At its September 16, 2008 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2008.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2010, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to establish a Capital Investment Fund pilot program for a four-year period beginning in fiscal year 2009, subject to congressional approval, which would allow participating court units to —

a. Voluntarily return funds for deposit into the fund up to a maximum at any given time of $50,000;

b. Utilize funds deposited into the Capital Investment Fund in subsequent fiscal years, once the Executive Committee has approved the national Salaries and Expenses financial plan and final allotments have been transmitted to the courts; and

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Agreed to seek legislation adjusting the time periods in 29 statutory provisions affecting court proceedings to account for the proposed changes in the time-computation rules.

Approved proposed amendments to Appellate Rules 4(a)(4), 22, and 26(c), and new Rule 12.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, 9023, and new Rule 7058 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revisions to Bankruptcy Official Forms 8, 9F, 10, 23, and Exhibit D to Form 1 to take effect on December 1, 2008.

Approved new Bankruptcy Official Form 27 to take effect on December 1, 2009.

Approved proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 13(f), 15(a), 48(c), and 81(d), and new Rule 62.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

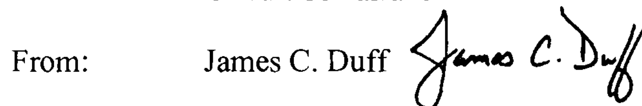
JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

December 1, 2008

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Chief Preargument/Conference Attorneys
Bankruptcy Administrators
Circuit Librarians

From: James C. Duff 

RE: AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE
(IMPORTANT INFORMATION)

Congress has taken no action on the amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, approved by the Supreme Court on April 23, 2008. Accordingly, the following amendments to the rules will take effect on December 1, 2008:

- Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011;

- Supplemental Rule C; and

- Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61.

The amendments and new rules were mailed to you in May 2008 as part of House Documents 110-117, 110-118, and 110-119. In accordance with 28 U.S.C. § 2074(a) and the April 23, 2008, Supreme Court orders, they will govern all proceedings commenced on or after

December 1, 2008, and "insofar as just and practicable" all proceedings then pending. The text of the amended rules and extensive supporting documentation can also be found on the Judiciary's Federal Rulemaking web site at http://www.uscourts.gov/rules. In addition, pamphlets containing the rules, as amended, will be sent to you as soon as they become available from the Government Printing Office.

If you have any questions concerning the status of these amendments, please contact Peter G. McCabe, Assistant Director for Judges Programs, at (202) 502-1800, or John K. Rabiej, Chief of the Rules Committee Support Office, at (202) 502-1820.

TAB

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the 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
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

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
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	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 Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant 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
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very productive meetings with both Chief Justice Roberts and Administrative Office Director

James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a trap for the unwary because some state holidays are obscure

and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn

whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national practice and represent far-flung creditors. Lawyers and creditors are largely unaware of

state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim. It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or 14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though

some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be significant obstacles to accomplishing this objective. There is certainly no guarantee of

success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

The committee without objection by voice vote approved all the proposed time-computation amendments for approval by the Judicial Conference.

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

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 May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 4(a)(4)(B)(ii)

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate

advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately

handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. **(See page 46.)**

FED. R. APP. P. 26(c)

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 1(b)

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

FED. R. APP. P. 29(a)

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

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

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

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

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

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

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs proceedings

contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

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

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 May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52,
53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G
FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

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

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

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

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

FED. R. CIV. P. 48(c)

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.*, "should."

Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall" throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if. . .," or "summary judgment is necessary if. . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion

for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.,* a response to each of the undisputed facts enumerated by the moving party;

(3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)." He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule

56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further

procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments, he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has

retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition

to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to

obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59
and
HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

FED. R. CRIM. P. 7, 32, and 32.2

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some

guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges

should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each.

Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

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

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to

meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply

focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

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

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE
FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

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

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use the provision because case law under the Confrontation Clause would preclude it from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

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

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an unconstitutional application in

some circumstances. Case law developments to date suggest that rule amendments may not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 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, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing

will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 15, 2008

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-one bills were introduced in the 110th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Evidence Rule 502

On September 19, 2008, the President signed into law S. 2450, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence (Pub. L. No. 110-322, 122 Stat. 3537) (see attached). Under the rule, a federal court may order that the attorney-client privilege or work product protection is not waived. Such an order applies to any subsequent federal or state litigation.

New Evidence Rule 502 is the culmination of three years of intense work by the Rules Committees and supporters of the rule. In 2005, the Evidence Rules Committee began work on a draft rule. The advisory committee held a mini-conference in April 2006 with a distinguished group of judges, lawyers, law professors, bar organizations, and government regulators to review the proposed rule. The committee also solicited input on the draft rule from the Conference of Chief Justices, revising the rule by limiting its scope to address the Conference's federalism concerns. After making these and other changes, the advisory committee published the revised rule for public comment in August 2006. The response to the proposed rule was significant. The committee received more than 70 comments and heard testimony from over 30 witnesses at two public hearings. In light of the public comment and witness testimony, the advisory committee made further changes to the rule. The revised rule was subsequently approved by the Committee on Rules of Practice and Procedure and the Judicial Conference and sent to Congress on September 26, 2007.

Though the Senate passed a bill containing Rule 502 in February 2008, further progress was stymied in the House. After six months of tireless efforts, and with the strong support of the major bar associations, prominent lawyers, and others interested in the improvement of judicial

administration, the House passed the Rule 502 legislation without change in September 2008. (The House added language to the explanatory note consistent with Rule 502.)

New Evidence Rule 502 applies to all cases filed after September 19, 2008, and, in so far as is just and practicable, to all pending cases. The text of the new rule, statement of Congressional intent, and other background information are posted on the Judiciary's Federal Rulemaking web site at http://www.uscourts.gov/rules/evidence502.html.

Other Developments of Interest

Protective Orders. On December 11, 2007, Senator Herb Kohl (D-WI) introduced the "Sunshine in Litigation Act of 2007" (S. 2449, 110th Cong., 1st Sess.), which is similar to legislation that had been introduced regularly since 1991. S. 2449 provides, among other things, that before a judge enters a protective order under Civil Rule 26(c), the judge must make findings of fact that the discovery sought is not relevant for the protection of public health or safety or, if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the protective order is narrowly drawn to protect only the privacy interest asserted. The bill would apply to protective orders sought by motion as well as agreed to by stipulation. On August 1, 2008, the Senate Judiciary Committee approved the bill (S. Rept. No. 110-439).

On April 23, 2008, Representative Robert Wexler (D-FL) introduced H.R. 5884 ("Sunshine in Litigation Act of 2008," 110th Cong., 2nd Sess.), which is virtually identical to S. 2449, as passed by the Senate Judiciary Committee. On July 31, 2008, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on H.R. 5884. Judge Kravitz testified and submitted a written statement on behalf of the Judicial Conference, opposing H.R. 5884. (See attached.) Judge Kravitz's follow-up response is also attached. It is expected that the bill will be reintroduced in the next Congress.

James N. Ishida

Attachments

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Public Law 110–322
110th Congress

An Act

To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.

Sept. 19, 2008
[S. 2450]

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

SECTION 1. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER.

(a) IN GENERAL.—Article V of the Federal Rules of Evidence is amended by adding at the end the following:

"Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

28 USC app.

"The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

"(a) DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

"(1) the waiver is intentional;

"(2) the disclosed and undisclosed communications or information concern the same subject matter; and

"(3) they ought in fairness to be considered together.

"(b) INADVERTENT DISCLOSURE.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

"(1) the disclosure is inadvertent;

"(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

"(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

"(c) DISCLOSURE MADE IN A STATE PROCEEDING.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

"(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

"(2) is not a waiver under the law of the State where the disclosure occurred.

"(d) CONTROLLING EFFECT OF A COURT ORDER.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

"(e) CONTROLLING EFFECT OF A PARTY AGREEMENT.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

"(f) CONTROLLING EFFECT OF THIS RULE.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

"(g) DEFINITIONS.—In this rule:

"(1) 'attorney-client privilege' means the protection that applicable law provides for confidential attorney-client communications; and

"(2) 'work-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.".

(b) TECHNICAL AND CONFORMING CHANGES.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 501 the following:

"502. Attorney-client privilege and work-product doctrine; limitations on waiver.".

28 USC app.

(c) EFFECTIVE DATE.—The amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.

Approved September 19, 2008.

LEGISLATIVE HISTORY—S. 2450:

SENATE REPORTS: No. 110–264 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 154 (2008):
Feb. 27, considered and passed Senate.
Sept. 8, considered and passed House.

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

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CHAIR

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

October 15, 2008

Honorable Linda T. Sánchez
Chair
Subcommittee on Commercial and Administrative Law
United States House of Representatives
Washington, DC 20515

Dear Representative Sánchez:

I write in response to your September 30, 2008, letter to answer the two follow-up questions on H.R. 5884. I appreciate the opportunity to continue our dialogue on this important issue. Please find enclosed my responses to these additional questions. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair. Please do not hesitate to contact me if further information would be useful.

Sincerely,

Mark R. Kravitz
United States District Judge
Chair, Civil Rules Advisory Committee

Enclosure

Response to Post-Hearing Written Questions from Representative Linda T. Sánchez Regarding H.R. 5884

Mark R. Kravitz

Question 1: You contend in your written statement (at 7) that the Sunshine in Litigation Act would impose "intolerable burdens" on courts when they are asked to issue protective orders. How would the Act burden courts any more than do the existing requirements under which courts must scrutinize requests for protective orders?

Under current law, when parties seek protective orders for discovery, the motions are generally made early in a case, before discovery begins. Parties seek protective orders to be able to exchange documents and information in discovery among themselves without frequent and expensive litigation over protecting such items as trade secrets, proprietary information, or sensitive personal information. Typically, motions for protective orders do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Protective orders typically provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made when the judge knows more about the case and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. The judge can order that documents designated as "confidential" during discovery no longer be subject to such protection. *See, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, — F.R.D. —, Nos. 04-MD-1596, 05-CV-4155, 05-CV-2948, 06-CV-0021, 06-CV-6322, 2008 WL 4097408, at *158–59 (E.D.N.Y. Sept. 5, 2008). Current law also allows the courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

By contrast, H.R. 5884 requires the judge to make specific fact findings in any case in which a protective order is sought in discovery. To make those fact findings, the judge would have to review all the documents and information, item-by-item. In many cases, the parties will be asking for and producing huge volumes of information and documents in discovery, only a very small percentage of which will ultimately be used by the parties in the case. The review required by H.R. 5884 will often involve huge amounts of information. Because the review occurs early in the case, when the judge knows relatively little, it will often be very difficult for the judge to tell if specific information or documents are relevant to public health or safety. The parties and lawyers will be unable to help because they do not have each other's documents at this stage. The review must take place and the findings of fact must be made before any protective order can issue, and the parties are usually unwilling to produce their documents before then. The result is a much larger burden on the courts than is imposed under current law, and greater delay and cost in getting needed information to the parties and their lawyers.

Question 2: You note in your written testimony (at 5) that the Rules Committee of the Judicial Conference "studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884." It found, "in particular, that the complaints in these civil cases typically contained extensive information describing the alleged actions sufficient to inform the public of any health or safety issue." But how can the public and regulatory agencies realistically identify health and safety risks from the many untested allegations in the 200,000-plus complaints filed in the federal court system each year? A complaint allegation is one thing; a smoking-gun document uncovered during discovery is another.

The protective-order issue arises in a small fraction of cases. As noted in my written statement, the available empirical data shows that protective orders are requested in only about 6% of the 200,000 plus civil cases filed in the federal courts each year. Nearly 75% of these requests are by motion, which courts carefully review and deny or modify as required. In addition, half of the requested protective orders involve orders governing the return or destruction of discovery materials or imposing a discovery stay pending some event, and only the other half deals with restricting disclosure of information. Accordingly, there is currently substantial information that is publicly available about most cases filed in federal court.

As to that small fraction of cases in which protective orders are entered, the allegations in the complaints, though not tested, contain enough information and details to provide notice of what claims are asserted and why those claims are a plausible basis for

relief. In product defect cases, for example, complaints typically at a minimum identify the allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press, and regulatory agencies. Remote electronic access to court filings, now available in virtually all federal courts, makes it easy, efficient, and inexpensive to find complaints with allegations that raise public health and safety issues. Filed complaints are where the public, the press, and regulatory agencies would be expected to look for case information on public health and safety issues. Based on the allegations in the complaint, the public, the press, or regulatory agencies can decide whether to monitor a case, investigate further, or seek information through the court handling the case.

Unlike complaints, materials produced in discovery are not filed with the court and cannot be remotely or easily accessed. The public does not have the right to materials produced in discovery. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). As a result, even in the absence of a protective order, the public has no right to know of, or obtain access to, documents produced in discovery, including the rare "smoking gun" document. The public does have a right to learn of and have access to documents produced in discovery if they are filed with the court or introduced into evidence in a hearing or at trial.

Under current law, if a protective order is in place, the public, the press, or regulatory agencies can use the allegations in a complaint to decide whether to ask the court to lift or modify the protective order to allow the parties to disseminate information or documents obtained in discovery. H.R. 5884 is not necessary to achieve this result. Moreover, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert.

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FOR THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2008," H.R. 5884

JULY 31, 2008

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700.

STATEMENT OF JUDGE MARK R. KRAVITZ
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Judge Mark R. Kravitz of the United States District Court for Connecticut and chair of the Judicial Conference's Advisory Committee on Civil Rules. I am submitting this statement on behalf of the Judicial Conference of the United States, the policymaking arm of the federal judiciary.

The Judicial Conference opposes the "Sunshine in Litigation Act of 2008" (H.R. 5884), which was introduced on April 23, 2008, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exacting and exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established.

After years of careful and thorough study through the Rules Enabling Act process, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules did not recommend that the Judicial Conference approve a change to Rule 26(c) similar to that proposed in the Sunshine in Litigation Act and its predecessors. Because the Rules

Committees made no such recommendation, the Judicial Conference has not been asked nor has it taken a formal position on the specifics of the Act's provisions. The Rules Committees did not recommend such a change to Rule 26(c) for three principal reasons. First, the bill is unnecessary. Second, it would impose an intolerable burden on the courts. Third, it would have significant adverse consequences on civil litigation, including making litigation more expensive and making it more difficult to protect important privacy interests.

I am no stranger to these issues. In my former life as a private practitioner I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. I practiced law in Connecticut for 27 years. During those years, I represented both plaintiffs and defendants in litigation in the federal courts and utilized protective orders. I also spent a good deal of my time representing media companies, including ABC and the New York Times, in their efforts to obtain access to courts and to government documents. And I am proud to say that during that time I received the Bice Clemow Award for my "support of open and accountable government" and the Dean Avery Award "for advancing the cause of freedom of information and speech in Connecticut." I say this so you will understand that I do not have a personal history of supporting secrecy in Government. I also have a deep appreciation of the Rules Enabling Act process having served on the Judicial Conference's Standing Committee on Rules of Practice and Procedure before becoming Chair of the Advisory Committee on Civil Rules about a year ago. As a judge I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally-grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 5884 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery

protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 5884, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 5884's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identifies Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 5884, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most of the 6% of civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the problematic protective orders targeted by H.R. 5884 represent only a small fraction of civil cases, which would nonetheless all be subjected to the bill's requirements. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials.

The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 5884. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public, e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns about them. That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in

discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Furthermore, even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court. Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts. Thus, my court of appeals, the Second Circuit has held that "[d]ocuments used by parties moving for, or opposing summary judgment should not remain under seal *absent the most compelling reasons.*" *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006)(quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)); *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that judicial records enjoy a "presumption of openness," a presumption that is rebuttable only "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest" (internal quotations omitted)). The Court of Appeals has instructed District Courts that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or

compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on Federal Courts

The scope of discovery has dramatically changed since legislation like H.R. 5884 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terrabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges and further delay pretrial discovery. Indeed, the requirement to review all this information would make it infeasible for most federal judges to even consider undertaking the review. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court, and that therefore, it would be difficult, if not impossible, for the court to make the review the legislation requires. Inevitably, a request for a protective order would be routinely denied, including requests that are entirely justified.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 5884 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court

filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties often rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

In many cases, protective orders are essential to effective discovery management. The burdensome requirements of H.R 5884 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 5884 are sought involve contract claims

and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 5884 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 5884, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Based on lengthy and thorough examination of the issues, the Rules Committees concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens

on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committee would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date the Rules Committee has not been directed to any such empirical information. In the absence of demonstrated abuses, however, there seems no reason to burden litigants and courts with the requirements of H.R. 5884.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 5884 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 5884 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue,

described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 5884, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources — including the complaint — to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements. Once again, if the Committee is aware of empirical information that suggests that sealed settlements have become a larger problem, the Rules Committee would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response.

I thank you for the opportunity to appear before you today.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

I am writing on behalf of the Judicial Conference to respectfully request that Congress enact legislation that would slightly change deadlines in certain statutes affecting court proceedings. These changes are necessary to account for the effect of amendments to the time-computation rules in the Federal Rules of Practice and Procedure approved by the Judicial Conference of the United States in September 2008. In order to avoid confusion, we would request the statutory changes to take effect on December 1, 2009.

The rules amendments simplify the provisions for calculating deadlines and make those rules consistent in each set of the Federal Rules. The amendments respond to years of complaints by practitioners that the present rules are confusing and can lead to missing deadlines and losing important rights. Because some statutes affecting court proceedings use the time-computation provisions in the Federal Rules, corresponding changes should be made to maintain consistency and avoid confusion. The proposed statutory amendments are noncontroversial and neutral. They have been vetted by numerous law and bar organizations, including the Department of Justice.

Under some – but not all – of the current Federal Rules on figuring out when a deadline will fall, intermediate weekends and holidays are omitted in computing short time periods but included in computing longer periods. To simplify calculating deadlines and to be consistent across the Federal Civil, Bankruptcy, Criminal, and Appellate Rules, the amended rules count intermediate weekends and holidays for all time periods. This

simple "days are days" approach can have the effect of shortening a time period. The Federal Rules amendments approved by the Judicial Conference lengthened deadlines in the rules to offset this effect. Legislation to effect a similar change in some statutory deadlines is needed because the Federal Rules for calculating time periods also apply to time periods in statutes that affect court proceedings, if those statutes do not themselves specify how to calculate time periods.

The Judicial Conference seeks legislation to amend a modest number of statutory provisions affecting proceedings in cases litigated in federal court to dovetail with the proposed rules changes in two important ways. First, the legislation would change certain statutory deadlines to offset any shortening of the time period resulting from the rules changes that count every day, in effect maintaining the same time period in the statutes. Second, the legislation would change some statutory deadlines that would otherwise be inconsistent with the amended rules deadlines and thereby lead to confusion.

The rules amendments were the subject of extensive study and public comment during the Rules Enabling Act process. The proposed statutory amendments have been circulated to a number of organizations and agencies and no adverse comment has been received. Some of the letters from these organizations and agencies are attached.

The rules amendments are now before the United States Supreme Court. If the Court approves them, they will be sent to Congress in late April or May 2009 and, if Congress does not act to delay or defeat them, will become effective on December 1, 2009. The statutory changes should become effective at the same time to avoid confusion.

The following materials are attached:

1. An explanation of the proposed rules amendments and the legislative changes.
2. A statutory language model.
3. An example of the proposed "template" rule, Civil Rule 6(a), on calculating time periods, with the committee note.
4. Letters from bar organizations and entities supporting the proposed legislation.

Thank you for your continued efforts to improve our justice system by making it

less confusing and complex when it is possible to do so. I look forward to working with you on this opportunity to make the system work better. If you have any questions about this or other matters regarding the Federal Judiciary, please contact Cordia A. Strom, Assistant Director for Legislative Affairs, at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

Enclosures

Identical letters sent to: Honorable Mitch McConnell
Honorable Patrick J. Leahy
Honorable Arlen Specter

SUMMARY OF THE NEED FOR LEGISLATION

The Judicial Conference is requesting legislation that would slightly alter deadlines in certain statutes that affect court proceedings. These changes are needed to take into account the effect of proposed amendments to the Federal Rules of Practice and Procedure on how to calculate time periods.

Under the current time-calculation rules, intermediate weekends and holidays are omitted when computing short time periods but included when computing longer periods. This has long proved vexing to lawyers and litigants and has led to missing deadlines and losing important rights. Three years ago, the Standing Committee began examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules to make them simpler, clearer, and more consistent. The project responded to frequent complaints by practitioners about the time, energy, and potential for prejudice created by the time-computation rules and to criticisms by judges about the anomalous results of those rules.[1]

To simplify calculating deadlines the amended rules count intermediate weekends and holidays for all time periods.[2] This simplified approach is made consistent across the rules in proposed amended Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. The proposed amendments adopted a "days-are-days" approach to computing all periods, omitting the current requirement of excluding weekends and legal holidays in calculating shorter time periods and including them in calculating longer time periods. Other changes included how to count forward when the deadline falls on a weekend or legal holiday, how to tell when the last day of a period ends, how to compute hourly time periods, and how to calculate when the clerk's office is inaccessible. At the same time, the Advisory Committees reviewed all the deadlines in every set of rules to be sure that the periods were reasonable and to offset the shortening effect of the amended calculation approach. To further simplify time-counting, the Advisory Committees proposed changing most rule-based periods of less than 30 days to multiples of 7 days – 7, 14, and 21-day periods – so that deadlines will usually fall on weekdays. The Advisory Committees proposed

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[1] "If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days. And this does not even take into account inclement weather. As we sometimes say in Kentucky, there's eight ways to Sunday. This case presents sort of an issue of first impression for this Court regarding the timeliness of motions for attorney fees under Federal Rule of Civil Procedure 54(d)(2)(B). After considering Federal Rules of Civil Procedure 6, 54, 59, 83, and a sprinkle of Federal Rule of Appellate Procedure 4, we reverse." *Miltimore Sales, Inc. v. International Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

[2] The proposed time-computation rules apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, the date for filing is "no later than November 1, 2007," the time-computation rules will not apply. But if a filing is required to be made "within 10 days" or "within 72 hours," the relevant time-computation rule explains how to compute that period.

amendments that generally extended the Rules' 5-day periods to 7-day periods and 10-day periods to 14-day periods.

In August 2007, the proposed amendments to each set of rules were published for comment from the bench and bar. A scheduled public hearing on the amendments was canceled because no one asked to testify. The Advisory Committees approved the amendments in the spring of 2008, the Standing Committee approved them in June 2008, and the Judicial Conference approved them in September 2008. The proposed rules changes are now before the United States Supreme Court. If approved, the proposed amendments will be transmitted to Congress in April or May 2009, and if Congress does not act to delay or defeat them, will become effective on December 1, 2009.

A brief summary of the time-calculation rule and a copy of proposed Civil Rule 6(a) and committee note as an example are attached.

II. The Need for the Legislation to Amend Certain Statutory Time Periods

The simple "days-are-days" approach also applies to time periods in statutes that affect court proceedings, if those statutes do not themselves specify how to calculate time periods. Current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) expressly apply to statutory time periods that affect court proceedings.[3]

As noted, the Rules Committees and the Judicial Conference concluded that virtually all short time deadlines in the Rules should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. Consistent with this decision, the Judicial Conference seeks changes in a modest number of statutes containing short statutory deadlines that are frequently applied or that could helpfully be adjusted to offset the effects of adopting a "days-are-days" approach.

A large number of statutory time periods could theoretically be affected by the proposed shift in the Federal Rules' time-computation approach. However, the number of statutory provisions to which case law has applied the Rules' time-computation method is much smaller. An even smaller number of statutes are either frequently used or have time periods that could helpfully be adjusted to offset the effects of the time-computation method. The proposed legislation would merely provide short extensions of short time deadlines in this small number of statutes to offset the effective shortening caused by the new Rules approach. The proposed statutory amendments take the same approach as was applied to the deadlines in the Rules themselves. Five-day periods are extended to seven-day periods and ten-day periods to fourteen-day periods. With respect to a few particularly short statutory time periods, the statute would state that the time period for that statute

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[3] Criminal Rule 45(a) governs "any period of time specified in these rules, any local rule, or any court order." Before 2002, it applied to "any period of time." Under the proposed amendments scheduled to take effect on December 1, 2009, Criminal Rule 45(a) would explicitly apply to statutory periods, consistent with the way it read before 2002 and consistent with the other sets of Rules.

is to be calculated by excluding intervening weekends and holidays; the time-calculation Rules only apply to a statutory deadline if the statute does not provide its own time-calculation method.

III. The Proposed Amendments to Statutory Provisions

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules concluded that legislation slightly extending the time deadlines in the statutory provisions affecting selected court proceedings should be considered. The proposed amendment and the statutes that would be affected are set out below.

The list is ordered by code provision altered slightly to group related provisions.

Bankruptcy Provisions

1. Certain timing provisions applicable to bankruptcy-related provisions should be changed from 5 to 7 days:

   a. 11 U.S.C. § 109(h)(3)(A)(ii): five-day period concerning debtor's unsuccessful attempt to obtain credit-counseling services.
   b. 11 U.S.C. § 322(a): five-day period within which trustee must file bond.
   c. 11 U.S.C. § 332(a): five-day deadline for United States trustee to appoint consumer privacy ombudsman.
   d. 11 U.S.C. § 342(e)(2): If a creditor specifies an address at which it desires to receive notice in a chapter 7 and 13 case of an individual debtor, that address must be used by the court and the debtor for any notice required to be provided the creditor later than five days after the court and debtor receive the creditor's notice of address.
   e. 11 U.S.C. § 521(e)(3)(B): If a creditor in a Chapter 13 case files a request to receive a copy of the plan filed by the debtor, the court shall make a copy of the plan available to such creditor not later than 5 days after such request is filed.
   f. 11 U.S.C. § 521(i)(2): Provides for dismissal, in certain cases, if an individual debtor fails to file required information within 45 days after filing of the petition; and provides that if a party in interest requests such an order of dismissal, the court shall (subject to certain other provisions) enter the order of dismissal not later than 5 days after such request.
   g. 11 U.S.C. § 704(b)(1)(B): With respect to individual debtors in cases under Chapter 7, United States trustee shall review debtor's filings and file a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and the court shall provide a copy of the statement to all creditors not later than 5 days after receiving it.
   h. 11 U.S.C. § 764(b): With respect to commodity broker liquidations, limits trustee's ability to avoid certain transfers of commodity contracts made before five days after the order for relief.

i. 11 U.S.C. § 749(b): With respect to stockbroker liquidations, limits trustee's ability to avoid certain transfers of securities contracts made before five days after the order for relief.

Criminal Provisions

2. Certain timing provisions applicable to the period between a criminal defendant's initial appearance and the preliminary hearing (and related provisions concerning that phase of a prosecution) should be changed from 10 to 14 days:

   a. 18 U.S.C. § 3060(b): preliminary examinations, except in certain circumstances, "shall be held . . . no later than the tenth day following the date of the initial appearance of the arrested person."
   b. 18 U.S.C. § 983(j)(3): a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than 10 days after the date on which it is entered."
   c. 18 U.S.C. § 1514(a)(2)(C): a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "10 days from issuance."
   d. 18 U.S.C. § 1963(d)(2): a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than ten days after the date on which it is entered."
   e. 21 U.S.C. § 853(e)(2): "a temporary restraining order under this subsection . . . shall expire not more than ten days after the date on which it is entered."

3. The four-day deadlines in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that intermediate weekends and holidays are excluded.

   a. 18 U.S.C. § 2339B(f)(5)(B)(iii)(I): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals – (I) shall hear argument . . . not later than 4 days after the adjournment of the trial; . . . ."
   b. 18 U.S.C. § 2339B(f)(5)(B)(iii)(III): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals – (III) shall render its decision not later than 4 days after argument on appeal . . . ."
   c. 18 U.S.C. App. 3 § 7(b)(1): in an appeal pursuant to the CIPA statute, "the court of appeals shall hear argument . . . within four days of the adjournment of the trial."
   d. 18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to the CIPA statute, the court of appeals "shall render its decision within four days of argument on appeal."

4. CIPA's deadline for taking a pretrial appeal should be changed from 10 to 14 days.

   - 18 U.S.C. App. 3 § 7(b) provides that "an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved."

5. The material-support statute's deadline for taking a pretrial appeal should be changed from 10 to 14 days.

   - 18 U.S.C. § 2339B(f)(5)(B)(ii) provides that an "appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved."

6. The two-day notice provision in 18 U.S.C. § 1514(a)(2)(E) should be amended to exclude weekends and holidays.

   - 18 U.S.C. § 1514(a)(2)(E) provides that "if on two days notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

7. The 10-day notice deadline in 18 U.S.C. § 2252A(c) should be changed to 14 days.

   - Under 18 U.S.C. § 2252A(c) a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than 10 days before the commencement of the trial." Extending the time for notification to 14 days will conform to the times provided for notice of other defenses. The Criminal Rules Committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12.3 (public-authority defense) to 14 days.

8. The three-day period set by 18 U.S.C. § 3432 should be amended to exclude weekends and holidays.

   - Under 18 U.S.C. § 3432 "a person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial."

9. The five-day deadline for applications under 18 U.S.C. § 3509(b)(1)(A) should be changed to 7 days.

   - 18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least 5 days before the trial date." Extending this period to 7 days will permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

10. The 10-day mandamus petition deadline in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(5), should be changed to 14 days.

    - 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. Under the proposed amendment to FRAP 4(b), the defendant's time to appeal would also be extended from 10 to 14 days, so there would be no conflict between the two periods.

<u>Civil Provisions</u>

11. The 10-day period in 28 U.S.C. § 636(b)(1) should be changed to 14 days. This statute applies to objections to a magistrate judge's report and recommendation in criminal proceedings as well as civil proceedings.

    - Section 636(b)(1) sets the period for objecting to a magistrate judge's report and recommendation at 10 days. The proposed amendments to Civil Rule 72 and Criminal Rule 59 extend the time from 10 days to 14 days, recognizing that under the present computation method 10 days has always meant at least 14 calendar days. Section 636(b) should be amended to allow 14 days so that the statute and rules continue to operate in harmony.

<u>Appellate Provisions</u>

12. The "not less than 7" day period in 28 U.S.C. § 1453(c)(1) should be changed to "not more than 10" days.

    - This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method.

13. The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days.

- This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B). The Appellate Rules Committee suggests choosing 14 days as opposed to 10 days, in keeping with the time-computation project's preference for periods that are multiples of 7 days. Lengthening the time period to 14 days would not unduly threaten any principle of repose; a party that wishes to be confident about the expiration of appeal time can protect itself by giving notice of the judgment to other parties.

V. Conclusion

The time-computation rule and statutory changes will benefit the bar and public by standardizing deadlines and making their computation easier. It is important that both the proposed rules and statutory amendments take effect simultaneously. We appreciate your assistance in this important matter.

SUMMARY OF CHANGES IN TIME-COMPUTATION RULES

Days-are-days approach. The current Rules' time-computation approach can be confusing and counterintuitive, because they direct one to omit intermediate weekends and holidays when computing short time periods. Under subdivision (a)(1) of the proposed time-computation rules, all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days – including intermediate weekends and holidays – are counted. However, if the period ends on a weekend or holiday, the deadline falls on the next day that is not a Saturday, Sunday or holiday. (The application of this principle to backward-counted time periods is discussed below.)

Deadlines stated in hours. The current time-computation rules do not specifically discuss periods stated in hours. Such periods are set by some statutes and also may be set by court orders in expedited proceedings. Accordingly, subdivision (a)(2) of the proposed amendments addresses those periods.

Inaccessibility of the clerk's office. Subdivision (a)(3) of the proposed amendments carries forward and refines existing provisions that extend filing deadlines in the event that the clerk's office is inaccessible.

Definition of the "last day." Proposed subdivision (a)(4) defines the end of the "last day" of a filing period. It distinguishes between electronic filing and filing by other means. Proposed Appellate Rule 26(a)(4) adds further distinctions based upon other methods of filing contemplated by the Appellate Rules.

Definition of the "next day," and backward-counted periods. Proposed subdivision (a)(5) explains how to determine the "next day." This definition comes into play when a deadline falls on a weekend or holiday, because subdivision (a)(1) then directs that the deadline continues to run until the "next day" that is not a weekend or holiday. Under subdivision (a)(5), if the deadline is measured after an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count forward. But if the deadline is measured before an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count backward – e.g., from Saturday the 31st to Friday the 30th.

Legal holidays. Proposed subdivision (a)(6) carries forward and refines the time-computation rules' current definition of legal holiday. As under the current rule, the proposed rule defines "legal holiday" to include certain state holidays.

STATUTORY MODEL

A BILL

To make technical amendments to laws containing time periods affecting judicial proceedings.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Statutory Time-Periods Technical Amendments Act of 2009'.

SEC. 2. AMENDMENTS RELATED TO TITLE 11, UNITED STATES CODE.

(a) Section 109(h)(3)(A)(ii) is amended by striking '5-day' and inserting '7-day'.

(b) Section 322(a) is amended by striking 'five days' and inserting 'seven days'.

(c) Section 332(a) is amended by striking '5 days' and inserting '7 days'.

(d) Section 342(e)(2) is amended by striking '5 days' and inserting '7 days'.

(e) Section 521(e)(3)(B) is amended by striking '5 days' and inserting '7 days'.

(f) Section 521(i)(2) is amended by striking '5 days' and inserting '7 days'.

(g) Section 704(b)(1)(B) is amended by striking '5 days' and inserting '7 days'.

(h) Section 749(b) is amended by striking 'five days' and inserting 'seven days'.

(i) Section 764(b) is amended by striking 'five days' and inserting 'seven days'.

SEC. 3. AMENDMENTS RELATED TO TITLE 18, UNITED STATES CODE.

(a) Section 983(j)(3) is amended by striking '10 days' and inserting '14 days'.

(b) Section 1514(a)(2)(C) is amended by striking '10 days from issuance' and inserting '14 days from issuance' and striking '10 days or for such longer period' and inserting '14 days or for such longer period'.

(c) Section 1514(a)(2)(E) is amended by inserting ', excluding intermediate weekends and holidays,' after 'two days notice to the attorney for the Government'.

(d) Section 1963(d)(2) is amended by striking 'ten days' and inserting 'fourteen days'.

(e) Section 2252A(c) is amended by striking '10 days' and inserting '14 days'.

(f) Section 2339B(f)(5)(B)(ii) is amended by striking '10 days' and inserting '14 days'.

(g) Section 2339B(f)(5)(B)(iii)(I) is amended by inserting ', excluding intermediate weekends and holidays' after '4 days after the adjournment of the trial'.

(h) Section 2339B(f)(5)(B)(iii)(III) is amended by inserting ', excluding intermediate weekends and holidays,' after '4 days after argument on appeal'.

(i) Section 3060(b)(1) is amended by striking 'tenth day' and inserting 'fourteenth day'.

(j) Section 3432 is amended by inserting ', excluding intermediate weekends and holidays,' after 'three entire days before commencement of trial'.

(k) Section 3509(b)(1)(A) is amended by striking '5 days' and inserting '7 days'.

(l) Section 3771(d)(5)(B) is amended by striking '10 days' and inserting '14 days'.

(m) Section 7(b) of Appendix 3 is amended by striking 'ten days' and inserting 'fourteen days'.

(n) Section 7(b)(1) of Appendix 3 is amended by inserting 'excluding intermediate weekends and holidays,' after 'four days of the adjournment of the trial,'.

(o) Section 7(b)(3) of Appendix 3 is amended by inserting 'excluding intermediate weekends and holidays,' after 'four days of argument on appeal,'.

SEC. 4. AMENDMENT RELATED TO TITLE 21, UNITED STATES CODE.

Section 853(e)(2) is amended by striking 'ten days' and inserting 'fourteen days'.

SEC. 5. AMENDMENTS RELATED TO TITLE 28, UNITED STATES CODE.

(a) Section 636(b)(1) is amended by striking 'ten days' and inserting 'fourteen days'.

(b) Section 1453(c)(1) is amended by striking 'not less than 7 days' and inserting 'not more than 10 days'.

(c) Section 2107(c) is amended by striking '7 days' and inserting '14 days'.

SEC. 6. EFFECTIVE DATE

The amendments made by this Act shall take effect on December 1, 2009.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
110th Congress

SENATE BILLS

- S.186 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 1/4/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/4/07). Judiciary Committee held hearing (9/18/07).
  - Related Bills: S. 3217, H.R. 3013
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- S. 344 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Specter
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Judiciary Committee held hearing (2/14/07). Senate Judiciary Committee reported

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

favorably without amendment (12/6/07, 7/29/08). Placed on Senate Legislative Calendar (7/29/08). Senate Judiciary Committee Report No. 110-448 filed (9/8/08).

• Related Bills: S. 352, H.R. 1299

• Key Provisions:

— Section 1 amends **Chapter 45, Title 28, U.S.C.**, requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 352 - *Sunshine in the Courtroom Act of 2007*

• Introduced by: Grassley

• Date Introduced: 1/22/07

• Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Senate Judiciary Committee held hearing (2/14/07). Senate Judiciary Committee approved with amendments by a vote of 10-8 (3/6/08). Placed on Legislative calendar (3/13/08).

• Related Bills: S. 344, H.R. 1299, HR 2128

• Key Provisions:

— Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

[On March 6, 2008, the Senate Judiciary Committee approved S. 352 by a vote of 10-8 after adopting several amendments to the bill: (1) the presiding judge must

not allow camera coverage if the judge determines that it would violate the due process rights of any party; (2) the Judicial Conference must promulgate mandatory guidelines on shielding certain witnesses from camera coverage, including crime victims, families of crime victims, cooperating witnesses, undercover law enforcement officers, witnesses relating to witness relocation and protection, or minors under the age of 18; and (3) nothing in the bill limits the inherent authority of a court to protect witnesses, preserve the decorum and integrity of the legal process, or protect the safety of an individual. An amendment to remove the district courts from the legislation was defeated by a tie vote of 9-9].

- S. 456 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Feinstein
  - Date Introduced: 1/31/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/31/07). Hearing held (6/5/07). Committee reported favorably with amendments (6/14/07). Reported with amendment in nature of substitute (7/30/07). Passed the Senate (9/21/07). Referred to the House Judiciary, Energy and Commerce, and Education and Labor Committees (9/24/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).
  - Related Bills: S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 990 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Menendez
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/26/07).
  - Related Bills: S. 456, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- S. 1267 - *Free Flow of Information Act of 2007*
  - Introduced by: Lugar
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/2/07).
  - Related Bills: H.R. 2102, S. 2035

• Key Provisions:

— Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

- S. 1749 - *Crime Victims' Rights Rules Act of 2007*
  - Introduced by: Kyl
  - Date Introduced: 6/29/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/29/07).
  - Related Bills: None.
  - Key Provisions:

    — Section 1 expressed the sense of Congress that the Chief Justice should appoint at least one member on the Committee of Rules of Practice and Procedure and the Advisory Committee on Criminal Rules who is a victims' rights advocate.

    — The legislation amends 33 rules in the Federal Rules of Criminal Procedure that create additional rights for crime victims.

- S. 2035 - *Free Flow of Information Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 9/10/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/10/07). Senate Judiciary Committee reported, with amendments, bill by vote of 15-2 (10/4/07). Motion to proceed to consider measure (7/28/08). Cloture on motion to proceed failed by a vote of 51-43 (7/30/08). Motion to proceed withdrawn (7/30/08).
  - Related Bills: H.R. 2102, S. 1267
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred, that the

testimony or document sought is essential to the investigation, prosecution, or defense, and any unauthorized disclosure has caused significant, clear, and articulable harm to national security; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; and (4) nondisclosure of the information be contrary to public interest. The content of any testimony or document compelled under this section must be: (1) limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and (2) be narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information.

— Section 2 does not apply to information obtained as a result of eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person; information necessary to prevent or mitigate death, kidnaping, or substantial bodily harm; and information that a federal court has found by a preponderance of the evidence that would assist in preventing acts of terrorism in the United States or significant harm to national security.

- S. 2237 - *Crime Control and Prevention Act of 2007*
  - Introduced by: Biden
  - Date Introduced: 10/25/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/25/07).
  - Related Bills: S. 456, S. 990, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 245 directs the Judicial Conference to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 2449 - *Sunshine in Litigation Act of 2007*
  - Introduced by: Kohl
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07). Senate Judiciary Committee approved substitute amendment by a vote of 12-6 (3/6/08). Reported by Leahy with an amendment by way of substitute (8/1/08). Placed on Senate Legislative Calendar (8/1/08).
  - Related Bills: H.R. 5884
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court

makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
— Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

[The substitute amendment added two provisions to the original bill: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

- S.2450 - *To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine*
  - Introduced by: Leahy
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07). Senate Judiciary Committee approved without amendment (1/31/08). Senate Report No. 110-264 filed (2/25/08). Passed Senate by unanimous consent without amendment (2/27/08). Received in House and referred to House Judiciary Committee (2/28/08). Passed House by unanimous consent (9/8/08). Signed by President (9/19/08) (Public Law No. 110-322).
  - Related Bills: H.R. 6610
  - Key Provisions:
    — Section 1 amends **the Federal Rules of Evidence** by adding a new Evidence Rule 502 on waiver of attorney-client privilege and work product protection. The legislation tracks the language of proposed Evidence Rule 502, as approved by the Judicial Conference of the United States at its September 2007 session.

- S.3217 - *Attorney-Client Privilege Protection Act of 2008*
  - Introduced by: Specter
  - Date Introduced: 6/26/08
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/26/08).
  - Related Bills: S. 186, H.R. 3013
  - Key Provisions:
    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding that an organization waive the attorney-client privilege or work product protection. Section 3 also prohibits the

government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

HOUSE BILLS

- H.R. 851 -*Death Penalty Reform Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 2/6/07
  - Status: Referred to House Committee on the Judiciary (2/6/07).
  - Related Bills: H.R. 1914
  - Key Provision:

    — Section 8 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 880 - *Gang Deterrence and Community Protection Act of 2007*
  - Introduced by: Forbes
  - Date Introduced: 2/7/07
  - Status: Referred to the House Committee on the Judiciary (2/7/07). Referred to House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (3/1/07).
  - Related Bills: H.R. 1582, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237
  - Key Provisions:

    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 1012 - *Small Business Growth Act of 2007*
  - Introduced by: Buchanan
  - Date Introduced: 2/13/07
  - Status: Referred to the House Committees on Education and Labor, Small Business, Judiciary, Oversight and Government Reform, and Ways and Means (2/13/07). Referred

to House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (3/19/07). Referred to the House Subcommittee on Health, Employment, Labor and Pensions (6/5/07).

• Related Bills: None

• Key Provisions:

— Title IV amends **Civil Rule 11** by: (1) imposing additional, mandatory sanctions on attorneys, law firms, and parties; (2) making the rule applicable in state cases affecting interstate commerce; (3) imposing a "three-strike" rule on attorneys who commit multiple violations of the rule; (4) creating a presumption of a rule violation when the same issue is relitigated; (5) providing enhanced sanctions for the willful and intentional destruction of documents in a pending federal court proceeding; and (6) by limiting a court's discretion in sealing a Rule 11 proceeding.

- H.R. 1299 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Poe
  - Date Introduced: 3/1/07
  - Status: Referred to the House Committee on the Judiciary (3/1/07).
  - Related Bills: S. 344, S. 352, H.R. 2128
  - Key Provisions:

    — Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- H.R. 1582 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Referred to the House Subcommittee on Crime, Terrorism, and Homeland Security (4/20/07).
  - Related Bills: H.R. 880, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237
  - Key Provisions:

    — Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- H.R. 1592 - *Local Law Enforcement Hate Crimes Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07

• Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Reported (Amended) by the Committee on Judiciary. H. Rept. 110-113. (4/30/2007). Passed by the House by a vote of 237-180 (5/3/2007). Received in the Senate, read twice, and referred to the Committee on the Judiciary (5/7/2007).
• Related Bills: None
• Key Provisions:
— Section 6 amends **Chapter 13, Title 18, U.S.C.**, by including the following provision: "In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness."

- H.R. 1692 - *Fighting Gangs and Empowering Youth Act of 2007*
  • Introduced by: Pallone
  • Date Introduced: 3/26/07
  • Status: Read twice and referred to the House Committees on the Judiciary, Education and Labor, and Financial Services (3/26/07). Referred to the House Subcommittee on Housing and Community Opportunity (6/8/07). Referred to House Subcommittee on Healthy Families and Communities (6/27/07).
  • Related Bills: H.R. 880, H.R. 1582, H.R. 3547, S. 456, S.990, S. 2237
  • Key Provisions:
  — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- H.R. 1914 -*Terrorism Death Penalty Act of 2007*
  •Introduced by: Carter
  • Date Introduced: 4/18/07
  • Status: Referred to House Committee on the Judiciary (4/18/07). Referred to Subcommittee on Crime Terrorism, and Homeland Security (5/4/07).
  • Related Bills: H.R. 851
  • Key Provision:
  — Section 3 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 2102 - *Free Flow of Information Act of 2007*
  • Introduced by: Boucher
  • Date Introduced: 5/2/07
  • Status: Read twice and referred to the House Committee on the Judiciary (5/2/07). Hearing held (6/14/07). Committee held markup session and ordered reported (8/1/07).

House passed bill with amendment below by vote of 398-21 (10/16/07). Placed on Senate Legislative Calendar (10/18/08).
• Related Bills: S. 1267, S. 2035
• Key Provisions:

— Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

[The Boucher/Pence amendment limits the scope of a journalist's protection by: (1) allowing disclosure of information to prevent or identify the perpetrator of a terrorist attack or harm to national security; (2) allowing disclosure of the identity of a person involved in leaking properly classified information; (3) permitting law enforcement officers to seek a court order compelling production of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct; (4) limiting coverage to a person who "regularly" engages in the listed journalistic activities and including exceptions to the definition of "covered person."]

- H.R. 2128 - *Sunshine in the Courtroom Act of 2007*

  • Introduced by: Chabot
  • Date Introduced: 5/3/07
  • Status: Read twice and referred to the House Committee on the Judiciary (5/3/07). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (6/4/07). Subcommittee discharged (9/20/07). Judiciary Committee held hearing (9/27/07). Committee held markup session and ordered bill to be reported favorably by vote of 17-11 (10/24/07).
  • Related Bills: S. 344, S. 352, H.R. 1299
  • Key Provisions:

  — Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may

not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- H.R. 2286 - *Bail Bond Fairness Act of 2007*
  - Introduced by: Wexler
  - Date Introduced: 5/10/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/10/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/1/07). Subcommittee held markup session (6/12/07). Committee considered, held markup session, and ordered reported by voice vote (6/13/07). House Report 110-208 filed (6/22/07). House passed by voice vote (6/25/07). Received in Senate, read twice, and referred to Committee on the Judiciary (6/26/07).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **Criminal Rule 46(f)(1)** limiting the authority of the court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond. H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only where the person actually fails to appear physically before a court as ordered, and not where the person violates some other collateral condition of release.)

- H.R. 2325 - *Court and Law Enforcement Officers Protection Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 5/15/07

• Status: Read twice and referred to the House Committee on the Judiciary (5/15/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/4/07).
• Related Bills: None
• Key Provisions:
— Section 7(c) amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts by adding at the end the following: "Rule 60(b)(6) of the Federal Rules of Civil Procedure does not apply to proceedings under these rules."

- H.R. 3013 - *Attorney-Client Privilege Protection Act of 2007*
  • Introduced by: Scott
  • Date Introduced: 7/12/07
  • Status: Read twice and referred to the House Committee on the Judiciary (7/12/07). Referred to the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security (7/20/07). Markup session held and subcommittee forwarded to full committee by voice vote (7/24/07). Judiciary Committee held mark-up session and ordered reported by voice vote (8/1/07). House Report No. 110-445 filed (11/13/07). Passed House by voice vote (11/13/07).
  • Related Bills: S. 186, S. 3217
  • Key Provisions:
  — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- H.R. 3147 - *Counter-Terrorism and National Security Act of 2007*
  • Introduced by: Wilson
  • Date Introduced: 7/24/07
  • Status: Read twice and referred to the House Committee on the Judiciary (7/24/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (8/10/07).

• Related Bills: None
• Key Provisions:
— Section 9 amends **Criminal Rule 41(b)(3)** giving magistrate judges authority to issue search warrants in certain multidistrict terrorism investigation cases.

● H.R. 3547 - *Gang Prevention, Intervention, and Suppression Act of 2007*
• Introduced by: Schiff
• Date Introduced: 9/17/07
• Status: Read twice and referred to the House Committees on the Judiciary and Education and Labor (9/17/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).
• Related Bills: S. 456, S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
• Key Provisions:
— Section 204 directs the Judicial Conference to study **Evidence Rule 804(b)** "to determine the necessity and desirability of amending that section, including the possible expansion of section 804(b)(6), and shall make modifications as the Judicial Conference sees fit."

● H.R. 4302 - *To Amend Title 18, United States Code, to Require the Reading in Open Court in Criminal Cases of Crime Victims' Rights*
• Introduced by: Chabot
• Date Introduced: 12/6/07
• Status: Read twice and referred to the House Committee on the Judiciary (12/6/07). Referred to the House Subcommittee on Crime, Terrorism, and Homeland Security (1/14/08).
• Related Bills: None
• Key Provisions:
— The bill amends 18 U.S.C. § 3771(b) by requiring the trial judge to read in open court the rights of crime victims at the start of every criminal proceeding or at sentencing.

● H.R. 5884 - *Sunshine in Litigation Act of 2008*
• Introduced by: Wexler
• Date Introduced: 4/23/08
• Status: Read twice and referred to the House Committee on the Judiciary (4/23/08). Referred to House Subcommittee on Courts, the Internet, and Intellectual Property and Subcommittee on Commercial and Administrative Law (6/3/08). Subcommittee on Commercial and Administrative Law held hearing (7/31/08).
• Related Bills: S. 2449
• Key Provisions:
— Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such

agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
— Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

— Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

● H.R. 6610 - *To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine*

- Introduced by: Jackson-Lee
- Date Introduced: 7/24/08
- Status: Read twice and referred to the House Committee on the Judiciary (7/24/08).
- Related Bills: S. 2450
- Key Provisions:

  — Section 1 amends **the Federal Rules of Evidence** by adding a new Evidence Rule 502 on waiver of attorney-client privilege and work product protection. The legislation tracks the language of proposed Evidence Rule 502, as approved by the Judicial Conference of the United States at its September 2007 session.

SENATE RESOLUTIONS

● S.J. Res.

HOUSE RESOLUTIONS

● H.J. Res. 66 - *Proposing an Amendment to the Constitution of the United States to establish and protect the Rights of Victims of Violent Crimes*

- Introduced by: Chabot
- Date Introduced: 12/6/07
- Status: Read twice and referred to the House Committee on the Judiciary (12/6/07). Referred to House Subcommittee on the Constitution, Civil Rights, and Civil Liberties (1/14/08).
- Related Bills: None

• Key Provisions:

— The bill proposes an amendment to the Constitution providing for rights of crime victims.

TAB

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 15, 2008

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Federal Rulemaking Website

We posted on the Judiciary's Federal Rulemaking web site an audio recording ("podcast") of the November 17, 2008, public hearing held by the Civil Rules Committee on proposed amendments to Civil Rules 26 and 56. The audio recording is located at http://www.uscourts.gov/rules/podcast.cfm

We have also received, acknowledged, forwarded, and followed up on over 90 comments and requests to testify on the proposed amendments published for comment in August 2008. The comments, requests, and written testimony are posted at http://www.uscourts.gov/rules/proposed0809.html

The office continues to add rules-related records to the rules web site. In October 2008, we retrieved, digitized, and posted to the web site thousands of pages of missing rules committee minutes, reports, memoranda, and other records from Professor Alan N. Resnick, former member and reporter to the Bankruptcy Rules Committee. Last month, we ordered hundreds of pages of rules committee and statutory materials from the Frank R. Kennedy collection at the University of Michigan's Bentley Historical Library. Finally, we are posting to the web site over 150 rules committee agenda books in pdf format from 1992 to the present. The rules web site continues to be one of the most popular sites on the Judiciary's web site, averaging over 250,000 visits per month in 2008.

Documentum

Since May 2008, Professor Struve has had remote access to Documentum, the office's document-management system. Professor Struve submitted, reviewed, and edited agenda and other rules-related materials using Documentum. In addition, she has access to thousands of

rules documents in Documentum, including drafts of proposed rules amendments, committee minutes, committee reports, agenda items, comments and suggestions, memoranda, and correspondence. Among other things, the system will: (1) allow multiple users to prepare, edit, and finalize documents; (2) search for documents in the database using enhanced indexing and search capabilities; and (3) track different versions of documents to ensure the quality and accuracy of work products, which will facilitate the preparation and reformatting of agenda materials, committee minutes and reports, and other rules-related documents. Upon successful completion of the pilot project with Professor Struve, we hope to expand the program to allow remote access to Documentum by committee members and reporters.

Committee and Subcommittee Meetings

For the period from May 2008 to December 2008, the office staffed eight meetings and a public hearing, including one Standing Rules Committee meeting, five advisory rules committee meetings, a public hearing on proposed amendments to Civil Rules 26 and 56, and a meeting of the informal working group on mass torts. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Approved by the Judicial Conference. We transmitted to the Supreme Court a package of rules amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, approved by the Judicial Conference at its September 2008 session. In preparing the package, our office reformatted and proofread the rules, created a "clean" set of rules incorporating the approved changes in Microsoft Word 2002, formatted excerpt reports of the Standing and Advisory Rules Committees, prepared a memorandum for Judge Lee H. Rosenthal briefly summarizing the proposed amendments, prepared a report on amendments that raised significant interest, and drafted transmittal letters and memoranda and Supreme Court orders adopting the proposed rules. The proposed amendments, if approved by the Supreme Court and if Congress takes no action otherwise, will become effective on December 1, 2009.

James N. Ishida

TAB

ORAL REPORT

TAB

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

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Mark R. Kravitz, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 9, 2008**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 17 and 18, 2008. Draft Minutes of the meeting are attached.

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee meeting began. The remaining hearings are scheduled for January 14, 2009, following the Standing Committee meeting in San Antonio, and for February 2 in San Francisco. The Advisory Committee will meet after the close of the February hearing to discuss the fruits of the hearings and the written comments that have been received by that time.

No action items are presented in this report.

Several discussion items are presented to provide information about tasks the Advisory Committee is considering for near- or intermediate-term action after the Rule 26 and 56 projects are wrapped up.

Discussion Items

RULE 26 PROPOSAL: EXPERT TRIAL WITNESSES

Early written comments and testimony at the November hearing continue to show widespread support for the Rule 26 proposals published last August. The proposals cover both trial expert witnesses who are required to prepare a disclosure report under Rule 26(a)(2)(B) and those who are

not required to prepare a 26(a)(2)(B) report. For one not required to prepare a report, the party who may use the witness at trial must disclose the subject matter of the expert testimony and a summary of the expected facts and opinions. Drafts of the disclosure are protected by the work-product rule. For an expert that is required to prepare a 26(a)(2)(B) report, work-product protection is extended both to drafts of the report and also to communications between the party's attorney and the witness. Work-product protection, however, does not apply to the extent that the communications relate to the expert's compensation, identify facts or data that the attorney provided and that the expert considered in forming the opinions to be expressed, or identify assumptions the attorney provided and that the expert relied upon in forming the opinions to be expressed.

The support so far expressed for these proposals rests on experience with the actual results of the widespread present practice allowing full discovery of draft reports and of attorney-expert communications. Support is offered by attorneys who typically represent plaintiffs and by those who typically represent defendants. Experienced attorneys often stipulate out of such discovery. When discovery is sought it yields little or nothing of value, but adds cost and delay. Perhaps worse, the prospect of discovery leads to behavior by attorneys and expert witnesses that accounts for the lack of useful discovery but also impedes the most effective use of the expert trial witness. And well-endowed parties often retain two sets of experts, including "consulting" experts who will not testify at trial and are shielded from discovery; other parties who cannot afford this indulgence may suffer significant disadvantages.

There are signs of discontent with these proposals among at least some procedure scholars, who believe that the rules should not seem to accept the evolution of expert witness testimony into modes that they see as advocacy, not testimony. They believe that full discovery into the attorney-expert relationship is necessary to the truth-finding function, particularly when it helps to show that a particular expert is serving as nothing more than a conduit for what is actually the lawyer's argument, not the expert's own considered judgment. This concern was actively explored in the deliberations that led up to the published proposal and will continue to be reviewed in considering what recommendation to make at the end of the hearing and comment process.

The next-to-last paragraph of the Rule 26 Committee Note continues to stir controversy. The Note recognizes that extending work-product production to draft reports and disclosures, and to some attorney-expert communications, "focus[es] only on discovery." But it states an expectation "that the same limitations will ordinarily be honored at trial." This observation reflects an abiding concern that allowing free inquiry at trial will defeat the purposes sought by protecting against discovery. Drafts will not be prepared (or will be erased), communications will be guarded, dual teams of experts will be retained when otherwise trial-witness experts would suffice, valuable deposition time will be wasted in generally vain discovery efforts, and so on. This is not an attempt to create a Rule of Evidence by a Civil Rule Committee Note; it is an invitation to courts to exercise their ordinary authority in ruling on evidence questions that are not addressed by an explicit rule. But some observers view it as an indirect attempt to create a Rule of Evidence; a few even carry this view to the point of asking whether this is an attempt to create a privilege that, if adopted in an Enabling Act Rule, could become effective only if approved by Act of Congress. This paragraph will remain the subject of lively debate as the process continues.

RULE 56 PROPOSAL: SUMMARY JUDGMENT

The Rule 56 proposal is an effort to create a clear, uniform, and efficient procedure for submitting a summary-judgment motion under the same standards and allocation of moving burdens as are established by current law. It will be important to assess comments and testimony by asking whether particular positions are shaped by dissatisfaction with current standards and burdens. Some observers seem to believe that summary judgment is given too readily. Others seem to believe that

it is not given often enough. Working through this potential source of misunderstanding may prove difficult on occasion.

Two major topics have come to the fore in early comments and testimony: the Style Project translation of "shall" grant summary judgment to "should," carried forward in the 2008 proposal, and the point-counterpoint procedure adapted from experience under the local rules of some 20 districts.

The argument that the Style Project erred in translating "shall" to "should" grant summary judgment is regularly framed in two parts. First is the assertion that everyone had assumed that there is a right to summary judgment "when there is no genuine issue as any material fact and * * * the movant is *entitled* to judgment as a matter of law." Recognizing that there is no discretion to grant summary judgment when there is a genuine issue of material fact, the argument is that there has been and should be no discretion to deny summary judgment when there is no genuine issue. On this view "must" is the only accurate translation. Second, it is urged that federal judges too often fail to grant summary judgment, inflicting on parties the need to choose between settlement or the costs and risks of trial. This view may be supported not only by anecdotes of summary judgment wrongly denied but also, at times, by figures in the FJC study showing that courts frequently fail to rule either way on summary-judgment motions.

The arguments against the point-counterpoint procedure in proposed Rule 56(c) take two quite different forms. One line of argument is that the disaggregating effect of looking at historic facts in isolation, one-by-one, blinds the court to the need to consider the inferences that may be drawn from the mass of fact entire. This effect is given the unflattering description of "slice-'n-dice," and decried because it deprives the nonmovant of the opportunity to tell the story of the dispute as an integrated narrative.

A different argument against the point-counterpoint procedure is that in practice it elicits motions that are far longer than the more sensibly framed motions made in districts that do not follow this procedure. This story is told by judges of courts that have adopted the practice only to abandon it, and by judges who have extensive experience both in a district that has the practice and in a district that does not have it. The same story has been told throughout the process of developing proposed Rule 56(c) by practicing lawyers who complain that statements of material facts may number in the hundreds, commonly including many that cannot have any effect on decision of the motion. These voices of experience are daunting, and will prove more daunting if further comments and testimony do not provide an offset. But what remains missing is an explanation of the ways in which lawyers who would frame sensible motions are transported into hypertrophy by a reminder that the motion must, after all, identify the facts that cannot be genuinely disputed and point to materials in the record that defeat any genuine dispute.

Of course the comments and testimony will provide reason to consider other aspects of the Rule 56 proposal in addition to these central issues. One example is provided by a continuing chorus of support for adding an attorney-fee sanction for making an unreasonable motion or an unreasonable response or reply. All of these issues will be studied further. But the choice between "should" and "must," and the basic point-counterpoint procedure, are likely to remain among the central issues.

The testimony and comments during the relatively early part of the publication period also raise a broader question that will lie at the center of ongoing deliberations. The Rule 56 project was launched to establish a uniform national procedure. The revisions would express in rule text practices that have evolved without finding expression in the rule, and would — where practices have substantially diverged — make uniform what seem to be the best practices among the districts. During the miniconferences convened to help the Advisory Committee, many lawyers expressed a

strong preference for uniform procedures. This support continues in the testimony and comments, albeit with different views of what the uniform procedure should be. But an impressive number of district judges have argued in favor of local autonomy, particularly with respect to the point-counterpoint procedure. To them it is not enough that the point-counterpoint procedure can be discarded on a case-by-case basis; bad experiences with it in at least some cases persuade them that it should not be made uniform for the large number of ordinary cases in which many courts have found it useful.

This confrontation of national uniformity with local autonomy is familiar in the Enabling Act process. One prominent example is the fate of the Civil Rule 26(a)(1) initial disclosure provisions adopted in 1993. The 1993 rule allowed districts to opt out by local rule. Many districts opted out in whole or in part. The rule was amended in 2000 to establish national uniformity, but at the price of substantially diluting the required disclosures. Allowing courts to opt out of the point-counterpoint provisions of proposed Rule 56(a) by local rule would substantially reduce the dissatisfaction expressed by the district judges who have commented. But it would perpetuate disuniformity in a central part of summary-judgment practice.

It is too early in the publication period to attempt a final resolution. But it may not be too early to ask the Standing Committee's guidance in helping the Advisory Committee to weigh the importance of local autonomy against the values of uniformity under rule text that clearly describes much actual practice. One part of the dilemma may be peculiar to the point-counterpoint procedure that lies at the heart of the debate. The Advisory Committee recognizes that this procedure could be counterproductive in some cases, as indeed it seems to have been. The proposed rule explicitly allows the court to order a different procedure on a case-by-case basis. The Committee Note highlights this authority. Power to depart in a particular case is important, and perhaps essential. But the power could be exercised by routinely entering, in every case, an order prescribing a different procedure. The order would give the parties clear notice of what they must do, eliminating the risk of misunderstanding. But if many judges took to this approach, uniformity would be defeated. Advisory Committee consideration of these questions after the publication period closes will be advanced by some discussion with the Standing Committee now.

AGENDA REVIEW

The Committee reviewed a number of public suggestions that have accumulated on the agenda. Several of them were removed because there did not seem to be sufficient reason to take them up for study in the near- or intermediate-term future. Some of the removed items did not seem to have merit. Others may have had merit, but presented questions that seem likely to be worked out in practice or to involve issues too particular to be addressed at the cost of further expanding and perhaps complicating the national rules.

Some of the items removed from the agenda relate in one way or another to the need to integrate developing CM/ECF practices with rule text. These issues do not seem to have matured to a point that would support clearly defined and well-supported responses in the rules. But they may well mature to a point that justifies comprehensive review in a few years. When the time comes, review is likely to involve joint work that involves at least most of the Advisory Committees, and may involve other Judicial Conference committees as well.

Other agenda items are to be carried forward without plans for immediate action but with the thought that they may deserve active consideration within the foreseeable future. These include matters that are likely to involve other advisory committees, such as the means of serving papers outside Civil Rules 4 (summons and complaint), 4.1 (other process), and 45 (subpoenas) — how far should party consent be required for service by electronic means, third-party commercial carrier, or

the like? Should the extra three days to act allowed by Rule 6(d) after many modes of service be retained? Another example in this category may be questions about Civil Rule 7.1 corporate disclosure statements; the Committee on Codes of Conduct is interested in further consideration of these disclosures.

The Civil Rule 68 offer-of-judgment provisions have a tenacious hold on the agenda. Thorough revisions were attempted in the 1980s and again in the 1990s, only to fall through. Unsolicited suggestions continue to arrive, including a recent plea by the Second Circuit that the rule provide better guidance on how to compare a rejected offer with the eventual judgment when the case involves nonmonetary relief. Well-informed proponents can be found for a variety of changes, covering the range from abrogation to complex rules that provide for attorney-fee sanctions for rejecting offers by any party. The underlying questions are complex. Efforts to make even modest changes could easily become unraveled as one change seems to mandate consideration of some related matter. Even if a genuinely modest proposal should come to seem worthwhile, it could easily stir vehement protests of the sort provoked by the 1980s proposals. There is a strong case to be made for leaving Rule 68 to rest in relative obscurity. It is used with some frequency by defendants in cases brought under fee-shifting statutes to cut off post-offer fees if the prevailing plaintiff fails to win a judgment better than the offer. It is very seldom used in other cases. But the topic continues to stir interest in some quarters. The Committee is likely to take a close look at possible responses within the next year or two.

Still other agenda items will be taken up promptly, at least to determine whether rules changes should be proposed. The Maritime Law Association has suggested that the final sentence of Supplemental Rule E(4)(f) has been superseded; if this suggestion proves out, abrogation will be in order. The proposal to delete "discharge in bankruptcy" from the Rule 8(c) list of affirmative defenses, published in 2007, was held back from adoption last year in hopes of resolving a disagreement between the Department of Justice and several participants in the Bankruptcy Rules process. This topic remains on the active agenda to be resolved as promptly as possible.

The subpoena provisions of Civil Rule 45 have prompted a number of suggestions. After discussing several of them, the Discovery Subcommittee was asked to make a recommendation whether the Committee should develop specific proposals for revision. Among the questions are whether to expand the modes of service — Civil Rule 45(b)(1) prescribes service by "delivering a copy to the named person." (Criminal Rule 17(d) is similar.) The issues posed by possible alternative means of service are likely to be shaped by practical judgment more than high theory. Another question involves the territorial reach of a trial subpoena addressed to a party. The answer appears plain on the face of Rule 45 — the subpoena can reach only to the limits defined by Rule 45(b)(2). But some courts have drawn a negative inference that nationwide service is possible from Rule 45(c)(3)(A)(ii), reasoning that by addressing service to command a nonparty witness to attend a trial, Rule 45(c)(3)(A)(ii) impliedly allows service on a party anywhere in the country. The cost-protection provisions in Rule 43(c)(3)(B)(iii) may be put to similar use. This interpretation seems surprising on the face of the rule text. But changes in the ease and cost of travel may justify substantial change. Indeed it may be appropriate to begin by examining the territorial limits established by Rule 45(b)(2), including the dependence on state law for statewide service. Yet another question arises from divided decisions on the question whether a court enforcing discovery against a nonparty in ancillary proceedings can refer a dispute to the court where the main action is pending. There may be compelling reasons to prefer disposition by that court, but the rules do not provide any clear opportunity to do so. Beyond these specific questions, it was observed that Rule 45 is long, complicated, frequently troubling to practitioners, and perhaps not as well integrated with the discovery rules as should be. Serious work on Rule 45 may lie in the relatively near future.

APPELLATE RULES COMMITTEE REPORT

The Appellate Rules Committee met just days before the Civil Rules Committee met. Professor Struve provided a very helpful summary of the discussions of several topics that may come to intersect with the Civil Rules. It is likely that collaborative work will occur on several fronts. The Civil Rule 58 requirement that judgment be entered on a separate document continues to generate problems after the recent amendments. In large part the problems arise from failure to remember to enter judgment on a separate document, but there may be other problems that deserve further study. The circuits take varied approaches to the opportunity to "manufacture" a final judgment by dismissing claims or parties in ways designed to revive the matters that defeated finality if the appeal leads to reversal; here too the inquiry may move in directions that require consideration of the Civil Rules as well as the Appellate Rules. The Appellate Rules Committee is considering the possibility of drafting legislation to address the "mandatory and jurisdictional" character of statutory appeal deadlines; development of a statute may involve nonstatutory provisions on appeal time, such as the provisions that, by virtue of Appellate Rule 4(a)(4), suspend appeal time for as long as needed to dispose of motions under various Civil Rules. The Civil Rules Committee looks forward to working with the Appellate Rules Committee as these projects develop further.

The Appellate Rules Committee also decided to terminate consideration of a revision of Appellate Rule 7 that would address providing for statutory attorney fees in an appeal cost bond exacted from an objector who appeals approval of a class-action settlement. Discussion of this issue in the Civil Rules Committee focused on the difficulty of distinguishing between "good" objectors and other objectors who seek only strategic advantage. It was suggested that thought should be given to evaluating the rule that a class member who is not named as a class representative is a "party" who can appeal denial of objections without becoming a party by intervening. Requiring a motion to intervene would enable the district court to evaluate the good faith of the appeal. Preliminary research will be undertaken to help guide the decision whether to pursue this question further.

REPORT ON SUBCOMMITTEES

A draft report to the Executive Committee of the Judicial Conference on the Civil Rules Committee's use of subcommittees was discussed, and further comments were invited. Useful comments were made after the meeting concluded, and were incorporated in the final Report.

OTHER MATTERS

The Committee also considered a report on progress in the first part of the second stage of the Federal Judicial Center's study of the impact of the Class Action Fairness Act on federal courts and on federal class-action practice. Judge Kravitz reported on his testimony to Congress on a proposed Sunshine in Litigation Act of 2008. Professor Gensler presented a helpful report summarizing issues with respect to privilege logs that have divided the courts. The Committee concluded that some of the privilege log issues should be considered by the Discovery Subcommittee as it reviews Civil Rule 45 subpoena practice, and that the questions would otherwise remain on the agenda for possible future consideration.

FUTURE WORK: NOTICE PLEADING AND DISCOVERY

Seventy years ago the FEDERAL RULES OF CIVIL PROCEDURE created a new system that packaged notice pleading, discovery that began well beyond anything that had gone before and moved beyond anyone's wildest imaginings, and summary judgment. The system has worked well for many years and for many types of litigation. But it has come under strain, and increasing strain. The focus of concern since the last great forward surge of discovery in the 1970 amendments has been on ways to protect against overuse, misuse, and abuse of discovery. It would be difficult to find anyone to champion the proposition that real success has crowned the constant efforts of the last

three decades and more to establish some happy balance. But it is not difficult to find those who believe that the problems, accelerated by the advent of ediscovery, are rapidly spiraling out of control.

If direct efforts to contain discovery have not yet met complete success, indirect efforts may be attempted. One theme that emerged clearly from the Supreme Court's decision in the *Twombly* case is the prospect that access to discovery might usefully be limited by raising the initial pleading threshold. The opinion is too artful to say directly that the time has come to reconsider the combination of notice pleading with sweeping discovery; lower courts are left to work on the pleading problem in ways that may reduce the opportunities for discovery run out of control. That process has only begun.

It would be premature to undertake a head-on project to reconsider the combination of notice pleading with wide-open discovery. Further experience in developing the *Twombly* decision will be important to determining whether there is much to be done about pleading standards, and what — if anything — it might be. Further experience with discovery as it moves increasingly into a world of electronically stored information that displaces paper documents will, if anything, be even more important. Discovery of electronically stored information may evolve in ways that force dramatic revision of the discovery rules. Paradoxically, it is still too early to reject the hope that electronic retrieval methods will outstrip the growth of electronic storage, making it possible to identify, at low cost, exactly the important information, to screen it for privilege and other protections, and to produce it in forms that facilitate further pretrial and trial efforts. New rules should not be written now.

The view that it is too early to begin rewriting the 1938 package does not justify inaction. Instead, it is important to establish the foundations to support thoughtful action if action comes to seem necessary. The Civil Rules Committee has determined to hold a conference in the first half of 2010 to begin exploring contemporary pleading, discovery, and related topics. Much will be gained by gathering the views and experiences of lawyers, judges, and academics. It will be vitally important to supplement these resources with disinterested and expert empirical research. The Federal Judicial Center has provided invaluable help in supporting past revisions of the discovery rules, and must be counted on to help once again. It will not be possible to do everything that might be wished within the present timeframe. But it will be possible to design work that is both immediately useful and a springboard for ongoing and future work. The research will be invaluable even if the conclusion is that there is no need to consider reform again before 2020. A baseline of information will be the only way to measure progress or regress over time.

The help and support of the Standing Committee will be essential to planning and implementing the short-term work on notice pleading and discovery. If further work seems indicated by the fruits of the initial work, further guidance will be equally important.

TAB

COPY OF PROPOSED AMENDMENTS TO RULE 26
SET OUT IN
REQUEST FOR COMMENT PAMPHLET

Executive Summary of Research Regarding Rules Enabling Act Issue and Proposed Amendments to Civil Rule 26

Some comments to the proposed amendments to Federal Rule of Civil Procedure 26 suggest that they may pose a Rules Enabling Act problem. One comment suggests that the proposed amendments' extension of work-product protection to drafts of expert reports and to certain attorney-expert communications may violate 28 U.S.C. § 2074(b), which provides that rules "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." The Committee requested research on section 2074(b) and case law on whether work product has been considered a "privilege." The legislative history and the case law do not support the proposition that there is a Rules Enabling Act problem with the proposed amendments.

Comments suggesting that there may be Enabling Act issues with the proposed amendments have argued that the discovery protections in the Rule would need to apply at trial to achieve their objective and that precluding inquiry at trial is what privilege rules are designed to do. The proposed amendments, however, only establish work-product protection for draft reports and certain attorney-expert communications in discovery. The proposed Committee Note expresses an expectation that the discovery protections afforded by the Rule will ordinarily be honored at trial, but this language is far from necessary and the Rule itself only imposes a limit on discovery and leaves the question of whether the protections will be extended to trial for common law development. If case law does develop to protect such communications and drafts at trial, that development will not contravene the Enabling Act procedure, but will be developed by "common law as . . . interpreted by the courts of the United States in the light of reason and experience," as authorized by Federal Rule of Evidence 501.

The case law does not support the proposition that work-product protection is a "privilege." Importantly, while work-product protection may be referred to as a "privilege" in certain contexts, courts have repeatedly found that it is not a "privilege" in the context of Federal Rule of Evidence 501. The fact that work-product protection has not been considered a "privilege" under Rule 501 is persuasive support for the proposition that courts are unlikely to find that work-product protection is a privilege under section 2074(b) because, like section 2074(b), Rule 501 was expressly enacted and drafted by Congress (as opposed to passed through the Enabling Act's congressional veto procedure for passage of rules other than privilege rules), because Rule 501 was enacted and considered together with the privilege restriction in former section 2076 (where the provision in current section 2074(b) formerly resided), and because Rule 501 also deals with limits that Congress imposed with respect to the role of federal courts in privilege issues. Indeed, the work-product doctrine was separated from privilege at its inception in *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the Supreme Court emphasized that the work-product doctrine was not a matter of attorney-client privilege.

The legislative history of the restriction on privilege rulemaking in section 2074(b) also strongly suggests that Congress did not have work-product protection in mind when it limited the Supreme Court's rulemaking power with respect to privileges. The provision was introduced when

Congress was considering whether to adopt the Rules of Evidence proposed by the Advisory Committee. The legislative debates on the proposed Rules of Evidence reveal congressional concern with the Advisory Committee's involvement in creating, modifying, or abrogating "traditional" privileges, which Congress viewed as matters of substantive law that should be expressly resolved by the legislative branch. The history repeatedly refers to traditional privileges, such as attorney-client, doctor-patient, newspapermen, and husband-wife, and expresses concern with the Court's rulemaking power being used to modify or abrogate any of these privileges, as well as with that power being used for the creation of privileges for matters such as governmental secrets. Congress ultimately rejected the proposed privilege rules and instead adopted only Rule 501, which left privilege law to be developed through common law. At the same time that Congress adopted the Rules of Evidence (including Rule 501), Congress also adopted the limitation in the Enabling Act that prevented the Supreme Court from changing privilege rules without express congressional consent. The legislative history does not indicate that Congress had work product in mind when it enacted the privilege restriction in the Enabling Act. Instead, Congress seemed concerned with the Court's ability to use its rulemaking power to modify privilege law because it viewed privileges as involving policy decisions to protect certain confidential relationships, and as affecting the behavior of all citizens, not just litigants.

The very limited case law discussing section 2074(b) provides little useful guidance in interpreting the meaning of the term "privilege" in that statute. While there are a few cases that cite the provision as an aside, there are no reported cases involving a challenge to a national federal rule of procedure under that statute. Although the meaning of "privilege" within the statute has not been directly addressed, the legislative history of the statute and the case law discussing whether work-product is a privilege show that a rule that establishes or modifies work-product protection only in discovery does not modify a "privilege" within the meaning of section 2074(b). It is unlikely that the proposed amendments to Rule 26 could be successfully challenged under the Rules Enabling Act.

MEMORANDUM

DATE: December 16, 2008

TO: Professor Richard Marcus

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal

SUBJECT: Rules Enabling Act Issue Raised by Comments to Proposed Amendments to Rule 26

This memorandum addresses comments to proposed amendments to Federal Rule of Civil Procedure 26 that suggest that there could be a Rules Enabling Act problem with the proposed amendments. The relevant portion of the proposed amendments applies the work-product protection found in Rule 26(b)(3)(A) and (B) to limit discovery of draft expert statements or reports, and, with three exceptions, of communications between expert witnesses and counsel regardless of form.[1] A group of professors has submitted a comment on this portion of the proposed amendments that argues that providing such protection for draft expert reports and attorney-expert communications could violate section 2074(b) of the Rules Enabling Act, which provides that rules "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *See* Letter from John Leubsdorf et al., Professor, Rutgers University (Newark), to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Nov. 30, 2008) (on file with the Administrative Office of the U.S. Courts) (available at http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-070 hyperlink) [hereinafter Professor Letter]. The Professor Letter asserts:

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[1] The exceptions include attorney-expert communications regarding compensation, identifying facts or data considered by the expert in forming the opinions, and identifying assumptions relied on by the expert in forming the opinions.

> The amendment is plainly meant, not just to forbid exploration of most lawyer-expert discussions at the discovery stage, but to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its desired goals. There would be little point in barring pretrial discovery of draft reports and the like if parties were free to ask about them at trial. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds for the amendment are exactly 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.

Id. at 3. In an effort to determine the meaning of the term "privilege" in the context of section 2074(b), and to determine whether section 2074(b) may apply to the proposed amendments in the manner suggested in the Professor Letter, we discussed looking into the following categories of research: (1) the legislative history of section 2074(b); (2) case law discussing whether work product is a "privilege"; and (3) case law applying or interpreting section 2074(b). Overall, the legislative history does not establish any intent to encompass work product or similar exclusionary rules within section 2074(b); the case law reveals that while work product is sometimes referred to as a "privilege" in some contexts, the doctrine is not a true "privilege"; and no cases have ever challenged a national federal civil rule under section 2074(b).

I. Legislative History

The provision requiring congressional approval of rules creating, abolishing, or modifying a privilege was introduced in the early 1970s when Congress considered the Rules of Evidence proposed by the Advisory Committee. Congress ultimately adopted the Evidence Rules in 1974, after modifying the proposed rules. One of the major congressional modifications involved rejecting the proposed rules on privileges and instead adopting only a congressionally-drafted Rule 501, which left privilege law to be "governed by the principles of the common law as they may be interpreted

by the courts of the United States in the light of reason and experience." In connection with the adoption of the Rules of Evidence, the provision regarding privilege rules that eventually was embodied in section 2074(b) was proposed by a member of the House of Representatives.

The legislative history of section 2074(b) and the accompanying discussion of the proposed rules of evidence show that Congress was concerned with the fact that privileges could be matters of substantive policy that would be better left in the hands of the legislature under separation-of-powers principles. The commentary accompanying section 2074(b) explains that Congress was concerned with the Court's ability to modify privilege law because of its substantive nature:

> This [section 2074(b)] is an outgrowth of the attempt the rules' drafters once made to overturn some key privileges, including the husband-wife privilege emanating from state law. Trifling with privileged communications was one of the main reasons (there were of course others) for Congress's rejection of the drafters' proposed Federal Rules of Evidence and for Congress's drafting and passage of its own version. That confrontation occurred in the early 1970s. The bad taste it left with Congress has endured. Subdivision (b) of § 2074 is a memento of the occasion.

David D. Siegel, Commentary on 1988 Revision to Section 2074, in 28 U.S.C.A. § 2074.[2]

When the Advisory Committee submitted the proposed Rules of Evidence to Congress for consideration, Congress enacted legislation to prevent the Rules of Evidence from becoming effective until Congress affirmatively approved of them, *see* Pub. L. No. 93-12, 87 Stat. 9 (March 30, 1973), focusing in large part on its perception that the Rules of Evidence involved substantive policy matters that should not become effective without substantial consideration by Congress. *See* 119 CONG. REC. 7647 (Mar. 14, 1973) (comments of Rep. Hutchinson) ("[T]here is an honest

[2] The provision now in section 2074(b) was added as part of section 2076 in 1975. *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified at 28 U.S.C. § 2076). The provision was moved to section 2074(b) in 1988. *See* Pub. L. No. 100-702, 102 Stat. 4642 (1988).

question as to whether the enabling acts which refer to the rules of practice and procedure were intended to cover the rules of evidence."); *id.* (comments of Rep. Dennis) ("[T]here is a very serious question whether those [privileges in proposed Article V] may, in fact, be matters of substantive law, rather than procedure, and, if so, whether they should not be governed by the laws of the States where the court sits under the normal doctrine of Erie versus Tompkins."); *id.* at 7648 (comments of Rep. Holtzman) ("The proposed rules of evidence do not deal with abstruse legal technicalities. They seek to resolve social issues over which there is now vast national debate: executive secrecy, the newsmen's privilege, and individual privacy."); *id.* (comments of Rep. Holtzman) ("[I]t may be that article III of the Constitution prohibits the Supreme Court from promulgating certain substantive rules of evidence, except in the context of a particular case or controversy."); *id.* (comments of Rep. Holtzman) ("Moreover, to the extent that these rules deal with substantive rights as opposed to housekeeping court procedures[,] the drafters may have overstepped the bounds of congressional authority delegated in the Enabling Act."); *id.* (comments of Rep. Holtzman) ("It is Congress—not the Supreme Court or the Justice Department—which has the prime responsibility for establishing national policy with regard to executive secrecy, newspaperman's privilege and personal privacy."); 119 CONG. REC. 7648 (memo by Rep. Holtzman) ("The Rules abridge many important existing substantive rights of federal court litigants, thus violating principles of federalism."); *id.* (memo by Rep. Holtzman) ("The Rules' treatment of privileges was perhaps singled out for criticism by so many witnesses because laws of privilege assure *all* citizens, not just those in court, of the confidentiality of important relationships; abolition of those laws will affect the relationships of *all* citizens, and the ability of those doctors, newsmen, accountants, etc. to serve the public well."); *id.* at 7650 (comments of Rep. Moorhead) ("It would appear that not only are many of the proposals of

a dubious quality on their face, but more important, are in fact substantive law and not merely procedural rules.").

The House debates regarding delaying enactment of the Rules of Evidence reveal that Congress was specifically concerned with "traditional" privileges, which were considered matters of substance. *See* 119 CONG. REC. 7644 (Mar. 14, 1973) (comments of Representative Hungate) ("To zero in on an area of ready controversy, I recommend Article V to the Members which deals with all of the privileges: husband and wife; doctor and patient; where they have newsman privilege, there would be no such privilege; secrets of State; and official information. I have not covered it all, and that is a shorthand version of that section."); *id.* at 7647 (comments of Rep. Dennis) ("There is not only the husband and wife privilege, but the physician and patient privilege, the privilege with respect to Government secrets, and the privilege, if any, with respect to police informers, and so on."); *id.* (comments of Rep. Dennis) ("Under these rules as provided there is no newsman's privilege, and the rules also state that the privileges as listed, which do not include the newsman's privilege[,] are the only privileges."); *id.* at 7648 (memo by Rep. Holtzman) (noting that the proposed Rules of Evidence "would eliminate the traditional doctor-patient privilege, narrow substantially the long-standing husband-wife privilege, and make inapplicable state statutes or common law protecting newsmen's sources and the confidentiality of the accountants' and social workers' relationships with their clients"); *id.* at 7649 (memo by Rep. Holtzman) ("To the inadequate procedures may be laid in part the apparent bias of Article V in favor of governmental secrecy and against individual privacy, much of the poor drafting and Notes, and the effect of the privileges sections to protect lawyers and corporate clients—those most involved in the drafting—but not doctors, accountants, social workers and journalists."). Thus, the Court's ability

to regulate matters of privilege through rulemaking emerged as a congressional concern when the Evidence Rules were proposed.

The same concerns that motivated Congress to delay enactment of the Rules of Evidence until thorough congressional review was completed, likely led to the addition to the Enabling Act that would preclude the Court from modifying privilege under the traditional Enabling Act regime that allowed rules to become effective unless Congress acted to prevent them under the timeline set forth in the statute. For example, during later debates on the bill that would have enacted the proposed Evidence Rules, Representative Holtzman pointed out: "Many of the rules of evidence, however, involve major policy questions, especially rules of privilege—such as husband and wife, lawyer and client, or newspapermen's privilege. By creating privileges, we express a desire to promote a social objective: for example, promoting free press, encouraging clients to be candid with their lawyers, and so forth." 120 CONG. REC. 1416 (Jan. 30, 1974) (comments of Rep. Holtzman); *see also id.* at 1409 (comments of Rep. Holtzman) ("The committee felt that those [privileges, including husband-wife, physician-patient, governmental secrets, and newsmen] were rather matters of substantive law than they were simply rules of evidence; that they did not really belong in a rules of evidence bill; and further, that we [the Committee members] were so divided on that subject ourselves, let alone what the House would be, that we would never get a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation."). Representative Holtzman then stated that she "intend[ed] to propose an amendment that will prevent any proposed rule, which seeks to change the law of privileges, from going into effect unless Congress acts affirmatively to approve it." *Id.* She further explained: "In matters as important as privileges—husband-wife, lawyer-client, newspaperman—Congress should always act explicitly and

affirmatively. Legislation by inaction is not a practice which this body can adhere to and command the respect of the American people. Finally, I do not think the present state of the enabling act is either constitutional or consonant with our concept of congressional prerogatives." *Id.* Later in the debates, Representative Holtzman argued:

> Evidentiary privileges are not legal technicalities. Rather, they involve decisions over some of the most critical issues facing us. For example, should there b[e] a privilege for Presidential or Executive communications and, if so, how broad should it be? Should there be a newspaperman's privilege and, if so, what kind? Should there be a doctor-patient, accountant-client privilege? Should we narrow or expand the confidentiality of husband-wife communications?

Id. at 1420.

Representative Holtzman proposed an amendment to the legislation adopting Evidence Rules that would limit the Court's ability to adopt rules of privilege without affirmative congressional action, arguing that "[u]nless [the] amendment is adopted, we will be giving the Supreme Court the basic power to legislate such decisions." 120 CONG. REC. 1420. Representative Holtzman believed such a limitation was necessary in the case of privilege rules for several reasons:

> First, evidentiary privileges have evolved in the past on a case-by-case basis. In H.R. 5463, we depart from that tradition and permit the Supreme Court to legislate by promulgating rules, instead of formulating such decisions in the judicial crucible of cases in controversy. This procedure may also be an unconstitutional delegation of powers.
>
> Second, if a law is to be written in the area of privileges, then Congress, not the Supreme Court, is the institution best capable of weighing the social and political implications and making the legislative decision.
>
> Finally—and perhaps most important—it is inconsistent with our notion of congressional prerogatives to permit laws on evidentiary privileges to go into effect as a result of congressional inaction rather than by affirmative steps. We cannot hope to maintain public

> confidence in the Congress if we continually abdicate our powers to other branches of Government.

Id. at 1420–21. In arguing in favor of her proposed amendment, Representative Holtzman later stated:

> Evidentiary privileges cover the areas of attorney-client, husband-wife, newspapermen, accountant-client, doctor-patient, and so forth. Evidentiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. Nonetheless, under the enabling act of this bill, the Supreme Court is given the power to legislate with respect to evidentiary privileges and the only role that Congress can play is that of exercising a veto.
>
> I think that the importance of privileges requires Congress to act affirmatively and not to delegate power to the Supreme Court to legislate in this area. To give you one example, I think it would be incredible if that after months and months of controversy and argument, we in Congress enacted a newspaperman's privilege and then the Supreme Court passed a rule modifying that law—which it could do under this enabling act; or modifying the husband-wife privileges as they stand now.

120 CONG. REC. 2391 (Feb. 6, 1974) (comments of Rep. Holtzman). Representative Holtzman argued that "there will be an article III constitutional problem with respect to allowing the Supreme Court to legislate in the area of privilege." *Id.* at 2392. She reiterated her view that the usual rulemaking process should not apply to privileges in the House Report:

> The dangers in this procedure [where a proposed rule becomes effective unless Congress rejects it] are particularly apparent with respect to evidentiary privileges: husband-wife, lawyer-client, doctor-patient privilege. Decisions regarding privileges necessarily entail policy considerations because, unlike most evidentiary rules, *privileges protect interpersonal relationships outside of the courtroom.* Clearly, by creating a newspapermen's privilege or defining the limits of confidential communications, we are expressing a desire to promote a social objective, e.g., promoting a free press, encouraging clients to be candid with their lawyers, etc.

> Rules creating, abolishing, or limiting privileges are legislative. Nonetheless, under the committee bill we would be allowing the Supreme Court to legislate in the area of privilege subject only to a congressional veto. This procedure is unwise since rules concerning privilege, if enacted, should be done through an affirmative vote by Congress.
>
> The process is, I submit, unconstitutional as well. The Supreme Court is not given the power under Article III of the Constitution to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy. Yet, H.R. 5453 allows the Court to promulgate a rule in a substantive policy area without the benefit of an adversary proceeding. We cannot (and should not) delegate such rule-making power to the Supreme Court.

H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7097–98 (separate views of Hon. Elizabeth Holtzman) (emphasis added).

Although the House eventually passed the amendment requiring affirmative congressional action for privilege law to be modified through the Court's rulemaking power, the Senate did not believe that such a restriction was necessary:

> The committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court. We determined, however, that while requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, it was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, the committee believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.
>
> For the same reasons, the committee has deleted an amendment made on the floor of the House providing that no amendment creating,

> abolishing or modifying a privilege could take effect until approved by act of Congress. The basis for the House action was the belief that rules of privilege constitute matters of substance that require affirmative congressional approval. While matters of privilege are, in a sense substantive, and also involve particularly sensitive issues, the committee does not believe that privileges necessarily require different treatment from other rules, provided there are adequate safeguards so that the Congress retains sufficient review power to review effectively proposed changes in this area, as well as in others.

S. REP. NO. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7070. Ultimately the Senate receded from its opposition to the change to the Enabling Act that would require affirmative congressional action to pass rules on privilege. *See* H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7107 ("The Conference adopts . . . the House provision requiring that an amendment creating, abolishing or modifying a rule of privilege cannot become effective until approved by Act of Congress."); *id.* at 7111 (statement of House committee chairman) ("Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values – such as preserving confidential relationships – outweigh the detrimental effect that excluding the information has on the judicial truthfinding process. In short, *rules of privilege reflect a substantive policy choice between competing values*, and this policy choice is legislative in nature. The legislative character of the policy choice is particularly clear with governmental privilege, there is a need for affirmative congressional action in formulating them.") (emphasis added).

The overall theme in the legislative history regarding the enactment of section 2074(b) seems focused on the fact that privilege was considered a matter of substantive policy that ought to be addressed by the legislature on a global scale, or by courts in the context of particular cases. Congress seemed particularly concerned with the prospect that the "traditional" evidentiary

privileges would be modified or abolished by the Court or that privileges that could promote government secrecy would be created by the Court. The legislative history repeatedly refers to the newspapermen's privilege, the doctor-patient privilege, the state secrets privilege, and other traditional privileges. I did not see any reference in the legislative history to work-product protection or any other similar exclusionary rules. It may be reasonable to assume that the work-product doctrine, which had been around for some time when the debates on the Rules of Evidence were taking place and which had recently become a part of the Rules of Civil Procedure, would have been mentioned in the debates regarding rules of privilege if it was intended to come within the scope of the limits on rulemaking with respect to "privileges." One possible inference from the lack of any discussion regarding work product is that it was not the type of thing Congress had in mind when it intended to prohibit the Court from making privilege rules without express congressional approval. Unlike the privileges that Congress was concerned about, the work-product doctrine does not address particular policy considerations, such as the desire to protect particular confidential relationships. In addition, because work-product affects behavior only in connection with litigation, it does not raise the concern mentioned in the legislative history that privileges affect the relationships and rights of all citizens, not just those involved in litigation. Instead, the work-product doctrine is aimed at providing a tool for courts and litigants to effectively prepare for trial without undue intrusion by adversaries. In contrast, the "privileges" that Congress seemed concerned about involved the policy decision to promote particular behaviors of members of society, even outside the context of litigation, such as the relationships between doctors and patients or between newspapermen and their sources. Work product arguably falls more within the scope of "procedural" rules aimed at making litigation fair, convenient, and efficient, rather than the

substantive side of "privilege" rules aimed at protecting particular confidential relationships.

II. Case Law Discussing Whether Work Product Is a "Privilege"

I looked at cases involving claims of work product in a variety of contexts to determine whether work product has been considered a "privilege," and whether that determination depends on the context. It does not appear that work product was intended to be a "privilege," at least in the context of the traditional meaning of that word. Some courts have referred to a "work product privilege," although it is not clear that the use of the word "privilege" has any substantive meaning in this sense or that the use of the term "work product privilege" means that work product is a "privilege," as that term is used in section 2074(b). *See, e.g.*, *Dep't of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001) ("[T]hose [civil discovery] privileges [incorporated into Exemption 5 of the Freedom of Information Act] include the privilege for attorney work-product and what is sometimes called the 'deliberative process' privilege."); *Fed. Trade Comm'n v. Grolier*, 462 U.S. 19, 23–25 (1983) (analyzing Exemption 5 of the Freedom of Information Act as being consistent with evidentiary privileges, and referring to "work product privilege," but also noting that it is a qualified privilege and also referring to work product as an "immunity"); *Alleyne v. N.Y. State Ed. Dep't*, 248 F.R.D. 383, 387 (N.D.N.Y. Feb. 6, 2008) (noting that "[t]he court has previously traced the history of the *work-product privilege* from its classic discussion in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), through its modification by the 1970 and 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure," and explaining that "[t]he *privilege precludes disclosure* of an attorney's core work-product, including his mental impressions, opinions, and legal theories concerning litigation," but that "[i]nsofar as non-core work-product is concerned, *the privilege is qualified* and does not protect everything a lawyer does") (emphasis added) (citations

omitted); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2007 WL 2900537, at *1 (S.D. Cal. Sept. 28, 2007) ("Because federal common law mandates that *work product is a privilege* that belongs to the attorney, the Court finds that if the attorneys choose to waive the attorney work product privilege in their declarations, doing so does not violate the attorneys' ethical duties and professional responsibilities . . . .") (emphasis added); *Green v. Sauder Mouldings, Inc.*, 223 F.R.D 304, 307 (E.D. Va. 2004) ("The work-product doctrine created by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), and codified in Rule 26(b)(3), *is a qualified privilege*.") (emphasis added) (citing *United States v. Nobles*, 422 U.S. 225, 237 (1975)); *id.* ("Waiver of the [work-product] privilege occurs when materials that are otherwise protected work-product are disclosed to someone with interests adverse to the party asserting the privilege.") (citation omitted).

However, many courts have also expressly stated that work product is not a privilege. *See, e.g.*, *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 218 n.1 (W.D. Ky. 2006) ("The protection afforded work-product is not a privilege as the term is used in the Rules of Civil Procedure or the Law of Evidence.") (citing *Hickman*, 329 U.S. at 509–510 & n.9); *Fru-Con Constr. Corp. v. Sacramento Mun. Utility Dist.*, No. S-05-0583 LKK GGH, 2006 WL 2050999, at *2 (E.D. Cal. July 20, 2006) ("Work product is not a 'privilege,' but rather is a court created immunity from disclosure. As such, the applicability of the work product doctrine is governed by federal law in diversity cases.");[3] *Ronald C. Fish, A Law Corp. v. Watkins*, No. CIV030067PHXSMM, 2006 WL 422302, at *5 (D. Ariz. Feb. 17, 2006) ("The doctrine of work product is not a privilege; rather it is 'a

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[3] Despite stating that work product is not a "privilege," the court later references the "work product privilege." *See Fru-Con Constr.*, 2006 WL 2050999, at * 6 n.4 ("If documents are created for routine business purposes, by non-attorneys, they do not fall within the purview of the work product privilege.").

qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.' The primary difference between the attorney-client privilege and the work product doctrine is that the work product immunity may be overcome by a showing of need for the materials in question, whereas the attorney-client privilege may not.") (internal citation omitted); *In re Combustion, Inc.*, 161 F.R.D. 54, 55 (W.D. La. 1995) (affirming magistrate judge's holding that applied federal law in a federal question case with pendent state law claims because "the work product doctrine is not a privilege, but is a creation of federal jurisprudence which is independent of privilege law"); *Republican Party of N.C. v. Martin*, 136 F.R.D. 421, 424 n.3 (E.D.N.C. 1991) ("The work product doctrine (or 'rule') is also sometimes referred to as the work product privilege. This terminology is not, technically speaking, correct, in that the defense of work product is not a privilege from discovery, but is only a *qualified immunity* from the same . . . .") (citations omitted);[4] *Foley v. Juron Assocs.*, No. 82-0519, 1986 WL 5557, at *4 (E.D. Pa. May 13, 1986) ("As was stated in *Augenti v. Cappellini*, this 'work product rule' is often spoken of as creating a 'privilege' when, in reality, it is more accurate to say that it gives a '[q]ualified immunity from discovery.' For indeed it must give way when the exigencies of the case are such that the statements involved were made at such a time and under such circumstances that they become 'unique catalysts in the search for the truth.'") (quoting *Augenti v. Cappellini*, 84 F.R.D. 73, 80 (M.D. Pa. 1979)); *cf. Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 579 (D.N.J. 1994) (noting that "[t]he Supreme Court in [*Nobles*] permitted the exclusion of trial preparation materials

[4] The court explained the differences between work product and attorney-client privilege: "The work product doctrine is separate from, and broader than, the attorney-client privilege. Unlike the privilege, the doctrine is not designed to protect client confidences; rather, it seeks to shelter 'the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'" *Republican Party of N.C.*, 136 F.R.D. at 429 (citing *Nobles*, 422 U.S. at 238).

when offered in a criminal trial," and that "[o]ne commentator has since concluded that the work product rule, which was originally considered to be an immunity, has been turned into a 'privilege' subject to Rule 501," but also noting that there are authorities to the contrary) (citing 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5423 (1980); *Airheart v. Chicago & N.W. Transp. Co.*, 128 F.R.D. 669, 670–71 (D.S.D. 1989); *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988));[5] *TJN, Inc. v. Superior Container Corp.* (*In re TJN, Inc.*), No. 94-73386-W, 96-8108, 1997 WL 33343976, at *5 (Bankr. D.S.C. Jan. 22, 1997) (stating that "[t]he application of the *work-product privilege* was created and is governed by Rule 26(b)(3) of the Federal Rules of Civil Procedure," but noting that "'the purpose of the work-product rule 'is not to protect the evidence from disclosure to the outside world, but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials''") (emphasis added) (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2024). Some commentators have also argued in favor of distinguishing between privileges and work product. As one commentator has put it:

> [T]he work-product protection is just that: a protection. It has not yet been fully elevated to the status of a privilege. The protection's primary function is not to protect the interests of any particular individual, plaintiff, defendant, *or* counsel. Rather, it is designed to benefit the adversary system itself and to produce an atmosphere in which counsel for both sides can fully prepare and present their clients' best case without the stifling self-editing that would be necessary if an attorney's work product were subject to unchecked discovery. Challenges to an invocation of work-product protection are best viewed with an understanding that the work-product doctrine

[5] The court did not decide whether "work product" was a privilege that would require the application of state law because it found "no substantial difference between federal and state law on this question." *Cordy*, 156 F.R.D. at 579.

> protects the adversary system. When that system ceases to reap those benefits, the protection is vitiated despite what may best serve individual interests.

Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 943 (1983); *see also* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 105 (1996) ("Sometimes attorney work-product is casually said to be a Rule 26(b)(1) 'privilege,' but it is more precise to consider it unprivileged matter the discovery of which is governed by Rule 26(b)(3).") (internal citation omitted).

One context that may shed some light on whether work product has been considered a "privilege" is Federal Rule of Civil Procedure 30(c)(2). Under that rule, "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." FED. R. CIV. P. 30(c)(2). Work product has uniformly been recognized as a valid basis for instructing a deponent not to answer under Rule 30, meaning that work product must be a "privilege" in that context. *See Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266–67 (10th Cir. 1995) (finding no abuse of discretion in the district court's sanctions in response to counsel's blanket instruction not to answer a particular line of questioning on the basis of work product because the witness was instructed "not to answer questions which clearly did not call for work product material");[6] *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, No. C-06-01665 PJH (JCS), 2007 WL 1514876, at *2 (N.D. Cal. May 21, 2007) ("During depositions, counsel shall not instruct witnesses not to answer, except on the grounds of

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[6] The court did not disapprove of instructing a witness not to answer a deposition question on the basis of work product, just of the blanket instruction that clearly prevented the witness from answering questions that did not call for work product.

attorney/client privilege, work product privilege, the Fifth Amendment of the United States Constitution, beyond the scope of a 30(b)(6) topic for which the witness is designated, or any other applicable privilege that prevents the witness from testifying.");[7] *Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 670 n.3 (D. Kan. 1998) ("A party can instruct a witness at deposition not to answer a question when necessary to protect the party's work-product privilege.") (citing FED. R. CIV. P. 30(d)(1)),[8] *modified on reconsideration on other grounds*, No. Civ. A. 98-2031-KHV, No. Civ. A. 98-2175-KHV, 1998 WL 919126 (D. Kan. Nov. 6, 1998), and *affirmed sub nom. Butler v. Biocare Med. Techs., Inc.*, 348 F.3d 1163 (10th Cir. 2003); *cf. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 421 (D. Md. 2005) (district court's discovery guidelines provided that "'[i]t is presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless under the circumstances permitted by FED. R. CIV. P. 30(d)(1),'" and that "'the person asserting the privilege shall identify during the deposition the nature of the privilege (including work product) that is being claimed' as required by FED. R. CIV. P. 26(b)(5)");[9] *Klein v. King*, 132 F.R.D. 525, 531 (N.D. Cal. 1990) (ordering that "[d]uring depositions, counsel may instruct a witness not to answer only on grounds of privilege or work product . . . ," implicitly recognizing that work product is separate from "privilege" but still within the scope of Rule 30's list of permissible reasons to instruct a witness not to answer). The Advisory

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[7] The court was setting forth guidelines for conducting depositions in the case, and was not considering a challenge to an instruction not to answer on the basis of work product.

[8] The court did not consider a challenge to an instruction not to answer on the basis of work product. Instead, the remark about the propriety of such an instruction was a side note to the court's consideration of whether an attorney had violated a local rule by hiring a witness and representing her at her deposition.

[9] The court did not consider a challenge to the propriety of instructing a witness not to answer on the basis of work product in general, but rather whether an instruction not to answer deposition questions on the basis of attorney-client privilege and work product was proper under the circumstances.

Committee's Note from the 1993 amendments to Rule 30 confirm that work product was intended to be included among the permissible reasons for instructing a deponent not to answer. *See* FED. R. CIV. P. 30 Advisory Committee's Note (1993 Amendments) ("The second sentence of new paragraph [(d)](1) prohibits such directions [to a deponent not to answer a question] except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product) . . . ."). I did not come across any cases in which a party challenged opposing counsel's ability to instruct a witness not to answer on the basis of work product as a general proposition, as opposed to arguing that the instruction was improper under the circumstances presented. It appears to be generally accepted that work product is a valid basis for instructing a witness not to answer a deposition question under Rule 30, implying that the term "privilege" in that Rule encompasses work product.

Another context for evaluating the meaning of the term "privilege" is Federal Rule of Evidence 501, which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. The term "privilege" in this context has almost universally been interpreted to exclude work product. *See, e.g., Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1059 (8th Cir. 2000) (Heaney, J., dissenting) ("The parties agree that work product doctrine is not a substantive privilege

under Federal Rule of Evidence 501, and therefore is governed by federal law."); *Randleman v. Fidelity Nat'l Title Ins. Co.*, No. 3:06CV7049, 2008 WL 4683297, at *2 (N.D. Ohio Oct. 21, 2008) ("Although questions of evidentiary privilege arising in the context of a state law claim are governed by state law, FED. R. EVID. 501, the work product doctrine, FED. R. CIV. P. 26(b)(3), is not an evidentiary privilege. Consequently, the scope of the work product doctrine is 'unquestionably a matter of federal procedural law even in a diversity action.'")[10] (quoting *Scotts Co. v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 WL 1500899, at *3 (S.D. Ohio May 18, 2007)); *Dow Chem. Co. v. Reinhard*, No. 07-12012-BC, 2008 WL 2245007, at *4 (E.D. Mich. May 30, 2008) ("Attorney-client privilege, however, differs from work product privilege. This latter privilege is codified at Federal Rule of Civil Procedure 26(b)(3). As such, Federal Rule of Evidence 501 requires that the federal law of privilege, rather than state law privilege, governs for work product privilege.") (internal citations omitted); *Peacock v. Merrill*, No. CA 05-0377-BH-C, 2008 WL 762103, at *2 (S.D. Ala. Mar. 19, 2008) (finding that federal law was applicable to the work-product issues in the case, and noting that "'[b]ecause the work product doctrine is not considered a substantive privilege, FED. R. EVID. 501 does not require that state law be applied'")[11] (quoting *Shipes v. BIC Corp.*, 154

[10] The court explained that "[t]he work product doctrine protects the adversarial process and is designed to prevent a potential adversary from gaining an unfair advantage. It reflects a strong public policy 'against invading the privacy of an attorney's course of preparation.'" *Randleman*, 2008 WL 4683297, at *2.

[11] The court quoted another case explaining that work product is not a privilege under Rule 501:

> "While Rule 501, FED. R. EVID.[,] provides that Florida law of *privilege* governs in a federal diversity suit, the work product doctrine is a limitation on discovery in federal cases and federal law provides the primary decisional framework . . . . 'Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in FED. R. CIV. P. 26(b)(3) . . . .'"

Peacock, 2008 WL 762103, at *2 (quoting *Milinazzo v. State Farm Ins. Co.*, No. 07-21892-CIV, 2007 WL 4350865, at *6, *8 (S.D. Fla. Dec. 11, 2007)).

F.R.D. 301, 305 n.2 (M.D. Ga. 1994)); *Continental Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 769 (D. Md. 2008) ("Because the work product doctrine is not a privilege, but rather a qualified immunity from discovery, FED. R. EVID. 501 is inapplicable, and Maryland law does not govern this waiver issue. Rather, federal law does, even though jurisdiction in this case is bottomed on diversity of citizenship.") (footnote omitted) (collecting cases); *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 700 (S.D. Fla. 2007) (distinguishing limited case law that had applied state law for work-product issues as involving unique facts, and noting that it had "found no case that generally holds state law governs the work product doctrine in federal court . . ."); [12] *Hunter's Ridge Golf Co. v. Georgia-Pacific Corp.*, 233 F.R.D. 678, 681 n.1 (M.D. Fla. 2006) ("Georgia-Pacific is correct that FED. R. EVID. 501 provides that Florida law of privilege governs in a federal diversity [lawsuit], however, as the work product doctrine is a limitation on discovery, federal law governs.") (citation omitted); *Melhelm v. Meijer, Inc.*, 206 F.R.D. 609, 614–15 (S.D. Ohio Feb. 26, 2002) (holding Rule 501 inapplicable because "[t]he work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative

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[12] The court explained why federal law governs the work product doctrine:

> "In diversity cases, the federal courts, with uniformity, albeit not with self-evident logical consistency, have concluded that issues of attorney-client privilege are substantive and thus controlled by the forum state's law, while *issues of work-product doctrine are procedural* and thus controlled by federal law. The reason for this bizarre distinction is that Rule 501 of the Federal Rules of Evidence requires that the privilege law of the forum state be applied, but is silent as to what law applies to issues of work-product doctrine, which are governed by Federal Rule of Evidence, codifying a Supreme Court case which created the concept of work-product protection."

Milinazzo, 247 F.R.D. at 700 (emphasis added) (quoting EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 1131–32 (5th ed. 2006)); *see also* EPSTEIN, *supra*, at 804 ("Because work-product protections are predicated on Federal Rule of Civil Procedure 26(b)(3), federal law applies even in diversity cases, even though the law of the state in which the forum sits is applied to attorney-client privilege issues.").

in anticipation of litigation);[13] *Clark v. Buffalo Wire Works Co.*, 190 F.R.D. 93, 95 n.3 (W.D.N.Y. 1999) (disapproving of a party's reliance on state law regarding work product because the case was based on a federal question and because "'the work product doctrine is a device providing qualified immunity from discovery rather than a traditional substantive privilege, [and] [therefore,] Rule 501 of the Federal Rules of Evidence does not require that state law be applied [even in the context of a diversity action]'") (quoting *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444–45 (S.D.N.Y. 1990)); *In re Combustion, Inc.*, 161 F.R.D. 51, 52 (W.D. La. 1995) ("The rationale underlying the conclusion reached by these courts [that federal law governs the application of the work-product doctrine] is that the work product doctrine is not a substantive privilege within the meaning of Rule 501; instead it is a device providing qualified immunity from discovery"), *aff'd*, 161 F.R.D. 54 (W.D. La. Apr. 18, 1995); *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, No. 90 C 5160, 1991 WL 192200, at *1 (N.D. Ill. Sept. 23, 1991) ("But work product is *not* a 'privilege' within the scope of the portion of that evidentiary rule that calls for reference to state law—it is rather a federal doctrine that stems from *Hickman v. Taylor*, 329 U.S. 495 (1947)[,] and that has now

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[13] The court explained the difference between the attorney-client privilege and the work-product doctrine:

> The work product doctrine covers a much broader swath of material than the attorney-client privilege; it is not directed toward protecting attorney-client communications, for the attorney-client privilege serves that purpose on its own. The work product doctrine is instead concerned with giving an attorney a sense of confidence that he or she will not be required to reveal his or her theory of the case prior to trial. Indeed, Rule 26(b)(3) of the Federal Rules of Civil Procedure provides that generally, documents and tangible items prepared by one party in anticipation of trial may only be obtained by another party upon a showing by the other party that it has a "substantial need" for the materials to prepare its own case and that it would be "unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Melhelm, 206 F.R.D. at 614–15.

been codified in FED. R. CIV. P. 26(b)(3).") (citations omitted);[14] *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988) ("Work product is not a privilege within the meaning of Rule 501 which protects the sanctity of confidential communications. Rather, it is a tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena.") (citations omitted);[15] *Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc.*, 97 F.R.D. 37, 41 (E.D.N.Y. 1983) (holding that a work-product claim was governed solely by FED. R. CIV. P. 26(b)(3), rather than by New York state law providing absolute immunity for attorney work product, relying on a previous case that had held that Rule 501 did not require application—in a federal case grounded in diversity jurisdiction—of a different section of the same New York law providing qualified immunity for material prepared for litigation) (citing *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54, 56 (S.D.N.Y. 1970));[16] *Niagara*

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[14] The court noted, however, that "[i]t is of course true that the *application* of the work-product doctrine may cause documents to be 'privileged' from disclosure (the locution employed for example, in *United States v. Nobles*, 422 U.S. 225, 239 (1975)), but that is a wholly different matter." *A.O. Smith*, 1991 WL 192200, at *1. The court's reference to *Nobles* may indicate that whether an exemption from disclosure qualifies as a "privilege" is determined by whether the exclusion extends beyond discovery and into trial.

[15] The court concluded that federal courts apply federal law, even in diversity, when considering questions involving work product because "[d]ecisions concerning work product are not governed by Federal [Rule] of Evidence 501 which mandates the application of state law with respect to determination of testimonial or evidentiary privileges in diversity cases." *Pete Rinaldi's Fast Foods*, 123 F.R.D. at 201.

[16] The New York statute at issue provided separately for complete immunity from disclosure for privileged matter (CPLR § 3101(b)) and attorney work product (CPLR § 3101(c)). The New York statute also provided a qualified immunity for material prepared for litigation (CPLR § 3101(d)). The *Railroad Salvage of Connecticut* court noted that "the CPLR itself distinguishes between a true evidentiary privilege (subdivision (b)) and attorney work product (subdivision (c)). If the latter were a privilege, there would obviously be no reason for subdivision (c)." *Railroad Salvage of Conn.*, 97 F.R.D. at 40. The court further explained: "Properly analyzed, it seems clear CPLR 3101(b) refers to the traditional evidentiary privileges (attorney-client, doctor-patient, etc.), while subdivisions (c) and (d) deal with matter as to which there is no evidentiary privilege, but which is nevertheless immune from pretrial discovery." *Id.* The court then determined that "Rule 501 does not apply to attorney work product under CPLR 3101(c), any more than it does to material prepared for litigation under CPLR 3101(d)." *Id.* Thus, the court determined that under Rule 501, work product was not a "privilege."

Mohawk Power Corp. v. Megan-Racine Assocs., Inc., (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 573 n.9 (Bankr. N.D.N.Y. 1995) ("Although there is conflicting authority, the Court does not consider the 'work-product doctrine' a privilege under the federal standards and as such relies on FED. R. CIV. P. 26(b)(3).");[17] *but see Walker Group, Inc. v. First Layer Comms., Inc.*, No. Civ.A04CV02112PSFMJW, Civ. A.03CV01973PSFMJW, 2006 WL 278552, at *7 (D. Colo. Feb. 3, 2006) ("Applying state law to determine whether the attorney-client or attorney work product privilege has been waived (*see* F.R.E. 501), neither North Carolina nor Colorado law appears to recognize either privilege in these circumstances."). In the context of Rule 501, "privilege" has repeatedly been held to exclude work product. Rule 501 may be particularly relevant in shedding light on what was meant by "privilege" in the context of section 2074(b) because Congress passed Rule 501 at the same time that it amended the Enabling Act to preclude the Court from creating, abolishing, or modifying a privilege. To the extent that courts have interpreted Congress's reference in Rule 501 to "privilege" as excluding work product, it seems likely that courts would interpret the term "privilege" in section 2074(b) as excluding work product as well.

In analyzing whether work product is a "privilege" within the scope of Rule 501, some commentators have provided a framework that could be useful for analyzing whether work product is a "privilege" within the scope of section 2074(b). In the FEDERAL PRACTICE AND PROCEDURE treatise, Professors Wright and Graham point out that one "way to decipher the meaning of 'privilege' in Rule 501 is to look at the rules in the Advisory Committee's version of Article V, since these are the rules that Congress rejected in favor of Rule 501." 23 CHARLES A. WRIGHT &

[17] Despite stating that work product is not a "privilege" under Rule 501, the court later called the doctrine a "privilege," stating that "the [work product] privilege only protects information 'against opposing parties, rather than against all others outside a particular confidential relationship.'" *Megan-Racine Assocs.*, 189 B.R. at 574 (citation omitted).

KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5423 (1980). Under this theory, determining what constitutes a "privilege" would be resolved by looking to the specific rules in proposed Article V as well as to rejected Rule 501, which provided a negative definition of "privilege." *Id.* Under Rejected Rule 501, a rule was "one of privilege if it involved a claim or a right to: (1) Refuse to be a witness; or (2) Refuse to disclose any matter; or (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing." *Id.* Professors Wright & Graham propose that if this method does not resolve the meaning of "privilege," courts are likely to use the method most often used by scholars. *Id.* They point out that Professor McCormick defined a rule of "privilege" as follows: "First, the rule was devised to foster some social policy other than the policy of accurate ascertainment of truth. Second, rules of privilege may properly be asserted by a person who is not a party to the action." *Id.* With respect to work-product, Professors Wright and Graham state:

> [T]he so-called "work product rule" was originally considered to be an immunity from discovery in civil cases rather than a true privilege. In this aspect, the doctrine falls within Civil Rule 26(b)(3). However, recently the Supreme Court [in *Nobles*] has applied the doctrine to exclude trial preparation materials when offered in a criminal trial, a decision which has gone some way toward turning the immunity into a privilege. As such, the "work product" doctrine is within Rule 501.

Id. (footnotes omitted).

Another potential analogy for understanding the meaning of "privilege" in section 2074(b) may be how that same term has been interpreted in the context of Federal Rule of Evidence 1101(c), which provides: "The rule with respect to privileges applies at all stages of all actions, cases, and

proceedings."[18] FED. R. EVID. 1101(c).[19] In one case examining the applicability of work product under Rule 1101(c), the court found that a grand jury witness could resist questioning or a subpoena on the grounds of work product. *See In re Grand Jury Investigation*, 412 F. Supp. 943, 946–47 (E.D. Pa. 1976); *see also In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) ("[E]ven if the work-product rule is not strictly a 'privilege' [under FED. R. EVID. 1101(c)], as applied to interviews with non-party witnesses, the rule has been applied to grand jury proceedings."). The *Grand Jury Investigation* court explained:

> We agree with respondent that work product is a valid ground on which to refuse a grand jury's subpoena or questioning. In *United States v. Nobles*, 422 U.S. 225, 236–40, 95 S. Ct. 2160, 2169, 45 L. Ed. 2d 141, 152–53 (1975), the Supreme Court held that the work product doctrine, first authoritatively enunciated in the context of civil discovery in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1974), *aff'g* 153 F.2d 212 (3d Cir. 1945) (en banc), also gave rise to a qualified testimonial privilege assertable by a witness in a criminal trial. Under FED. R. EVID. 1101(c), (d)(2), evidentiary privileges also apply in grand jury proceedings. Accordingly, we hold that a grand jury witness may resist questioning or a subpoena on grounds that it calls for the production of work product.

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[18] At least one court has explained that "the 'rule with respect to privileges' referred to in Rule 1101(c) is FED. R. EVID. 501 . . . ." *In re Grand Jury Investigation*, 412. F. Supp. 943, 947 n.3A (E.D. Pa. 1976). However, when the Advisory Committee proposed Rule 1101(c), it may have been referring to all of the rules in proposed Article V of the Evidence Rules, which Congress ultimately chose not to adopt in favor of Rule 501. The preliminary draft of the Rule submitted by the Standing Committee referred to "rules" rather than "rule." *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 417 (1969) ("The rules with respect to privileges apply at all stages of all proceedings."); *see also* 31 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 8076 (2000) ("Congress amended "rules" to "rule" for the express purpose of conforming Rule 1101(c) to changes in Article V that reduced the number of privilege rules to one.").

[19] According to the Advisory Committee Note that accompanied the 1972 proposed rule, this rule was necessary because of the limited applicability of the rules other than privilege rules. *See* FED. R. EVID. 1101(c) Advisory Committee's Note (1972 Proposed Rules). Evidence Rule 1101(d) provides that rules other than privilege rules have limited applicability in certain circumstances, including preliminary questions of fact, grand jury proceedings, and miscellaneous proceedings. FED. R. EVID. 1101(d).

In re Grand Jury Investigation, 412 F. Supp. at 946–47 (footnotes omitted).[20] The court explained that work product was essential to proper functioning of the judicial system:

> Justice Murphy, speaking for the majority in *Hickman*, stated that work product was exempt from civil discovery, either absolutely or qualifiedly depending on its nature, 'not because the subject matter is privileged or irrelevant, as those concepts are used in (the Rules of Civil Procedure),' 329 U.S. at 509, 67 S. Ct. 392, 91 L. Ed. at 461, but because:

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[20] While work product has been held to be a "privilege" within the context of Rule 1101(c), other evidentiary rules excluding matters from evidence have not been held to be "privileges" within the context of that Rule. *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 11:4 (3d ed. 2008) (noting that if Federal Rule of Evidence 407, blocking evidence of subsequent remedial measures to prove negligence or culpable conduct, created a privilege, "it would apply during discovery as well as trial," but concluding that "it seems clear that FED. R. EVID. 407 does not create a privilege as the term is used in FED. R. EVID. 1101(c), and evidence of subsequent remedial measures is indeed discoverable") (footnote omitted). The FEDERAL EVIDENCE treatise notes that in addition to Rule 407, "[m]any other provisions similarly create exclusionary principles, but these are not necessarily privileges for purposes of FED. R. EVID. 1101." *Id.* (footnotes omitted). However, according to the treatise, "privileges for purposes of FED. R. EVID. 1101(c) should not mean only those doctrines described by FED. R. EVID. 501, and at least some others should be included." *Id.* The treatise argues that Evidence Rule 410 should be seen as creating a "privilege" that applies in a suppression hearing and motions in limine because "the possibility of using statements against the accused undercut the aim of encouraging plea bargaining, and the fact that FED. R. EVID. 410 is found in Article IV (governing relevance and its limits) should not prevent it from being viewed as a privilege under FED. R. EVID. 1101." *Id.*; *see also* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FED. EVID. § 11:7, at n.7 (3d ed. 2008) ("Once Congress blocked a change proposed by the Court in the Rules of Evidence (one affecting FED. R. EVID. 410 on withdrawn guilty pleas, nolo pleas, and plea bargaining statements), but the change ultimately took effect and arguably the Court was in that instance amending a privilege rule."); *id.* at § 11:8 (noting that "[t]echnically, the 1975 amendment to FED. R. EVID. 410 did not modify a privilege (it is not in Article V), but that provision operates and looks like a privilege," that "FED. R. EVID. 410 could be read as creating a privilege rule under Fed. R. Evid. 1101(c), which suggests that it should be viewed as a privilege provision under the 1975 statute," and that "[i]f Congress fails to take definitive action on such points, it is hard to imagine other courts disapproving the Court's action in amending FED. R. EVID. 410"). The treatise also argues that "[e]ven if FED. R. EVID. 410 is a privilege under the [Rules Enabling] statute, arguably Congress has approved it in a manner that would satisfy the enabling act," because "[t]he congressional action did not suggest a determination that FED. R. EVID. 410 was a privilege that could only take effect if Congress acted[, b]ut the block-or-delay statute allowed the amendments to take effect, and amounts to at least tacit congressional approval." *Id.* at § 11:8. However, the treatise also recognizes that just because something is considered a "privilege" under Rule 1101(c), that does not necessarily mean it is a privilege in other contexts. *See id.* at § 11:4 ("Other protective doctrines that are not always viewed as creating privileges should probably apply in at least some contexts set out in FED. R. EVID. 1101(d). For instance, the work product doctrine is sometimes viewed as creating a qualified privilege. Under this view, arguably application of the doctrine in contexts like grand jury proceedings is assured by FED. R. EVID. 1101.") (footnotes omitted). Another treatise indicates that the language of Rule 1101(c) and its legislative history support the theory that "quasi-privileges"—rules excluding evidence of settlement negotiations, subsequent remedial measures, liability insurance, etc.—are not privileges under Rule 1101(c), and notes that Rule 1101(c) "implicitly refers to Rule 501," but that it is not clear what constitutes a "privilege" under Rule 501. 31 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 8076 (2000). Another section of the treatise points out that "quasi-privileges" have been treated as rules of relevance, and "for purposes of Rule 501, rules of this sort are not privileges." 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5423 (1980).

> an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . contravenes the public policy underlying the orderly prosecution and defense of legal claims . . . . (T)he general policy against invading the privacy of an attorney's course of preparation is so well recognized and *so essential to an orderly working of our system of legal procedure* that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through subpoena or court order.

In re Grand Jury Investigation, 412 F. Supp. at 946 n.3 (emphasis added) (quoting *Hickman*, 319 U.S. at 510, 512). The *Grand Jury Investigation* court stated that "[i]n holding that the work product doctrine gives rise to a qualified evidentiary privilege, the *Nobles* majority did not overrule *Hickman*'s position that work product is not itself a privilege when asserted in civil discovery." *Id.* (citing FED. R. CIV. P. 26(b)(3)). The *Grand Jury Investigation* court's analysis of *Hickman* and *Nobles* implies that work product is an immunity (and not a privilege) when asserted in discovery, but that it transforms into an evidentiary privilege when used to preclude testimony at trial. Under this analysis, the proposed amendments to Rule 26 do not create or modify a privilege because the Rule's text only refers to protecting draft reports and attorney-expert communications from discovery. Although the committee note expresses an expectation that the protection will be respected at trial as well, the Rule does not itself command that result, and whether the cases will provide protection at trial will not be certain until the Rule is enacted and case law develops regarding protecting such drafts and communications at trial. If the case law does develop to protect such communications and drafts at trial, that development will not contravene the Enabling Act procedure, but will be developed by "common law as . . . interpreted by the courts of the United

States in the light of reason and experience," as Congress contemplated with its enactment of Rule 501. *See In re Grand Jury Investigation*, 412 F. Supp. at 947 n.3A ("We believe that *Nobles* is an 'interpret(ation)' of 'the principles of the common law' within the meaning of Rule 501, insofar as that opinion articulated a privilege analysis of work product in the criminal context."). Although the Professor Letter argues that the amendment will not accomplish its goals unless inquiry into drafts and communications is barred at trial as well, that does not mean that the amendments bar inquiry at trial. To the extent that barring inquiry at trial is the test of whether an exclusion from discovery is a "privilege," the proposed Rule leaves for common law development whether its protections will apply at trial. While it is probably true that the Rule will not completely eliminate the undesirable behavior if its protections are not extended to trial, that does not necessarily mean that the Rule itself extends the protections to trial. The Advisory Committee determined that providing an exclusion from discovery for drafts and attorney-expert communications would be a substantial step towards eliminating the artificial behaviors prevalent under the current regime.

One other context that may provide a potential analogy for the determination of whether work product is a "privilege" under section 2074(b) involves the Indian Mineral Development Act (IMDA). In *Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611 (2004), the court analyzed the meaning of the term "privilege" in the context of the IMDA. The IMDA, which "'governs the Secretary's approval of agreements for the development of certain Indian mineral resources through exploration and like activities,'" *id.* at 612 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 509 (2003)), requires the Department of the Interior to keep certain information regarding the terms and conditions of mineral agreements as "*privileged proprietary information* of the affected Indian or Indian tribe," *id.* (quoting 25 U.S.C. § 2103(c) (2000) (emphasis added by *Jicarilla* court)). The

defendant in *Jicarilla* argued that the phrase "privileged proprietary information" meant that such information was exempt from discovery. *Id.* The court rejected the defendant's assertion, finding that "the IMDA was not intended to create an evidentiary privilege that would remove the information protected thereby from the reach of discovery." *Id.* The court looked at the common usage of the term "privileged," and found that "something is 'privileged' if it '[e]njoy[s] a privilege,' and a 'privilege' is merely a 'special advantage, immunity, permission, right or benefit granted to or enjoyed by an individual class or caste.'" *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1396 (4th ed. 2000)). The court concluded that "while the use of the term 'privilege' suggests that Congress intended the IMDA information to benefit from some special rule or protection, it neither specifically defines that rule or protection nor, especially, indicates that the protection extends to preventing disclosure by way of discovery." *Jicarilla*, 60 Fed. Cl. at 612 (citation omitted). The court also found that "the language of section 2103(c) plainly lacks the clear direction that the Supreme Court has required, and the Congress, in other contexts, has supplied, to create an exception to discovery." *Id.* at 613. The court found that the legislative history revealed that the provision was included in the statute to exempt such information from disclosure requirements under the Freedom of Information Act. *Id.* (citations omitted). The court later implied that work product is a "privilege," stating that it was "bothered by defendant's apparent belief that the discovery privilege allegedly embodied by section 2103(c) is absolute, rather than qualified," and comparing "other well-established privileges" that "may be overcome on a showing of strong need." *Id.* at 614 n.3 (citing *Hickman*, 329 U.S. at 510–12, as involving the "work product privilege"). The *Jicarilla* decision at least shows that the term "privilege" has different meanings in different statutory contexts. In the IMDA, "privileged" did not mean exempt from discovery or from disclosure at trial,

but simply meant exempt from disclosure under FOIA.

In sum, the case law is not clear as to whether work product is a "privilege." Although some cases have referred to the protection as a "privilege," it is not clear that those cases do so with any substantive meaning. Work product has also been considered a "privilege" within the scope of Federal Rule of Civil Procedure 30(c) and within the scope of Federal Rule of Evidence 1101(c). But work product generally has not been considered a "privilege" within the scope of Rule 501, an analogy that may be particularly relevant in terms of determining the meaning of "privilege" under section 2074(b) because both Rule 501 and the amendment to the Enabling Act regarding rules of privilege were enacted as part of Congress's consideration of the proposed Rules of Evidence, making it more likely that the term was used consistently between the Rule and the Act. In addition, Congress drafted Rule 501 rather than passing the privilege rules proposed by the Advisory Committee, whereas Civil Rule 30 and Evidence Rule 1101(c) were drafted by the Advisory Committee.

III. Cases Citing Section 2074(b)

I have also reviewed case law citing section 2074(b) (and the similar language previously found in section 2076). None of the cases citing the relevant portions of the statute in either its prior or current form specifically address a challenge to a federal civil rule asserting a violation of the Enabling Act procedure that requires congressional approval of privilege rules. Since the provision was embodied in section 2074(b) in 1988, it has only been cited four times, and only one of those cases involved a challenge to a rule. In *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 764 F. Supp. 328 (E.D. Pa. 1991), *aff'd*, 975 F.2d 102 (3d Cir. 1992), the court considered a challenge to a Pennsylvania state disciplinary rule. Pennsylvania Disciplinary Rule 3.10

provided that a prosecutor could not subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity if the prosecutor sought to compel the attorney to provide evidence concerning a client of the attorney, unless the prosecutor obtained prior judicial approval. *Baylson*, 764 F. Supp. at 331. Before the state court enacted Rule 3.10, the federal district courts in Pennsylvania had adopted the Pennsylvania Disciplinary Rules through their own local rules. *See id.* at 331. After Rule 3.10 was enacted, the federal district courts amended their local rules to opt out of that particular disciplinary rule. *Id.* at 331–32. The plaintiffs brought the lawsuit to prevent the state Disciplinary Board from enforcing Rule 3.10 against them and other federal prosecutors who were members of the Pennsylvania state bar. *Id.* at 332. The district court concluded that the amendments to the local rules that excluded Rule 3.10 from the disciplinary rules adopted by the local federal rules were invalid because of insufficient public notice. *See id.* at 335–36. The court then found that because the amendments exempting Rule 3.10 from the local rules were invalid, Rule 3.10 would ordinarily apply in the federal district courts. *Id.* at 336. However, the court concluded that the local rules implicitly rejected absorption of Rule 3.10 and that Rule 3.10 was not compatible with the Federal Rules of Criminal Procedure or federal grand-jury practice. *Id.* at 336–37. In finding that the district courts could not have adopted Rule 3.10, the court noted that "if the district courts have adopted Rule 3.10, then they have conferred on attorneys not only a protection that exceeds the bounds of recognized privileges, but also one that constitutes an almost impregnable immunity from ever testifying or producing documentary evidence regarding their clients." *Baylson*, 764 F. Supp. at 344. The court found that "Rule 3.10 . . . converts the confidentiality rule [to safeguard client secrets] into a legal mandate, that is, a privilege, because it requires the court to withhold altogether approval of a subpoena directed to an attorney if the information sought

'relate[s] to representation of [the attorney's] client,' unless the client consents after consultation or unless one of four exceptions is applicable." *Id.* The court concluded: "Apart from simply prohibiting the issuance or service of subpoenas directed to attorneys under all circumstances, it would be difficult indeed to invest another linguistic formulation that so grossly distorts current notions of evidentiary privilege and is so profoundly inimical to the traditional configuration of grand jury authority." *Id.* at 345. The court also found that Rule 3.10 could not be adopted by local rule because "[e]ven if one could harmonize the 'new and expanded' attorney-client privilege created by Rule 3.10 with the scope of the grand jury's powers, it is a modification that most assuredly cannot be engineered by local rule," noting that while "[r]easonable minds may disagree about the exact contours of district court rulemaking authority, . . . there is no question that the lower federal courts cannot alter or enhance privileges in that manner." *Id.* (internal citation omitted). The court explained: "Even Federal Rules touching upon those matters are not valid without Congress's blessing. As 28 U.S.C. § 2074(b) clearly prescribes, 'Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.'" *Id.* (citations omitted). The court held:

> Rule [3.10] cannot be fairly understood to have been integrated into the local rules of the district courts. It distorts evidentiary privileges, disrupts existing subpoena practice, and compromises the authority and function of the modern grand jury. In consequence, Rule 3.10 is without vitality in the district courts of Pennsylvania, and the state may not sanction prosecutors who fail to adhere to it when they are working in those fora.

Id. at 349. The Third Circuit affirmed, but did "not find it necessary to rest [its] decision on any of the broad grounds announced by the district court," and thought "it suffice[d] to hold that Rule 3.10 is invalid because its adoption as federal law falls outside the local rule-making authority of the

federal district courts [because it is inconsistent with FED. R. CRIM. P. 17 and goes beyond "matters of detail" permissibly regulated by local rules under FED. R. CRIM. P. 57], and its enforcement as state law violates the Supremacy Clause of the United States Constitution [because it is incompatible with FED. R. CRIM. P. 17]." *Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 106–07 (3d Cir. 1992).

The district court in *Baylson* found that federal local rules could not adopt Rule 3.10 because it was inconsistent with a federal criminal rule and federal grand jury practice, and noted that it would also go beyond even what the national federal rules were permitted to do without express congressional approval because it expanded a privilege. While *Baylson* did not expressly consider a challenge to a federal rule of procedure, it at least provides an example of a rule that, if proposed as a Federal Rule of Civil Procedure, would expand a privilege and require congressional action to be effective. While it is relatively clear that creating an additional shield for attorney-client communications would be a modification of a privilege, it does not necessarily follow that modification of work-product protection in proposed Rule 26 for drafts and attorney-expert communications is also a modification of a privilege.

The other cases citing section 2074(b) do not address challenges to particular rules. For example, in *In re Grand Jury*, 103 F.3d 1140, 1155–56 (3d Cir. 1997), the court refused to adopt a parent-child privilege for many reasons, one of which was that the court felt that section 2074(b) showed that Congress was the better body to create new privileges. The court stated: "Although we have the authority to recognize a new privilege, we believe the recognition of such a privilege, if one is to be recognized, should be left to Congress." *Id.* at 1147. The court found that "[t]he legislature, not the judiciary, is institutionally better equipped to perform the balancing of the competing policy

issues required in deciding whether the recognition of a parent-child privilege is in the best interests of society," and that "Congress, through its legislative mechanisms, is also better suited for the task of defining the scope of any prospective privilege." *Id.* at 1154. In another case—*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 258 n.5 (D. Md. 2008)—the court only mentioned section 2074(b) in a footnote in which it discussed the amendments to the Rules of Civil Procedure relating to electronically stored information, and noted that those rules could not have created a privilege. The *Victor Stanley* court analyzed waiver of any attorney-client privilege or work-product protection that had attached to electronically stored information that had been voluntarily produced. The court noted that the Civil Rules Advisory Committee had acknowledged the challenges presented by privilege review of electronically stored information, but the court explained that "[n]otwithstanding this recognition [by the Advisory Committee], however, the recently adopted rules of civil procedure relating to ESI do not effect any change in the substantive law of privilege waiver . . . because the Rules Enabling Act precludes creation or abrogation of any privilege by ordinary rule making." *Victor Stanley*, 250 F.R.D. at 258 n.5 (citing 28 U.S.C. § 2074(b)). Finally, in *Rhoads Industries, Inc. v. Building Materials Corp. of America*, --- F.R.D. ---, No. 07-4756, 2008 WL 4916026, at *1 n.1 (E.D. Pa. Nov. 14, 2008), the court analyzed claims of privilege waiver and cited to section 2074(b) as the authority for the enactment of Evidence Rule 502. These additional cases citing section 2074(b) did not involve an analysis of the meaning of "privilege" in that statute or a challenge to a rule under the Enabling Act procedure.

Several cases discuss the limitation on rules involving privileges set forth in section 2076, prior to that restriction being moved to section 2074(b). In *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam), the court faced a challenge similar to that addressed by the

court in *Baylson*. In *Klubock*, federal prosecutors brought a declaratory judgment action to prevent enforcement of a Massachusetts ethical rule that prohibited prosecutors from subpoenaing an attorney to give evidence to the grand jury about the attorney's client without prior judicial approval. The federal district court in Massachusetts thereafter adopted that Massachusetts ethical rule as a local rule of the district court. The original panel opinion found that the district's local rule was valid, holding that the rule did not violate the Supremacy Clause because of an alleged conflict with the Federal Rules of Criminal Procedure and federal substantive law, and that the local rule did not exceed the district court's rule-making powers. *See United States v. Klubock*, 832 F.2d 649, 651–53, 656 (1st Cir. 1987). On rehearing en banc, the court vacated the panel's previous opinion, and the district court's opinion upholding the local rule was affirmed by an equally divided court. *See Klubock*, 832 F.2d 664, 667–68 (1st Cir. 1987). In dissent, Chief Judge Campbell argued that "the rule is most akin to an expanded rule of attorney-client privilege, placing a new and significant limitation upon a grand jury's power to seek information from certain attorneys." *Id.* at 669 (Campbell, J., dissenting en banc). Judge Campbell asserted that "it [was] difficult to imagine how [disciplinary rule] PF 15 [could] operate meaningfully except as a substantive modification of the existing rules both of grand jury power and attorney-client privilege." *Id.* at 670 (footnote omitted). Judge Campbell noted: "To the extent that PF 15 effects substantive change in the law of the attorney-client privilege, it is arguably beyond even the Supreme Court's rule-making power." *Id.* at 670 n.5 (citing FED. R. EVID. 501; 28 U.S.C. § 2076 (1982) ("providing a 'fast track' method for congressional ratification of Supreme Court amendments to the Federal Rules of Evidence, save '[a]ny such amendment creating, abolishing, or modifying a privilege,' which can only be adopted by a full-blown act of Congress")). Judge Campbell concluded that the local rule "clearly involve[d]

the creation of new substantive privilege law of very significant consequence," and that it was "not the sort of matter of detail a single district court is empowered to legislate under its local rule-making authority." *Id.* at 671. Like *Baylson*, the dissent in *Klubock* recognized a limitation on local rulemaking, noting that if the Federal Rules cannot modify a privilege without express congressional approval, then the local rules cannot do so either. However, also like *Baylson*, the dissent in *Klubock* does not resolve whether the proposed amendments to Rule 26 violate section 2074(b) because the rule at issue in *Klubock* related to the attorney-client privilege, while the proposed amendments to Rule 26 do not address a clearly defined privilege.

In *State v. Knee*, 616 P.2d 263 (Idaho 1980), the court analyzed the validity of a state court rule that allowed a defendant to be impeached by use of a prior felony conviction. The defendant challenged the rule as being an evidentiary rule that modified the substantive right to a fair and impartial jury, in violation of an Idaho statute providing that court rules "shall neither abridge, enlarge nor modify the substantive rights of any litigant." *Id.* at 264. The majority found the rule valid, noting that "[r]ules of evidence have been generally regarded as procedural in nature . . . ." *Id.* (citations omitted). The majority did not address any analogy to the limitation on adoption of privilege rules in 28 U.S.C. § 2076, but the dissent pointed to that provision and noted that in the legislative debates, it had been argued that privilege rules are substantive.[21]

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[21] The dissent argued that the rule at issue was more substantive than procedural in nature:

> A rule which allows your adversary to keep one of your witnesses off the stand can only be a rule of substantive law. A rule which prescribes only the time and manner of raising the objection to your witness testifying is procedural. A rule which allows your adversary to destroy the credibility of your best witness is a rule of substantive law. A rule which would state when and how it may be done is procedural. Although in some instances the distinctions might be blurred, any rule which keeps a witness off the stand, or allows his testimony to be collaterally discredited, for felony conviction, affects his substantive rights—no matter what the procedure which brings about that result.

The other cases discussing the limitation on privilege rules in former section 2076 do not address specific challenges to rules, but instead cite the provision as a side note. For example, in *Trammel v. United States*, 445 U.S. 40, 53 (1980), the Court modified the rule stated in *Hawkins v. United States*, 358 U.S. 74 (1958), barring the testimony of one spouse against the other unless both spouses consent, to give the witness-spouse alone the privilege to refuse to testify against his or her spouse. The Court rejected the petitioner's reliance on section 2076 for the proposition that the Court lacked power to reconsider *Hawkins* because "[t]hat provision limits this Court's *statutory* rulemaking authority by providing that rules 'creating, abolishing, or modifying a privilege shall have no force or effect unless . . . approved by act of Congress.'" *Trammel*, 445 U.S. at 47 n.8. The Court explained: "It [the privilege rules limitation in section 2076] was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise. In Rule 501 Congress makes clear that § 2076 was not intended to prevent the federal courts from developing *testimonial privilege law* in federal criminal cases on a case-by-case basis 'in light of reason and experience'; indeed Congress encouraged such development." *Id.* (emphasis added). As another example, in *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988),

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Knee, 616 P.2d at 269 (Bistline, J., dissenting). The dissent argued that the U.S. Supreme Court had never recognized an "inherent" right to promulgate rules of evidence, and that the Federal Rules of Evidence were adopted by Congress. *Id.* The dissent also noted that the portion of the bill to adopt the Federal Rules of Evidence originally would have modified 28 U.S.C. § 2076 to allow the Supreme Court to change the rules subject only to congressional veto, but Representative Holtzman had criticized that provision by arguing that rules of privilege are substantive and that the proposed process would have been unconstitutional. *Id.* at 269 n.3. The dissent concluded that the court had the power to adopt only rules of procedure, and explained: "Procedure determines the manner in which a case moves through the courts. Rules which structure the order of appearance of parties, designate times for filing and dictate the manner in which arguments and motions are to be presented are procedural rules and clearly within the power of this Court to adopt." *Id.* at 270 (citations omitted). The dissent's reference to section 2076's limitation on rules involving privilege does not clarify the meaning of "privilege" in that statute, but the dissent does provide some points of reference that might be used for distinguishing between rules of substance and rules of procedure. Under the dissent's analysis, work-product protection could arguably be characterized as falling into either category because it does more than simply regulate the manner in which matters are presented to the court, but does not strictly keep a witness of the stand.

vacated, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989), the Ninth Circuit analyzed the constitutionality of the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and authorized the Commission to promulgate sentencing guidelines. The Ninth Circuit found it problematic that federal judges were appointed to serve on the Commission because their service was an unconstitutional delegation of power to the judiciary. *Id.* at 1254–60. The court recognized that federal judges have very limited authority over matters that are not "cases or controversies," and cited the authority to promulgate rules of procedure as an example. *See id.* at 1252–53. The court pointed to the adoption of the Federal Rules of Evidence as an example of the distinction between rules of procedure and substance. *Id.* at 1253. The court noted that "[u]nlike other rules of evidence, rules of privilege 'are not designed or intended to facilitate the fact-finding process or to safeguard its integrity,' but rather are intended to further public policies and protect primary conduct extrinsic to the judicial process." *Id.* (citing KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 72, at 171 (3d ed. 1984)). The court pointed out that during congressional debates on the Rules of Evidence, it was argued that rules of privilege affect the rights of individual citizens and that such rules are substantive. *Id.* (citations and footnotes omitted). The court then noted that after Congress deleted the Court's proposed privilege rules and substituted Rule 501, it "permanently constrain[ed] judicial authority in this area" by adding the limitation on privilege rules in section 2076. *Gubiensio-Ortiz*, 857 F.2d at 1253. The court noted that the provision in section 2076 was added in the House by an amendment proposed by Representative Holtzman, "who argued that because rules of privilege 'involve extraordinarily important social objectives' and 'are truly legislative in nature,' 120 CONG. REC. 2391 (1974), judicial promulgation of such rules was unconstitutional: 'The Supreme Court is not given the power under Article III of the Constitution

to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy.'" *Id.* at 1253–54 (citing H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075, 7098). The court found the sentencing guidelines unconstitutional, but that decision was vacated by the Supreme Court in light of *Mistretta v. United States*, 488 U.S. 361 (1989), which had held that the sentencing guidelines were constitutional.

In sum, none of the cases discussing the limitation on modification of privilege rules addresses a direct challenge to a federal rule of procedure. A tangential issue involves whether the 1993 amendments to Rule 26, which included allowing for broad discovery of expert materials and requiring parties to expressly claim privilege or work product or potentially face waiver of the privilege or protection, constituted abrogation or modification of a privilege. According to one of the submitted comments, the argument in the Professor Letter that the amendments violate the Enabling Act "proves too much" because "[i]f returning the state of discovery to essentially where it was prior to the enactment of the 1993 amendment to Rule 26 [violates the Enabling Act], then the academics' argument actually proves that the current rule (which is the 1993 amendment to Rule 26) violated the Rules Enabling Act . . . ." Letter from Gregory P. Joseph, Gregory P. Joseph Law Offices LLC, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Nov. 15, 2008) (*available at* http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-055 hyperlink)). If the changes made in 1993 had provoked criticism that they violated the Enabling Act, discussion or resolution of such criticism might be useful in determining whether the current

proposed change might constitute a violation.[22] However, it does not appear that anyone has litigated whether the 1993 amendments contravened the Enabling Act procedure. *See* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 106 (1996) ("If core work-product is an 'evidentiary privilege,' and if mandating the waiver of this 'evidentiary privilege' constitutes 'abolishing or modifying' it, § 2074(b) has to that extent been contravened and Rule 26(a)(2)(B) is to that extent invalid. Because § 2074(b) has not been construed, the meaning of these operative phrases is not settled."); *see also* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FED. EVID. § 11:7 (3d ed. 2008) ("The Court has never proposed a Rules change dealing with privileges, although a privilege waiver provision [FED. R. EVID. 502] was under consideration in a committee of the Judicial Conference in 2007.") (footnote omitted).

IV. Conclusion

Overall, the legislative history and the case law do not support the theory that the proposed amendments to Rule 26 violate the Enabling Act procedure. The legislative history does not indicate that Congress was thinking of work product or any similar protection when it enacted the restriction on the court's power to modify privilege rules. The case law analyzing whether work product is a

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[22] If the 1993 amendments did constitute a violation of the Enabling Act, it is unclear what that would mean for the present amendments. On the one hand, it could be argued that the Enabling Act procedure would not be contravened by returning discovery to its pre-1993 state because the amendments would undo the alleged violation that occurred through the 1993 amendments. On the other hand, it could be argued that if the 1993 amendments violated the Enabling Act, then any further changes to the "privilege" in Rule 26 would also violate the Act, even if those changes were simply returning the "privilege" to its state before the first "violation." As Mr. Joseph notes, any potential Enabling Act issue with the 1993 amendments "was never the subject of a reported decision (it does not appear that it was every litigated)." Gregory P. Joseph, Proposed Expert Witness Rule Amendments, at 6 (2008) (available at http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-055 hyperlink)). Mr. Joseph notes several possibilities: "Perhaps work product protection is not 'an evidentiary privilege.' Perhaps the Rules are simply reverting to the pre-1993 legal landscape. Perhaps it is simply a deferral to the common law. Perhaps this provision, too, will never be litigated." *Id.*

"privilege" varies depending on context, but most cases do not consider it a "privilege" under Federal Rule of Evidence 501, a fact that weighs heavily in favor of finding that work product is not a "privilege" under section 2074(b) because, like section 2074(b), Rule 501 was expressly enacted and drafted by Congress (as opposed to passed through the Enabling Act's congressional veto procedure for passage of rules other than privilege rules), because Rule 501 was enacted and considered together with the privilege restriction in former section 2076, and because Rule 501 also deals with limits that Congress imposed with respect to the role of federal courts in privilege issues. The case law interpreting former section 2076 and section 2074(b) is not conclusive on the meaning of "privilege" in the statute because it does not appear that anyone has ever litigated whether a rule has been enacted in violation of these provisions, but the fact that no one has ever litigated the validity of the 1993 amendments to Rule 26 makes it less likely that the current proposed changes to that Rule, which essentially undo the 1993 amendments, will be interpreted to create an Enabling Act problem. *See* 5 FED. EVID. § 11:7 ("If the Court promulgates a rule that takes effect when Congress fails to intervene, it is at least doubtful that either the Supreme Court or another court will find the Rule invalid because it is a privilege that Congress did not endorse by statute."). To the extent the case law indicates that a "privilege" is a complete exclusion from disclosure and/or that it is a protection that extends to trial, the proposed amendments do not modify a privilege because they only create qualified exclusion from discovery. To the extent that the case law and legislative history indicate that a "privilege" encompasses a policy decision to protect certain confidential relationships, and that a "privilege" is a rule that affects the behavior of all citizens (not just those in litigation), the proposed amendments do not modify a privilege because they only impose a limitation on discovery intended to reduce costs imposed on parties in litigation and to allow litigants

to more effectively prepare for trial.

TAB

COPY OF PROPOSED AMENDMENTS TO RULE 56
SET OUT IN
REQUEST FOR COMMENT PAMPHLET

MEMORANDUM

DATE: February 19, 2008

TO: Judge Mark Kravitz

FROM: Andrea Thomson

CC: Judge Lee H. Rosenthal
Judge Michael Baylson
Professor Edward Cooper

SUBJECT: Discretion to Deny Summary Judgment

This memorandum addresses research regarding FED. R. CIV. P. 56 and whether there is a circuit split regarding discretion to deny a motion for summary judgment when the movant meets the requisite standard in Rule 56.

A law review article from 2002 evaluated some of the case law on this issue. *See* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002). In the article, the authors state that "the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinion since the earliest decisions regarding summary judgment under the Federal Rules." *Id.* at 96. The article notes that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate. *Id.* at 104. According to the article, "[t]he majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view. Moreover, various district courts in these and other circuits also have accepted this position." *Id.*

I. *Anderson v. Liberty Lobby, Inc.*

The confusion about the discretion to deny summary judgment may stem from a key Supreme Court case regarding summary judgment, in which the Court used conflicting language to describe the discretion given to trial court judges in considering motions for summary judgment. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In parts of the majority's opinion, the Court implied that there is little or no discretion to deny a motion for summary judgment if the movant has met his burden. For example, the Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, pp. 93–95 (1983)). This language implies that a district court may not deny a properly supported summary judgment motion unless the court finds a material factual dispute. The Court also noted that "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)) (additional internal quotation marks omitted). Further, the Court found that after the opponent to a motion for summary judgment sets forth facts showing that there is a genuine issue for trial, "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Id.* at 250. The Court analogized to a motion for directed verdict in the criminal context, noting with approval that it has been held that upon a motion for directed verdict of acquittal, if the judge "'concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to

state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted.'" *Id.* at 253 (quoting *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir. 1947)). All of this language taken together seems to imply that a district court does not have discretion to deny a motion for summary judgment if the requisite standard is met—the judge must grant the motion upon the proper showing by the movant.[1]

However, the *Anderson* Court later suggested just the opposite: "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 where there is reason to believe that the better course would be to proceed to a full trial." *Id.* at 255 (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)). Indeed, *Anderson* has been cited both for the proposition that district courts have discretion to deny summary judgment, *see, e.g.*, *United States v. Certain Real Estate and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991), as well as for the proposition that they do not, *see Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), *aff'd on other grounds*, 515 U.S. 304 (1995). Thus, there is language in some cases showing potential disagreement as to whether there is discretion to deny a well-supported motion for summary judgment. The arguably conflicting language regarding discretion to deny summary judgment is discussed in more detail below. Overall, it may be that the circuits are generally in agreement that

[1] The language implying a lack of discretion to deny a motion for summary judgment is consistent with statements made by the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), decided the same day as *Anderson*. *See* Friedenthal et al., 31 HOFSTRA L. REV. at 101–02. In *Celotex*, the Court stated: "'[T]he 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.'" *Id.* at 102 (quoting *Celotex*, 477 U.S. at 322). In Friedenthal's article, the authors note that after *Celotex*, "[t]he Court's apparent position limiting judicial discretion would thus seem crystal clear were it not for another case in the trilogy, *Anderson v. Liberty Lobby Inc.*, decided on the same day as *Celotex*, that included language completely contrary to that quoted above." *Id.*

a court should grant a summary judgment motion if the movant has met his burden, but that there are some rare instances in which it would be appropriate for the court to deny even a well-supported motion.

II. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Most of the circuits examining this issue have concluded that there is discretion to deny summary judgment.[2] *See, e.g.*, *NMT Med., Inc. v. Cardia, Inc.*, No. 2006-1645, 2007 WL 1655232, at *6 (Fed. Cir. June 6, 2007) (unpublished) ("This court defers to the district court's denial of summary judgment.") (citing *SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999)); *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285–86 (11th Cir. 2001) (holding that denial of a motion for summary judgment is not reviewable after a trial on the merits, and noting that the Supreme Court has held that "'even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.''") (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (quoting *Anderson*, 447 U.S. at 255), and citing *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (affirming the district court's opinion, which stated: "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial.'") (quoting *Anderson*, 477 U.S. at

[2] Many of the circuits have issued opinions that state in their boilerplate language regarding the legal standards for analyzing summary judgment motions that the motion must be granted upon the proper showing. However, in cases where the discretion issue truly arises and is substantively evaluated, such as where a circuit court is reviewing a district court's denial of a summary judgment motion, most circuits have leaned towards finding that there is discretion to deny.

255–56); *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. Trial courts may 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.' A trial court's discretion to *deny* summary judgment is reviewed only for an abuse of discretion.") (internal citations omitted); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (finding no error in refusal to grant a motion for summary judgment because "[a] district judge has discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.") (citing *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981); C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983)); *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir. 1985) ("This Court has previously noted that even if the district court 'is convinced that the moving party is entitled to [summary] judgment the exercise of sound discretion may dictate that the motion should be *denied*, and the case fully developed.'") (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. We think this is such a case . . . .") (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2728 (1983)); *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981) ("Even if St. Paul were entitled to summary judgment, the sound exercise of judicial discretion dictates that the motion should be denied to give the parties an opportunity to fully develop the case. This is particularly true in light of the posture

of the entire litigation. A district court can perform this 'negative discretionary function' and deny a Rule 56 motion that may be justifiable under the rule, if policy considerations counsel caution.") (citing *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979), *after remand*, 637 F.2d 1159 (8th Cir. 1980)); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979) ("The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed.").

In addition, several circuit courts have explained that an order denying a motion for summary judgment is reviewed only for abuse of discretion, implying approval of the proposition that a district court has discretion to deny a motion for summary judgment. *See SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999); *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) ("This court reviews a district court's decision to *deny* a motion for summary judgment for an abuse of discretion.") (citing *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993); *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988)). In *SunTiger*, the court rejected the argument that the district court had erred by denying summary judgment of patent invalidity, explaining:

> When a district court *grants* summary judgment, we review without deference to the trial court whether there are disputed material facts, and we review independently whether the prevailing party is entitled to judgment as a matter of law. By contrast, when a district court *denies* summary judgment, we review that decision with considerable deference to the court.

SunTiger, 189 F.3d at 1333 (internal citations omitted) (emphasis in original). The court continued:

> "The trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it if in the court's opinion, the case would benefit from a

> full hearing. The court can perform this 'negative discretionary function' and deny summary judgment if policy considerations so warrant; absent a finding of abuse, the court's discretion will not be disturbed."

Id. (quoting 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 56.41[3][d] (3d ed. 1999)). The court also held that "[t]o disturb the decision by the trial court, we would have to find that the facts were so clear that the denial of summary judgment was an unquestioned abuse of discretion." *Id.* at 1334. Judge Lourie dissented in *SunTiger*, noting that "[t]he rule of deference [to the trial court's denial of summary judgment] is a good one, soundly based. However, the rule is not absolute." *Id.* at 1337 (Lourie, J., dissenting). Judge Lourie thought the patent at issue should have been held invalid in light of the fact that validity is a question of law for the court and that the facts were clear that denial of summary judgment was an abuse of discretion. *Id.* at 1337–38.

Thus, at least the Fourth, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits have recognized the discretion to deny a motion for summary judgment by expressing approval of discretionary denials or by expressing that denials should be reviewed only for an abuse of discretion. The First Circuit has also commented that "in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed." *Buenrostro v. Collazo*, 973 F.2d 39, 42 n.2 (1st Cir. 1992). The *Buenrostro* court held that generally "[d]istrict court orders granting or denying brevis disposition are subject to plenary review," but reserved its opinion on whether the use of negative discretion could work in qualified immunity cases, and on what the proper standard of review might be. *Id.* at 42, 42 n.2.

B. District Court Opinions

District courts have also explained that they have discretion to deny motions for summary judgment even if the standard in Rule 56 is met. For example, in *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933 (S.D.N.Y. 1983), the court stated:

> Were this [claim of price discrimination] the only claim before the Court, we would undoubtedly grant summary judgment. However, in this case, in which the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose. Such a disposition would save the defendants no costs in time, effort, or money and would deprive the plaintiff of whatever opportunity it may otherwise have to build a foundation under the claim, which has at least been adequately pled. Since the facts are exclusively in the possession of the moving party and discovery has barely begun, it appears desirable for the Court to exercise its discretion and deny the motion with leave to renew when discovery is complete.

Martin Ice Cream, 554 F. Supp. at 944 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728, at 557 & n.56 (1973 and Supp. 1982)). Likewise, the Eastern District of Pennsylvania has described the discretion to deny summary judgment motions:

> Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is "reason to believe that the better course would be to proceed to full trial." This discretion remains "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings.

Payne v. Equicredit Corp. of Am., No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) (internal citations omitted), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also Lyons v. Bilco Co.*, No. 3:01CV1106(RNC), 2003 WL 22682333, at *1 (D. Conn. Sept. 30, 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals.") (citing Friedenthal et al., *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFTRA L. REV. at 104; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982 (2003)).

Other district courts in various circuits have described their discretion to deny summary judgment in certain circumstances. *See, e.g., Lister v. Prison Health Servs., Inc.*, No. 8:04-cv-2663-T-26MAP, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (denying summary judgment because of lack of clarity regarding material factual disputes, and noting that the court was exercising "its discretion to deny summary judgment, *even assuming the absence of a factual dispute . . . .*") (emphasis added); *Taylor v. Truman Med. Ctr.*, No. 03-00001-CV-W-HFS, 2006 WL 2796389, at *3 (W.D. Mo. Sept. 25, 2006) (denying a motion for summary judgment with respect to a claim for which the court "would not be comfortable in ringing down the curtain . . .," and for which the court found the exercise of its "negative discretion" to deny summary judgment when the record is inconclusive to be appropriate) (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979)); *Propps v. 9008 Group, Inc.*, No. 03-71166, 2006 WL 2124242, at *1 (E.D. Mich. July 27, 2006) (holding that in light of the voluminous record and the complexity of the proposed facts, the effort necessary to determine whether genuine issues of fact existed was "not a productive use of [the

court's] time," that even if the movants had carried their burden, the court doubted the wisdom of terminating the case prior to trial, and that a court has discretion to deny a motion for summary judgment); *Lyons*, 2003 WL 22682333, at *1 ("Because summary judgment has this effect [of cutting off a party's right to present his case to the jury], trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial.'")[3] (quoting *Anderson*, 477 U.S. at 255); *United States v. T.J. Manalo, Inc.*, 240 F. Supp. 2d 1255, 1261 (Ct. Int'l Trade 2002) (declining to grant summary judgment despite the fact that there was no dispute as to any material fact because it was not clear that the Government was entitled to judgment as a matter of law and because "even where a movant has met its burden, a court retains the discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . . Rule 56 is thus 'far less mandatory' than the language of the rule would indicate."[4]; *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) (denying summary judgment on certain claims because of the poor factual record and the necessity of difficult scientific evidence on the CERCLA claim, and noting that the exercise of discretion to deny was appropriate) (citing *Anderson*, 477 U.S. at 255–56); *Butler v. CMC Miss., Inc.*, No. CIV.A. 1:96CV349-D-D, 1998 WL 173233, at *7 (N.D. Miss. March 18, 1998) (denying summary judgment because a fact issue existed, but noting that the court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the

[3] The court also noted that in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948), the Supreme Court had "recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56." Lyons, 2003 WL 22682333, at *1 n.1.

[4] The court also noted that "'[t]here is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis.'" *T.J. Manalo, Inc.*, 240 F. Supp. 2d at 1261 (quoting 11 MOORE'S FEDERAL PRACTICE § 56.32[6]).

record for the trier of fact") (citing *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989)); *Morris v. VCW, Inc.*, No. 95-0737-CV-W-3-6, 1996 WL 429014, at *1 (W.D. Mo. July 24, 1996) (denying summary judgment because of "necessarily limited consideration and the need for a quick ruling," noting that "[c]aution is the rule of judicial practice in . . . cases [seeking summary judgment late in the case]" and that "there is a 'negative discretion' to deny summary judgment even when 'technically' justifiable, when the ends of justice appear to favor full development of the facts at trial, in order that a fact-finder may acquire a sound 'feel' for the issues.") (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Caine v. Duke Commc'ns Int'l*, No. CV-95-0792 JMI (MCX), 1995 WL 608523 (C.D. Cal. Oct. 3, 1995) (granting a motion for summary judgment, but stating in boilerplate language that "[t]here is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits.") (citing *Anderson*, 477 U.S. at 249–55); *McDarren v. Marvel Entm't Group, Inc.*, No. 94 CV. 0910 (LMM), 1995 WL 214482, at *5 (S.D.N.Y. April 11, 1995) (denying a motion for summary judgment on a breach of contract claim on the basis that an interpretation of the "best efforts" contract clause in light of circumstances had to be made by the fact finder, but also noting that "[w]here an issue is closely intertwined with an issue to be tried, a court has discretion to deny summary judgment even if the issue is 'ripe' for summary judgment.") (citing *Citibank v. Real Coffee Trade Co.*, 566 F. Supp. 1158, 1165 (S.D.N.Y. 1983); *Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 126 (S.D.N.Y. 1980)); *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711, 718–19 (S.D. Ind. 1987) (denying summary judgment and stating, "It has been repeatedly held that

despite all that may be shown, the Court always has the power to deny summary judgment if, in its sound judgment, it believes for any reason that the fair and just course is to proceed to trial rather than to resolve the case on a motion. Thus, an appraisal of the legal issues may lead the Court to exercise its discretion and deny summary judgment motions in order to obtain the fuller factual foundation afforded by a plenary trial.")[5] (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Flores v. Kelley*, 61 F.R.D. 442 (D. Ind. 1973); *Western Chain Co. v. Am. Mut. Liab. Ins. Co.*, 527 F.2d 986 (7th Cir. 1975)).

III. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Despite the existence of the circuit opinions clearly stating that there is discretion to deny a motion for summary judgment, other circuit opinions have consistently repeated language that implies that there is little or no discretion to deny. *See, e.g.*, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("A motion for summary judgment *must be granted* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)) (emphasis added); *Rease v. Harvey*, No. 06-15030, 2007 WL 1841080, at *1 (11th Cir. June 28, 2007) (unpublished) (same); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 994 (6th Cir. 2007) (same); *Guilbert v.*

[5] The *Wilson* court's description of discretion to deny is seemingly at odds with a later Seventh Circuit opinion in *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), where the Seventh Circuit held that "[s]ummary judgment is not a discretionary remedy." While the *Wilson* case has not been expressly overturned, the subsequent decision in *Jones* may call *Wilson*'s language regarding discretion to deny summary judgment motions into question. However, it is also possible that the holding in *Jones* was not as broad as it may seem. The appellate court in *Jones* reviewed the denial of the summary judgment motion on an interlocutory appeal regarding the defense of qualified immunity. The Seventh Circuit commented that immunity claims ought to be resolved as early in the case as possible, *id.*, and it may be that the reason for the court's statement regarding lack of discretion was that the appeal related to a defense that needed to be immediately resolved.

Gardner, 480 F.3d 140, 145 (2d Cir. 2007) (same); *Loggins v. Nortel Networks, Inc.*, No. 06-10361, 2006 WL 3153471, at *1 (5th Cir. Nov. 2, 2006) (unpublished) (same); *Mambo v. Vehar*, No. 05-2356, 2006 WL 1720211, at *1 (10th Cir. June 23, 2006) (unpublished) ("The familiar standard *requires that summary judgment be granted* . . ." if the Rule 56(c) standard is met.) (emphasis added); *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1335 (Fed. Cir. 2005) ("Summary judgment *must be granted* . . ." if the Rule 56(c) standard is met) (emphasis added); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) ("[S]ummary judgment *is to be entered* if the evidence is such that a reasonable fact finder could find only for the moving party.")[6] (citing *Anderson*, 477 U.S. at 248; *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389 (3d Cir. 1994)) (emphasis added); *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment *is not a discretionary remedy.* If the plaintiff lacks enough evidence, *summary judgment must be granted.*") (citing *Anderson*, 477 U.S. at 249–51; *Celotex*, 477 U.S. 317) (emphasis added), *aff'd on other grounds*, 515 U.S. 304 (1995); *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) ("A district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law.") (citing *Celotex*, 477 U.S. at 322).

In sum, at least the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have issued opinions that contain language seeming to mandate the entry of summary judgment if the movant shows that he is entitled to judgment. However, most of the cases containing this language have the language in the boilerplate section reciting the legal standard for review of

[6] The court also noted that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear th burden of proof at trial' *mandates the entry of summary judgment.*" *Watson*, 235 F.3d at 857–58 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (emphasis added).

summary judgment orders. Very few of the cases with this language appear to actually apply the standard to an order denying summary judgment.[7] Of the cases cited in the previous paragraph, for example, only one of them definitively applied the rule that motions must be granted if the Rule 56(c) standard is met. *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) (finding that the district court was mistaken in determining that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim should also be tried"), *aff'd on other grounds*, 515 U.S. 304 (1995). The remainder of the cases cited in the previous paragraph involved review of a grant of summary judgment, and thus the courts did not have occasion to apply the standard used for review of a denial of summary judgment, despite discussion of that standard in the "legal standards" portion of the opinions.

B. District Court Opinions

Various district court cases also contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment. *See, e.g.*, *Starns v. Health Prof'ls, Ltd.*, No. 04-1143, 2008 WL 268590, at *1 (C.D. Ill. Jan. 29, 2008) ("'Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.'") (quoting *Jones*, 26 F.3d at 728)[8]; *Levine v. Children's Museum of Indianapolis, Inc.*, No. IP00-0715-C-H/G, 2002 WL 1800254, at *1 (S.D. Ind. July 1, 2002) (granting summary judgment

[7] Finding appellate cases actually disapproving of a discretionary denial has proven to be difficult, perhaps because denials of summary judgment are rarely appealable. Most of the appellate cases substantively reviewing a denial of summary judgment have concluded that discretion to deny exists.

[8] A Westlaw search reveals that the *Jones* case has been cited in other cases 113 times for the proposition that summary judgment is not a discretionary remedy. All of these citations have been by district courts within the Seventh Circuit. I have surveyed a selection of these cases, and they appear to generally use this language as boilerplate language in the legal standards section of the opinion. Within the sampling of cases I reviewed, I did not see any cases where the district court expressed a desire to deny the motion but felt compelled to grant it in view of a standard that granting summary judgment is mandatory if the movant has shown entitlement.

where the plaintiff had failed to come forward with sufficient evidence, and stating in the section describing the legal standards that "[s]ummary judgment is not discretionary; if a party shows it is entitled to summary judgment, judgment must be granted.") (citing *Jones*, 26 F.3d at 728), *aff'd*, No. 02-3013, 2003 WL 1545156 (7th Cir. March 24, 2003) (unpublished); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *3 (S.D. Ind. April 16, 2002) ("Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it.") (citing *Tangwall v. Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998)), *aff'd sub nom. First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004); *Gates v. L.R. Green Co.*, No. IP 00-1239-C H/G, 2002 WL 826394, at *1 (S.D. Ind. Mar. 20, 2002) ("Summary judgment is not a discretionary procedure, though. When the moving party has shown it is entitled to summary judgment, the court must grant it. To do otherwise would be to condemn the parties, witnesses, and jurors to spend time, money, and energy on a trial that could have only one just result."); *Acceptance Assoc. of Am., Inc. v. Various Underwriters of Lloyds of London*, CIV. A. No. 88-6816, 1989 WL 25146, at *2 (E.D. Pa. Mar. 16, 1989) (granting summary judgment after finding no genuine issue of material fact and citing 18A COUCH ON INS. 2d § 77:16 (Rev'd ed. 1983) for the proposition that "when undisputed documents show that the insurer is entitled to summary judgment, the court must grant the motion regardless of other facts in the record that may be in dispute."), *aff'd*, 884 F.2d 1382 (3d Cir. 1989); *Martinez v. Ribicoff*, 200 F. Supp. 191, 192 (D.P.R. 1961) ("It, therefore, follows that there is no genuine issue as to any material fact and that defendant's motion for summary judgment must be granted, defendant being entitled to judgment as a matter of law.").

Most of the district court cases I reviewed that state that summary judgment must be entered if the movant is entitled state this standard in the "legal standards" section of the opinion, and it is not clear if the court ultimately granted the summary judgment because it had no choice if the movant met its burden or because the court felt no need to exercise discretion to deny the motion under the facts of the case.[9] The *Acceptance Assoc. of Am.* and *Martinez* cases use the mandatory language within the analysis portion of the opinions, as opposed to in a separate section describing legal standards, but even in those cases, it is not clear whether the court felt compelled to grant summary judgment simply because it was mandatory if the movant met its burden or if the court granted the summary judgment because it viewed granting as the best option after the movant had met its burden.

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

A January 10, 2008 letter from Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform ("the Letter") insists that the current standard is that summary judgment is mandatory when a litigant has met the burden of demonstrating the absence of a genuine issue of material fact. However, most of the cases cited in the Letter for this proposition do not actually evaluate the denial of a motion for summary judgment, making any boilerplate language that summary judgment is required less persuasive than the Letter indicates. The Seventh Circuit *Jones* case cited in the letter may be an anomaly with its strict language stating that "[s]ummary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted." *Jones*, 26 F.3d

[9] A search in Westlaw for cases stating that summary judgment is mandatory or must be granted if the standard is met turns up many cases. However, a review of a sampling of these cases reveals that few of them actually apply the proposition that summary judgment is mandatory if the standard is met, and merely contain language to that effect in the "legal standards" portion of the opinion. Finding district court cases granting summary judgment based on an alleged lack of discretion to deny once the standard is met has proven difficult, possibly because courts may not express a desire to deny the motion at the same time the court is granting the motion.

at 728. Notably, the *Jones* court emphasized that the issue on summary judgment involved a defense of immunity, stating that "[i]mmunity claims should be resolved as early in the case as possible—and by the court rather than the jury." *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, ___, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliot v. Thomas*, 937 F.2d 338, 344–45 (7th Cir. 1991)). In *Jones*, the defendants filed an interlocutory appeal asserting a defense of qualified immunity. *Id.* at 727. The district court had denied the defendants' summary judgment motion both with respect to the plaintiff's false arrest claim and with respect to the plaintiff's excessive force claim. With respect to the excessive force claim, the Seventh Circuit held that it had no appellate jurisdiction because the district court had found that an issue of fact existed as to whether the defendants beat the plaintiff while he was in custody, an issue that had to be "resolved in the district court before it could be reviewed on appeal." *See id.* at 727–28. With respect to the false arrest claim, the district court had held that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried." *Id.* at 728. The Seventh Circuit rejected that conclusion, finding that summary judgment should have been granted in favor of the defendants with respect to the false arrest claim because there was no genuine issue of fact and summary judgment is not a discretionary remedy. *Id.*

One could argue that *Jones* creates a circuit split as to whether there is discretion to deny summary judgment. However, despite its broad language disapproving of discretion to deny, the *Jones* court may have been particularly focused on the importance of resolving immunity claims early in the litigation.[10] A persuasive argument can be made that the need to resolve immunity issues

[10] The Seventh Circuit has repeated the language regarding the mandatory nature of granting summary judgment if the movant meets his burden. *See Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 621 (7th Cir. 1995) ("Summary

played a strong role in the court's opinion, particularly given the absence of discussion distinguishing cases from other circuits that had recognized the existence of discretion to deny fully-supported summary judgment motions.

Other than the *Jones* case, the cases cited in the Letter do not substantively evaluate the discretion to deny summary judgment motions, despite having language stating that summary judgment is mandatory. For example, the Letter cites *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857–58 (3d Cir. 2000), for the proposition that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment." However, in *Watson*, the court affirmed a grant of summary judgment where the non-movant failed to make the required evidentiary showing. Because the Third Circuit affirmed a grant of summary judgment on the basis that the requisite showing was not made and because the case did not involve review of a denial of summary judgment (or of a grant of summary judgment where the court felt compelled to grant the motion despite wanting to deny it), the language stating that summary judgment is mandatory does not carry as much weight as suggested by the Letter.

Similarly, the Letter cites *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam), for the proposition that "[a] district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law." However, the cited language appears in the section of the opinion entitled "The Standards Governing Summary Judgment," and is not applied to the merits

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judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine dispute over a material fact.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, in *Anderson*, the Seventh Circuit reviewed a grant of summary judgment rather than a denial.

because the case involved review of a grant of summary judgment, rather than a denial. The court affirmed part of the grant of summary judgment, but found that the non-movant had presented sufficient evidence to avoid summary judgment on one of the claims. Thus, the court had no reason to address whether there would have been discretion to deny summary judgment if there had not been sufficient evidence. The language regarding the mandatory nature of granting summary judgment is further weakened by the fact that a subsequent Eleventh Circuit decision involving an attempted appeal of a denial of summary judgment recognized discretion to deny summary judgment motions. *See Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).

The Letter argues that the version of Rule 56 effective prior to the Style Amendments, containing the statement that "the judgment sought shall be rendered . . .," has language commanding mandatory action. However, the cases simply have not always interpreted the language that way. *See, e.g., Payne v. Equicredit Corp. of Am.*, No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) ("Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is 'reason to believe that the better course would be to proceed to full trial.'"), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also* EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE & PROCEDURE at 10, http://www.uscourts.gov/rules/supct1106/Excerpt_JC_Report_CV_0906.pdf (stating that the restyled rules "minimize the use of inherently ambiguous words," such as "shall," which "can mean 'must,' 'may,' or 'should,' depending on context"); FED. R. CIV. P. 56 advisory committee's note (2007 Amendment) (stating that "shall" is changed to

"should" in light of case law establishing that "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

The assertion in the Letter that discretion to deny summary judgment would "run[] headlong into the concern expressed in *Anderson v. Creighton*, 483 U.S. 635, 643 (1987)[,] that conscientious public officials would lose the 'assurance of protection that [] is the object' of summary judgment," is misplaced. The quotation is taken slightly out of context because it omits the remainder of the sentence, which reveals that the quoted language was used in the case to describe the purpose of the doctrine of qualified immunity.[11] Nonetheless, it follows that requiring summary judgment regarding qualified immunity defenses would also further the assurance of protection that qualified immunity is intended to provide. However, even if courts may have less discretion to deny summary judgment in certain contexts, such as qualified immunity, *see Jones*, 26 F.3d at 728, it does not necessarily follow that it is mandatory in all circumstances where the Rule 56 standard is met.

IV. Conclusion

Most of the case law substantively evaluating whether there is discretion to deny a motion for summary judgment has determined that discretion to deny summary judgment exists when the movant has made the proper showing. The discretionary power of a court to deny a properly-supported motion for summary judgment has been summarized as follows:

> Although the court's discretion plays no role in the granting of summary judgment, since the granting of summary judgment under FRCP 56 must be proper or the action is subject to reversal on appeal, the court may deny summary judgment as a matter of discretion even where the criteria for granting judgment are technically satisfied. Denial of summary judgment is appropriate where the court has

[11] The full sentence actually reads: "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson*, 483 U.S. at 643.

> doubts about the wisdom of terminating the case before a full trial or believes that the case should be fully developed before decision. For example, denial of summary judgment may be appropriate where the court has received inadequate guidance from the parties, where further inquiry into the facts is deemed desirable by the court to clarify the application of the law, where the motion is tainted with procedural unfairness, where a case involves complex issues of fact or law, or a question of first impression, or where summary judgment would be on such a limited basis or on such limited facts that it would be likely to be inconclusive of the underlying issues. In a case involving multiple claims, the court may exercise its discretion to deny summary judgment where it finds it better as a matter of judicial administration to dispose of all the claims and counterclaims at trial rather than to attempt piecemeal disposition, or where part of the action may be ripe for summary judgment but is intertwined with another claim that must be tried.

27A FED. PROC., LAW. ED. § 62:683 (2007).

Although there is plenty of case law with boilerplate language stating that a court must grant summary judgment if the Rule 56 standard is met, most of those cases at the appellate level do not involve review of a denial of a motion for summary judgment. Likewise, a review of a selection of some of those at the district court level reveals that most do not express that a motion is granted simply because of mandatory language in the rule when the court believes that the motion should be denied for administrative or other reasons. The one case the research uncovered that substantively involved review of a denial of summary judgment and that disapproved of that denial arguably may be limited in its application because it involved a request for summary judgment on qualified immunity grounds. While the court's language was broad, it also emphasized that immunity claims ought to be resolved early in the case, perhaps giving a stronger reason to remove discretion to deny a motion in that case than in the case of other summary judgment motions.

TAB

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 7-8, 2008

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

16 *Hearing*

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

20 *Meeting*

21 Judge Kravitz began the meeting by noting membership changes.

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

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

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

33 *Report on Standing Committee*

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

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

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

47 *April 2008 Minutes*

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

50 *Hearing Review*

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

53 *Summary Judgment Study*

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

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

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

87 The disaggregation question has a parallel in the fear that the movant may produce an
88 unreasonably long statement of facts that cannot be genuinely disputed. That can be a problem, but
89 the solution is not to write into the rule a motion to strike on the ground that nonmaterial facts have
90 been included.

91 Practice in the District of Arizona was addressed by written comments provided by two
92 judges from the District of Alaska who regularly accept assignments to Arizona. Arizona has a
93 point-counterpoint practice akin to proposed Rule 56(c). Alaska does not. The Alaska judges report
94 that their experience with many cases and many summary-judgment motions in both districts show
95 the disadvantages of the point-counterpoint procedure. The judges in Arizona have considered these
96 comments, and despite having thought for many years that the point-counterpoint procedure is a
97 good thing have become persuaded that they should begin to experiment with other approaches.
98 They have the highest respect for the Alaska judges, and have begun to wonder whether it is too
99 early to adopt point-counterpoint as a national rule. They want to be free, after experimenting, to
100 adopt a local rule that dispenses with point-counterpoint practice; the authority under proposed Rule
101 56(c) to depart on a case-by-case basis may not suffice. It was pointed out that other judges have
102 submitted comments that experience with point-counterpoint practice has shown its shortcomings.

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

110 *Enabling Act Birthday*

111 1938 brought dramatic changes to federal practice. On April 25 the decision in Erie v.
112 Tompkins abandoned federal common law on matters of substance. On September 16 the Federal
113 Rules of Civil Procedure took effect. The 70th Birthday is an important milestone.

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

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

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

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

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

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

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

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

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

154 The perennial resurgence of efforts to legislate court rules is illustrated by Evidence Rules
155 412 through 415. Early efforts to amend Rule 412 in Congress were successfully stalled. But in
156 1994 Congress, prodded by groups actively pressing to address evidence rules in child molestation
157 cases, considered specific proposals. Limited success was achieved in winning first a 150-day
158 waiting period, then a second 150-day waiting period, but in the end Congress acted. The rules it
159 produced are not well integrated with the other Evidence Rules. The Sunshine in Litigation bills that
160 are introduced in every Congress may yet achieve sufficient support to add another illustration.

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

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

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

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

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

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

228 toward one proposal will distract attention from another that in fact is more truly transformative.
229 In addressing the 1993 disclosure rules, for example, opposition focused intensely on initial
230 disclosure — later developments, including the substantial dilution of initial disclosure, proved
231 wrong the predictions of disaster. Little attention was directed, on the other hand, to the package
232 that transformed discovery of expert trial-witness testimony, including the Rule 26(a)(2)(B) report
233 requirement. Events have shown that these changes were far more important.

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

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

275 *Class Action Fairness Act: Federal Judicial Center Study*

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

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

293 231 diversity actions are included in the sample analyzed for this report.

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

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

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

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

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

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

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

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

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

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

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

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

346 *Agenda Review*

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

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

362 The first group of ten items was suggested for removal from the agenda. Eight of them were
363 set for removal without further discussion, including 03-CV-E, 04-CV-J, 06-CV-B, 06-CV-F, 07-
364 CV-B, 07-CV-C, 07-CV-F, and 08-CV-A. One, 06-CV-H, was discussed briefly. It advances two
365 suggestions. The first involves a question that seems to have been resolved. Several district courts
366 in the District of Columbia had ruled that the United States is not a "person" that can be subjected
367 to a nonparty subpoena under Rule 45, but the Court of Appeals for the District of Columbia Circuit
368 overruled these decisions. There is no apparent present need to amend Rule 45 on this account. The
369 other suggestion is that something should be done about the questions that arise when a government
370 agency relies on agency regulations to resist compliance with a subpoena on confidentiality
371 grounds. These questions do not seem likely subjects of rulemaking. They involve the rulemaking
372 authority of different agencies. Any one agency may act under a number of different statutes. Most
373 of the issues — and perhaps virtually all of them — will involve substantive questions that in part
374 are peculiar to the particular agency and statute and in part involve general administrative law. The
375 Committee concluded that the prospects for action in this area within the foreseeable future are too
376 remote to hold these topics on the agenda.

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

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

389 A second group of three items was recommended to be carried forward without advancing
390 for immediate consideration. Two, 04-CV-H and 06-CV-D, relate to the offer-of-judgment
391 provisions of Rule 68. It was agreed that they should be considered as part of the accumulating
392 study of Rule 68. The third, 04-CV-I, suggests that Rule 7.1 disclosure statements should be eligible
393 for electronic filing. This suggestion will be carried forward only because the Committee on Codes
394 of Conduct has suggested that Rule 7.1 might be amended in some ways not yet determined. If Rule
395 7.1 indeed comes on for possible revision, any possible need to address filing methods can be taken
396 up at the same time.

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

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

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

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

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

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

443 Another discovery item is 07-CV-E, submitted in the form of a law review article reviewing
444 practice under Rule 30(e)(1)(B). The rule allows a deposition witness to review the deposition
445 transcript or recording and "if there are changes in form or substance, to sign a statement listing the
446 changes and the reasons for making them." Some courts are wary of changes that seem simple flat
447 contradictions of the deposition testimony. At least at times the concern is similar to the concerns
448 underlying the "sham affidavit" doctrine that allows a court to disregard a self-contradicting and
449 self-serving affidavit offered by a party to oppose summary judgment by changing earlier deposition
450 testimony. The Committee agreed to remove this item from the agenda. One observation was that
451 when the matter is important, the deposition testimony is often corrected during the deposition itself
452 — perhaps after a break in the proceedings. Another observation was that the need to revise an
453 answer often arises from a poorly framed question. Yet another observation was that if the witness
454 is going to change the story, it is better to learn of the change before trial than at trial.

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

461 One question is raised by 05-CV-H, which addresses the Rule 45(b)(1) provision that serving
462 a subpoena requires "delivering a copy to the named person." A majority of courts interpret delivery
463 to require personal in-hand service; a significant number of decisions depart from this reading. The
464 proposal is that service should be permitted by any of the means recognized for service of the
465 summons and complaint under Rule 4. There may be reasons to stop short of the full reach of Rule
466 4, or perhaps to recognize methods not generally available under Rule 4. Some sense of accepted
467 present practice, and of practice under state rules, should be gathered. And it will be important to
468 remember that Criminal Rule 17(d) requires that the server deliver a copy of the subpoena to the
469 witness. The Criminal Rules Committee should be advised of any serious consideration of these
470 questions.

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

494 Another question arises when a nonparty resists a subpoena issued by a court in proceedings
495 ancillary to an action pending in another district. Rule 45(c)(2)(B) says that when a person
496 commanded to produce makes an objection, "the serving party may move the issuing court for an
497 order compelling production or inspection." Rules 45(c)(3)(A) and (B) likewise provide for relief
498 by "the issuing court." (See also Rule 37(a)(2), directing that a motion for an order to a nonparty
499 compelling discovery must be made in the court where the discovery is or will be taken.) Rule
500 26(c), on the other hand, provides that a motion for a protective order may be made by a party or any
501 person in the court where the action is pending, or as an alternative in the court where a deposition
502 will be taken. Most — but not all — courts read these provisions together to mean that if a
503 nonparty objects or moves to quash a subpoena in an ancillary discovery court, the discovery court
504 must decide the motion. If the request is framed as one for a protective order, on the other hand, the

505 discovery court may be able to defer to the court where the main action is pending. Circumstances
506 arise in which it is important to defer to the main-action court no matter what the means chosen to
507 raise the objection. The main-action court should have primary control over discovery management,
508 and may be in a much better position to assess the need for the discovery and the strength of the
509 objections. A denial of discovery in the discovery court may effectively terminate the action. It
510 would be useful to address this question in the rules.

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

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

521 *Sunshine in Litigation Act*

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

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

534 The other major aspect of the Act addressed protective discovery orders. This part of the Act
535 will create massive problems if enacted. It will impose an impossible task on the district judge at
536 the beginning of an action. At a time when it is difficult to form much idea of what the action will
537 involve, and impossible to determine what sorts of information may be available for discovery, the
538 judge must decide whether a protective order would defeat access to information that would protect
539 the public health or safety, whether any need for privacy outweighs the usefulness of the
540 information, and whether a requested protective order is no broader than necessary to protect the
541 privacy interest. Confronted with a demand for findings that cannot be supported, the result
542 commonly would be denial of a protective order. Denial of a protective order would in turn
543 exacerbate problems with discovery. Information that now is turned over in reliance on a protective
544 order would be carefully screened at great cost in time and money, refusals to produce information
545 would proliferate, and courts would be called upon to resolve ever more discovery disputes.

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

549 *Discovery Privilege Logs*

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

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

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

571 The question of timing is less certain. It seems clear that the claim of privilege must be made
572 when responding to the discovery request. It is not as clear when the elements required by Rule
573 26(b)(5)(A) must be provided. This uncertainty seems to arise most persistently with document
574 production. The possible choices include insistence that the required information be provided at the
575 time of responding to the document request; or that it be provided at the time of producing; or that
576 it be provided within a reasonable time from the response or from the production.

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

584 That leaves the possibility of amending the rule to provide clear directions as to timing. The
585 most likely approach would be to establish a clear provision subject to alteration by agreement of
586 the parties or court order. Similar provisions could be added to Rule 45, subject to the complication
587 that Rule 45 remains obscure on the opportunity to present a belated — untimely — objection in the
588 guise of a motion to quash.

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

591 A practitioner noted that in the last couple of years clients have started to "push back hard"
592 on the costs of screening documents. Some clients take the chore inside. It may be divided up
593 among contract attorneys rather than firm associates, or farmed out to independent screening firms.
594 Vendors have become insistent that electronic screening software can do the job at much lower cost
595 — the software may have developed to a point about equal to screening by a first-year associate.

596 The cost of screening is being reduced. As for privilege logs themselves, the rule itself seems OK.
597 The parties often reach informal agreements. "You want it before the depositions. Usually it is the
598 last thing produced before depositions." One reason for delay is that documents that on their face
599 seem privileged may be unprotected because they have been circulated outside the privilege circle.
600 It may be that nonparties deserve greater consideration and protection than parties, but it would be
601 better to put off consideration for a year.

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

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

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

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

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

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

629 An observer suggested that an effort to come up with a rule will only intensify costs. There
630 is no real problem. "People work it out." The log is the last thing produced. And in some cases the
631 parties may tacitly agree not to produce them at all, or to generate them only for particular categories
632 of documents. Consider a case that claims an ongoing conspiracy: is counsel obliged to create a log
633 for every letter written to the client while the litigation carries on?

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

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

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

642 *Rule 68*

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

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

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

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

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

673 The list of topics that might be addressed by a modest revision has a way of expanding. One
674 obvious candidate is the ruling that a plaintiff who fails to better a rejected Rule 68 offer loses the
675 right to statutory attorney fees incurred after the offer if — but only if — the fee statute refers to fees
676 as "costs." Turning the consequence on the happenstance of statutory language seems a puzzling
677 use of "plain meaning" interpretation — no plausible reason can be advanced for believing that the
678 wording choice of fee statutes is made with an eye to invoking, or rejecting, Rule 68 consequences.
679 More fundamentally, it is difficult to agree that Rule 68 should become a vehicle for cutting off fee
680 rights established for prevailing plaintiffs enforcing specially favored rights. This effect seems to
681 abridge or modify important substantive statute-based rights. The fear of losing statutory fees,
682 moreover, may create at least a tension between the interests of counsel and the party's interests.

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

690 expand the opportunities for strategic game playing.

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

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

705 More thorough revision would address such questions as offers made to multiple parties; the
706 opportunity to make successive offers — which could greatly complicate not only the rule, but also
707 the consequent strategic use of the rule; and adoption of a margin of error, hoping to reduce the
708 problems of uncertainty by invoking sanctions only if the offer beats the judgment by a factor of
709 20% or 25%.

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

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

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

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

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

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

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

734 A judge noted that lawyers very seldom use Rule 68.

735 Another judge thought it may be worthwhile to explore the option of changing from an offer
736 of judgment to an offer of settlement. An attorney replied that it was difficult to imagine that Rule
737 68 would make a difference; "if you're talking, you're talking."

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

740 *Notice Pleading: Twombly's Aftermath*

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

750

751 *Discovery of Electronically Stored Information*

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

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

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

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

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

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

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

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

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

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

790 *Report on Use of Subcommittees*

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

799 *Appellate Rules Committee Report*

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

804 Manufactured Finality: One topic on which the Appellate Rules Committee has sought input from
805 the Civil Rules Committee is "manufactured finality." This topic arises from strategies used to
806 achieve a final judgment for appeal purposes when, if it were not for the desire to appeal, ordinary
807 practice would not establish a final judgment. These strategies arise from dissatisfaction, shared by
808 lawyers and trial judges, with some applications of the final-judgment rule. One problem is that
809 attempts to enter a partial final judgment under Civil Rule 54(b) are not always successful — it may
810 be found that the part chosen for judgment is not a "claim" separate from matters that remain in the
811 trial court, or (less often) that entering judgment was an abuse of discretion. The circuits disagree
812 as to some of the methods that might be used to manufacture finality. One tactic is to rely on a
813 conditional dismissal with prejudice of claims that have not been decided. The condition is that the
814 dismissed claims can be revived if the judgment is reversed. The Second Circuit recognizes this
815 tactic. Some other circuits do not. The Appellate Rules Committee believes that one approach to
816 these questions might be revision of Rule 54(b); it may be that Civil Rule 41 also could be used.
817 These questions must be considered further, beginning with the helpful materials developed for the
818 Appellate Rules Committee.

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

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

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

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

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

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

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

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

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

887 A separate question arises from the 2002 amendment and the Committee Note. As amended,
888 Rule 58(a) directs that every judgment and amended judgment must be set out in a separate
889 document, "but a separate document is not required for an order disposing of a motion" in a list of
890 five post-judgment motions. The problem is that the order disposing of the motion, which does not
891 have to be entered in a separate document, often also leads to an amended judgment, which does
892 have to be entered in a separate document. The question is whether appeal time should start to run
893 from entry of the order disposing of the motion — which at least ordinarily will include all of the
894 terms of the amended judgment, but also may include additional material that defeats
895 characterization as a "separate document" — or only from entry of the amended judgment in a
896 separate document. The Seventh Circuit has addressed this question, concluding that a separate
897 document is required. Its approach is explored and explained in Kunz v. DeFelice, 538 F.3d 667
898 (7th Cir.2008). The Appellate Rules Committee asks for guidance on the desirability of further rules
899 amendments.

900 *Next Meetings*

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

906 Dates for the spring meeting were tentatively discussed. At the moment, the week beginning
907 April 20 seems the most likely convenient time. (Shortly after the meeting the date was set for April
908 20-21, 2009, in Chicago.)

909 *Adjournment*

910 The Committee adjourned without further work.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB

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

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DATE: December 11, 2008

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 13 and 14, 2008, in Charleston, South Carolina. The Committee gave final approval to a proposed amendment to Rule 40(a)(1), and it removed one item from its study agenda.

Part II of this report discusses the Committee's request for final approval of the proposed amendment to Rule 40(a)(1). Part III sets forth a discussion item concerning the Committee's recommendation that appropriate steps be taken to improve district court compliance with Civil Rule 58's separate document requirement. Part IV covers other matters.

The Committee has tentatively scheduled its next meeting for April 16-17, 2009.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting[1] and in the Committee's study agenda, both of which are attached to this report.

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[1] These minutes have not yet been approved by the Committee.

II. Action Item: Request for Final Approval of Proposed Amendment to Rule 40(a)(1)

The Committee proposes to amend Rule 40(a)(1) to clarify the treatment of the time to seek rehearing in cases to which a United States officer or employee is a party. This proposal was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). However, the Committee subsequently noted that the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), raises questions concerning the advisability of pursuing the proposed amendment to Rule 4(a)(1)(B). That amendment would address the scope of the 60-day appeal period in Rule 4(a)(1)(B) – a period that is also set by 28 U.S.C. § 2107. Because *Bowles* indicates that statutory appeal time periods are jurisdictional, amending Rule 4(a)(1)(B)'s 60-day period without a similar statutory amendment to Section 2107 would not remove any uncertainty that exists concerning the scope of the 60-day appeal period. Accordingly, the Department of Justice (which initially proposed the Rule 4(a)(1)(B) and Rule 40(a)(1) amendments) has withdrawn its proposal to amend Rule 4(a)(1)(B). A similar issue does not arise with respect to Rule 40(a)(1), because the deadlines for seeking rehearing are not set by statute. The Committee therefore determined to abandon the proposed amendment to Rule 4(a)(1)(B), but it voted without opposition to give final approval to the proposed amendment to Rule 40(a)(1). The Rule 40(a)(1) amendment will clarify the applicability of the extended (45-day) period for seeking rehearing, and it will render Rule 40(a)(1)'s language parallel to similar language in Civil Rule 12(a) concerning the time to serve an answer.

A. Text of Proposed Amendment and Committee Note

The Committee recommends final approval of the proposed amendment as set out in the enclosure to this report.

B. Changes Made After Publication and Comment

As noted above, after publication and comment the Committee decided to abandon the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment after publication and comment. The Committee is of the view that these changes do not require republication.

The public comments on the proposed amendment are summarized in the enclosure to this report. The Committee discussed, but ultimately decided not to implement, two suggestions concerning the wording of the proposed amendment. The Committee concluded that Chief Judge Easterbrook's comment concerning the use of the term "United States" as an adjective is a question of style; and the Committee noted that adopting Chief Judge Easterbrook's proposed change would cause the language used in the Rule 40(a)(1) amendment to diverge from the language employed in restyled Civil Rule 12(a). The Committee also discussed the Public

Citizen Litigation Group's view that the wording of the amendment should be changed so that the extended time period's applicability turns on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. A meeting participant expressed opposition to this suggestion, arguing that the time period for rehearing should not turn on the way in which the complaint was framed. It was also noted that the uncertainty which concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) than it would have been in connection with the Rule 4(a)(1)(B) amendment concerning appeal time, because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. Finally, it was noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

III. Discussion Item: Recommendation Concerning District Court Compliance With Civil Rule 58

At its November meeting, the Committee voted to recommend to the Standing Committee that appropriate steps be taken to improve district court compliance with Civil Rule 58's separate document requirement. The Committee's concerns arise from its discussion of the possible effects of noncompliance with the separate document requirement in a case where an appeal is filed and then a belated motion is made which suspends the effect of the appeal. The concern would arise in cases where a separate document is required but not provided; an appeal is commenced; and a party subsequently files a tolling motion which is timely (due to the lack of a separate document) and which suspends the effectiveness of the notice of appeal.

The Committee's discussion of this issue at its spring 2008 meeting led to several lines of inquiry by some of those who had participated in that discussion. Over the summer, the importance of compliance with the separate document requirement was raised with the district clerks in the Tenth Circuit, and this led to a salutary increase in the level of compliance in that circuit. Inquiries by a member of the Committee within his own district (not in the Tenth Circuit) led him to conclude that compliance with the requirement could be improved in that district.

Committee members believe that the best way to approach this issue at this time is through outreach efforts to improve compliance rates rather than through a rule amendment. Members noted the importance of coordinating, on this issue, with the Civil Rules Committee and the Bankruptcy Rules Committee. Meeting participants suggested that it would be useful if the Director of the Administrative Office were to write to district judges and district clerks to highlight the importance of complying with the separate document requirement. The letter might enclose sample documents which show how easy it is to comply. In addition to a letter from the Director, other measures could also help to raise awareness of the issue; for example, it could be discussed in newsletters. And perhaps a feature might be added to the CM/ECF system that would prompt judges or clerks to provide a separate document when required.

IV. Information Items

The Committee continues to discuss the implications of *Bowles v. Russell*, 127 S. Ct. 2360 (2007), for appeal-related deadlines. In the lower courts, a few trends can be identified. Appeal deadlines set by statute – such as the 30-day and 60-day time periods set by 28 U.S.C. § 2107 for civil appeals – are jurisdictional. Appeal deadlines set entirely by Rule rather than statute – such as a criminal defendant's appeal deadline under Appellate Rule 4(b)(1)(A) – appear likely to be non-jurisdictional claim-processing rules. And there is a developing circuit split concerning hybrid deadlines which implicate both a rule-based and a statutory time period; one example is the treatment of the Civil Rules' deadlines for making postjudgment motions which, if timely made, suspend the time for taking a civil appeal. The Committee has resolved to consider – in coordination with the other Advisory Committees – the possibility of drafting proposed legislation that could rationalize the treatment of appeal deadlines by making clear which existing and future appeal deadlines are to be treated as jurisdictional and which are not.

The Committee discussed and retained on its agenda a number of proposals. The Committee is considering whether to amend Rule 4(c) to clarify various aspects of practice with respect to the timeliness of inmates' notices of appeal. The Committee is considering possible changes to Form 4 (concerning applications to proceed in forma pauperis); these changes would be in addition to the privacy-related amendments to Form 4 that are currently out for comment. The Committee is taking a wait-and-see approach to certain proposals that are not yet ripe for action, such as a proposal to amend Rule 3(d) concerning service of the notice of appeal (in light of the ongoing shift to electronic filing); an item concerning the Rules implications of the Judicial Conference's mandatory conflict screening policy; and an item concerning Rule 25(a)(5) and the publication of alien registration numbers in judicial opinions. The Committee intends to seek the input of the Bankruptcy Rules Committee concerning a possible amendment to remove an ambiguity in Rule 6(b)(2)(A)(ii) (which addresses the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The Committee is considering the Rules framework for interlocutory appeals in tax cases. The Committee has discussed, but has not taken any action on, a proposal to address amicus briefs with respect to rehearing. At the Committee's November meeting some members expressed support for the view that local rules on the amicus-brief topic would be useful, but other members argued that the Committee itself should not take action to seek the adoption of such local rules; a motion to direct that a proposed letter on the subject be drafted (for consideration at the Committee's spring meeting) failed.

The Committee looks forward to collaborating with the Civil Rules Committee on several issues that are of interest to both Committees. One such issue is whether to amend Rule 4(a)(4) to refine the timing and scope of notices of appeal (with respect to challenges to the disposition of post-judgment motions). Another such item concerns the possibility of a Rule change to address the doctrine of "manufactured finality" – i.e., whether rulemaking is desirable to address the possibility of avenues (other than Civil Rule 54(b) or 28 U.S.C. § 1292(b)) for taking an appeal when the district court has dismissed a plaintiff's most important claims but the plaintiff's other, peripheral, claims survive. The Committee removed from its study agenda a proposal to

amend Rule 7 to clarify the scope of "costs" for which an appeal bond may be required; but the Committee will follow with interest any further consideration by the Civil Rules Committee of the related topic of appeals by class action objectors.

A number of Appellate Rules amendments are currently on track to take effect on December 1, 2009, assuming that the Supreme Court approves them and assuming that Congress takes no contrary action. The set of amendments includes the proposed clarifying amendment to Rule 26(c)'s three-day rule; new Rule 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in Rule 4(a)(4)(B)(ii); an amendment to Rule 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

Among the proposed amendments published for comment this past August were three Appellate Rules items: a proposed amendment to Rule 1 that would define the term "state" for purposes of the Appellate Rules; proposed amendments to Rule 29 that would revise that Rule in the light of the proposed Rule 1 amendment and that would impose an amicus brief disclosure requirement modeled on Supreme Court Rule 37.6; and proposed amendments to Form 4 to bring that form into compliance with the new privacy requirements. The Committee looks forward to discussing at its spring 2009 meeting the comments submitted on these proposals.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 40. Petition for Panel Rehearing

1 **(a) Time to File; Contents; Answer; Action by the Court**
2 **if Granted.**
3 (1) **Time.** Unless the time is shortened or extended by
4 order or local rule, a petition for panel rehearing
5 may be filed within 14 days after entry of
6 judgment. But in a civil case, ~~if the United States~~
7 ~~or its officer or agency is a party, the time within~~
8 ~~which any party may seek rehearing is 45 days~~
9 ~~after entry of judgment,~~ unless an order shortens or
10 extends the time~~.~~, the petition may be filed by any
11 party within 45 days after entry of judgment if one
12 of the parties is:
13 (A) the United States;
14 (B) a United States agency;
15 (C) a United States officer or employee sued in
16 an official capacity; or
17 (D) a United States officer or employee sued in
18 an individual capacity for an act or omission

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

19 occurring in connection with duties

20 performed on the United States' behalf.

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Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The proposed amendment to Rule 40(a)(1) was published for comment in 2007 along with a proposal to make a similar clarifying amendment to Rule 4(a)(1)(B). But due to possible complications as a result of the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Committee decided not to proceed with the proposed amendment to Rule 4(a)(1)(B) and to proceed with the proposed amendment to Rule 40(a)(1) on a standalone basis. That decision led the Committee to delete from the Note to Rule 40(a)(1) a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment as released for public comment.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly-published proposals to amend Rules 4(a)(1)(B) and 40(a)(1).

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook criticized the proposals' "stylistic backsliding." He asserted that "[t]reating a

proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court*. Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests." (The Department of Justice subsequently withdrew its support for the proposed amendment to Rule 4(a)(1)(B).)

TAB

DRAFT

Minutes of Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13 and 14, 2008
Charleston, SC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 13, 2008, at 8:30 a.m. at the Charleston Place Hotel in Charleston, South Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Gregory G. Garre joined the meeting after lunch on November 13, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), attended the whole meeting. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Mr. Timothy Reagan from the FJC and Professor Richard Marcus joined the meeting on the morning of the 14th. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a number of proposed amendments. Those amendments, which were also approved by the Judicial

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[1] Dean McAllister was present on November 13 but was unable to be present on November 14.

Conference in September 2008, are currently on track to take effect on December 1, 2009, assuming that the Supreme Court approves them and assuming that Congress takes no contrary action. The set of amendments include the proposed clarifying amendment to FRAP 26(c)'s three-day rule; new FRAP 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in FRAP 4(a)(4)(B)(ii); an amendment to FRAP 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments. The Reporter noted that the Standing Committee had made a change to the treatment of state holidays in the time-computation rules; had revised the Note to new Rule 12.1; and had decided upon a change to the text of Rule 22. All these changes had been summarized in the Reporter's June 20, 2008 email report to the Advisory Committee.

Judge Rosenthal noted that she and others had met with congressional staffers and had discussed the time-computation project. The staffers indicated their belief that it should not be difficult to secure the passage of legislation to amend the short list of statutes containing time periods that require amendment in the light of the change in time-computation method. The staffers suggested that participants in the rulemaking process return to the Hill in early December 2008 with proposed statutory language; the goal will be to secure legislation that takes effect on the same day as the proposed Rules amendments. Mr. Letter asked whether any of the proposed statutory amendments show signs of being controversial. Judge Rosenthal responded that there have been no signs of controversy.

Judge Rosenthal also noted that there will be a need for local rulemaking activity in order to adjust time periods set by local rules in light of the change in time-computation approach. The Standing Committee plans to communicate on this topic with the chief judges of each district court, and also plans to arrange for the matter to be raised at judges' workshops and conferences.

The Reporter noted that the Standing Committee had approved for publication the proposed amendments to Form 4, Rule 1(b), and Rule 29(a). Those amendments were published for comment in August, along with the proposed amendment to Rule 29(c) (which had previously been approved for publication). So far, the Committee has received one comment in general support of the proposals and two comments critiquing the proposed new Rule 29(c) disclosure requirement. The Washington Legal Foundation (WLF) points out that the proposed requirement that the amicus "identify" all persons who contributed money intended to fund the brief could be read to allow an amicus to say nothing if no such persons exist. However, WLF asserts, the Supreme Court interprets its similarly-worded rule to require, in such instances, a *statement* that no such persons exist. WLF suggests re-drafting the proposed Rule to clarify the point. A member responded that such a clarification might be inserted into the Note. The second comment on the Rule 29(c) proposal comes from Luther Munford, who asks why the rule imposes a disclosure requirement rather than simply setting a conduct rule (as by banning parties from contributing to the preparation of the amicus brief). Mr. Munford will send the Committee a written comment along these lines. Comments are due by February 17, 2009, so the Committee will be in a position to consider the comments at its spring 2009 meeting.

IV. Other Information Items

Judge Stewart noted that he has not received any further responses to his letter to the chief judges of each circuit concerning circuit-specific briefing requirements. He noted that as new judges are appointed to a circuit, it becomes more likely that the circuit may be willing to re-evaluate its existing local rules. Progress in paring down circuit-specific requirements is likely to be incremental.

Judge Stewart reported that he had written to Judge Jerry Smith to apprise him of the Committee's decision not to proceed with Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. Likewise, Judge Stewart reported, he had written to Judge Alan Lourie to let him know that the Committee had decided not to proceed with Judge Lourie's proposal to amend Rule 28.1(e) to address abuses of the cross-appeal briefing length limits.

V. Discussion Items

A. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to present an update on issues relating to the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

The most recent Supreme Court case implicating appeal deadlines was *Greenlaw v. United States*, 128 S. Ct. 2559 (2008). Greenlaw had appealed his sentence to the court of appeals and the government had failed to cross-appeal. The court of appeals rejected Greenlaw's challenge, and in addition – raising on its own motion the district court's failure to comply with a statutory mandatory minimum – the court of appeals decided that Greenlaw's sentence must be *increased.* When Greenlaw sought review, the United States confessed error and argued for vacatur and remand; but instead, the Supreme Court ordered full briefing and appointed separate counsel to defend the court of appeals' judgment. Ultimately, the Supreme Court vacated the judgment, holding that absent a government appeal or cross-appeal, the court of appeals should not have increased Greenlaw's sentence. Even assuming that there might be circumstances in which the court of appeals could initiate plain error review, such an approach is not appropriate as to sentencing errors which the government did not pursue. The Supreme Court's opinion in *Greenlaw* does not resolve the nature of the cross-appeal requirement. The *Greenlaw* Court's discussion of the deadlines for appeals and cross-appeals is interesting. As the Court puts it, those deadlines are "unyielding," and they serve the goals of finality and notice. In particular, an appellant such as Greenlaw should be able to rely (in formulating his litigation strategy) on the fact that the government has decided not to take a cross-appeal.

Meanwhile, the lower courts continue to examine *Bowles*' implications for various types of appeal deadlines. Statutory appeal deadlines – such as Section 2107's 30-day and 60-day deadlines for taking civil appeals – are clearly regarded as jurisdictional. Entirely rule-based appeal deadlines, however, appear to be non-jurisdictional claim-processing rules. Examples include the Appellate Rule 4(b)(1)(A) deadline for appeals by criminal defendants and the Civil Rule 23(f) deadline for appeals from decisions concerning class certification. There is a nascent circuit split concerning hybrid deadlines – i.e., deadlines which are set by rule but which affect a deadline set by statute. One set of hybrid deadlines encompasses the Civil Rules deadlines for making motions that toll the time to appeal under Appellate Rule 4(a)(4). The Sixth Circuit views such tolling-motion deadlines as non-jurisdictional, but the Ninth Circuit disagrees. Most recently, the Eighth Circuit confronted a case in which the district court had purported to grant a defendant's (unopposed) motion for an extension of time to file a Civil Rule 50(b) motion. In its opposition on the merits of the motion (and after the time had run out for making a timely Rule 50(b) motion) the plaintiff raised the timeliness objection, and the district court denied the motion. The Eighth Circuit held that the deadline for making Civil Rule 50(b) motions is non-jurisdictional, but that the objection in this case was properly raised and that the untimely motion did not toll the time to appeal. Nor, in the court's view, could the "unique circumstances" doctrine rescue the appeal, because the court viewed such an application of the doctrine as barred by *Bowles*.

A judge member noted that a circuit split concerning the treatment of appeal deadlines is not desirable. He asked whether a proposal should be made to Congress to enact legislation that would adopt a uniform approach to such deadlines. Another judge member stated that if action is to be taken to adopt such an approach, Congress is better positioned to do so than are the rulemaking committees. This member concurred in the notion that it could be useful to make a recommendation to Congress; he suggested that in the preface to such a proposal one should explain the Committee's reasons for thinking that the matter is not amenable to a rulemaking solution.

It was noted that the *Bowles* issues also affect the other Advisory Committees and that coordination with those Committees will be essential. Judge Rosenthal observed that a legislative proposal, if one were to be formulated, would presumably include two components – first, a list of existing statutory appeal deadlines and a method for determining how to treat them, and second, a method for establishing the treatment of statutory appeal deadlines enacted in the future. She noted that in assessing the desirability of such a proposal, it would be useful to see possible language. Professor Coquillette agreed that sample language would be very useful for purposes of evaluating this possibility. He also noted that in order to be successful any such proposal would need the support of the DOJ. Mr. Letter promised to raise the question with Solicitor General Garre. Judge Rosenthal wondered whether proposed legislation that changes the treatment of existing statutory appeal deadlines would be controversial. Mr. Letter responded that he did not think so. An appellate judge suggested that in drafting proposed statutory language, it would be advisable to avoid use of the term "jurisdictional." A judge member suggested that it would be worthwhile to consider the Court's reasoning in *Arbaugh v. Y&H*

Corp., 546 U.S. 500, 515-16 (2006) (in holding "that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue," suggesting a clear statement rule for determining when "a threshold limitation on a statute's scope shall count as jurisdictional").

The Committee resolved by consensus that the Reporter will ask the Reporters for the other Advisory Committees to raise the general issue with a view to obtaining the views of the Advisory Committees concerning the possibility of coordinating on this project. The Reporter will draft (for the Committee's review) possible language for a proposed statute that would identify which statutory deadlines are to be treated as jurisdictional and which are not. The Reporter's charge includes developing a list of existing statutory deadlines the status of which should be clarified by the proposed statute, and also developing proposed statutory language that would govern the treatment of deadlines set by statutes that are enacted in the future.

B. Item No. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to introduce the discussion of this item, which concerns the problems that could be caused by belated tolling motions in cases where the district court has failed to comply with Civil Rule 58's separate document requirement. The concern is as follows: suppose that a separate document is required but not provided; that an appeal is commenced; and that a party subsequently files a tolling motion which is timely (due to the lack of a separate document) and which suspends the effectiveness of the notice of appeal. The Committee's discussion of this problem at the Spring 2008 meeting resulted in several requests that members make additional inquiries. Judge Hartz undertook to discuss these issues with the Tenth Circuit Clerk. Fritz Fulbruge agreed to survey the circuit clerks for their views. Marie Leary was asked to check with the Federal Judicial Center to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. And the Committee directed the Reporter to consult the Chair and Reporter of the Civil Rules Committee for their views.

The results of those inquiries are, overall, encouraging. Judge Hartz reported that he had raised the matter at a Tenth Circuit judges' meeting in May, and that the Tenth Circuit Clerk had subsequently contacted the district court clerks to encourage compliance with the separate document requirement. The outreach to the Tenth Circuit's district clerks produced a marked increase in compliance. Judge Hartz noted, however, that the problem of noncompliance may be more widespread than the Committee realizes, since the problem is a hidden one.

A district judge member reported that, after reading the agenda book materials, he made inquiries within his district. He learned that failure to comply with the separate document requirement is common, particularly in connection with the entry of summary judgment. The member suggested that the first step to take is to raise the matter with the district clerks' offices.

Judge Rosenthal observed that compliance with the separate document requirement is not difficult. Mr. Letter noted the importance of the separate document requirement in making clear, to practitioners, the point at which the district judge considers the case to be at an end (and thus ripe for appeal).

Judge Stewart suggested that compliance could be improved by raising awareness of the issue, for example, by placing an item on the agenda at meetings for district judges. A letter from the chief judge to the district judges in the district could highlight the issue. Judge Rosenthal noted that if the Committee believes such a reminder would be helpful, it could be useful for the Committee to make a recommendation along those lines. For example, the Committee might ask the Director of the AO to send out such a letter, with examples of documents that comply with the separate document provision. Mr. Rabiej noted that such a letter could be sent to both judges and district clerks. Mr. McCabe noted that there are a number of possible additional avenues for distributing the information, for example, through newsletters. Perhaps it might also be possible to insert a measure into the CM/ECF system that would prompt users to comply. A district judge member suggested that the Director's letter could be followed by another letter from a judge. Judge Rosenthal suggested that the letter could present the matter as a problem which is easy to solve.

Mr. Letter moved that the Committee recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. The motion was seconded and was approved by voice vote without objection.

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning Judge Wood's proposal with respect to Rule 4(c)(1)'s inmate filing rule. At the Committee's Spring 2008 meeting, members raised a number of questions about institutional practices with respect to inmate legal mail – and, in particular, the extent to which indigent inmates have access to funds for postage for use on legal mail. Mr. Letter has made inquiries concerning the policy of the federal Bureau of Prisons. He reports that the issues raised by Judge Wood are not currently of concern to federal agencies or to the DOJ. The Bureau of Prisons has special procedures for legal mail; it provides indigent prisoners with a reasonable supply of postage for use on legal mail; and it requires the prisoners to affix the postage themselves. Thus, if Rule 4(c) were interpreted or amended to require prepayment of postage when an inmate uses an institution's legal mail system, that would not alter existing practice within the Bureau of Prisons. Mr. Letter has also put the Reporter in touch with an official who can provide information concerning the practice in immigration facilities; the Reporter will follow up with her directly.

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent inmates a reasonable amount of free postage; some institutions advance money for postage to such inmates and then seek to recoup the money once there is a balance in the inmate's account.

The caselaw appears to recognize that indigent prisoners have a federal constitutional right to some amount of free postage in order to implement the inmate's right of access to the courts. The Supreme Court's 1977 decision in *Bounds v. Smith*, 430 U.S. 817 (1977), provides authority for this view. However, *Bounds* has been narrowed in some respects by *Lewis v. Casey*, 518 U.S. 343 (1996). The caselaw from the different circuits varies, and the decisions are very fact-specific; however, common themes appear to be that indigent inmates do have a right to some free postage for legal mail – but also that the constitutionally required amount may not be very large.

Mr. Fulbruge noted that roughly 40 percent of the Fifth Circuit's docket consists of cases involving prisoner litigants. A district judge member asked whether the high percentages of inmate filings in the Fifth and Ninth Circuits are atypical. Mr. Fulbruge responded that, nationwide, the percentage of appellants in the courts of appeals who are pro se is roughly 40 per cent, and that most of those pro se litigants are inmates. The Ninth, Fifth and Fourth Circuits have the greatest proportion of inmate litigation, and the Eleventh Circuit has a large share of inmate litigation as well.

Mr. Letter noted that he sympathizes with Judge Wood's original inquiry: the Rule could definitely be written more clearly. A member noted that the Rule's use of the word "inmate" might be misleading, to the extent that the Rule is intended to cover other institutionalized persons such as people in mental institutions; he suggested that a broader term would be "person" rather than "inmate." A judge member agreed that the Rule should be clarified. An attorney member wondered whether it might be useful to take a more global look at the inmate-filing rule, as opposed to treating only the question of postage. Judge Hartz noted that a related but distinct issue is raised by cases such as *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid.

Judge Sutton, Dean McAllister, and Mr. Letter agreed to work with the Reporter to formulate some possible options for the Committee's consideration at the next meeting.

D. **Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)**

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the Committee's Spring 2008 meeting there was no consensus on whether a national rule would be desirable, but members did suggest that circuits should consider adopting local rules on the issue. Members noted that it would be useful to ask judges in circuits which do not currently have a local rule on point why no such local rule exists. Members also observed that circuits without local rules on the subject are most likely to adopt such rules if attorney groups advocate their adoption.

Accordingly, the Committee's discussion at the Spring 2008 meeting gave rise to a number of lines of inquiry. Mr. Letter raised the issue with the federal appellate chiefs from around the country to see what their experience has been and whether the lack of local rules on the topic seems problematic. Judge Sutton raised the issue with the Sixth Circuit's local rules committee and also contacted some judges in the circuits that do not have a local rule on point to inquire why they do not have one. And Mr. Fulbruge consulted his fellow Circuit Clerks for their input on the practice in their respective circuits.

Mr. Letter reported that the question of amicus filings in connection with rehearing is not much of an issue for the United States Attorney offices; the question is much more likely to arise for the litigating divisions in Main DOJ. He noted that the DOJ does find local rules like those of the Ninth and Eleventh Circuits useful, because they provide needed clarity on whether motions are required in order to file such amicus briefs and on questions of brief length and timing.

Judge Sutton contacted circuit judges in the circuits (First, Second, Fourth, Sixth, and Eighth) which do not currently have a local rule on point. In his conversations with those judges, a number of themes emerged. Judges noted that even without a local rule on point a would-be amicus can always make a motion for leave to file the brief. Most circuits will usually grant such a motion unless the filing would cause a recusal. (The Eighth Circuit, he noted, may be somewhat less receptive and does not always grant leave.) Some judges feel that adopting a local rule would be undesirable because it could encourage amicus filings. And in courts which do not generally allow additional briefing after granting rehearing en banc, permitting amicus filings at that point would create a need to review the court's policy with respect to party filings at that stage as well.

Mr. Fulbruge's survey of the circuit clerks disclosed that some seven of the clerks who responded do not favor the adoption of a national rule. Two clerks see no need for a local rule, but two other clerks feel that it would be useful for circuits to consider adopting one.

Mr. Levy stated that even though the Committee does not seem inclined to adopt a national rule, it would be useful to encourage the adoption of local rules. Though this would not achieve uniformity, it would bring clarity to an area where questions frequently arise. A judge member observed that judges and practitioners have different perspectives on this issue. He suggested that local rules would be useful, and that the best way to encourage their adoption would be for the suggestions to come from attorney organizations.

Mr. Levy asked whether each circuit has a local rules committee. Judge Stewart stated that each circuit technically does have such a committee, and that he had identified those committees for the purpose of sending them copies of his letter to the chief judges concerning circuit-specific briefing requirements. Mr. Fulbruge noted that the Fifth Circuit's local rules committee is not used as much as those in some other circuits (such as the Seventh Circuit).

A district judge member stated that he opposes the adoption of a national rule, and he also questioned why the Committee should encourage the adoption of local rules on this topic. An attorney member responded that local rules could usefully provide answers to the questions that attorneys commonly have about such briefs (concerning the need for a motion, and concerning length and timing); she wondered whether an appropriate measure might be a letter from the Advisory Committee to the chairs of the circuits' local rulemaking committees.

Professor Coquillette observed that, in general, the Standing Committee's policy has been not to encourage local rulemaking as a solution unless there is a good reason for local variation. An appellate judge observed that there are indeed variations in local circuit culture that affect the courts' treatment of amicus briefs in connection with rehearing.

Mr. Fulbruge noted that circuit clerks who oppose adoption of a local rule on this point are concerned that a local rule would encourage amicus filings. Mr. Levy noted that a local rule, if adopted, need not encourage filings; for example, it could state that party consent is not enough and that a motion is required. Mr. Levy observed that one important function of local rules is to instruct practitioners. Mr. Letter agreed that this issue comes up constantly in his practice and that having a local rule would inform practitioners as to what they are supposed to do.

Professor Coquillette asked whether the adoption of local rules on this point would be justified by circuit-to-circuit variation – for example, by variations in the size of the circuit, the circuit's geographical range, and the types of litigation commonly seen in the circuit. Mr. Levy responded that in his view such variation does exist. A district judge member disagreed; he suggested that at most, the Committee might send the minutes of the meeting to the chief judges of each circuit (so as to apprise them of the discussion) but without any recommendation by the Committee. Then, he suggested, practitioners who are interested in the adoption of such local rules can work to seek their adoption. An appellate judge responded that he sees things somewhat differently, since there is already a lot of local variation in briefing practice. The district judge member responded that it is one thing for the Committee to tolerate variation, and another for the Committee to recommend the proliferation of local rules. The appellate judge

member responded that his research had brought to light some rather surprising local practices. For example, some circuits which require a motion for leave send that motion to the original panel – the members of which might be expected to be unreceptive to the arguments of an amicus who wishes to submit a brief in support of rehearing en banc. The appellate judge member agreed, though, that the key factor in the adoption of local rules on this issue will be the support of practitioners who push for the adoption of such rules.

Mr. Levy noted that the D.C. Circuit has an active practitioners' committee; he suggested that it would be useful for the Appellate Rules Committee to state that the issue is worth thinking about. A member countered, however, that the recent experience with the issue of local circuit briefing rules weighs against the notion of asking the Chair to write a letter to the chief judges of the circuits; the member noted that such a letter would only be useful if it contained a detailed suggestion, yet if the letter were to contain a detailed suggestion that might make it seem that the Committee is promoting the adoption of local rules on the issue. Professor Coquillette noted that the response in his home circuit indicates that Judge Stewart's letter on local briefing rules has had an effect. Professor Coquillette reviewed some relevant history concerning local rules. Local rules are adopted without the report-and-wait process which is used for the national rules, and thus in 1988 Congress became concerned about the proliferation of local rules because such rules are adopted without congressional oversight. Professor Coquillette observed that on occasions when the Committees have considered an issue important enough for a national rule, the Committees have not been persuaded by the argument that the issue is one treated differently in different circuits due to local legal culture (he cited the example of new Appellate Rule 32.1 concerning unpublished opinions). He also noted that the ABA's Section on Litigation has tended to prefer the adoption of uniform national rules rather than local rules because the need to look at local rules is a burden on practitioners.

An attorney member asked whether – if the Committee were to communicate directly with the local rules advisory committees – that would offend the judges in the relevant circuit. An appellate judge observed that contacting the practitioners who serve on local rules committees may not be particularly useful, because lawyers who are accustomed to practicing in a given circuit are less likely to seek clarification of a circuit's practices than lawyers who practice nationwide. Mr. Levy noted that one relevant national organization would be the American Academy of Appellate Lawyers.

A district judge member expressed opposition to the idea of contacting local rules advisory committees directly; he suggested that, instead, practitioners should be the ones to make such contacts. At most, he stated, he would be willing to support communicating with the chief judges of the circuits, not with the local rules advisory committees. Judge Rosenthal noted that she did not recall any instances in which an Advisory Committee or the Standing Committee communicated directly with local rules advisory committees. She noted that it would be interesting to consider the 1990s experience under the Civil Justice Reform Act. Mr. Levy suggested that perhaps a first letter could be sent to the chief judges of the circuits, and then that letter could be followed by one to the local rules advisory committees. Mr. McCabe questioned

whether the AO has a current list of the local rules advisory committee members; Mr. Rabiej noted that the AO does have a list of the local rules committees for the district courts.

An attorney member concurred in the prior observation that practitioners on the local rules advisory committees are unlikely to advocate the adoption of local rules on the issue. He suggested that – given the low probability that a letter from the Committee would lead to the adoption of local rules on the point – if the Committee has an institutional interest in not encouraging the proliferation of local rules, the Committee should take no action.

Mr. Levy moved that the Committee resolve to draft a letter (the specifics of which the Committee could consider at its Spring 2009 meeting) to the chief judges of each circuit advising them of the Committee's discussion and asking them to consider adopting a local rule on amicus briefs with respect to rehearing. He suggested that the letter might include a copy of sample local rules on the subject. Mr. Letter seconded the motion. A district judge member stated that he would vote against such a motion because he expected to disagree with what he anticipated Mr. Levy would suggest including in the substance of the letter. Mr. Levy responded that if the motion were to pass, it would be possible to prepare more than one proposed alternative drafts of the letter. The motion failed by a vote of five to three. No further motions were made with respect to this item.

E. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to introduce the topic of Rule 7 bonds for costs on appeal. The Reporter noted that, at its spring 2008 meeting, the Committee had discussed the pending proposal to amend Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. There was consensus that the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

The input received since then from Judge Kravitz and Professor Cooper has been very helpful. Professor Cooper provided some preliminary observations which underscore the challenges of moving forward with a proposal to address class-action appeals through an amendment to Rule 7. He notes that to the extent that a commentator takes the view that rulemaking action is warranted to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through Rule 7's appeal bond provision. He points out that it is difficult to craft rules that will distinguish accurately between objectors who are raising useful objections and objectors who are not. Professor Cooper has also identified a number of subsidiary issues which would require attention in drafting an amendment to Rule 7. He agrees that any such proposal should be developed in coordination with the Civil Rules Committee. But he also notes that this general topic could pose additional issues for the Civil Rules Committee. This is because the reasoning

of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts' discussions of the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the statute in question defines "costs" to include attorney's fees. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 "costs," and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*'s treatment of attorney fees as "costs" under Civil Rule 68. And the latter issue would not be uncontroversial. In the event that the Committee wishes to proceed with its consideration of an amendment to Rule 7, Professor Cooper has provided a very helpful list of litigators who have in the past assisted the Civil Rules Committee in its consideration of issues relating to class actions.

An attorney member asked whether there would be any downside if the Committee were to decide not to amend Rule 7. Judge Stewart noted that the Committee had, in a prior year, voted to approve for publication a proposal to amend Rule 7 to exclude attorney fees from the costs for which an appeal bond can be required; that proposal did not, however, focus on the question of class actions. Judge Rosenthal stated that Professor Cooper's comments summarize well the difficulty of attempting to address by rule the role of class action objectors – a question that has become more prominent since the adoption of Civil Rule 23(f) (which authorizes interlocutory appeals by permission from class certification rulings). Another attorney member suggested that the Committee let the matter continue develop through caselaw; crafting a rule amendment would be highly complex and would risk unintended consequences. A district judge member expressed agreement with this view, but also noted that such a disposition should not be taken as intended to discourage the Civil Rules Committee from considering this set of issues in the first instance. The question was posed whether the Appellate Rules Committee would like to ask the Civil Rules Committee to continue to monitor developments in this area. A member responded that such a course of action should be left up to the judgment of the Civil Rules Committee. Another member moved to remove Item 03-02 from the Committee's study agenda. The motion was seconded and passed by voice vote without opposition.

F. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited Mr. Letter to introduce the DOJ's revised proposal concerning the possibility of an amendment to address the treatment of litigation involving federal officers or employees. Mr. Letter noted that the DOJ had wished to clarify the treatment of litigation involving federal officers sued in their individual capacity and also to clarify the treatment of litigation involving federal employees. The courts have never clearly explained the distinction between a federal "officer" (as used in Rules 4(a)(1)(B) and 40(a)(1)) and federal employees in general. Civil Rule 12 was amended in 2000 to make clear that the additional time that Rule provides for answers by a United States litigant covers federal officers or employees, including

officers or employees sued in their individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Some years ago, the DOJ proposed that similar changes be made in Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1). The Committee approved those proposals for publication, but the proposals were held in order to await publication along with other proposals. The result was that the proposals were still under consideration at the time that the Supreme Court decided *Bowles*. In the light of *Bowles*, a problem arises with the proposed amendment to Rule 4(a)(1)(B): Because the amendment to Rule 4(a)(1)(B) would not change the corresponding statutory language (concerning civil appeal deadlines) in 28 U.S.C. § 2107, amending Rule 4(a)(1)(B) would not provide practitioners with the certainty that the amendment was originally designed to achieve. Accordingly, the DOJ has decided to withdraw its proposal to amend Rule 4(a)(1)(B), but the DOJ still feels that it is worthwhile to amend Rule 40(a)(1). Rule 40(a)(1)'s deadlines concerning rehearing petitions are entirely rule-based and therefore *Bowles* creates no problem for the proposed Rule 40(a)(1) amendment. The proposed amendment would bring certainty to the application of Rule 40(a)(1) and would bring that Rule into conformity with the approach taken in Civil Rule 12(a).

A judge member asked why amending Rule 40 would not raise similar *Bowles* issues – i.e., is Rule 40's use of the term "officer" mirrored in a statute? The Reporter responded that 28 U.S.C. § 2101(c), which sets the 90-day period for seeking certiorari review, does not say anything about rehearing petitions, and it is, instead, Supreme Court Rule 13.3 that provides for an extension of the time to seek certiorari when a petition for rehearing is timely filed. This means, the Reporter said, that *Bowles* does not raise the same sort of problem for an amendment to Rule 40(a)(1) that it raises for an amendment to Rule 4(a)(1)(B). The judge member questioned whether it is clear that it would be inappropriate to proceed with the proposed amendment to Rule 4; if the Committee were to make clear what the *Bowles*-related issue is, and if the Supreme Court were nonetheless to approve the amendment to Rule 4, then, the member suggested, litigants could fairly rely upon the amended Rule.

The Committee adjourned its discussion of this item in order to break for lunch. The discussion of this item resumed later in the afternoon, after Solicitor General Garre had joined the meeting. In the meantime, a copy of the proposed language for the Rule 40(a)(1) amendment had been distributed. The language of the proposed amendment was the same as the language that was published for comment in August 2007 except that the members approved the deletion of one sentence in the Note (which in the published version had referred to the concurrent proposed amendment to Rule 4(a)(1)(B)). That sentence is bracketed in the proposal shown here:

Rule 40. Petition for Panel Rehearing

1 **(a) Time to File; Contents; Answer; Action by the Court if Granted.**

2 (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition

3 for panel rehearing may be filed within 14 days after entry of judgment. But in a

4 civil case, ~~if the United States or its officer or agency is a party, the time within~~

5 ~~which any party may seek rehearing is 45 days after entry of judgment,~~ unless an

6 order shortens or extends the time~~.~~, the petition may be filed by any party within

7 45 days after entry of judgment if one of the parties is:

8 (A) the United States;

9 (B) a United States agency;

10 (C) a United States officer or employee sued in an official capacity; or

11 (D) a United States officer or employee sued in an individual capacity for an

12 act or omission occurring in connection with duties performed on the

13 United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. [(A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)] In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter noted that the Committee should decide whether any further changes to the proposal should be made, and whether republication of the proposal is needed. On the latter point, Mr. Rabiej noted that the criterion for whether to republish a proposal is whether there has been a substantive change in the proposal (compared to the published version); the underlying practical concern is whether republication (and the resulting public comment) would be helpful

in the consideration of the proposal. A district judge member stated that republication was not needed since the Committee had not made a substantive change in the proposed Rule 40 amendment.

The Committee discussed whether to change the proposal's language in response to Chief Judge Easterbrook's comments. Chief Judge Easterbrook states that it is incorrect to use "United States" as an adjective; he would prefer that the Rule use the adjective "federal." It was noted that this is a matter of style, and that adopting Chief Judge Easterbrook's proposed change would render amended Rule 40(a)(1) inconsistent with the language used in restyled Civil Rule 12(a).

The Committee also discussed the Public Citizen Litigation Group's concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argues that the wording should be changed to make clear that the extended time periods' availability turns on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggests that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." Mr. Letter expressed opposition to Public Citizen's proposed wording change; the time period for rehearing should not turn on the way in which the complaint was framed. The Reporter pointed out, that the uncertainty which concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. A member noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

A motion was made to give final approval to the proposed Rule 40(a)(1) amendment, as published, subject to the deletion of the sentence in the Note that had referred to the concurrent proposed amendment to Rule 4(a)(1)(B). The motion was approved by voice vote without opposition.

After that vote was taken, Mr. Garre asked whether the Committee would be inclined to recommend to Congress that it amend 28 U.S.C. § 2107 so as to permit a corresponding change to Rule 4(a). Judge Rosenthal noted that such a request would require coordination between the rulemaking process and the legislative process.

An appellate judge member asked whether there is any precedent for proposing a rule that would clarify an ambiguity in a statute (as the proposed Rule 4(a) amendment would do). The Reporter noted that there is some loosely analogous past history with Rule 4 and Section 2107; in particular, when the 1991 amendments to Rule 4 went through the rulemaking process, the attention of Congress was called to the desirability of amending Section 2107 in order to make the statute correspond to the 1991 changes in Rule 4(a), and shortly after the 1991 amendments to Rule 4 took effect, Congress did enact a corresponding amendment to Section 2107.

VI. Additional Old Business and New Business

A. Item No. 08-AP-A (proposed FRAP 3(d) amendment concerning service of notices of appeal)

Judge Stewart invited the Reporter to introduce the study item concerning Appellate Rule 3(d). This item was drawn to the Committee's attention by Judge Kravitz, who passed along a suggestion by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee"). The CBA Local Rules Committee points out that in a district which permits the notice of appeal to be filed electronically through the CM/ECF system, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."

At the present time, not all the district courts which are on CM/ECF for filing permit the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing is still in process. The CBA Local Rules Committee is correct that where the CM/ECF system is fully operational there is no need for the clerk to serve paper copies of the notice of appeal. But even in those instances, it would be necessary to have paper copies of the notice for the purpose of serving litigants who are not on the CM/ECF system, and inmate filings would continue to be in paper form. It would also continue to be necessary for the district clerk to notify the court of appeals of district-court filings that post-date the notice of appeal. In the light of the ongoing transition to CM/ECF, it would be reasonable to take a wait-and-see approach to Rule 3(d) at this time. That is particularly true in the light of the Committee's practice of holding proposed amendments until such time as there is a critical mass of them to publish for comment.

Mr. Fulbruge observed that the district courts do not always notify the circuit clerk electronically of the filing of a notice of appeal. An attorney member suggested that, given time, this issue is likely to work itself out. Judge Stewart noted the likelihood that the Committee on Court Administration and Case Management (CACM) will also consider the issue.

By consensus, this item was retained on the study agenda.

B. Item No. 08-AP-C (possible changes to FRAP 26(c)'s "three-day rule")

Judge Stewart invited the Reporter to present the issues relating to the "three-day rule." Rule 26(c) provides that when a deadline is measured after service of a paper on a party, and the paper is served electronically or is not delivered on the date of service, then three days are added at the end of the prescribed period. Rule 26(c) is the subject of a pending amendment that is currently on track to take effect December 1, 2009, and that will clarify the mechanics of the three-day rule. During the time-computation project, comments were received which suggest

that the three-day rule should be abolished. Chief Judge Frank Easterbrook observes that the three-day rule will thwart the time-computation project's expressed preference for periods that are set in multiples of 7 days. And he argues that the three-day rule makes particularly little sense when a paper is served electronically (and thus instantaneously).

The Reporter suggested that the Committee should coordinate its work on this issue with that of the Civil, Criminal and Bankruptcy Rules Committees. She observed that the Committees have been debating the merits of the three-day rule, on and off, since at least the spring of 1999. Some of the concerns that have been expressed over that time seem less weighty now than they once did – for example, the concern that technical glitches will occur in the course of electronic service. Moreover, since the CM/ECF system is set up to require those using it to consent to electronic service, it is less plausible to argue that applying the three-day rule when service is made electronically is important in order to preserve the incentive to consent to electronic service. However, another concern has been that if the three-day rule were eliminated parties would engage in the undesirable tactic of serving papers electronically just before a weekend or holiday in order to disadvantage their opponent; the developments noted above do not mitigate that particular concern.

A judge member queried whether a decision to maintain the three-day rule, for the present time, even in cases of electronic service might result in a situation – a few years hence – in which the availability of the extra three days has come to be viewed by practitioners as an entitlement. An attorney member stated that she did not think so, because the extra three days are currently viewed more as a gift than as a right. Another attorney member stated that it makes sense to wait to address this issue until the CM/ECF system matures. Another attorney member agreed that it makes sense to coordinate the Appellate Rules Committee's consideration of this issue with the other Advisory Committees. A motion was made to defer action on this item but to encourage the other Advisory Committees to consider it. The motion was seconded and passed by voice vote without opposition.

C. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Stewart invited the Reporter to summarize the various proposals to amend Rule 4(a)(4). One such proposal comes from Peder Batalden, who 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, he suggests, the judgment might not be issued and entered until well after the entry of the order. One such scenario concerns remittitur: Suppose the court orders a new trial unless the plaintiff agrees to accept a reduced award of damages, and gives the plaintiff 40 days to consider that choice. Another scenario concerns complex injunctive relief: suppose that the court, having entered a judgment containing an injunction, subsequently grants a motion for reconsideration and directs the parties to attempt to agree on the form of an amended judgment that includes narrower relief than the initial judgment. In either of these instances, the time to appeal from the *order* might

actually run out before the *amended judgment* is actually issued and entered. These scenarios apparently would work differently in the Seventh Circuit, because that Circuit has read Civil Rule 58's reference to orders "disposing of a motion" to mean orders "denying a motion" – with the result that a separate document would be required by Civil Rule 58 for orders *granting* motions listed in Civil Rule 58(a)(1) - (5).

To address the problem he identifies, Mr. Batalden suggests that Rule 4(a)(4)(B)(ii) be amended by deleting "or a judgment altered or amended upon such a motion," so that the Rule would read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) 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 scenarios 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.

The other suggestions come from Public Citizen and from the Seventh Circuit Bar Association. They 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. It is interesting to note that Rule 4(b)(3)(C) provides that a notice of appeal in a *criminal* case encompasses challenges to subsequent orders disposing of the post-verdict motions listed in Rule 4(b)(3)(A). The contrasting approaches taken in Rules 4(a) and 4(b) date from the same set of 1993 amendments to Rule 4; the minutes from the relevant Committee meeting do not explain the reason for the difference in approaches. As Public Citizen recognizes, one of the questions to be considered in assessing the proposal is whether the appellee would have sufficient notice of the nature of the appeal under a regime which permits the initial notice of appeal to encompass challenges to subsequent dispositions of post-judgment motions.

With respect to the issues raised by Mr. Batalden, an attorney member stated that he had not seen such scenarios in his practice. Another attorney member agreed, but also noted that Rule 4(b)'s approach holds some appeal. A third attorney member stated that he had seen the remittitur scenario in his practice. A judge member suggested that the Committee continue to study the issues. Another judge member noted that even if problems in this area are rare, such problems are very serious when they arise. An attorney member asked whether the three sets of proposals are linked (in the sense that, for example, adopting Public Citizen's proposal would address Mr. Batalden's concerns). The Reporter suggested that the answer to that question would be difficult to predict.

By consensus, these items were retained on the Committee's study agenda. The Reporter was asked to report the substance of the discussion to the Civil Rules Committee.

D. Item No. 08-AP-H ("manufactured finality" and appealability)

Judge Stewart invited the Reporter to introduce Mr. Levy's suggestion concerning the "manufactured finality" doctrine. This doctrine concerns situations in which the district court dismisses with prejudice fewer than all the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in order to obtain an appealable judgment. 28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the 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. 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.

There exist some safety valves that can mitigate the occasional harshness of the final judgment rule. Civil Rule 54(b) permits the district judge to direct entry of a final judgment as to fewer than all claims or parties if the district judge expressly determines that there is no just reason for delay. 28 U.S.C. § 1292(b) permits an interlocutory appeal to be taken if there are both (1) a certification from the district judge that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and (2) permission from the court of appeals.

The manufactured finality doctrine, where it applies, can provide an additional option for seeking an immediate appeal. The circuits take varying approaches to this doctrine. The variations can be briefly summarized by reviewing various points along the spectrum of possible fact situations. 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. When the plaintiff dismisses its remaining (peripheral) claims with prejudice, all circuits (except perhaps the Eleventh Circuit) treat the resulting judgment as final and appealable. What if the plaintiff "conditionally" dismisses the peripheral claims with prejudice – i.e., dismisses them on the understanding that the dismissal is with prejudice unless the dismissal of the central claims is reversed on appeal? The Second Circuit treats such a conditional dismissal as creating an appealable judgment, but the Third and Ninth Circuits do not. In situations when the peripheral claims are dismissed without prejudice but the facts are such that those claims can no longer be asserted (for example, due to the statute of limitations), at least three circuits treat the resulting judgment as appealable. In cases where the peripheral claims are dismissed without prejudice and that dismissal completely removes a particular defendant from the suit, the Eighth and Ninth Circuits consider the resulting judgment to be appealable. In other instances when the peripheral claims are dismissed without prejudice, some six circuits treat the resulting judgment as not final and therefore not appealable, but two or more other circuits disagree. The Ninth Circuit has added a further nuance by inquiring whether there was evidence of litigant intent to manipulate the court of appeals' jurisdiction.

There could be a value to achieving a nationally uniform approach to this issue, and one could make a policy argument in favor of recognizing a judgment as appealable in some of the manufactured-finality scenarios just described. If such a result seems desirable, there is the further question of how best to achieve that result. 28 U.S.C. § 2072(c) provides that rules adopted through the rulemaking process can define when a judgment is final for purposes of appeal. There is also the question of which Committee – Civil or Appellate – is best situated to take the lead in considering such possible solutions.

Mr. Levy noted that this is an area in which clarity is very important. He suggested that 28 U.S.C. § 1292(e), which authorizes the adoption through the rulemaking process of rules permitting interlocutory appeals, could be another source of authority for a rulemaking solution in this area. Mr. Levy suggested that the two Advisory Committees should consider whether Civil Rule 54(b) is intended to occupy the field, or whether Rule 54(b) should not be read to preclude other mechanisms for permitting immediate appeals.

A district judge member stated that he would like to hear more from persons who believe that the status quo is a problem. He stated that the existing framework already provides a means for addressing these issues. One existing rule is Civil Rule 54(b). Another relevant rule, he suggested, is Civil Rule 58: where Civil Rule 41 requires the district court's permission for the dismissal of the peripheral claims, the district judge can determine whether the situation warrants a final judgment and whether to issue a judgment under Civil Rule 58. The judge member suggested that, therefore, the problems identified by Mr. Levy should come up only with respect to very early dismissals. The Reporter agreed that where Civil Rule 41 requires district judge approval of the dismissal of the peripheral claims, one can argue that the district court's approval of the dismissal should weigh in favor of the conclusion that the resulting judgment is final and appealable. However, she suggested, there are some cases where, regardless of the district court's view on the matter, the court of appeals has refused to recognize a final judgment.

An attorney member suggested that these issues might more appropriately be tackled by the Civil Rules Committee in the context of the Civil Rules (such as Civil Rule 54(b)). She also wondered whether it is unduly ambitious for the Committee to take on the task of adopting a rule in order to resolve a circuit split concerning the proper interpretation of Section 1291. A judge member agreed that the matter is one for consideration by the Civil Rules Committee; he stated that if he were required at this point to decide whether to take any action on this matter, he would favor doing nothing. He wondered whether the conditional-dismissal branch of the manufactured finality doctrine raises problems similar to those that arise with respect to hypothetical jurisdiction.

A motion was made to communicate the Committee's discussion to the Civil Rules Committee; seek the Civil Rules Committee's input; and continue to study the matter. The motion was seconded and it passed by voice vote without opposition.

E. Item No. 08-AP-I (discussion of the uses of postjudgment motions)

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. During the consideration of the time-computation project, there was some discussion of the timing of postjudgment motions. During that discussion, Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions which seek reconsideration of matters already decided. If such concerns exist, he suggested, the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made, though the Committees should also weigh the need not to unduly foreclose the appropriate uses of post-trial motions.

The Reporter noted that the Civil Rules Committee has primary jurisdiction with respect to the appropriate scope of post-judgment motions, but that it would be useful to be able to convey to the Civil Rules Committee any views that Appellate Rules Committee members might have on this question. An attorney member stated that he makes frequent use of post-judgment motions and he considers them very useful; and he noted that the district court's ruling on the post-judgment motion can inform the court of appeals' review of the issue. A district judge member noted that a meritorious post-judgment motion gives the district judge an opportunity to correct a ruling that may have been made hastily during the heat of trial; this opportunity is especially valuable given that most trials of any length involve hundreds of decisions. An appellate judge member agreed that post-judgment motions give the district judge a salutary opportunity to examine the relevant issue and either correct or otherwise address it.

By consensus, the Committee resolved that the Reporter should convey the substance of the Committee's discussion to Professor Cooper.

F. Item No. 08-AP-J (rules implications of mandatory conflict screening policy)

Judge Stewart invited the Reporter to summarize this item, which concerns the rules implications of the Judicial Conference's Mandatory Conflict Screening Policy. The Judicial Conference Committee on Codes of Conduct has tentatively raised with the Standing Committee three questions which may have implications for practice under Appellate Rule 26.1. Rule 26.1 requires certain disclosures that are designed to help judges determine whether a conflict requires their recusal from hearing an appeal. Such recusal determinations are informed by Canon 3C(1) of the Code of Conduct for United States Judges.

Two of the three questions primarily concern the Bankruptcy and Criminal Rules, respectively. The other question does implicate the Appellate Rules; in particular it implicates the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. But an inquiry into this question would be premature at this stage for a couple of

reasons. First, the Committee on Codes of Conduct has been asked for additional information concerning some of its questions, and a response from the Committee on Codes of Conduct is expected late this year. Second, the courts of appeals are still in the process of making the transition to CM/ECF, so the question of overlap between disclosures required by prompts in the CM/ECF system and disclosures required by Rule 26.1 is one as to which the facts are still developing.

By consensus, the Committee retained this item on its study agenda.

G. Item No. 08-AP-K (privacy rules and alien registration numbers)

Judge Stewart invited the Reporter to introduce this item, which relates to concerns raised by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. Public.Resource.Org points out that the inclusion within appellate opinions of social security numbers or alien registration numbers raises privacy concerns, and Public.Resource.Org proposes a number of measures to address this concern. These suggestions have been referred to the Court Administration and Case Management Committee of the Judicial Conference (CACM), which has primary jurisdiction over the Conference's privacy policy. CACM will consider the suggestions at its meeting on December 4-5, 2008.

The Reporter briefly summarized the history of the privacy provisions in Appellate Rule 25(a)(5) and the other sets of Rules. Pursuant to the E-Government Act, the rules were amended in 2007 to include provisions concerning privacy. The privacy Rules are similar to the Judicial Conference's privacy policy. They require the redaction from filings of names of minor children, birth dates, and all but the last four digits of Social Security numbers, taxpayer I.D. numbers, and financial-account numbers; in criminal cases Criminal Rule 49.1 also requires redaction of all but the city and state of an individual's home address. Appellate Rule 25(a)(5) adopts for proceedings in the courts of appeals whatever the privacy rule was that applied below; for proceedings that come directly to the court of appeals, Civil Rule 5.2 governs, except that Criminal Rule 49.1 governs when an extraordinary writ is sought in a criminal case. The rules do not mention alien registration numbers, and it does not appear that they were much discussed in the advisory committee deliberations.

In summarizing Public.Resource.Org's concerns, the Reporter indicated that she would focus on the question of alien registration numbers, because there is consensus that social security numbers should not be included in judicial opinions and because the data provided by Public.Resource.Org do not indicate that the disclosure of social security numbers in judicial opinions is a significant problem. Alien registration numbers are provided to immigrants by the Bureau of Immigration and Customs Enforcement, which uses them for purposes of tracking and identification. It appears that a person's A-number could be used to obtain information about their immigration case (including information that might allow an asylum seeker to be located by

one wishing to do him or her harm). A person's A-number might also be used by one wishing to create false identification documents for a person in the United States illegally. Not only would the existence of such false I.D.s pose a law enforcement problem, but also a false I.D. might jeopardize the status of the person to whom the A-number was issued (for instance, if the holder of the false I.D. were carrying it when apprehended for the commission of a crime).

Against such privacy concerns, one should balance the possible costs of protecting A-numbers from disclosure in appellate opinions. A blanket requirement for redaction of A-numbers could impose costs on courts that currently include those numbers in their opinions, as well as on attorneys wishing to keep track of their own cases or to research decisions in other cases. Including A-numbers in the court of appeals opinion links that opinion readily to the relevant Board of Immigration Appeals (BIA) decision. And redaction could burden the Clerk's office, particularly in circuits – such as the Ninth – which deal with a huge volume of immigration appeals. Some of the circuit clerks have noted that eliminating the use of A-numbers in connection with immigration appeals could result in a net harm to aliens if the redaction significantly increased the risks of erroneous determinations due to confusion concerning the identity of the alien involved in the appeal. One might also question whether requiring redaction of A-numbers from court of appeals opinions would even render those numbers inaccessible to Internet users. The BIA publishes its precedential decisions on the Internet. If an A-number is listed in an opinion published on the BIA website, then redacting that A-number from the court of appeals opinion would not seem to make that A-number less accessible to Internet users.

There is, however, one category of case in which the BIA currently does appear to redact A-numbers: A quick look at some of the precedential opinions on the BIA's website suggests that the BIA does not include A-numbers when publishing a precedential opinion in an asylum case.

Mr. Fulbruge noted that there is some concern among the Circuit Clerks with respect to the possibility of mis-identification. He noted that a case has been mentioned in which mistaken identity resulted in the wrong person being deported. A district judge member agreed that the concern over confusion and mistaken identity is a real one.

Mr. Rabiej noted that CACM has collecting issues relating to the E-Government Act. In the future a subcommittee may be formed to consider those issues. Judge Rosenthal observed that these issues concern multiple committees.

Mr. Fulbruge noted that Public.Resource.Org's algorithm appears to have picked up an over-inclusive set of results – i.e., it has picked up not just opinions that list social security numbers or alien numbers but also opinions listing other similarly formatted numbers such as insurance policy numbers. The Reporter noted that Public.Resource.Org's search might be also be underinclusive in some respects (in the sense that it does not appear to pick up "unpublished" opinions that are available on Westlaw).

Solicitor General Garre stated that the DOJ would confer with the relevant federal officials concerning these issues.

By consensus, the Committee resolved to await input from CACM and to retain the item on its study agenda.

H. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

Judge Stewart invited the Reporter to summarize the questions relating to Form 4 (concerning applications to proceed in forma pauperis). Proposed amendments to Form 4 designed to conform to the new privacy requirements are currently out for comment. In addition, the Committee has expressed interest in considering other possible amendments to Form 4. Meanwhile, in October 2008 the Forms Working Group approved a revised version of Form AO 240 and also approved a newly created form AO 239. Form 239 was created because some judges feel that AO 240 does not request enough detail from non-inmate IFP applicants.

The AO has posted WordPerfect and Word-compatible versions of Form 4 on the www.uscourts.gov website. However, Timothy Dole of the AO points out that it could also be helpful to post a text-fillable PDF version on the public judiciary forms page. Many circuits provide an electronic version of Form 4, but not all of those versions are text-fillable. Also, providing a text-fillable version of Form 4 might usefully assist the circuits in employing a form that is up-to-date. For example, as of fall 2008, not all circuits have removed from their forms both the request for full names of minor dependents and the request for the applicant's social security number. It was also noted that some circuits caption their circuit-specific forms with the name of the court of appeals; this contrasts with Form 4, which is captioned with the name of the relevant district court.

Another issue has to do with Question 10 on current Form 4. The Committee has noted that in future it may wish to consider revising that question, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. In the past, some have argued that these questions seek information that is protected by the attorney-client privilege. Most recently, similar arguments have been made in connection with the Forms Working Group's publication of proposed new Form AO 239.

By consensus, the Committee retained this item on its study agenda.

I. Item No. 08-AP-L (possible amendment to FRAP 6(b)(2)(A)(ii))

Judge Stewart invited the Reporter to present the proposal concerning Rule 6(b)(2)(A)(ii). It turns out that Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in Rule 4(a)(4)

that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). An amendment designed to remove the Rule 4(a)(4) ambiguity is currently on track to take effect December 1, 2009. The amendment would alter Rule 4(a)(4)(B)(ii) as follows: "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." During the course of research this summer, the Reporter became aware of a similar ambiguity in Rule 6(b)(2)(A)(ii), dealing with the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 ... measured from the entry of the order disposing of the motion." Before the 1998 restyling of the FRAP, the comparable subdivision of Rule 6 instead read "A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal ...."

The Reporter suggested that the Committee may wish to consider amending Rule 6(b)(2) for reasons similar to those that led the Committee to propose the pending amendment to Rule 4(a)(4)(B)(ii). She noted that she had benefited from very helpful discussions on this issue with Professor Gibson, the Reporter to the Bankruptcy Rules Committee. A judge member stated that the Committee should ask the Bankruptcy Rules Committee for its views on this question.

By consensus, the Committee determined to seek the views of the Bankruptcy Rules Committee concerning Rule 6(b)(2)(A)(ii).

J. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Stewart invited the Reporter to present this item concerning interlocutory appeals in tax cases. The Reporter stated that in the course of research concerning Appellate Rules 13 and 14, she noticed an apparent quirk concerning interlocutory appeals in tax matters. In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts. When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what Rules govern an interlocutory appeal by permission under Section 7482(a)(2). As of 2008, though, Tax Court Rule 193(a) states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure."

This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5. The Reporter therefore wondered whether it might be useful to remove a source of potential confusion by amending Appellate Rule 14 to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2) (with references to the "district court" in Appellate Rule 5 being treated as references to the Tax Court). But before suggesting such a proposal to the Committee, the Reporter thought it best to try to ascertain whether the current framework causes problems in practice. With Judge Stewart's permission, the Reporter made an informal inquiry seeking this information (while emphasizing that she was asking only on her own behalf and that the Committee had not yet considered the issue). That inquiry has not, however, turned up any information yet.

Mr. Letter undertook to make inquiries on this issue with tax litigators within the DOJ. By consensus, the matter was retained on the Committee's study agenda.

K. Discussion of long-range planning issues

Judge Stewart led a discussion of issues relating to long-range planning. There has been a shift in thinking concerning long-range planning; one recent development is that the Chairs of the Advisory Committees are now involved in the long-range planning process. This provides an opportunity to consider, in a coordinated fashion, issues that relate to the work of more than one Committee. The goal is to identify cross-cutting issues with potentially far-reaching consequences; examples include questions relating to electronic filing; immigration appeals; and ongoing changes in the courts. At the most recent Judicial Conference long-range planning meeting (in September), participants assessed the Judicial Conference committees' long-range planning process. Each committee is asked to incorporate long-range planning into their discussions. The notion is to have a short-term plan that is operational and a longer-term plan that is strategic. Judge Stewart expressed confidence that as the Advisory Committee proceeds in its future meetings, it will keep an eye on long-range planning issues.

L. Discussion of draft Best Practices Guide to Using Subcommittees

Judge Stewart introduced the topic of the draft Best Practices Guide to Using Subcommittees, which was included among the agenda book materials. He noted that the Appellate Rules Committee has not made frequent use of formal subcommittees. He observed that the underlying concern is that subcommittees not take on a life of their own.

It was suggested that the Judicial Conference Executive Committee's concerns may largely be directed at committees other than the rules committees. Some other committees, it was suggested, may rely unduly on subcommittees and not engage in a sufficient degree of independent review of the subcommittee recommendations. This is a particular concern with respect to committees that rely heavily on staff and may lack transparency and public input. It

was suggested that it will be important, in commenting on the draft Guide, to make clear that the rules committees' use of subcommittees has differed from the uses to which a number of other committees have put their subcommittees.

Judge Rosenthal suggested that the Committee consider concurring in a recommendation that the AO Director be authorized to act on behalf of the Chief Justice to designate one or more non-committee members to serve on subcommittees. Such instances, she stated, should arise rarely, but in appropriate instances the procedures should not require the Chief Justice personally to make the designation. By consensus, the Committee members resolved to concur in this recommendation.

The Reporter briefly summarized a few additional suggestions on the drafting of the Best Practices Guide. One concerns the draft Guide's alternative statement (at the bottom of page 2) that "[c]ommunication with AO staff should be through the chair." This would alter the way in which the Appellate Rules Committee Reporter has ordinarily worked; under current practice, she communicates directly with the AO staff on various issues, while always making sure to communicate to Judge Stewart any matters of substance arising from those communications. It would be cumbersome if the practices were changed to require all such communications to go through the Chair. This aspect of the draft Best Practices Guide may be a better fit for Judicial Conference committees other than the Rules committees; Judge Rosenthal observed that most Judicial Conference committees, other than the Rules committees, do not have reporters. Another question is what the proposed draft Best Practices Guide means when it states that "[t]he chair of the full committee should sign any committee-related communication to recipients who are not members of the committee." The draft would appear to be targeting communications that are sent on the Committee's behalf – yet "committee-related communication" could be read more broadly than that. One possible way to narrow this broad language might be to refer to "any communication on behalf of the committee or any subcommittee." No Committee members expressed dissent from the idea of conveying the Reporter's suggestions on those points.

VII. Schedule Date and Location of Spring 2009 Meeting

Possible dates for the Committee's Spring 2009 meeting were discussed. One option might be April 16-17, 2009; a possible alternative might be April 2-3, 2009. More details concerning the meeting's date and location will follow.

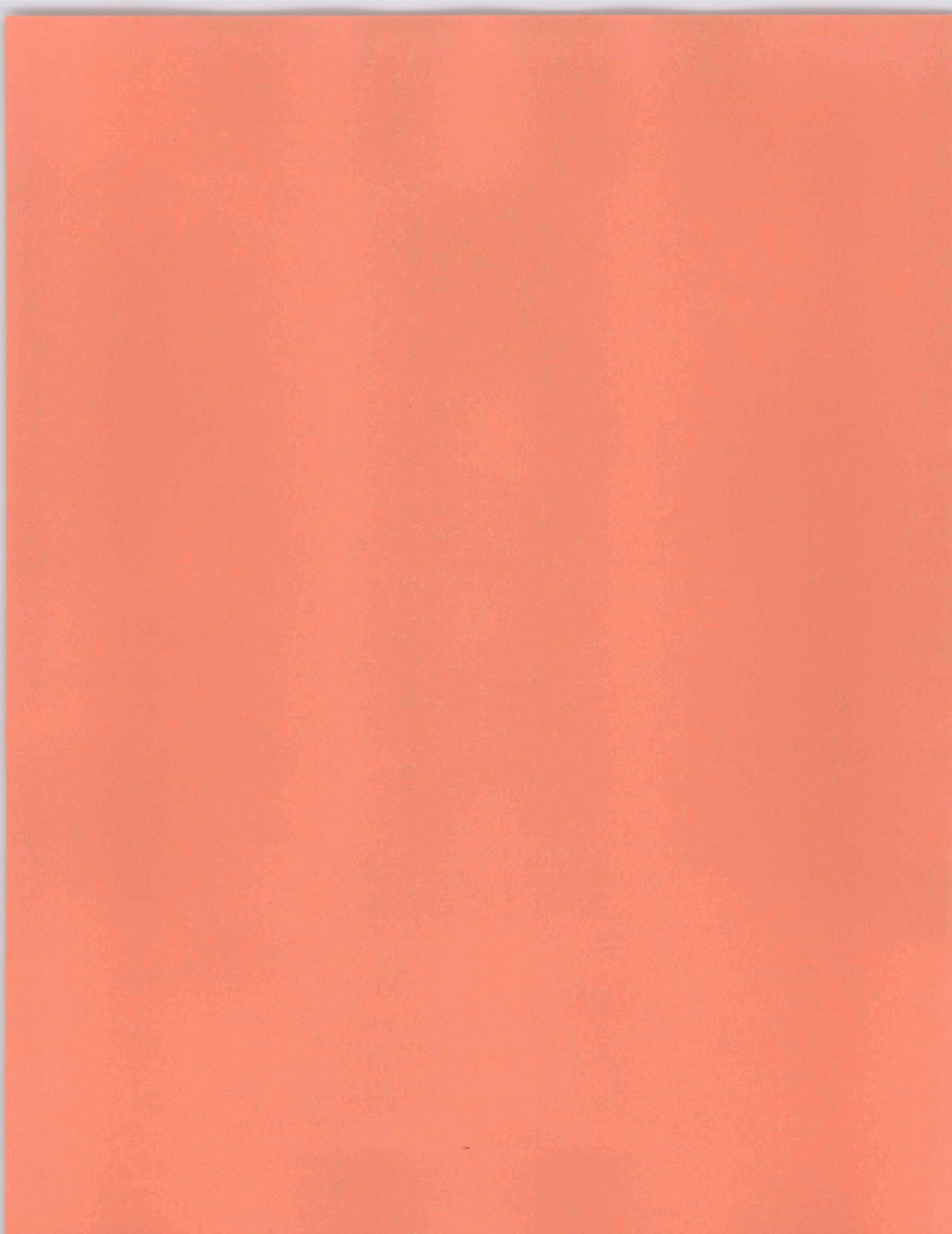
VIII. Adjournment

Judge Stewart thanked Mr. Rabiej and the AO staff, the Federal Judicial Center, Mr. Fulbruge, and all the Committee members for their work. He expressed appreciation to Solicitor General Garre for joining the meeting. And he noted with regret the fact that Justice Holland had been unable to attend.

The Committee adjourned at 9:50 a.m. on November 14, 2008.

Respectfully submitted,

Catherine T. Struve
Reporter



Advisory Committee on Appellate Rules
Table of Agenda Items — December 2008

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06

FRAP Item	Proposal	Source	Current Status
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08

FRAP Item	Proposal	Source	Current Status
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07 Revised FRAP 22 draft approved 04/08, contingent on approval of corresponding amendments to the rules for § 2254 and § 2255 proceedings FRAP 22 amendment approved by Standing Committee 06/08 FRAP 22 amendment approved by Judicial Conference 09/08
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08
08-AP-E	Amend FRAP 4(a) so that an original NOA encompasses dispositions of any post-trial motions	Public Citizen Litigation Group	Discussed and retained on agenda 11/08
08-AP-F	Amend FRAP 4(a) so that an original NOA encompasses any post-appeal amendments of the judgment	Members of Seventh Circuit Bar Association	Discussed and retained on agenda 11/08
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08
08-AP-I	Consider uses of postjudgment motions	Prof. Daniel Meltzer	Discussed and retained on agenda 11/08
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Awaiting initial discussion
08-AP-O	Amend FRAP 31 to clarify deadlines when multiple appellants or appellees file separate briefs and serve them on different days	Peder K. Batalden, Esq.	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Awaiting initial discussion
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Awaiting initial discussion

TAB

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

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CHAIR

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APPELLATE RULES

LAURA TAYLOR SWAIN
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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 2008

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 23-24 in Santa Fe.

At its meeting, the Committee approved proposed amendments that would restyle Evidence Rules 501-706. The Committee seeks approval of these proposed amendments for release for public comment — with the proviso that these rules, if approved, will be held until all the rules are restyled, so that the restyled rules will be released for public comment in a single package. The proposed restyled Rules 501-706 are attached as Appendix A to this Report.

The Committee also discussed a number of other matters at its meeting that required no action. These matters are discussed below as information items.

A complete discussion of all of these action and information items can be found in the draft minutes of the Fall 2008 meeting, attached as Appendix B to this Report.

II. Action Item

Restyled Evidence Rules 501-706

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above would therefore be conducted in three separate stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Committee has established a working principle for whether a change is one of "style" (in which event the final determination is made by the Style Subcommittee) or one of "substance" (in which event the final decision is for the Committee). A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility; or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; or

3. It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement."

At its Spring 2008 meeting the Committee approved the restyling of the first third of the Evidence Rules (Rules 101-415); these proposed restyled rules were approved for release for public comment by the Standing Committee at its June 2008 meeting.

At its Fall 2008 meeting, the Committee reviewed the draft of restyled Rules 501-706. The draft had been reviewed and approved by the Style Subcommittee. The Committee reviewed each rule to determine whether any of the proposed changes were of substance rather than style. The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. The

Committee determined that a number of proposed changes were substantive, including some changes to Rules 604, 606, 609, 611, 613, and 705. The Committee also made style suggestions for Rules 602, 605, 608, 703, 704, and 706. A complete description of the Committee's changes and suggestions can be found in the Minutes of the Fall 2008 Committee meeting, attached to this Report as Appendix B.

After implementing changes of substance and recommending changes of style, the Committee voted unanimously to refer the restyled Rules 501-706 to the Standing Committee, with the recommendation that they be released for public comment when the complete set of Evidence Rules has been restyled.

The Committee also resolved to maintain a list of "global" questions to maintain consistent terminology. Some of the global questions include how to refer to the government and the defendant in a criminal case, and how to use such terms as "case", "proceeding" and "action". Finally, the Committee will consider at its next meeting whether to include a new rule providing definitions for some recurring terms such as "record" and "writing."

The proposed restyled Rules 501-706 are attached to this Report as Appendix A — they are presented in a "side-by-side" version, with the existing rule in the left column and the restyled rule in the right. The restyled rules reflect changes made by the Style Subcommittee in light of suggestions made at the Committee meeting.

The template Committee Note to each of the restyled rules will read as follows:

Committee Note

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

The Committee plans to prepare a more detailed Committee Note to Rule 101, which will provide a short description of the process and the goals of restyling. It will be adapted from the Committee Note to the restyled Civil Rule 1.

Recommendation: The Evidence Rules Committee recommends that the proposed restyled Evidence Rules 501-706 be approved for release for public comment, with the release to occur when all the restyled rules have been prepared.

II. Information Items

A. Proposed Amendment to Evidence Rule 804(b)(3)

The proposed amendment to Rule 804(b)(3) has been released for public comment. The amendment would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in a criminal case. Currently the Rule requires that if a declaration against penal interest is offered by the accused it is not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement." But the same statements offered by the government are not subject to that requirement. The purpose of the amendment is to assure that only reliable declarations against penal interest are admitted against the accused.

To date no comments have been received on the proposed amendment to Rule 804(b)(3), but comments are expected by the end of the public comment period.

B. Report on Use of Subcommittees

The Judicial Conference has requested the Standing Committee (as well as other Conference committees) to prepare a report on the use of subcommittees. The Evidence Rules Committee has no subcommittees, and so has no relevant information about best practices. But the Committee does support any suggestions of the Standing Committee and the other Advisory Committees that do use subcommittees.

C. *Crawford v. Washington* and the Hearsay Exceptions

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court 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. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And the Court in *Whorton v. Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. But the Committee has determined that there is no need to propose any amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the

Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, given the fact that the Supreme Court, this term is considering the admissibility of laboratory reports under *Crawford*. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

IV. Minutes of the Fall 2008 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2008 meeting is attached to this report as Appendix B. These minutes have not yet been approved by the Committee.

TAB

ARTICLE V. PRIVILEGES Rule 501. General Rule	ARTICLE V. PRIVILEGES[1] Rule 501 — Privilege in General
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.	The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise: • the United States Constitution; • a federal statute; or • other rules prescribed by the Supreme Court under statutory authority [restore *under statutory authority* to 402]. But in a civil case, state law governs if the privilege relates to a claim or defense for which state law supplies the rule of decision.

[1] The date of this version is December 8, 2008.

ARTICLE VI. WITNESSES Rule 601. General Rule of Competency	ARTICLE VI. WITNESSES Rule 601 — Competency to Testify in General
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.	Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law on witness competency governs when the witness's testimony relates to a claim or defense for which state law supplies the rule of decision.

Rule 602. Lack of Personal Knowledge	Rule 602 — Need for Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Rule 603. Oath or Affirmation	Rule 603 — Oath or Affirmation to Testify Truthfully
Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.	Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreters	Rule 604 — Interpreter
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.	An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Competency of Judge as Witness	Rule 605 — Judge's Competency as a Witness
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606. Competency of Juror as Witness	Rule 606 — Juror's Competency as a Witness
(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.	**(a) At the Trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.
(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.	**(b) During an Inquiry into the Validity of a Verdict or Indictment.** **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. **(2)** ***Exceptions.*** A juror may testify about whether: **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** any outside influence was improperly brought to bear on a juror; or **(C)** a mistake was made in entering the verdict on the verdict form.

Rule 607. Who May Impeach	Rule 607 — Who May Impeach a Witness
The credibility of a witness may be attacked by any party, including the party calling the witness.	Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608. Evidence of Character and Conduct of Witness	Rule 608 — A Witness's Character for Truthfulness or Untruthfulness
(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.	**(a) Opinion or Reputation Evidence.** A witness's credibility may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct, in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. **(c) Privilege Against Self-Incrimination.** By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Rule 609. Impeachment by Evidence of Conviction of Crime	Rule 609 — Impeachment by Evidence of a Criminal Conviction
(a) General rule. For the purpose of attacking the character for truthfulness of a witness, **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and **(2)** evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.	**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: **(A)** must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and **(B)** must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of the evidence outweighs its prejudicial effect; and **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.
(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.	**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the conviction or the witness's release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.	**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if: **(1)** the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or **(2)** the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.	**(d) Juvenile Adjudications**. Evidence of a juvenile adjudication is admissible under this rule only if: **(1)** it is offered in a criminal case; **(2)** the adjudication was of a witness other than the defendant; **(3)** a conviction of an adult for that offense would be admissible to attack the adult's credibility; and **(4)** admitting the evidence is necessary to fairly determine guilt or innocence.
(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.	**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 610. Religious Beliefs or Opinions	Rule 610 — Religious Beliefs or Opinions
Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.	Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 611. Mode and Order of Interrogation and Presentation	Rule 611 — Mode and Order of Questioning Witnesses and Presenting Evidence
(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.	**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to: **(1)** make those procedures effective for determining the truth; **(2)** avoid wasting time; and **(3)** protect witnesses from harassment or undue embarrassment.
(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.	**(b) Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination.
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should permit leading questions on cross-examination. And the court should permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 612. Writing Used to Refresh Memory	**Rule 612 — Writing Used to Refresh a Witness's Memory**
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either— **(1)** while testifying, or **(2)** before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.	**(a) General Application.** This rule gives an adverse party certain options when a witness uses any form of a writing to refresh memory: **(1)** while testifying; or **(2)** before testifying, if the court decides that justice requires a party to have those options. **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. **(c) Failure to Produce or Deliver.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Rule 613. Prior Statements of Witnesses	Rule 613 — Witness's Prior Statement
(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.	**(a) Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).	**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Rule 614. Calling and Interrogation of Witnesses by Court	Rule 614 — Court's Calling or Questioning a Witness
(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.	**(a) Calling.** The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.
(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.	**(b) Questioning.** The court may question a witness regardless of who calls the witness.
(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.	**(c) Objections.** A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Rule 615. Exclusion of Witnesses	Rule 615 — Excluding Witnesses
At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.	At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: **(a)** a party who is a natural person; **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or **(d)** a person authorized by statute to be present.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701. Opinion Testimony by Lay Witnesses	ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 701 — Opinion Testimony by Lay Witnesses
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts	Rule 702 — Testimony by Expert Witnesses
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.	A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts	Rule 703 — Bases of an Expert's Opinion Testimony
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue	Rule 704 — Opinion on an Ultimate Issue
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	**(a)** **In General.** An opinion is not objectionable just because it embraces an ultimate issue.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.	**(b)** **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	Rule 705 — Disclosing the Facts or Data Underlying an Expert's Opinion
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 706. Court Appointed Experts	Rule 706 — Court-Appointed Expert Witnesses
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.	**(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. **(b) Expert's Role.** The court must inform the expert in writing, in any form, of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert at a conference in which the parties have an opportunity to participate. The expert: **(1)** must advise the parties of any findings the expert makes; **(2)** may be deposed by any party; **(3)** may be called to testify by the court or any party; and **(4)** may be cross-examined by any party, including the party that called the expert.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.	**(c) Compensation.** The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows: **(1)** in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and **(2)** in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.
(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.	**(d) Disclosing the Appointment.** The court may authorize disclosure to the jury that the court appointed the expert.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.	**(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

TAB

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 23-24, 2008
Santa Fe, New Mexico

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 23rd and 24th in Santa Fe.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. James A. Teilborg, Chair of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Richard A. Schell, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Alan Rudlin, Esq., ABA representative

Opening Business

Judge Hinkle welcomed the members and other participants to the meeting and noted that Ronald Tenpas, the Department of Justice representative, would be going off the Committee after this meeting. Judge Hinkle, Committee members, and the Reporter thanked Mr. Tenpas for his stellar efforts on behalf of the Committee and the rulemaking process.

The Committee approved the minutes of the Spring 2008 meeting.

Judge Hinkle reported on developments since the last meeting. At its June 2008 meeting, the Standing Committee approved for publication the proposed amendment to Rule 804(b)(3) as well as the proposed restyled Rules 101-415 (both proposals discussed below).

Judge Hinkle also reported that Evidence Rule 502, which provides important protections against waiver of privilege, was signed by the President on September 19, 2008. The Committee expressed its gratitude to Judge Rosenthal for her amazing dedication and brilliant leadership in getting Rule 502 passed by Congress. Judge Rosenthal noted that thanks were owed to John Rabiej, Dan Coquillette, and the Reporter for their work in the effort to enact Rule 502. Judge Rosenthal and the Committee also expressed thanks and appreciation to all those members of Congress, and the staff of both Judiciary Committees, who worked through the issues raised by Rule 502 and helped to move the rule through the process.

I. Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. At the Spring 2008 meeting the Committee approved the restyled Rules 101-415; the Standing Committee authorized those rules to be released for public comment, but publication will be delayed until all the Evidence Rules are restyled.

At the Fall 2008 meeting the Committee reviewed a draft of restyled Rules 501-706. The draft had been prepared in the following steps: 1) Professor Kimble prepared a first draft, which was reviewed by the Reporter; 2) Professor Kimble made some changes in response to the Reporter's comment; 3) the revised draft was reviewed by the Evidence Rules Committee, and Professor Kimble made some further revisions in light of Committee comments; 4) the Style Subcommittee reviewed the draft and implemented changes, resolving most of the open questions left in the draft. The Advisory Committee reviewed the Style Subcommittee's approved version at the Fall 2008 meeting.

At the meeting, the Committee reviewed each rule to determine whether any change was one of substance rather than style (with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase"). Under the protocol for the restyling project, if a significant minority of Evidence

Rules Committee members agree that the proposed change is substantive, then that change is not implemented.

The Committee also reviewed each rule to determine whether to recommend that a change, even though one of style, might be considered by the Style Subcommittee of the Standing Committee. After considering possible changes of both substance and style, the Committee unanimously voted to refer the restyled rules to the Standing Committee, with the recommendation that they be released for public comment. If the Standing Committee accepts the Evidence Rules Committee's recommendations, then all of the proposed restyled rules would be released for public comment as one complete package, in approximately two years.

What follows is a description of the Committee's determinations, rule by rule. It should be noted that a number of the rules required no discussion because any drafting questions in those rules had already been resolved in the extensive vetting process described above.

Rule 501

Rule 501 currently provides as follows:

General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The restyled version of Rule 501, reviewed by the Committee at the meeting, provides as follows:

Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provide otherwise:

- the United States Constitution;
- a federal statute; or
- other rules prescribed by the Supreme Court under statutory authority.

But in a civil case, state law governs if the privilege relates to a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. Before discussion of the particulars of the restyled draft, the Committee considered whether a restyled rule would have to be directly enacted by Congress. 28 U.S.C. § 2074(b) provides that "any rule creating, abolishing or modifying a privilege shall have no force or effect unless approved by Congress." It is clear that any restyling would not create or abolish a privilege. The Committee also found it unlikely that any style changes could be thought to modify the privilege — it would modify the language of the rule, but not the privilege itself.

The Committee therefore decided to proceed with restyling Rule 501. Judge Rosenthal noted that she has been keeping Congress apprised of the work of the Rules Committee, and would notify the House and Senate Judiciary Committees of the restyling of Rule 501 as well as the other Evidence Rules.

2. The Committee considered whether the phrase "under statutory authority" was necessary. But the Reporter argued that the language was necessary given the Enabling Act provision requiring rules of privilege to be directly enacted by Congress. The reference to statutory authority provides emphasis that the Supreme Court cannot establish rules of privilege on its own rulemaking power — nor through its supervisory power over federal courts. The Committee agreed that the reference to statutory authority should be maintained. Professor Kimble noted that the phrase "under statutory authority" was used in other rules, such as Rules 402 and 801. The Committee agreed that it would need to be consistent in the use of the phrase.

3. The Committee agreed that there was no need to refer to the parties who would be holding the privilege, i.e., "witness, person, government, State, or political subdivision thereof." The rule is not about who holds the privilege — rather it is about which law governs the existence and scope of a privilege. So the Committee agreed with the proposal to strike that language from the rule.

4. The restyled rule refers to a "civil case" while the existing rule refers to "civil actions and proceedings." The Committee recognized that the description of the cases or proceedings to which an Evidence Rule applies raises a "global" issue that must be treated consistently throughout the Rules. It determined that it would revisit all global terminology questions after it had completed restyling the final third of the Evidence Rules.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 501 be released for public comment.

Rule 601

Rule 601 currently provides as follows:

General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

The restyled version of Rule 601, reviewed by the Committee at the meeting, provides as follows:

Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law on witness competency governs when the witness's testimony relates to a claim or defense for which state law supplies the rule of decision.

Committee Discussion:

1. The Reporter noted that the draft had been changed to clarify that state law applies when the witness's testimony, as opposed to competency, relates to a state law claim or defense. The Committee agreed that this change was necessary.

2. A Committee member asked what would happen in a case involving both federal and state claims, in which the competency rules of federal and state laws were in conflict. Both the original rule and the draft would seem to provide that state law on competency would apply to both federal and state claims. The Reporter noted that under the similar language of Rule 501, federal courts generally apply federal law to mixed claims. The Reporter was unaware of any case law involving mixed claims under Rule 601. In any case, the style change would not change the result that a court would reach under the current Rule 601.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 601 be released for public comment.

Rule 602

Rule 602 currently provides as follows:

Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

The restyled version of Rule 602, reviewed by the Committee at the meeting, provided as follows:

Need for Personal Knowledge

A witness may testify on a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 703.

Committee Discussion:

1. Committee members expressed concern about the change from "testifying to a matter" to "testifying *on* a matter." Members thought that courts and litigants more commonly use the term "testifying to a matter." The Committee recognized that the change was one of style; it voted unanimously to recommend to the Style Subcommittee that the draft be amended to return to the original iteration — "testify to a matter."

2. One Committee member wondered whether the exceptional sentence at the end of the rule should be made an exceptional clause at the beginning, e.g., "Except as provided in Rule 703, a witness may testify on a matter . . . " Professor Kimble responded that there is no uniform rule on how to treat exceptional clauses, and that moving the last sentence to the beginning of the rule would complicate the first sentence. The Committee made no recommendation to change the location of the last sentence.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 602 be released for public comment, with the suggestion that the Style Subcommittee substitute "on the matter" for "to the matter" in the first sentence of the Rule.

Rule 603

Rule 603 currently provides as follows:

Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

The restyled version of Rule 603, reviewed by the Committee at the meeting, provides as follows:

Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Committee discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 603 be released for public comment.

Rule 604

Rule 604 currently provides as follows:

Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

The restyled version of Rule 604, reviewed by the Committee at the meeting, provided as follows:

Interpreters

An interpreter is subject to Rule 603 on giving an oath or affirmation to make a true translation and to Rule 702 on qualifying as an expert.

Committee Discussion:

Committee members expressed concern about the reference to Rule 702 in the restyled draft. Rule 702 covers testifying witnesses, and interpreters do not testify in the same sense as experts under Rule 702. Moreover, some interpreters are not experts within the meaning of Rule 702 — an example is a person who interprets the signals of an impaired witness, based on having taken care of the witness for years. While interpreters must be qualified, the Committee thought a reference to Rule 702 would raise confusion and argument about how to qualify interpreters — that is, the reference could raise problems not currently experienced by courts and litigants in the current practice. **Consequently, the Committee unanimously determined that the reference to Rule 702 constituted a substantive change.**

Committee Vote:

The Committee voted unanimously that the reference to Rule 702 in the restyled draft constituted a substantive change. It also voted unanimously to recommend that the following restyled version of Rule 604 be released for public comment:

"An interpreter must be qualified and must give an oath or affirmation to make a true translation."

Rule 605

Rule 605 currently provides as follows:

Competency of Judge as a Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

The restyled version of Rule 605, reviewed by the Committee at the meeting, provided as follows:

Judge as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve a claim that the judge did so.

Committee Discussion:

1. Committee members discussed whether the rule is intended to apply to judges commenting on the evidence. The Reporter stated that the Rule is not intended to regulate the judge in commenting on the evidence, nor in asking questions of witnesses (a topic covered by Rule 614). Committee members stated that taking the term "competency" out of the heading could send an incorrect signal that the rule should be construed more broadly to cover such matters as judges commenting on the evidence.

2. Committee members expressed concern that the restyled language "need not preserve a claim that the judge did so" might be a bit indistinct. The Committee found it stylistically preferable to state that a party "need not object to preserve the issue."

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 605 for release for public comment:

Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 606

Rule 606 currently provides as follows:

Competency of Juror as a Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The restyled version of Rule 606, reviewed by the Committee at the meeting, provided as follows:

Juror as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; anything that may have affected the juror or another juror and thus influenced that person's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Committee Discussion:

1. Professor Kimble noted that if the reference to competency is to be restored in the heading to Rule 605, it should also be restored (for purposes of consistency) to the heading of Rule 606. The Committee unanimously agreed.

2. Committee members expressed concern over the change from "the effect of anything upon that or any other juror's mind" to " anything that may have affected the juror or another juror." Under the case law of Rule 606(b), juror testimony is allowed about such things as extraneous information or outside influence, but juror testimony is *never* allowed on the *effect* of such information on jury deliberations or on any juror's vote. The change from "the effect of anything" to "anything that may have affected" changes the rule from one prohibiting testimony about *effect* on the jury to one that focuses on the things that may affect the jury. Moreover, the restyled draft, in prohibiting testimony about anything that affected the jury in (b)(1) creates a tension with (b)(2), which permits testimony about things that may have affected the jury. **Accordingly, Committee members unanimously determined that the change to "anything that may have affected the juror" constituted a substantive change.**

Committee Vote:

The Committee voted unanimously to recommend the following restyled Rule 606 for release for public comment:

Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on the juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) any outside influence was improperly brought to bear on a juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Rule 607

Rule 607 currently reads as follows:

Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

The restyled version of Rule 607, reviewed by the Committee at the meeting, provides as follows:

Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 607 be released for public comment.

Rule 608

Rule 608 currently provides as follows:

Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

The restyled version of Rule 608, reviewed by the Committee at the meeting, provided as follows:

A Witness's Character for Truthfulness or Untruthfulness

(a) Opinion or Reputation Evidence. A witness's credibility may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible

only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct, in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

(c) Privilege Against Self-Incrimination. By testifying about a matter that relates only to a character for truthfulness, a witness does not waive the privilege against self-incrimination.

Committee Discussion:

1. The restyled version retains the original rule's reference allowing bad acts impeachment only on cross-examination. In fact bad acts impeachment can occur on direct examination as well. This is because Rule 607 allows a party to call an adverse witness, in which case direct examination is functionally cross-examination — in which bad acts may be introduced to impeach the witness's character for untruthfulness. The Committee considered whether it would be a stylistic improvement to delete the references to cross-examination in Rule 608(b), on the ground that it would be a useful clarification and it would not change any case law. After discussion, the Committee decided against deleting the references to cross-examination. The Committee noted that courts are having no problem under the existing rule in allowing bad acts impeachment on direct examination where appropriate. They also observed that the cross-examination limitation may be useful to prohibit an attempt to *support* a witness's credibility through evidence of *good* acts on direct examination. Thus, deleting the references to cross-examination may lead to unintended consequences, well outside the scope of restyling.

2. Some Committee members suggested that the language in restyled Rule 608(a) — "may be attacked or supported by evidence in the form of an opinion about — or a reputation for — having a character for truthfulness or untruthfulness" — might be sharpened stylistically. After discussion, the Committee unanimously voted to suggest to the Style Subcommittee that the language to restyled Rule 608(a) should be changed as follows:

A witness's credibility may be attacked or supported by opinion or reputation evidence ~~in the form of an opinion about — or a reputation for — having a~~ of the witness's character for truthfulness or untruthfulness.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 608 be released for public comment, with the suggestion that the Style Subcommittee consider the proposed change to the first sentence of Rule 608(a).

Rule 609

Rule 609 currently provides as follows:

Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The restyled version of Rule 609, reviewed by the Committee at the meeting, provided as follows:

Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and

(B) must be admitted if the witness is a defendant in a criminal case and the court determines that the probative value of the evidence outweighs its prejudicial effect; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the conviction or the witness's release from confinement for the conviction, whichever is later. Evidence of the conviction is admissible only if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. But before offering the evidence, the proponent must give an adverse party reasonable written notice, in any form, of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of

rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible only if:

(1) the case is a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) a conviction for that offense would be admissible to attack an adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Discussion:

1. Committee members expressed concern about the deletion of the proviso "under the law under which the witness was convicted" in Rule 609(a)(1). That language provides a choice of law rule — the court must treat the conviction as the convicting jurisdiction would treat it. For example, it could occur that the witness was convicted of a crime that is treated as a misdemeanor in the convicting jurisdiction but that would be treated as a felony in the court in which the witness is testifying. Without the deleted language, a court could well decide to treat the conviction as a felony and find it admissible for impeachment under Rule 609(a)(1) — and that would be a substantive change from the existing rule. **The Committee voted unanimously that the choice of law provision in Rule 609(a)(1) must be restored to avoid a substantive change**— though the Committee recognized that the language could be improved stylistically, given that the existing iteration uses the word "under" twice within the same phrase.

Professor Kimble suggested using the phrase "in the convicting jurisdiction" instead of "under the law under which the witness was convicted." The Committee agreed that this was a significant stylistic improvement. The Committee voted unanimously to change the restyled Rule 609(a)(1) accordingly:

1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

2. The restyled draft deleted the language "under this rule" in the first sentence of Rule

609(d), the provision on juvenile adjudications. The Reporter noted that courts and commentators have relied on the limiting phrase "under this rule" to hold that the Rule's substantial limitations on admissibility of juvenile adjudications are applicable only if the witness is being attacked for having an untruthful character. So for example, if impeachment is for bias, the chances for admissibility are much higher, as the Supreme Court indicated in *Davis v. Alaska.* Deleting the limiting phrase "under this rule" may lead to an argument that Rule 609(d) has been extended to other forms of impeachment. **The Committee therefore determined, unanimously, that deletion of the term "under this rule" was a substantive change, and voted unanimously to restore that language to the restyled draft.** The Committee therefore approved the preamble of Rule 609(d) to be restyled as follows:

"Evidence of a juvenile adjudication is admissible under this rule only if:"

3. The restyled Rule 609(d)(1) provided, as a condition of admissibility of a juvenile adjudication, that "the case is a criminal case." The Committee determined that this language was inaccurate because it was vague as to which case was being described — the one in which the adjudication was obtained or the one in which the evidence is offered as impeachment. **The Committee therefore voted unanimously that a substantive change was required to the language of restyled Rule 609(d)(1).** After discussion, the Committee unanimously agreed on the following language:

"Evidence of a juvenile adjudication is admissible under this rule only if:

(1) ~~the case is~~ it is offered in a criminal case;

4. The restyled Rule 609(d)(3) provides, as a condition of admissibility of a juvenile adjudication, that "a conviction for that offense would be admissible to attack an adult's credibility." A Committee member suggested a style change would be useful in clarifying that the juvenile was never "convicted" for the offense. After discussion, the Committee unanimously agreed to suggest to the Style Subcommittee a style change to Rule 609(d)(3), as follows:

"Evidence of a juvenile adjudication is admissible under this rule only if:

* * *

(3) a conviction of an adult for that offense would be admissible to attack ~~an~~ the adult's credibility;"

5. Rule 609(e), on the pendency of an appeal, refers only to convictions and not juvenile adjudications (the subject of Rule 609(d)). The Style Subcommittee asked the Evidence Rules Committee to consider whether adjudications should be included in subdivision (e). After discussion, the Committee determined that no reference to juvenile adjudications should be made in Rule 609(e). The original Advisory Committee could have included adjudications within the general rule that the pendency of appeal did not affect admissibility. But given the extremely narrow grounds for admissibility of juvenile adjudications in Rule 609(d), it is plausible that the Advisory

Committee may have decided to allow trial courts to have discretion to exclude such adjudications if they were on appeal. Therefore, including adjudications under Rule 609(e) would be a substantive change. Looked at another way, the current Rule 609(e) contains no reference to juvenile adjudications, so continuing the omission in the restyling results in no substantive change.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 609 be released for public comment, with the following changes to the existing draft: 1) addition of "in the convicting jurisdiction" to Rule 609(a)(1); 2) restoring "under this rule" to the preamble to Rule 609(d); 3) substituting "it is offered in a criminal case" for "the case is a criminal case" in Rule 609(d)(1); and 4) a style suggestion for changing Rule 609(d)(3) to clarify that the juvenile was not "convicted" of an offense.

Rule 610

Rule 610 currently provides as follows:

Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

The restyled version of Rule 610, reviewed by the Committee at the meeting, provides as follows:

Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 610 be released for public comment.

Rule 611

Rule 611 currently provides as follows:

Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The restyled version of Rule 611, reviewed by the Committee at the meeting, provided as follows:

Mode and Order of Questioning Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. The court should limit cross-examination to the subject matter of the direct examination and matters affecting a witness's credibility. The court may permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. The court should permit leading questions on direct examination only if necessary to develop the witness's testimony. Ordinarily, the court should permit leading questions on cross-examination. And the court must permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with

an adverse party.

Committee Discussion:

1. The current Rule 611(a) states that the court "shall" exercise reasonable control over the mode and order of interrogating witnesses. One of the goals of the restyling project is to delete the word "shall" because it is subject to different interpretations — it could mean that a rule is mandatory, but it could also mean that a rule is permissive. In Rule 611(a), the restyling substitutes "should" for "shall." Other possibilities are "must" and "may." Committee members determined that "must" could not be used in Rule 611(a), as that Rule is designed to give courts the discretion to handle various issues that might arise in the presentation of testimony and other evidence at trial. It would be inconsistent with the discretionary grant to impose a mandatory obligation on the trial court. After discussion, Committee members agreed with the restyled version's use of "should" rather than "may" because it implies more authority on the part of the court to control the proceedings.

2. The current Rule 611(b) provides that cross-examination "should be limited" to the subject matter of the direct examination. The restyled draft changed this language to the active voice by providing that "[t]he court should limit cross-examination to the subject matter of the direct examination . . ." Committee members contended that this change of focus, from what the parties should not do to what the court should do, was a substantive change. The changed language could be read to invite more court intervention, when in fact the rule is intended to instruct the parties to adhere to the American Rule in framing questions on cross-examination. Moreover, the focus on what the court should do in the first sentence of Rule 611(b) creates tension with the second sentence of the Rule, which provides that the court may in its discretion permit inquiry beyond the scope of direct. There is tension if the first sentence provides that the court should control the scope of cross-examination and the next sentence provides that it may expand the scope of cross. The Committee determined that the existing Rule's approach had much to recommend it, given its focus in the first instance on limiting the parties, and then allowing them to seek relief from the court. **The Committee unanimously agreed that the language "the court should limit" in the first sentence of the restyled Rule 611(b) effected a substantive change.** It unanimously approved a restyling that retained the focus of the existing Rule 611(b), changing the restyled version as follows:

> "~~The court should limit cross-examination to~~ Cross-examination should not exceed the subject matter of the direct examination and matters affecting the witness's credibility.

3. As in Rule 611(b), the restyling attempted to avoid the passive voice that is in the current Rule 611(c) by changing the focus of the rule to court involvement in regulating leading questions. The result is to imply that courts are to be more active in regulating leading questions than is implied in the current rule. As with Rule 611(b), **the Committee unanimously agreed that the change of focus in the first sentence of Rule 611(c) effected a substantive change to the Rule.** The Committee voted unanimously to return to the original focus of the rule (with a slight stylistic variation) and approved the following changes from the restyled version of the first sentence to Rule

611(c):

> "~~The court should permit leading questions~~ Leading questions should not be used on direct examination ~~only if~~ except as necessary to develop the witness's testimony."

4. The restyled version of the last sentence of Rule 611(c) provided that the court "must" permit leading questions when a party calls a hostile witness. Committee members noted, however, that under the case law the court is not absolutely required to permit leading questions of a hostile witness. *See, e.g., Rodriguez v. Banco Cent.* 990 F.2d 7 (1st Cir. 1993) (finding no error in the trial court's refusal to permit leading questions of hostile witnesses). **The Committee therefore determined unanimously that the use of the word "must" effected a substantive change of the last sentence of Rule 611(c).** The Committee unanimously approved the following restyled version of Rule 611(c):

> "And the court ~~must~~ should permit leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 611 be released for public comment, with the following changes to the restyled version: 1) Changing the first sentence of Rule 611(b) to "Cross-examination should not exceed the subject matter of the direct examination . . ."; 2) Changing the first sentence of Rule 611(c) to "Leading questions should not be used on direct examination . . ." 3) Changing "must" to "should" in the last sentence of Rule 611(c).

Rule 612

Rule 612 currently provides as follows:

Writing Used to Refresh Memory

> Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—
>
> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any

portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

The restyled version of Rule 612, reviewed by the Committee at the meeting, provides as follows:

Writing Used to Refresh a Witness's Memory

(a) General Application. This rule gives an adverse party certain options when a witness uses any form of a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Discussion:

The Committee determined that the few issues it had previously raised about the restyling of Rule 612 had all been addressed very effectively by Professor Kimble in the latest draft.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 612 be released for public comment.

Rule 613

Rule 613 currently provides as follows:

Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

The restyled version of Rule 613, reviewed by the Committee at the meeting, provided as follows:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if justice so requires or if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Committee Discussion:

1. Rule 613(a) currently provides that a prior inconsistent statement need not be shown to the witness at the time of questioning, but that it must be shown or disclosed to "opposing counsel." This was restyled to provide that the statement must be shown "to an adverse party." Committee members pointed out that the change would mean that if it was the adverse party being examined, the examiner would have to disclose the statement to the witness on the stand. This would be contrary to the first sentence of the Rule, under which witnesses are not entitled to inspect their inconsistent statements. **Thus, taking out the reference to "opposing counsel" effected a substantive change in situations in which the adverse party is being questioned.** The Committee unanimously determined that the reference to "an adverse party" in the second sentence

of Rule 613(a) had to be changed to "an adverse party's attorney."

2. The existing version of Rule 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the statement, "or the interests of justice so require." This interests of justice exception to the general rule of presentment is intended to be a narrow exception, and has been applied narrowly as well (usually to situations in which the statement was discovered after the witness has been excused and can no longer be produced). The restyled version places the interest of justice language as the first factor for the court to consider in determining whether to admit extrinsic evidence of a prior inconsistent statement. Committee members argued that this new placement raised "interest of justice" to a more prominent place than intended by the drafters of the rule. The drafters intended that the major focus of admissibility is to be whether the witness is afforded an opportunity to explain or deny the statement. **The Committee unanimously determined that the change in placement of the "interest of justice" factor effected a substantive change.** The Committee voted unanimously to return the interest of justice factor to the end of the first sentence of Rule 613(b).

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 613 be released for public comment (with changes shown from the restyled version reviewed at the Committee meeting:

Witness's Prior Statements

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if ~~justice so requires or if~~ the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to a party opponent's admission under Rule 801(d)(2).

Rule 614

Rule 614 currently provides as follows:

Calling and Interrogation of Witnesses by the Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

The restyled version of Rule 614, reviewed by the Committee at the meeting, provides as follows:

Court's Calling or Questioning a Witness

(a) Calling. The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.

(b) Questioning. The court may question a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or questioning a witness either at that time or at the next opportunity when the jury is not present.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 614 be released for public comment.

Rule 615

Rule 615 currently provides as follows:

Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

The restyled version of Rule 615, reviewed by the Committee at the meeting, provides as follows:

Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

Committee Discussion:

None.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 615 be released for public comment.

Rule 701

Rule 701 currently provides as follows:

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The restyled version of Rule 701, reviewed by the Committee at the meeting, provides as follows:

Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Discussion:

1. In the drafting process leading up to the meeting, the major question on Rule 701 was whether the reference to "inferences" could be deleted as superfluous — leading to similar deletions of the references to "inferences" throughout Article VII. Professor Broun researched whether the term "inference" had any meaning in the case law different from "opinion" and found no case that had made any such distinction. The Reporter consulted scholars in Evidence and determined that a separate reference to "inferences" was unnecessary because in the final analysis, an inference (as used in Article VII) is a type of opinion.

At the meeting, the Committee unanimously agreed with the deletion of "inference" from Rule 701 as well as the other rules in Article VII.

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 701 be released for public comment.

Rule 702

Rule 702 currently provides as follows:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The restyled version of Rule 702, reviewed by the Committee at the meeting, provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Committee Discussion:

In discussions of previous drafts, Professor Kimble, Committee members and the Style Subcommittee worked to make sure that the preamble to the rule accurately set forth the existing qualification requirements. At the meeting, there was no further discussion on restyled Rule 702.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 702 be released for public comment.

Rule 703

Rule 703 currently provides as follows:

Basis of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The restyled version of Rule 703, reviewed by the Committee at the meeting, provided as follows:

Basis of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in that same field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the court determines that their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Committee Discussion:

1. The existing rule provides that experts can rely on inadmissible information if other experts "in the particular field" would rely on such information in forming an opinion. The restyled version referred to experts "in that same field." Committee members noted that the case law on Rule 703 often relied on the language "the particular field" in order to determine which experts' whose reasonable reliance would be relevant. Members expressed concern that any change of that language could lead to unanticipated results. Committee members described the change to "that same field" as substantive, but the members of the Style Subcommittee at the meeting agreed in any case to restore the term "the particular field." The Committee unanimously approved that change, finding it unnecessary under the circumstances to vote on whether the proposed change in the restyled draft to "that same field" was substantive.

2. The Style Subcommittee asked the Committee to consider whether the reference in the last sentence of Rule 703 to "the jury" could have "any negative or unintended implications in a bench trial without a jury." Committee members addressed this question and determined that the reference to "the jury" was an essential part of the Rule. The last sentence of Rule 703 addresses whether an expert who relies on otherwise inadmissible information can disclose it at trial. The danger in the disclosure is that the jury will use the information not just to assess the basis of the expert's opinion, but also for some purpose not permitted under the Evidence Rules (e.g., using hearsay information for the truth of the matter asserted). At a bench trial, there is no comparable risk of misuse. Moreover, in a bench trial, it would make no sense to try to regulate disclosure of the otherwise inadmissible information at trial, because the judge likely would already have heard about the information at a *Daubert* hearing. Consequently, the reference to "the jury" in Rule 703 was appropriate and should be retained.

Committee Vote:

The Committee voted unanimously to recommend that the restyled version of Rule 703 be released for public comment, with the phrase "that same field" replaced by "the particular field" in the second sentence of the Rule.

Rule 704

Rule 704 currently provides as follows:

Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The restyled version of Rule 704, reviewed by the Committee at the meeting, provided as follows:

Opinion on an Ultimate Issue

(a) Admissibility in General. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Committee Discussion:

1. Committee members suggested that the heading to subdivision (a) might be improved because Rule 704(a) does not provide a grant of admissibility — rather it emphasizes that an opinion that is otherwise admissible (because it is helpful) is not excluded merely because it embraces an ultimate issue. The Committee unanimously agreed to request the Style Subcommittee to consider a change to the heading of subdivision (a) that would delete the term "Admissibility."

2. One Committee member suggested that the phrase "just because" in Rule 704(a) should be changed to "solely because" in order to sound less colloquial. The motion to make that style choice was defeated by a vote of two in favor and five against.

Committee Vote:

The Committee voted unanimously to recommend that restyled Rule 704 be released for public comment, with a suggestion to the Style Subcommittee to delete the word "Admissibility" from the heading to Rule 704(a).

Rule 705

Rule 705 currently provides as follows:

Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The restyled version of Rule 705, reviewed by the Committee at the meeting, provided as follows:

Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the court may require the expert to disclose those facts or data on cross-examination.

Committee Discussion:

The Style Subcommittee avoided the passive voice in the second sentence of the existing rule by providing that "the court may require the expert to disclose" facts or data on cross-examination. But Committee members noted that a focus on the court's role oversimplified what occurs at the trial when an expert does not disclose facts or data on direct. At that point, the cross-examiner can demand disclosure of the facts or data on cross, and the expert would be expected to comply. If not, the court would then have the authority to require the disclosure. The Committee unanimously determined that **the change of focus to solely what the court will do effected a substantive change in how Rule 705 actually applies in a litigation.** The Committee voted unanimously to restore the language of the existing rule: "the expert may be required."

Committee Vote:

The Committee voted unanimously to recommend that the following restyled version of Rule 705 be approved for public comment (blacklined from the restyled version reviewed by the Committee at the meeting):

Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But ~~the court may require~~ the expert may be required to disclose those facts or data on cross-examination.

Rule 706

Rule 706 currently provides as follows:

Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

The restyled version of Rule 706, reviewed by the Committee at the meeting, provides as follows:

Court-Appointed Experts

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert in writing, in any form, of the expert's duties and have a copy filed with the clerk. Or the court may so inform the expert

at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to whatever reasonable compensation the court allows. The compensation is payable as follows:

(1) in a criminal case and in a civil action or proceeding involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil action or proceeding, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts

Committee Discussion:

Committee members suggested that it would be useful to change the heading to the Rule to clarify that the Rule covered only court-appointed experts who testify as witnesses. The Rule does not cover, for example, experts appointed by the court to be technical advisors. The Committee voted unanimously to suggest to the Style Subcommittee that the heading be amended to refer to "Court-Appointed Expert Witnesses."

Committee Vote:

The Committee voted unanimously to recommend that the restyled Rule 706 be released for public comment, with the suggestion to the Style Subcommittee that it consider changing the title of the rule to "Court-Appointed Expert Witnesses."

Rules 101-415

The restyled Rules 101-415 were approved for release for public comment at the June 2008 Standing Committee meeting (though the release will be delayed until all the rules have been restyled). The Style Subcommittee raised two issues on which it sought reconsideration by the Evidence Rules Committee. Both of these issues concerned restyled Rule 404(b)(2). The first was the heading to restyled Rule 404(b)(2) — which currently is "Permitted Uses". The Style Subcommittee requested reconsideration of a proposal to change the heading to "Exceptions." The second and related issue was requested reconsideration of a proposal to provide that "the court may admit" evidence of uncharged misconduct when offered for a non-character purpose. Restyled Rule 404(b) currently states that such evidence "may be admissible" if offered for a non-character purpose — which is the same language as is used in the existing Rule 404(b).

Both proposals for reconsideration were an attempt to use terminology that is consistent with Rules 407, 408 and other similar rules. Those rules, as restyled, are structured as providing "exceptions" to exclusionary principles, in which "the court may admit" the evidence if offered for a proper purpose.

The Committee considered the changes to Rule 404(b) proposed by the Style Subcommittee and unanimously rejected them on the ground that they would effect substantive changes to the Rule. The DOJ representative noted that hundreds of cases had established that Rule 404(b) was a rule of inclusion — not an "exception." It was also noted that Congress explicitly changed the original Advisory Committee draft of Rule 404(b) — which used more exclusionary language — to "may be admissible," thus indicating a legislative intent that Rule 404(b) is to be treated as an inclusionary rule. Under the Style protocol, language in a rule that is a "sacred phrase" is considered substantive and is not to be changed. The Committee unanimously determined that changing the heading to "Exceptions" and changing the text of the Rule to "the court may admit" was substantive both because 1) it made the rule potentially less permissive and 2) it would alter a "sacred phrase." Many members noted that the cost of stylistic uniformity would be high, given the Justice Department's strong objections to any attempt to change Rule 404(b) in a way that might be considered less permissive.

II. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Evidence Rules Committee approved, for release for public comment, an amendment to Evidence Rule 804(b)(3). The proposal was approved by the Standing Committee. The comment period ends in March, 2009. The amendment would require the government to provide corroborating circumstances indicating trustworthiness before a declaration against penal interest could be admitted in a criminal case. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection

against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

The Reporter noted that no public comment had yet been received on the proposed amendment to Rule 804(b)(3). The Committee will consider all public comments at its next meeting.

III. Report on Subcommittees

The Judicial Conference has requested the Standing Committee (as well as other Conference committees) to prepare a report on the use of subcommittees. Judge Rosenthal in turn asked the Advisory Committees to report on use of subcommittees — the goal is to prepare a "best practices" report on the use of subcommittees. Judge Hinkle reported on this development and informed the Committee that he had reported to Judge Rosenthal that, as the Evidence Rules Committee has no subcommittees, it had no relevant information about best practices — but that it would support the suggestions of Judge Rosenthal and the other Advisory Committees that do use subcommittees. The members of the Evidence Rules Committee agreed with this approach.

IV. Report on Proposed Amendment to Civil Rule 26

Judge Hinkle reported on a proposed amendment to Civil Rule 26. The amendment would provide protection against discovery of work product when counsel consults with testifying experts. One sentence in the Committee Note to the proposed amendment provides an opinion that if work product is to be protected in the discovery process, it should also result in the information being excluded at trial. Judge Hinkle observed that this sentence of the Committee Note carried possible implications for the rules of evidence. Judge Kravitz, chair of the Civil Rules Committee, has agreed that the amendment to Rule 26 deals only with discovery, not trial evidence. Judge Hinkle and the Evidence Committee Reporter have suggested removal of the Committee Note's reference to admissibility at trial. The Evidence Committee was not asked to address this issue and took no action.

V. Report on *Crawford v. Washington* and Subsequent Case Law

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial," but the later case of *Davis v. Washington* provides some guidance on the proper definition of that term: a hearsay statement will be testimonial only if the primary purpose for making the statement is to have it used in a criminal prosecution. Thereafter the Court in *Whorton v. Bockting* held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause. This Supreme Court case law has been reviewed and developed in a large

body of lower court case law. In the 2008-9 term, the Supreme Court will once again address a question under the Confrontation Clause — whether a report of a chemical test for drugs is testimonial.

Committee members resolved to continue to monitor case law developments after *Crawford*, and to propose amendments should they become necessary to bring the Federal Rules into compliance with the *Crawford* standards as developed in the federal case law.

VI. Next Meeting

The Spring 2009 meeting of the Committee is scheduled for March 30th and 31st in Washington, D. C.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB

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

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 15, 2008**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on October 20-21, 2008 in Phoenix, Arizona, to consider a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

Although the Committee did not approve any amendments for submission to the Standing Committee, it is continuing work on a number of proposals that will likely come to the Standing Committee in the near future. The remainder of this report discusses the following information items:

(1) proposed amendments to Rule 32 concerning sentencing procedures;
(2) a proposed amendment to Rule 12 concerning challenges for failure to state an offense;
(3) a review of all of the Rules of Criminal Procedure to identify candidates for change that need to be updated in light of new technologies;
(4) a proposed amendment to Rule 41 to allow probation and pretrial service officers to apply for and conduct searches; and
(5) continued implementation of the Crime Victims' Rights Act.

II. Information Items

A. Proposed Amendments to Rule 32 Concerning Sentencing

The Committee discussed at length two amendments to Rule 32 that would require additional disclosure to the parties during the sentencing process. The Committee solicited input from the United States Sentencing Commission, and representatives of the Commission participated in the discussion of these issues in subcommittee teleconferences and at the meeting in Phoenix.

The first proposal would amend Rule 32(h), which requires the district court to notify the parties if the court intends to depart from the guidelines range for a reason not identified in the presentence report or the parties' submissions. The proposed amendment has a lengthy history. After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Committee proposed an amendment extending the notice requirement in Rule 32(h) to *Booker* variances as well as departures. The proposed amendment to 32(h) was approved for publication in 2005, but it was remanded by the Standing Committee for further study in 2006 after the public comment period. The Rules Committee deferred action pending the Supreme Court's decision in *Irizarry v. United States*, 553 U.S. ___, 128 S.Ct. 2198 (June 12, 2008), which held that Rule 32(h), as presently drafted, does not apply to variances.

The Supreme Court's decision in *Irizarry* has cleared the way for the Committee to resume its consideration of the proposal to amend Rule 32(h) to require notice of *Booker* variances as well as departures. Although the Sentencing Commission, the government, and the defense bar have expressed support for the proposed amendment, several members of the Committee expressed the view that extending the requirement of notice was not necessary, would be impractical, and would generate frivolous appeals. Representatives of the Sentencing Commission stated that it was too soon after the decision in *Irizarry* for any data collected by the Commission to shed light on these issues. After extended discussion, the Committee referred the issue back to a subcommittee for further study.

The Committee also discussed a second amendment proposed by the American Bar Association House of Delegates, which approved the proposal at its August 2008 annual meeting. The ABA proposal would amend Rule 32 by requiring disclosure to the parties of all information upon which the probation officer relies in preparing the presentence report. Absent relief for good cause shown, the ABA proposal requires disclosure of:

(1) documentary evidence submitted to the probation officer by any party in connection with the presentence investigation;
(2) documentary evidence provided to the probation officer by any non-party in connection with the presentence investigation;

(3) a written summary of oral information received by the probation officer from any party (other than through an interview of the defendant) in connection with the presentence investigation; and
(4) a written summary of oral information received by the probation officer from any non-party in connection with the presentence investigation.

The ABA supported its proposal with a report describing a number of local court rules that provide for some or all of these forms of disclosure.

Discussion focused on a variety of issues, including the need to protect confidential witness information, concern that the proposed disclosure would impose burdens on the probation and pretrial services officers, and questions regarding the application to information provided by third parties. Members who supported the proposal praised it as a means of increasing the transparency of the process and the accuracy of presentence reports, but other members expressed concern that it could turn the production of the presentence report into even more of an adversary process and might cause the government to reduce the information provided to the probation officer.

There was general agreement that it would be desirable to have more information from the districts with the local rules that had served as a model for the ABA proposal. The staff of the Administrative Office will work with the Federal Judicial Center to develop this information, and the Criminal Law Committee will be consulted as well.

B. Rule 12(b) Challenges for Failure to State an Offense

Rule 12(b)(3) presently requires a motion alleging a defect in the indictment or information to be made before trial, but it excepts from this requirement "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." Failure to state an offense had been regarded as a "jurisdictional" defect, but in 2002 the Supreme Court in *United States v. Cotton*, 535 U.S. 625, held that the omission of an essential element from the defendant's indictment did not deprive the court of jurisdiction. The decision in *Cotton* provided the impetus for consideration of an amendment that would require a challenge for failure to state an offense, like other defects in an indictment or information, to be made prior to trial.

Although there was considerable support for the general notion that it would be desirable to require defects in the indictment or information to be raised prior to trial, the proposed amendment and committee note raised a number of thorny issues about how the change would affect cases in which a defect was not raised until later in the process, either during the trial or on appeal. Rule 12(e) provides that a party who does not raise an objection by the time set by 12(b)(3) "waives" that objection, but for "good cause" the court may grant relief from the waiver. Discussion focused principally on two issues, one concerning the breadth of the good cause relief from waiver, and the other concerning the impact of the Fifth Amendment grand jury clause.

Some members supported the proposed amendment on the understanding that the "good cause" relief from the waiver provisions of Rule 12 would apply when a defendant would be prejudiced by trial on an incomplete indictment. In other contexts, however, courts have interpreted the "good cause" language to require a showing of both "cause" and "prejudice." A proposed note attempted to resolve this issue by stating that good cause "may include injury to a defendant's substantial rights." Committee members recognized, however, that attempting to define "good cause" in a committee note referring to one subpart of the rule would be problematic.

Discussion also focused on the relationship between the proposed amendment and the cases holding that the Fifth Amendment precludes the court from constructively amending an indictment. Although a defendant has waived a defect in the indictment if he does not raise it before trial, the jury instructions raise a different issue. Would it violate the Fifth Amendment to instruct the jury on elements that were not presented to the grand jury? If the Fifth Amendment would preclude such a constructive amendment, then it appears that the court would be required to dismiss the case at mid trial, notwithstanding the amendment. There may also be due process fair warning issues in some cases where the defendant may be unfairly surprised at trial by the introduction of evidence of an element that was neither charged in the indictment nor drawn to his attention by other means. There is, of course, no precedent on these issues because the current rule provides that the issue can be raised at any stage in the proceeding, and courts therefore dismiss the indictment whenever such defects are raised.

The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying committee note, and will return to this issue at its April meeting.

C. Use of Technology

New technologies have affected practice in many ways, and will continue to do so. Within the past year the Committee has proposed several amendments incorporating new technologies: Rule 6 (concerning the return of indictments by two-way video conference); Rule 15 (concerning depositions outside the United States where the defendant cannot be present, but is able to participate meaningfully), and Rule 41 (concerning searches for electronically stored information). Other rules already allow for the use of technology. For example, Rule 41(d)(3)(A) allows a magistrate judge to issue a warrant on the basis of information communicated "by telephone or other reliable electronic means."

To avoid taking new issues up in a piecemeal fashion, I have formed a technology subcommittee, chaired by Judge Tony Battaglia, and asked it to do a comprehensive review of all of the Rules of Criminal Procedure to assess where amendments authorizing the use of new technologies might be desirable. The subcommittee is proceeding with its review and will complete its report in time for the Committee's April meeting.

D. Rule 41, Proposal to Authorize Pretrial Services and Probation Officers to Seek and Execute Warrants

The Committee discussed a preliminary proposal from the Criminal Law Committee to authorize probation and pretrial service officers to seek and execute warrants as part of their efforts to enforce court-ordered supervision conditions. This nascent proposal was seen as a major policy change, and it generated a great deal of discussion. Authorizing judicial personnel to apply to the courts for warrants raises separation of power concerns. Probation officers may not want to do searches, and the new authority may not be compatible with their efforts to cultivate rehabilitative relationships with the individuals they supervise. Moreover, probation and pretrial services officers are not trained to deal with the dangerous situations that may arise when conducting a search. The Committee noted, however, that courts are creating this problem by charging probation officers with the enforcement of search conditions.

The Committee has conveyed these concerns to the Criminal Law Committee.

E. Implementation of the Crime Victims' Rights Act

The Committee is continuing to monitor issues arising under the Crime Victims' Rights Act (CVRA). It received a report concerning the efforts of the U.S. Government Accountability Office (GAO) to evaluate the implementation of the CVRA. The GAO has surveyed judges, victims, and prosecutors concerning their experiences. Although the GAO's report was not yet in final form, the Committee was briefed on a draft. The Committee was pleased to learn that the draft report included no criticism of the courts. It did, however, conclude that the CVRA's 72-hour time limit on appellate mandamus review was too short.

The Committee was also informed that the Department of Justice is continuing to meet with victim advocacy groups to learn of their concerns.

TAB

COPY OF PROPOSED AMENDMENTS TO RULE 15
SET OUT IN
REQUEST FOR COMMENT PAMPHLET

TAB

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 20-21, 2008
Phoenix, Arizona

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Phoenix, Arizona, on October 20-21, 2008. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morrison C. England, Jr.
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Matthew W. Friedrich, Acting Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Judge Mark L. Wolf, whose term expired last month, also attended. Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Judge Rosenthal's law clerk, Andrea Kuperman, was also present. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — and two officials from the U.S. Sentencing Commission, General Counsel Kenneth P. Cohen and Assistant General Counsel Tobias A. Dorsey.

A. Chair's Remarks, Introductions, and Administrative Announcements

The Committee welcomed its newest member, Judge England, from the Eastern District of California, appointed by the Chief Justice to succeed Judge Wolf, whose term just expired.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2008 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court, Pending Before Congress, and Set to Take Effect on December 1, 2008

Mr. Rabiej noted that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, are set to take effect, absent Congressional intervention, on December 1, 2008.

Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to

administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej observed that the Judicial Conference had approved the following proposed rule amendments, which the Rules Committee Support Office was proofreading for eventual submission to the Supreme Court:

Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Rule 41. Search and Seizure. The proposed amendment specifies procedure for executing warrants to search for or seize electronically stored information.

Rule 45. Computing and Extending Time. The proposed amendment simplifies time-computation methods. Related proposed amendments involve the time periods in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and Rule 8 of § 2254/§ 2255 Rules.

Rule 11 of the Rules Governing § 2254 Cases. The proposed amendment clarifies requirements for certificates of appealability.

Rule 11 of the Rules Governing § 2255 Cases. The proposed amendment clarifies requirements for certificates of appealability.

C. Other Recent Developments

It was noted that the Judicial Conference had also approved the two dozen or so proposed statutory changes that Congress is being asked to enact to account for the effect of the rule changes on certain statutory time periods. Congressional staff are reportedly optimistic about the

legislation's eventual prospects. Judge Rosenthal noted that chief judges will be alerted, probably in January 2009, about the need for conforming local rule adjustments. The Department of Justice offered to send Congress a letter supporting the statutory changes. Judge Tallman suggested that a similar letter from the Public Defenders would be helpful, so that the non-controversial nature of the proposed time changes is clear.

Judge Tallman noted that the proposed Rule 6 amendment on the use of video conference for the return of a grand jury indictment had not yet been forwarded to the Judicial Conference. It was felt that the Supreme Court should be given an opportunity first to weigh in on the proposed Rule 15 amendments permitting overseas depositions.

The Committee was informed that Congress had enacted Evidence Rule 502 as drafted — a significant accomplishment affecting white-collar criminal law cases, among others.

Professor Beale notified the Committee that Senator Jeff Sessions has requested committee background materials on the proposed amendment of Rule 29 permitting a judgment of acquittal to be appealed. She noted that the Committee had rejected the proposed amendment only after careful study and after weighing the public comments opposing it. Judge Tallman mentioned the Judicial Conference's long-standing policy against legislative efforts to bypass the Rules Enabling Act process. A participant suggested that the issue may involve substantive law outside the rulemaking process, which might call for further examination.

D. Proposed Amendments Approved by the Standing Committee for Publication

Judge Tallman noted that the following amendments were published in August 2008. Public hearings have tentatively been scheduled to take place on January 16 in Los Angeles, California, and on February 9 in Dallas, Texas.

> Rule 5. Initial Appearance. This proposed amendment implements the Crime Victims' Rights Act (CVRA) by directing a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.
>
> Rule 12.3. Notice of Public-Authority Defense. The proposed amendment implements the CVRA by providing that a victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.
>
> Rule 15. Depositions. The proposed amendment authorizes a deposition outside the defendant's presence in limited circumstances if the court makes case-specific findings.

Rule 21. Transfer for Trial. The proposed amendment implements the CVRA by requiring that the convenience of victims be considered in determining whether to transfer the proceedings to another district for trial.

Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the evidentiary standard and burden of proof for releasing or detaining a person on probation or supervised release.

III. SUBCOMMITTEE REPORTS

A. Rule 32(h), Procedural Rules for Sentencing

Judge Molloy reported that the majority view of the Rule 32(h) subcommittee, which he chairs, was that the rule should be amended to require notice of a contemplated "variance" and the grounds for a variance from the U.S. Sentencing Guidelines similar to notification requirements governing sentencing "departures." He suggested, however, that the Committee first consult with the Sentencing Commission to learn how the rule has operated in the wake of the Supreme Court's decision in *Irizarry v. United States*, 553 U.S. ___ (June 2008), which held that Rule 32(h) does not apply to a variance from a recommended Guidelines range.

Mr. Wroblewski said that this was the rare situation when prosecutors and defense counsel are on the same side of an issue. Both parties in a criminal case are seeing surprises at sentencing and dislike the lack of predictability. Prior to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act provided litigants with transparency and an opportunity to be heard on all aspects of sentencing. Post-*Booker*, judges are free to impose sentences either longer or shorter than recommended by the guidelines based on grounds contemplated by neither party. Mr. McNamara agreed that this was a concern.

There was discussion about whether amending Rule 32(h) to *require* notice of a variance would create frivolous grounds for appeal, inviting claims that the notice was insufficiently specific or no notice was given about a given detail. Being specific regarding a Guidelines departure is much easier than regarding a variance. Ms. Felton pointed out that a technical failure of notice can be harmless error, reducing the problem of frivolous appeals. One member stated that lack of notice may be infrequent, but when it does happen, it has severe consequences. She raised concern about a broader issue, that in preparing the presentence report (PSR), probation officers too often rely on one-sided information.

Mr. Cohen from the Sentencing Commission observed that the Commission had sent a letter supporting the proposed expansion of Rule 32(h) to cover variances and would be trying to collect data relevant to the issue. Mr. McNamara expressed support for a rule amendment to increase the flow of information. Currently, he said, probation officers receive information that never makes it to the other side. Other participants at the meeting contended that a rule amendment was unnecessary, that the problem occurs infrequently, and that it had just been addressed by the Supreme Court. District judges almost always handle problems that arise

effectively on a case-by-case basis by granting additional time to respond or a continuance. One member suggested that the Committee continue to study the issue and obtain more data before taking action.

Professor Beale directed the Committee's attention to the related question whether the Committee can, and should, draft a disclosure provision similar to what has been proposed by the American Bar Association (see ABA report at p. 198 of the agenda book). Mr. Wroblewski reported that the Department of Justice was asking the ABA to consider modifying its proposal to include greater reciprocity. Judge Tallman explained that the ABA proposes giving access not only to the presentence report itself, but also to all the underlying documents and oral conversations that the probation officer relies on to prepare the report. The proposal would turn the drafting of the presentence report into an adversary discovery process. Mr. Wroblewski agreed, expressing concern that it would result in disclosure to the defense of confidential witness information in the Department's files, to which probation officers now have access.

One member said that the probation officer often injects the PSR with a lot of information that the defense has never seen. Mr. McNamara agreed, reporting that many times the prosecutor later apologizes and says, "We should have given you that." One member reported that, unlike the ABA proposal itself, none of the local rules cited by the ABA provide for disclosure of information provided to the probation officer by *third-parties*. Mr. McNamara said that probation officers do not share with the defense any information obtained from probation officers in other districts regarding prior crimes and charges against the accused. Ms. Brill added that, although the defense could ask the court to order its probation officer to share the information or could go to another court and read the record of any charges there, this is not an easy process.

Judge Raggi defended the present system, warning that the ABA proposal could turn preparation of a PSR into even more of an adversary proceeding, each party objecting to anything that it might disagree with. If the Committee did decide to adopt something akin to the ABA proposal, Judge Raggi recommended requiring the probation officer to attach the source documents directly to the PSR, thereby giving all parties access to the raw information. Judge Rosenthal recommended that the Committee obtain data to learn how the various local rules have played out in practice.

Further discussion focused on the effects of the proposed amendment. Mr. McNamara suggested that requiring probation officers to disclose all their information sources directly to the parties would obviate the need for judges to get involved in wrangling over the text of the PSR or having to deal with these issues at the sentencing hearing. Judge Wolf reported that First Circuit Judge Michael Boudin had wondered in a recent opinion whether Rule 32(h) should be rescinded completely post-*Booker*. Judge Tallman commented that if the ABA proposal is adopted, then there would be no need for Rule 32(h). The parties would already have all the information they could possibly obtain other than what is in the judge's mind.

Professor King reported that there was debate when the presentence report system was first instituted whether the parties should have access to it, given concerns about chilling the judge's access to all the data needed to make sound sentencing decisions. The Committee should consider whether a requirement that the probation officer disclose every source of information obtained in preparing the PSR would chill the provision of information to the probation officer or
create other problems — for instance, in cases where information has been provided upon a promise of confidentiality. Professor Beale observed that some version of this ABA proposal is now being road-tested in a number of districts. Mr. Cunningham reiterated that advocates on both sides have made it clear that they do not want surprises at sentencing, and they want to have the opportunity to address all of the evidence and issues that will determine the sentence.

Judge Wolf suggested that further study is necessary, recognizing that the Rule 32(h) issue is part of a broader set of issues. It was suggested that the Criminal Law Committee be consulted to determine how the proposed Rule 32(h) amendment might change the way probation officers do their work and that input be sought from probation officers themselves. Judge Tallman agreed that the issue requires further study. He asked the subcommittee to work with AO staff, Andrea Kuperman, and Laural Hooper at the FJC to contact and research the districts cited by the ABA, and any other district courts with similar rules. Meanwhile, he will contact Judge Julie E. Carnes, chair of the Criminal Law Committee, for additional input. After further discussion, Judge Tallman thanked the subcommittee for its substantial work.

B. Rule 12(b) Challenges for Failure to State an Offense; Rule 34

Judge Wolf presented the Rule 12(b) Subcommittee report. Under Rule 12(b)(3), certain pretrial motions must be raised before trial. All but one subcommittee member agreed with the Department of Justice to add the motion to dismiss for failure to state an offense to the pretrial motions listed in Rule 12(b)(3), particularly given that the Supreme Court has ruled that the defect is non-jurisdictional. However, additional considerations complicate the issue. "Good cause" under Rule 12(e) is generally defined in the case law as both "cause" and "prejudice." In other words, in addition to showing prejudice from being precluded from raising the issue at or after trial, the defendant must also show good cause for not having raised the matter earlier. As a result, a defendant who was prejudiced by errors of counsel might have no redress.

Judge Wolf observed that the bracketed language in the proposed Committee Note (pages 177-78 of the agenda book) says "Good cause may include injury to the substantial rights of the defendant." Preventing a party from raising a tardy motion to dismiss the case for failure to state an offense presumably affects the defendant's substantial rights, satisfying the good-cause requirement and vitiating any waiver. This could affect the definition of "good cause" in *other* Rule 12 contexts.

Judge Wolf also noted that there is a circuit split on whether failure to raise the claim that the indictment fails to state an element of the offense is a "forfeiture" of the issue, subject to

plain-error appellate review, or a "waiver" of the issue, not subject to appellate review. The subcommittee proposes leaving this matter to the case law, as explained in the draft Note.

Judge Tallman suggested that the bracketed language modifies the "good cause" requirement of "cause" *and* "prejudice" adopted in circuit case law by changing the conjunctive to the disjunctive. Instead of *both* cause and prejudice being required, only a showing of "prejudice" would be required. Another member agreed, suggesting that the Committee may want to omit the bracketed language and entrust the definition of "good cause" to case law.

One member asked whether the proposed rule amendment would prohibit a defendant from challenging at trial an indictment that failed, for instance, to charge a nexus with interstate commerce on the ground that this constitutes failure to invoke the court's jurisdiction. Failure to allege an element of the offense is covered by the proposed amendment, which would require the motion to dismiss to be filed *pretrial*, but this would also constitute a failure to allege the court's jurisdiction. Could the rule disallow a motion to dismiss filed during or after trial alleging that the indictment did not establish the court's jurisdiction? Another member agreed, suggesting that, if a charge fails to allege a crime, it must be dismissible even during or after trial.

Judge Wolf indicated that, if the standard for raising the issue during trial were to be "good cause equals 'cause' plus 'prejudice'," then he would oppose the rule amendment. Defendants should not lose rights simply because their lawyers dropped the ball. If the judge doesn't have discretion to fix a defective indictment where the defendant suffers prejudice, then the amendment is ill-advised.

Another member suggested that the proposed rule change would create a host of new issues while purporting to "solve" what is a rare occurrence, which he has never seen in his career and which the Department of Justice had relatively few reports of, namely, a defendant filing a motion to dismiss for failure to allege an element *during trial*. It was noted that the committee lacked empirical data on how often the issue is raised at trial and on what the defendant's reasons have been when it is raised at trial.

Another member suggested that, in the wake of *United States v. Cotton*, 535 U.S. 625 (2002), there is no reason to treat the failure to include an element of the offense differently from any other Rule 12 issue. If the Committee concludes, however, that it is necessary to recast the cause and prejudice standard to accomplish that objective, the proposed amendment could do more harm than good, all in an effort to solve a relatively small problem. The Department of Justice agreed that the cause and prejudice standard is all over the map and that the Committee should perhaps fix that someday. This amendment, however, tries only to bring consistency, in light of *Cotton*, to how different Rule 12 motions are handled.

Professor Coquillette suggested that the draft Committee Note might not want to refer to the current circuit split, as the split could change, whereas the Note could not unless the rule were subsequently amended and could easily become archaic and misleading.

One member objected that removal of the Note's bracketed language at page 178 would cause the rule to do what the Department of Justice said that it did not want, namely, force a defendant to lose substantial rights because of a bad attorney. Mr. Wroblewski disagreed, stating that in circuits where mistakes are analyzed as to whether they constitute substantial error, the proposed rule amendment might not alter much. Professor Beale observed that the Note could follow the format of the time computation notes and discuss the effect of the amendment in sample fact situations — which she considered a better option than redefining the good cause standard. Judge Tallman suggested that a vote on whether to amend the rule should precede a discussion about the Note.

Judge Jones moved to adopt the amendment as printed on page 176, conditioned upon a rewriting of the draft Committee Note. Judge Tallman said that the Note would be revised for presentation at the Committee's next meeting. One member argued against amending the rule if it requires both cause *and* prejudice to permit this issue to be raised at trial. Another member recommended leaving that question to the courts of appeals and suggested that the Committee need not resolve that question as a precondition to the rule change.

Concern was raised that, absent resolution of the Note's wording, it was unclear what the Committee was voting on. Judge Tallman clarified that this was a vote on whether, *in principle*, the rule needs amending. He expressed reluctance about creating a new definition of "good cause" strictly for one subsection of Rule 12, which would create a significant potential for mischief, and he warned against attempting to resolve a circuit split in a Committee Note. He then clarified that an affirmative vote would simply indicate a desire to continue the effort to fix the Note, not necessarily a commitment to amending Rule 12. The entire amendment, including the revised Note, would then become the subject of a new vote at the Committee Spring 2009 meeting.

The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying Committee Note.

Judge Tallman appointed Judge England to chair the subcommittee, taking over for Judge Wolf, whose term expired. He welcomed further discussion of the good cause issue. After further discussion about the Note, Judge Tallman thanked Judge Wolf for his leadership on this issue and remarked that unless the subcommittee was able to address the circuit split and the other issues raised in a satisfactory manner, the rule amendment proposal could be rejected altogether.

C. Use of Technology

Judge Battaglia delivered the report of the Technology Subcommittee, which was tasked not only with reviewing the Rule 41 amendment proposal, authorizing law enforcement to apply for search warrants electronically, but also with reviewing the rules more broadly to determine which ones might be in need of amendments to reflect technological advances. The subcommittee came up with a list of 16 rules that it believed fit that description (page 2 of Tab

3C of the agenda book). Each subcommittee member has been asked to prepare an analysis of several of these rules, and a full subcommittee report will be presented to the Committee in April 2009.

Asked whether the CVRA might affect any of this — for instance, victims' right to participate at various stages, Judge Battaglia responded that the subcommittee would consider that. Asked how the appellate courts could review the existence of probable cause, when the warrant was applied for telephonically, Judge Battaglia responded that a written document would have to be produced at that time, which could then be read over the phone to the judge. The law enforcement agent could not obtain telephone approval and then subsequently draft an application.

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Letter from Judge Carnes on Amending Rule 41 to Authorize Pretrial Service and Probation Officers to Seek and Execute Search Warrants

Judge Battaglia noted that the Criminal Law Committee proposes authorizing probation officers to seek and execute search warrants and suggests conforming changes to Rule 41 (see Tab 4A-B of agenda book). Current policy requires probation officers, in the absence of consent, to withdraw and refer suspicions of illegal activity to a law enforcement officer, complicating their jobs. It was suggested that "probation officers" and "pretrial services officers" could be added to the Rule 41 list of employees authorized to seek search warrants.

John Rabiej stated that the Criminal Law Committee is surveying probation officers and has yet to develop new probation officer guidelines. Judge Tallman explained that there is consequently no action item on this yet. The Criminal Law Committee meets in December and hopes to be in a position to propose a Rule 41 amendment by this Committee's next meeting.

Mr. Friedrich of the Department of Justice expressed concern over what appeared to be a major policy change. Judge Tallman reported that the Criminal Law Committee shared those concerns and expressed initial reluctance. Probation officers, however, made the case by pointing out that if judges continue to order supervision conditions that require search, then probation officers must have the authority to enforce those conditions on the spot, without having to retreat and ask a law enforcement officer to apply for a warrant and return to the scene at some later time. It was noted that officers would need appropriate training to do this.

Noting that Rule 41 now refers to search warrants being sought by "officers authorized by the Attorney General," Professor King asked why the Attorney General could not simply add probation officers and pretrial service officers to the list, obviating the need for a rule change. Professor Beale suggested that further changes to Rule 41 would nevertheless be required; because the proposal expands the type of material subject to search and seizure, as well as the standard for suppression.

One member suggested that authorizing judiciary officers to apply to judges for warrants raised Separation of Powers concerns. Another member questioned the wisdom of having probation officers, who try to cultivate a rehabilitative relationship with the people they supervise, applying for search warrants themselves. Judge Rosenthal recommended waiting until the Criminal Law Committee had issued its new guidelines, which might assuage some concerns. Judge Tallman emphasized that the Criminal Law Committee had primary jurisdiction over the policy question. Mr. Rabiej observed that the Judicial Conference was the ultimate policymaker and that the Conference would likely take any concerns expressed by this Committee into account in evaluating the Criminal Law Committee's recommendation. Judge Tallman suggested that Judge Carnes, chair of the Criminal Law Committee, be invited to the next meeting.

Mr. Friedrich remarked that the Department of Justice has occasionally authorized officers not under its authority to apply for search warrants, but only executive branch officers. The Criminal Law Committee proposal could raise potential conflicts. For instance, a probation officer conducting a search could undermine an undercover investigation that the probation officer knows nothing about. Probation officers are *not* law enforcement officers, at least not in the way that FBI agents are, and searches can become dangerous in short order.

One member noted that probation officers in his district did not want to do searches. Mr. Rabiej said he believed the Criminal Law Committee's guidelines would be narrowly tailored, opposing broad search authority. Judge Tallman suggested that it was *judges* who were creating the problem at sentencing by tasking probation officers with enforcement of search conditions. It was noted that the guidelines could be written very narrowly, authorizing a probation officer to apply for a search warrant where he or she has first-hand information, for instance, but tasking someone else to execute it. Judge Tallman promised to relay the concerns to Judge Carnes.

B. Letter from Judge Weinstein on Amending Rule 11 to Authorize Discovery by Defendants

Judge Tallman invited discussion of the letter from Judge Jack B. Weinstein (NY-E), at page 230 of the agenda book, suggesting that Rule 11 be amended to include a reference to the defendant's right to compel the production of documents. He expressed reluctance to initiate the proposed rule change, suggesting instead a change to the Federal Judicial Center's Bench Book that would recommend a statement in the guilty-plea colloquy like, "You have the right to use the power of this court to bring in evidence and witnesses on your behalf." Judge Raggi agreed, warning that if this is in the rule, a guilty plea may not be considered voluntary if those words are not said. Judge Tallman said that he would respond to Judge Weinstein's letter.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, AND OTHER COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

John Rabiej reported that the bail bond bill had died in this Congress, although he predicted that it would be introduced again, as it has been in every Congress for years.

B. Update on Implementation of Crime Victims' Rights Act and Issues Arising Under the Act

Judge Jones provided an update on implementation of the Crime Victims' Rights Act (CVRA). He reported that no action had been taken in Congress on Senator Kyl's proposal to amend the rules by statute to incorporate various provisions implementing the CVRA that the Committee did not adopt. John Rabiej observed that, following a lengthy investigation that included a survey of judges, victims, and prosecutors, the U.S. Government Accountability Office (GAO) had issued a draft report on how the Act has been implemented. The draft report included no criticism of the courts and agreed that the CVRA's 72-hour provision was too short.

A few other issues were discussed. Judge Tallman asked whether courts were complying with the 72-hour limit. He said he thought all the parties usually sought extensions anyway, because no one – neither the court nor the parties – can do it in 72 hours. Mr. Wroblewski observed that the Department of Justice meets regularly with victims' rights groups, and could raise these questions with them. Professor Beale said that it would be helpful if the Department sent the Committee letters summarizing those meetings. Judge Tallman agreed, adding that it would be good for the Committee to have such feedback. Mr. Wroblewski agreed to do that. Judge Jones observed that the Committee could also meet with victims' representatives itself to discuss these matters.

C. Revision of the Search and Seizure Warrant Forms

Mr. McCabe requested the Committee's input on a proposed substantive change to national search warrant forms. As part of a recent revision of national forms to reflect the new privacy rules and to restyle the language in simple, modern English, AO staff and the Forms Working Group discovered that search warrant forms have long required law enforcement agents to swear before a judge to the warrant inventory even though this is not required in the rules. Agents have traveled 200 miles to appear before a judge and swear to the inventory. It appears that this form language is a holdover from a 1917 statute abrogated decades ago when the Federal Rules of Criminal Procedure were first adopted.

Judge Battaglia reported that his subcommittee is looking at whether this can all be done electronically, in which case it would be clear that the return of a warrant need not be presented to the judge in person. Referring to the warrant form on page 243 of the agenda book, Judge

Tallman suggested that nothing in Rule 41 prevents ending the form with the officer's sworn signature declaring under penalty of perjury that the inventory is correct. Although Rule 41(f)(1)(D) requires the agent to return the warrant and inventory to the magistrate judge, it was noted that the rule does not require that it be sworn before the judge, whether in person or by video.

Judge Tallman asked Mr. McCabe to convey the Committee's consensus to the Forms Working Group that the "sworn before me" signature section can be eliminated from forms AO 93, AO 93A, and AO 109. If the Forms Working Group or the AO has any additional questions involving national criminal forms, those can be transmitted to the Committee's reporter.

D. Proposed Amendment of Rule 12.4

The Committee discussed a request by Judge Gordon J. Quist on behalf of the Committee on Codes of Conduct that consideration be given to amending Rule 12.4 to require greater victim information disclosure. Rule 12.4, added in 2000, requires the Department of Justice to submit a disclosure statement on the holdings of organizational victims.

It was agreed that the central issue was whether a new provision should be added to Rule 12.4 that would require the government to disclose all victims, not just organizational victims and whether the rule should require all organizational victims asserting rights to disclose their affiliates. The present rule requires disclosure of information only by the government and non-governmental *parties*. And, the government must disclose only as to *organizational* victims. The government must do so at the defendant's initial appearance, and must supplement. So, if an organizational victim exercises CVRA rights, the organizational victim itself – as distinguished from the government – has no disclosure obligation. Requiring *individual* victims to disclose could raise privacy concerns, unless the disclosure was done to the judge under seal, strictly for recusal purposes. Judge Tallman noted that the rules now include a definition of "victim," drawn from the CVRA.

It was noted that, practically speaking, judges often do not know the identity of victims in a case until trial or even sentencing. Mr. Wroblewski said that he perceives no problem with respect to *individual* victims, since the judge would likely be aware of the conflict if a victim is a family member or the like, where recusal is required. And if the victim was not as closely related, recusal would not be required. The main problem was judges' stockholdings in organizational victims. One member agreed, but observed that if a non-organizational victim was the judge's neighbor or friend, the judge might not be aware of that fact, but would want to be promptly alerted to it. Another member pointed out that under the current rule, the government must do the disclosing even if it does not know a victim's affiliates. If the victim is asserting rights, the rules could instead require the victim to make the disclosure.

Judge Tallman observed that the Committee should only concern itself with whether the information needs to be disclosed to the judge, not whether or not the judge must recuse, which was not this Committee's concern. He suggested that the subcommittee begin drafting a Rule

12.4(a)(3) proposal for review at the April 2009 meeting. He said he saw no reason why the rule should exclude non-organizational victims. Where appropriate, disclosure could be made under seal so that the information is not made public. Mr. Rabiej reported that the Committee on Codes of Conduct is drafting a follow-up letter on this. Judge Tallman indicated that he would contact Judge Margaret McKeown, who has succeeded Judge Quist as chair of that committee.

E. Use of Subcommittees

Judge Tallman drew the Committee's attention to the memorandum from Judge Anthony J. Scirica, chair of the Executive Committee, requesting input from each committee chair on the use of subcommittees by Judicial Conference committees. Judge Tallman observed that he has pared down the Committee's list of standing subcommittees. His draft response is reproduced in the agenda book, although obsolete language about Rule 49.1 in the next-to-last paragraph on page 232 of the agenda book would be removed. Judge Tallman expressed doubt that anyone could seriously contend that the use of subcommittees by rules committees represents an inefficient use of resources, noting that the Committee as a whole could not possibly wordsmith every single proposed word change. The Committee would continue making appropriate use of subcommittees, he said.

Judge Rosenthal suggested that Judge Scirica's memorandum reflected concerns not applicable to the rules committees. In some committees, too much of the work is being done by staff and subcommittees with little committee supervision — which is not true of the rules committees. The rules committees need subcommittees to study specific issues in detail and to draft rule amendment language, a practice that would be threatened if the Executive Committee were to promulgate poorly designed rules that were then misapplied to the rules committees. For instance, the proposed requirement that subcommittee chairs communicate with outsiders only through the committee chair would not work in the context of mini-conferences, where the subcommittee chair must communicate directly with outsiders. Judge Rosenthal asked that each advisory rules committee send its responsive memo to her. She would then forward them to Judge Scirica with a cover memorandum.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman advised the group that the next meeting had been tentatively scheduled for April 6-7, 2009, in Washington, D.C., although April 27-28, 2009, had been identified as alternative dates. After thanking Judge Wolf for his years of service and contribution to the Committee, Judge Tallman adjourned the meeting.

TAB

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

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2008

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on October 2-3, 2008, in Denver, Colorado. The Committee considered a number of issues as more fully set out in the draft of the minutes of that meeting, which is attached to this report as Exhibit A.

The Committee recommends Standing Committee approval for publication of the preliminary draft of proposed amendments to one Rule and two Official Forms.

Several information items are set out following the action items. They concern the following matters: the status of previously-approved actions relating to the Bankruptcy Rules, action taken after the Denver meeting to implement the National Guard and Reservists Relief Act of 2008, the Committee's new project to revise the appellate provisions of the Bankruptcy Rules, Bankruptcy Rules issues brought to the Standing Committee's attention by Chief Judge Easterbrook and referred to this Committee for study, residential mortgage-related disclosure rules that are currently being developed by the Committee, an update on the Forms Modernization project, and changes in the membership of the Committee.

II. Action Items

A. <u>Preliminary Draft of Proposed Amendment to Bankruptcy Rule 6003.</u>

The Advisory Committee recommends that the Standing Committee approve the attached draft of a proposed amendment to Bankruptcy Rule 6003 for publication for comment.

1. *Synopsis of Preliminary Draft of Proposed Amendment to Bankruptcy Rule 6003.*

   Rule 6003 is amended to clarify that the requirement of a 21-day waiting period before a bankruptcy court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying an effective date for the order that is earlier than the date of its issuance. The amendment also makes clear that the rule restricts only the issuance of orders granting the specified relief, and not the entry of all orders that may relate in some way to the specified motions or applications.

2. *Text of Preliminary Draft of Proposed Amendment to Bankruptcy Rule 6003 Attached as Exhibit B.*

B. <u>Preliminary Draft of Proposed Amendments to Bankruptcy Official Forms 22A and 22C</u>

The Advisory Committee recommends that the Standing Committee approve the attached draft of proposed amendments to Official Forms 22A and 22C for publication for comment.

1. *Synopsis of Preliminary Draft of Proposed Amendments to Official Forms 22A and 22C.*

   Official Forms 22A and 22C – Statement of Current Monthly Income and Means Test Calculation for chapter 7 and chapter 13 cases respectively – are amended to delete several references to "household" and "household size" and to replace them with "number of persons" or "family size." These amendments to the Forms implement more accurately the provisions of § 707(b)(2)(A)(ii)(I) of the Bankruptcy Code that allow means test deductions to be taken from current monthly income based on IRS National and Local Standards.

   Allowing the specified deductions to be based on household size leads to results that are both over-inclusive and under-inclusive. If a debtor has dependents who are not members of the debtor's household, an instruction that the debtor's deduction take into account only household members results in a smaller

deduction than IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit.

2. *Text of Preliminary Draft of Proposed Amendments to Bankruptcy Official Forms 22A and 22C Shown in the Attached Excerpted Copies of the Forms as Exhibits C and D.*

III. Information Items

A. Publication of Proposed Amendments to Bankruptcy Rules

At the January 2008 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 1007, 1019, 4004, and 7001. At the June 2008 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 1014, 1015, 1018, 5009, and 9001, and a preliminary draft of proposed new Bankruptcy Rules 1004.2 and 5012. The deadline for the submission of comments on these proposals is February 17, 2009. Thus far, we have received one comment on the proposals. Public hearings on the proposals are scheduled for January 23, 2009, in New York, and February 6, 2009, in San Francisco.

The Advisory Committee will consider all of the comments submitted on these proposals, whether in writing, or at the public hearings, during its March 2009 meeting. The Advisory Committee anticipates that it will present these amendments, with appropriate changes, if any, to the Standing Committee at its June 2009 meeting for approval and transmittal to the Judicial Conference.

B. Interim Rule and Official Form Amendments to Implement National Guard and Reservists Relief Act of 2008

Subsequent to the Committee's Denver meeting, Congress passed and the President signed the National Guard and Reservists Relief Act of 2008, which provides a temporary exclusion from application of the means test for certain members of the National Guard and reserve components of the Armed Services who become debtors in chapter 7 bankruptcy cases. Because the new legislation takes effect on December 19, 2008, changes in the relevant Official Form and Bankruptcy Rule had to be implemented on an expedited basis. The Advisory Committee by means of an email vote approved amendments to Official Form 22A and a new

Interim Rule 1007-I. This recommendation was submitted to the Standing Committee by Judge Rosenthal in an email communication dated November 3, 2008. The Standing Committee approved the proposed Interim Rule and revisions to the Official Form, and sent them to the Judicial Conference for its approval. That approval was obtained on November 18, 2008, thus allowing the changes to Official Form 22A to take effect as of December 19, 2008. Those changes are reflected in section 1C of the form, which is attached to this report as Exhibit C. Interim Rule 1007-I has been sent to the courts for adoption as a local rule. Unless extended by Congress, the Act will apply only to bankruptcy cases filed within the three-year period following its effective date. The new exclusion from means testing applies in a given case only for the period provided in the statute (i.e., while the debtor is on active duty and for 540 days thereafter). Accordingly, the amended form and Interim Rule provide for a delayed means test form filing requirement in appropriate cases, as well as for notice of that requirement.

C. Project to Revise Part VIII of the Bankruptcy Rules

At the Denver meeting, the Advisory Committee voted to undertake a project to revise Part VIII of the Bankruptcy Rules, which governs bankruptcy appeals. The goal of the project is to bring the content, organization, and style of this part of the Bankruptcy Rules into closer alignment with the Federal Rules of Appellate Procedure. A subcommittee of the Advisory Committee has prepared a preliminary draft of a revision of the Part VIII rules, which it presented to the Committee in Denver. In order to obtain the input of practitioners, academics, and judges with substantial bankruptcy appeals experience, the Committee will host a mini-conference on this topic in San Diego prior to its March 2009 meeting.

D. Consideration of Issue Raised by Chief Judge Easterbrook in *Zedan v. Habas*

Chief Judge Frank Easterbrook brought to the attention of a member of the Standing Committee an issue implicating the bankruptcy rules that he raised in a concurring opinion in *Zedan v. Habas*, 529 F.3d 398, 407 (7th Cir. 2008), and Judge Rosenthal referred the matter to the Advisory Committee. The issue raised by Chief Judge Easterbrook concerns Bankruptcy Rule 7001's classification of a proceeding to object to or revoke a discharge as an adversary proceeding, the termination of which constitutes a final decision permitting appellate review under 28 U.S.C. § 158(d). He questioned whether it would be more appropriate to treat such proceedings as contested matters, given their statutory designation as "core proceedings" and the possibility that under the current rule an appeal from the denial of one creditor's objection to discharge could be taken while other objections remain pending.

The Advisory Committee thoroughly considered the issue at the Denver meeting and decided not to recommend an amendment of Rule 7001. Because of the importance of the discharge to a debtor, the Advisory Committee favored the long-held position that the greater

procedural protections available in an adversary proceeding are appropriate for most objections to or attempts to revoke a discharge. The Committee was also of the view that cases in which several different objections to a discharge are litigated sequentially are relatively rare and that existing procedural mechanisms (e.g., consolidation, stay orders) can be employed to prevent premature or piecemeal appeals.

Another bankruptcy rule issue raised by *Zedan* concerns the situation in which a party opposing a debtor's discharge discovers, after the deadline for objecting to discharge but prior to the granting of the discharge, fraud committed by the debtor. Because *Zedan* held that under current Rule 4004 and § 727(d) of the Bankruptcy Code a creditor in this situation can neither object to discharge nor seek revocation of the discharge once it is entered, the Committee concluded that this issue warranted further consideration. It therefore referred the matter to a subcommittee and will discuss it further at its March meeting.

E. Decision to Carry Over to March Meeting Amendments to Bankruptcy Rule 3001 and New Bankruptcy Rule 3002.1

The minutes of the Denver meeting reflect that the Advisory Committee voted to recommend that the Standing Committee approve drafts of proposed amendments to Bankruptcy Rule 3001 and a new Rule 3002.1 for publication for comment. These amendments would require in chapter 13 cases the disclosure and itemization of amounts needed to cure residential mortgage defaults occurring prior to bankruptcy and of changes in mortgage payment amounts occurring during the pendency of the case. They also would create a procedure for bankruptcy court resolution of any disputes over these amounts. Subsequent to the meeting, however, the Chair made the decision to hold the rules for further consideration at the March meeting, in light of a suggestion submitted to the Advisory Committee of the possible need for other amendments to Rule 3001.

F. Forms Modernization Project Update

The Advisory Committee's Forms Modernization Project is continuing its review of the bankruptcy forms and how the forms can be redesigned to improve the gathering and presentation of information needed during bankruptcy cases and proceedings.

The project is currently focusing on three discrete tasks: analyzing existing bankruptcy

forms to identify redundant or unnecessary information; evaluating alternative technologies for getting information into the bankruptcy system and retrieving the information in formats that may improve the ability of judicial users and other stakeholders to use the information in connection with case administration and/or litigation; and considering form and question redesign and simplification. The Advisory Committee believes an outside consultant could provide valuable expertise in forms redesign, with the aim of improving the accessibility of the forms and the accuracy of responses, as well as providing assistance to the Committee in structuring and coordinating the upcoming phases of the project. The Committee has begun the process of exploring the feasibility of retention of a consultant and identifying experts.

G. Committee Membership

The Chief Justice has appointed three new members of the Advisory Committee. They are Chief Bankruptcy Judge Judith Wizmur of the District of New Jersey, Michael St. Patrick Baxter, Esquire, and David A. Lander, Esquire. They replace outgoing members Judge Irene M. Keeley of the Northern District of West Virginia, Bankruptcy Judge Kenneth Meyers of the Southern District of Illinois, and G. Eric Brunstad, Jr., Esquire.

Professor S. Elizabeth Gibson of the University of North Carolina School of Law has succeeded Professor Jeffrey W. Morris of the University of Dayton School of Law as the Advisory Committee's Reporter. Professor Morris served as Reporter for 10 years, including the hectic six-month period after the enactment of the 2005 amendments to the Bankruptcy Code when the Advisory Committee developed the Interim Rules and Forms to implement the new law.

Attachments: Draft of Minutes of the Advisory Committee Meeting of October 2-3, 2008
Text of Preliminary Draft of Proposed Amendment to Bankruptcy Rule 6003
Excerpted Copies of Official Forms 22A and 22C

TAB

Exhibit B

PROPOSED AMENDMENT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 6003[1]

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case – Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts[2]

1 Except to the extent that relief is necessary to avoid
2 immediate and irreparable harm, the court shall not, within 21
3 days after the filing of the petition, ~~grant relief~~ issue an order
4 granting ~~regarding~~ the following:
5 (a) an application under Rule 2014;
6 (b) a motion to use, sell, lease, or otherwise incur an
7 obligation regarding property of the estate, including a motion
8 to pay all or part of a claim that arose before the filing of the
9 petition, but not a motion under Rule 4001; ~~and~~ or
10 (c) a motion to assume or assign an executory contract
11 or unexpired lease in accordance with § 365.
12 * * * * *

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[1] New material is underlined, matter to be omitted is lined through.

[2] Incorporates time computation amendments approved by the Committee on Rules of Practice and Procedure and the Judicial Conference that are due to take effect on December 1, 2009, if the Supreme Court approves and if Congress takes no action otherwise. Accordingly, all references in the Rule and Committee Note to 20 days have been changed to 21 days.

COMMITTEE NOTE

The rule is amended to clarify that it limits the timing of the entry of certain orders, but does not prevent the court from providing an effective date for such an order that may relate back to the time of the filing of the application or motion, or to some other date. For example, while the rule prohibits, absent immediate and irreparable harm, the court from authorizing the employment of counsel during the first 21 days of a case, it does not prevent the court from providing in an order entered after expiration of the 21-day period that the relief requested in the motion or application is effective as of a date earlier than the issuance of the order. In addition, it does not prohibit the filing of an application or motion for relief prior to expiration of the 21-day period. Moreover, nothing in the rule prevents a professional from representing the trustee or a debtor in possession pending the approval of an application for the approval of the employment under Rule 2014.

The amendment also clarifies that the scope of the rule is limited to granting the specifically identified relief set out in the subdivisions of the rule. Deleting "regarding" from the rule clarifies that the rule does not prohibit the court from entering orders in the first 21 days of the case that may relate to the motions and applications set out in (a), (b), and (c); it is only prohibited from granting the relief requested by those motions or applications. For example, in the first 21 days of the case, the court could grant the relief requested in a motion to establish bidding procedures for the sale of property of the estate, but it could not, absent immediate and irreparable harm, grant a motion to approve the sale of property.

In re ______________________
Debtor(s)

Case Number: ________________
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Unless the exclusion in Line 1C applies, joint debtors may complete a single statement. If the exclusion in Line 1C applies, each joint filer must complete a separate statement.

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**Disabled Veterans.** If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).
1B	**Non-consumer Debtors.** If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**Reservists and National Guard Members; active duty or homeland defense activity.** Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 days and ☐ I remain on active duty /or/ ☐ I was released from active duty on ______________, which is less than 540 days before this bankruptcy case was filed; OR b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on ______________, which is less than 540 days before this bankruptcy case was filed.

<table>
<tr><td>19A</td><td>National Standards: food, clothing and other items. Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</td><td>$</td></tr>
<tr><td>19B</td><td>National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.

<table>
<tr><th colspan="3">Persons under 65 years of age</th><th colspan="3">Persons 65 years of age or older</th></tr>
<tr><td>a1.</td><td>Allowance per person</td><td></td><td>a2.</td><td>Allowance per person</td><td></td></tr>
<tr><td>b1.</td><td>Number of persons</td><td></td><td>b2.</td><td>Number of persons</td><td></td></tr>
<tr><td>c1.</td><td>Subtotal</td><td></td><td>c2.</td><td>Subtotal</td><td></td></tr>
</table></td><td>$</td></tr>
<tr><td>20A</td><td>Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.</td><td>$</td></tr>
<tr><td>20B</td><td>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. Do not enter an amount less than zero.

<table>
<tr><td>a.</td><td>IRS Housing and Utilities Standards; mortgage/rental expense</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42</td><td>$</td></tr>
<tr><td>c.</td><td>Net mortgage/rental expense</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
<tr><td>21</td><td>Local Standards: housing and utilities; adjustment. if you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:
____
____
________________________________</td><td>$</td></tr>
</table>

COMMITTEE NOTE

Form 22A, lines 19A, 19B, 20A, and 20B, and Form 22C, lines 24A, 24B, 25A, and 25B, are amended to delete the terms "household" and "household size" and to replace them with "number of persons" or "family size." Under § 707(b)(2)(A)(ii)(I) means test deductions for food, clothing, and other items and for heath care are permitted to be taken in the amounts specified in the IRS National Standards, and deductions for housing and utilities are permitted in the amounts specified in the IRS Local Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

In order for forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to "household" and "household size" are deleted, and the substituted terms—"number of persons" and "family size"—are defined in terms of exemptions and the debtor's federal income tax return and other dependents.

In re ______________________
Debtor(s)

Case Number: ______________
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts: $ b. Ordinary and necessary business expenses: $ c. Business income: Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts: $ b. Ordinary and necessary operating expenses: $ c. Rent and other real property income: Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse.	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ ______ Spouse $ ______	$	$

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. | | $ b. | | $ c. | | $ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.	$

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$

<table>
<tr><td>25B</td><td>Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Housing and Utilities Standards; mortgage/rent expense</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net mortgage/rental expense</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
<tr><td>26</td><td>Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:
____
____
____________________</td><td>$</td></tr>
<tr><td>27A</td><td>Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.
Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more.
If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td><td>$</td></tr>
<tr><td>27B</td><td>Local Standards: transportation; additional public transportation expense. If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)</td><td>$</td></tr>
<tr><td>28</td><td>Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more.
Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Transportation Standards, Ownership Costs</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net ownership/lease expense for Vehicle 1</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
</table>

COMMITTEE NOTE

Form 22A, lines 19A, 19B, 20A, and 20B, and Form 22C, lines 24A, 24B, 25A, and 25B, are amended to delete the terms "household" and "household size" and to replace them with "number of persons" or "family size." Under § 707(b)(2)(A)(ii)(I) means test deductions for food, clothing, and other items and for heath care are permitted to be taken in the amounts specified in the IRS National Standards, and deductions for housing and utilities are permitted in the amounts specified in the IRS Local Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

In order for forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to "household" and "household size" are deleted, and the substituted terms—"number of persons" and "family size"—are defined in terms of exemptions and the debtor's federal income tax return and other dependents.

TAB

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIRMAN, EXECUTIVE COMMITTEE

(215) 597-2399
(215) 597-7373 FAX
ascirica@ca3.uscourts.gov

Memorandum of Action

Executive Committee
Judicial Conference of the United States

November 18, 2008

By mail ballot concluded on November 18, 2008, the Executive Committee, on recommendation of the Committee on Rules of Practice and Procedure, approved on behalf of the Judicial Conference two items to take effect on December 19, 2008: 1) revisions to Official Bankruptcy Form 22A; and 2) distribution to the district courts of proposed Interim Bankruptcy Rule 1007-I with a recommendation that it be adopted through a local rule or standing order. The revisions to the Official Form are technical and necessary to conform to changes made by the National Guard and Reservists Debt Relief Act of 2008 (Pub. Law No. 110-438), which amends the Bankruptcy Code to exclude, in cases commenced in the three-year period after the effective date of the Act, certain members of the National Guard and Reserves from means testing in chapter 7 cases. Expedited action was required to accommodate rules vendors who need significant lead time to make changes.

Anthony J. Scirica

Committee:

Danny J. Boggs
Charles R. Breyer
James C. Duff
Alan B. Johnson
Paul R. Michel
Lawrence L. Piersol
David Bryan Sentelle

November 19, 2008

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

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

To: Honorable Anthony J. Scirica

From: Honorable Lee H. Rosenthal

Date: November 10, 2008

RE: REQUEST JUDICIAL CONFERENCE APPROVAL OF REVISIONS TO OFFICIAL BANKRUPTCY FORM 22A AND INTERIM BANKRUPTCY RULE 1007-I

The Committee on Rules of Practice and Procedure requests the Judicial Conference, or the Executive Committee acting on its behalf, approve proposed revisions to Official Form 22A to take effect on December 9, 2008, and approve distributing to the courts proposed Interim Rule 1007-I with a recommendation that it be adopted as a local rule or standing order also to take effect on December 19, 2008. The proposed changes implement the National Guard and Reservists Debt Relief Act of 2008, which was enacted on October 20, 2008. The Act amends the Bankruptcy Code to exempt from means testing for the next three years certain members of the National Guard and Reserves. The December 19 effective date is consistent with the effective date of the Act. The Interim Rule and the Official Form revisions would remain in effect for all cases begun in the three years covered by the Act. The proposed changes are technical to conform to the change in the Code and not controversial.

The attached memorandum from Judge Laura Taylor Swain, chair of the Advisory Committee on Bankruptcy Rules, provides additional information on the Act, a copy of the Act, proposed language revising the Official Form, and the proposed Interim Rule and Committee Note. A quick turnaround is requested to accommodate form vendors who require significant lead time to make the changes.

Thank you for considering our request.

Attachments

cc: Laura Minor
Peter McCabe

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

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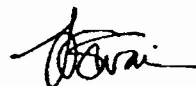
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules



DATE: October 29, 2008

RE: Report of the Advisory Committee on Bankruptcy Rules Recommending Approval of Amendment to Official Form 22A and Interim Rule 1007-I

On October 20, 2008, the President signed the National Guard and Reservists Debt Relief Act of 2008, Pub.L. 110-438, which amends § 707(b)(2)(D) of the Bankruptcy Code to exempt from means testing National Guard members and Reservists called for at least 90 days to active duty or homeland defense activity after September 11, 2001. The Act prohibits courts from dismissing chapter 7 cases of qualifying National Guard members or Reservists, during the active duty or homeland defense activity or within 540 days after the cessation of the active duty or homeland defense activity, based on any form of means testing.

The amendment to § 707(b)(2)(D) takes effect on December 19, 2008, 60 days after enactment, and will apply in cases filed during the ensuing three years. The Advisory Committee recommends that a new Interim Rule 1007-I – Lists, Schedules, Statements, and other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion – be approved and

that Official Form 22A – Statement of Current Monthly Income and Means Test Calculation – be amended to permit qualifying debtors to invoke the exclusion.

Because the prohibition against dismissing these cases based on means testing expires 540 days after a debtor is released from active duty or is no longer performing homeland defense activities, the exclusion may expire while a debtor's case is pending, and at a point when a timely motion to dismiss the debtor's case may still be filed under § 707(b)(2). The Advisory Committee recommends that a debtor whose exclusion expires under such circumstances be required to complete the means test computation form no later than 14 days after the expiration of the exclusion and that the clerk be required to give such debtors notice of the need to complete the means test. Because the law takes effect before the normal rule-making process can be completed, the Advisory Committee recommends the adoption of an Interim Rule.

The Advisory Committee requests that the Standing Committee:

(1) approve the Interim Rule and submit it to the Judicial Conference with a recommendation that the Conference approve transmission of the Interim Rule to the courts for adoption as a local rule; and

(2) approve the revisions to Official Form 22A and submit the amended Official Form to the Judicial Conference with a recommendation that the revisions be adopted.

The Advisory Committee requests that the Interim Rule and the revisions to Official Form 22A take effect on December 19, 2008, and remain in effect for all cases commenced while the amendments made by Pub.L. 110-438 to § 707(b)(2)(D) are applicable, as provided in that statute or any subsequent extension thereof.

(The Interim Rule, an excerpt of the Official Form with the revisions highlighted, and committee notes are attached.)

Interim Rule 1007-I. Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion

1 * * * * *

2 (b) SCHEDULES, STATEMENTS, AND OTHER
3 DOCUMENTS REQUIRED.

4 * * * * *

5 (4) Unless either: (A) § 707(b)(2)(D)(i) applies, or
6 (B) § 707(b)(2)(D)(ii) applies and the exclusion from means testing
7 granted therein extends beyond the period specified by Rule 1017(e),
8 an individual debtor in a chapter 7 case shall file a statement of
9 current monthly income prepared as prescribed by the appropriate
10 Official Form, and, if the current monthly income exceeds the median
11 family income for the applicable state and household size, the
12 information, including calculations, required by § 707(b), prepared as
13 prescribed by the appropriate Official Form.

14 * * * * *

15 (c) TIME LIMITS. In a voluntary case, the schedules,
16 statements, and other documents required by subdivision (b)(1), (4),
17 (5), and (6) shall be filed with the petition or within 15 days
18 thereafter, except as otherwise provided in subdivisions (d), (e), (f),
19 and (h), and (n) of this rule. In an involuntary case, the list in

20 subdivision (a)(2), and the schedules, statements, and other
21 documents required by subdivision (b)(1) shall be filed by the debtor
22 within 15 days of the entry of the order for relief. In a voluntary case,
23 the documents required by paragraphs (A), (C), and (D) of
24 subdivision (b)(3) shall be filed with the petition. Unless the court
25 orders otherwise, a debtor who has filed a statement under
26 subdivision (b)(3)(B), shall file the documents required by
27 subdivision (b)(3)(A) within 15 days of the order for relief. In a
28 chapter 7 case, the debtor shall file the statement required by
29 subdivision (b)(7) within 45 days after the first date set for the
30 meeting of creditors under § 341 of the Code, and in a chapter 11 or
31 13 case no later than the date when the last payment was made by the
32 debtor as required by the plan or the filing of a motion for a discharge
33 under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at
34 any time and in its discretion, enlarge the time to file the statement
35 required by subdivision (b)(7). The debtor shall file the statement
36 required by subdivision (b)(8) no earlier than the date of the last
37 payment made under the plan or the date of the filing of a motion for
38 a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code.
39 Lists, schedules, statements, and other documents filed prior to the
40 conversion of a case to another chapter shall be deemed filed in the
41 converted case unless the court directs otherwise. Except as provided

42 in § 1116(3), any extension of time to file schedules, statements, and
43 other documents required under this rule may be granted only on
44 motion for cause shown and on notice to the United States trustee,
45 any committee elected under § 705 or appointed under § 1102 of the
46 Code, trustee, examiner, or other party as the court may direct.
47 Notice of an extension shall be given to the United States trustee and
48 to any committee, trustee, or other party as the court may direct.
49 * * * * *
50 (n) TIME LIMITS FOR, AND NOTICE TO, DEBTORS
51 TEMPORARILY EXCLUDED FROM MEANS TESTING.
52 (1) An individual debtor who is temporarily excluded from
53 means testing pursuant to § 707(b)(2)(D)(ii) of the Code shall file any
54 statement and calculations required by subdivision (b)(4) no later
55 than 14 days after the expiration of the temporary exclusion if the
56 expiration occurs within the time specified by Rule 1017(e) for filing
57 a motion pursuant to § 707(b)(2).
58 (2) If the temporary exclusion from means testing under §
59 707(b)(2)(D)(ii) terminates due to the circumstances specified in
60 subdivision (n)(1), and if the debtor has not previously filed a
61 statement and calculations required by subdivision (b)(4), the clerk
62 shall promptly notify the debtor that the required statement and

63 calculations must be filed within the time specified in subdivision

64 (n)(1).

COMMITTEE NOTE

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).

In re ______________________
Debtor(s)

Case Number: ______________
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Unless the exclusion in Line 1C applies, joint debtors may complete a single statement. If the exclusion in Line 1C applies, each joint filer must complete a separate statement.

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**Disabled Veterans.** If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. .☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).
1B	**Non-consumer Debtors.** If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**Reservists and National Guard Members; active duty or homeland defense activity.** Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 days and ☐ I remain on active duty /or/ ☐ I was released from active duty on ______________, which is less than 540 days before this bankruptcy case was filed; OR b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on ______________, which is less than 540 days before this bankruptcy case was filed.

COMMITTEE NOTE

The chapter 7 form is amended to implement the temporary exclusion from means testing created by the National Guard and Reservists Debt Relief Act of 2008. That law amended § 707(b)(2)(D) for a period of three years by adding a new subsection (ii) to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. The new temporary exclusion would last for the period that the qualifying debtor is on active duty or is performing a homeland defense activity, and for 540 days thereafter.

Because the exclusion for Reservists and National Guard members applies only for a defined period of time, it may expire during the course of the chapter 7 case filed by a debtor initially entitled to the exclusion. For that reason, a new check box is added to the top of the form that states that the "presumption is temporarily inapplicable." A debtor who is entitled to claim the Reservists and National Guard exclusion at the commencement of the chapter 7 case may check that box.

The new exclusion applies only to a debtor who satisfies all of the requirements of § 707(b)(2)(D)(ii), and its expiration date depends on facts specific to each debtor. Therefore, in a joint case in which the exclusion in part 1C is claimed by either or both filers, each joint filer must complete a separate statement. If only one joint debtor qualifies for the exclusion in part IC, the other joint debtor must complete the form.

Part 1C is added to the form to allow qualifying debtors to claim the temporary exclusion under § 707(b)(2)(D)(ii). Debtors who declare under penalty of perjury that they satisfy all of the requirements of that provision are directed to verify their declaration in Part VIII and to check the "temporary presumption" box at the beginning of the form. They are not required to complete the remaining parts of the form for so long as the exclusion remains applicable.

A debtor who is or has been a Reservist or a National Guard member may qualify for the exclusion described in part 1C by being called to active duty service after September 11, 2001, for a period of at least 90 days, or while performing homeland defense activity for a period of at least 90 days. After the debtor has been released from active duty or has ceased performing homeland defense activity, the exclusion applies for a period of 540 days

after the release date or cessation of homeland defense activity. Under those circumstances the debtor must state the date of release from active duty or the date on which the performance of homeland defense activity terminated.

If the Reservist and National Guard exclusion terminates during the course of a chapter 7 case – because of the expiration of the 540 day period following the release from active duty or the cessation of homeland defense activity – then the debtor may be required to complete the remaining parts of the form that are applicable to the debtor. If the exclusion terminates while a timely motion to dismiss under § 707(b)(2) may still be filed, Interim Rule 1007-I(n) requires that the debtor complete the remaining parts of the form no later than 14 days after the termination. If the obligation to complete the form arises in these circumstances and the debtor has not previously completed the form, the clerk is required to give the debtor notice of the obligation.

UNITED STATES PUBLIC LAWS
110th Congress - Second Session
Convening January 04, 2008

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Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL **110-438** (S 3197)
October 20, 2008
NATIONAL GUARD AND RESERVISTS DEBT RELIEF ACT OF 2008

An Act A bill to amend title 11, United States Code, to exempt for a limited period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days.

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

<< 11 USCA § 101 NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Guard and Reservists Debt Relief Act of 2008".

SEC. 2. AMENDMENTS.

Section 707(b)(2)(D) of title 11, United States Code, is amended--

(1) in clauses (i) and (ii)--

<< 11 USCA § 707 >>

(A) by indenting the left margin of such clauses 2 ems to the right, and

<< 11 USCA § 707 >>

(B) by redesignating such clauses as subclauses (I) and (II), respectively,

<< 11 USCA § 707 >>

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(2) by striking "testing, if the debtor is a disabled veteran" and inserting the following:

"testing--

"(i) if the debtor is a disabled veteran",

<< 11 USCA § 707 >>

(3) by striking the period at the end and inserting "; or", and

<< 11 USCA § 707 >>

(4) by adding at the end the following:

"(ii) with respect to the debtor, while the debtor is--

"(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or

"(II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days; if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.".

SEC. 3. GAO STUDY.

(a) COMPTROLLER GENERAL STUDY.--Not later than 2 years after the effective date of this Act, the Comptroller General shall ***5001** complete and transmit to the Speaker of the House of Representatives and the President pro tempore of the Senate, a study of the use and the effects of the provisions of law amended (and as amended) by this Act. Such study shall address, at a minimum--

(1) whether and to what degree members of reserve components of the Armed Forces and members of the National Guard avail themselves of the benefits of such provisions,

(2) whether and to what degree such members are debtors in cases under title 11 of the United States Code that are substantially related to service that qualifies such members for the benefits of such provisions,

(3) whether and to what degree such members are debtors in cases under such title that are materially related to such service, and

(4) the effects that the use by such members of section 707(b)(2)(D) of such title, as amended by this Act, has on the bankruptcy system, creditors, and the debt-incurrence practices of such members.

(b) FACTORS.--For purposes of subsection (a)--

(1) a case shall be considered to be substantially related to the service of a member of a reserve component of the Armed Forces or a member of the National Guard that qualifies such member for the benefits of the provisions of law amended (and as amended) by this Act if more than 33 percent of the aggregate amount of the debts in such case

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is incurred as a direct or indirect result of such service,

(2) a case shall be considered to be materially related to the service of a member of a reserve component of the Armed Forces or a member of the National Guard that qualifies such member for the benefits of such provisions if more than 10 percent of the aggregate amount of the debts in such case is incurred as a direct or indirect result of such service, and

(3) the term "effects" means--

(A) with respect to the bankruptcy system and creditors--

(i) the number of cases under title 11 of the United States Code in which members of reserve components of the Armed Forces and members of the National Guard avail themselves of the benefits of such provisions,

(ii) the aggregate amount of debt in such cases,

(iii) the aggregate amount of debt of such members discharged in cases under chapter 7 of such title,

(iv) the aggregate amount of debt of such members in cases under chapter 7 of such title as of the time such cases are converted to cases under chapter 13 of such title,

(v) the amount of resources expended by the bankruptcy courts and by the bankruptcy trustees, stated separately, in cases under title 11 of the United States Code in which such members avail themselves of the benefits of such provisions, and

(vi) whether and to what extent there is any indicia of abuse or potential abuse of such provisions, and

(B) with respect to debt-incurrence practices--

***5002**

(i) any increase in the average levels of debt incurred by such members before, during, or after such service,

(ii) any indicia of changes in debt-incurrence practices adopted by such members in anticipation of benefitting from such provisions in any potential case under such title; and

(iii) any indicia of abuse or potential abuse of such provisions reflected in the debt-incurrence of such members.

<< 11 USCA § 707 NOTE >>

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.--Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect 60 days after the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS.--The amendments made by this Act shall apply only with respect to cases commenced under title 11 of the United States Code in the 3-year period beginning on the effective date of this Act.

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Approved October 20, 2008.

PL **110-438**, 2008 S 3197

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TAB

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 2 - 3, 2008
Denver, Colorado

(Draft Minutes)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge David H. Coar
District Judge Irene M. Keeley
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, outgoing reporter
Professor S. Elizabeth Gibson, incumbent reporter
Bankruptcy Judge Christopher M. Klein, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Professor Daniel R. Coquillette, reporter for the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen "Scott" Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following member was unable to attend:

Dean Lawrence Ponoroff

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, *other than materials distributed at the meeting after the agenda was published,* is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; Appreciation of departing Reporter and Members.

The Chair welcomed the members and guests to the meeting. She noted that Judge Rosenthal and Professor Daniel Coquillette, the chair and reporter of the Standing Committee, were in attendance, and thanked them for coming. The Chair also praised the outgoing reporter, Professor Jeffery Morris, for ten years of outstanding service to the Committee, and she welcomed the incumbent reporter, Professor Elizabeth Gibson, to her new position. The Chair said Judge Kenneth Meyers had resigned from the Committee for personal reasons and he would not attend this meeting, and she said that this would be the last meeting for Judge Keeley and Mr. Brunstad. She commended the departing members' dedicated and effective Committee service. Finally, the Chair expressed the regrets of Dean Lawrence Ponoroff, who was unable to attend the meeting because Hurricane Gustav necessitated class rescheduling at Tulane Law School.

2. Approval of minutes of St. Michaels meeting of March 27-28, 2008.

The minutes were approved without objection.

3. Oral reports on meetings of other Committees.

(A) June 2008 meeting of the Committee on Rules of Practice and Procedure, including final Time Computation changes.

The Chair gave the report. She said with respect to the proposed time computation amendments, this Committee argued for change in the templates so that state holidays would not be taken into account in backward-looking deadlines. She reported that the Standing Committee

approved the change, not only with respect to the bankruptcy template, but with respect to all of time computation templates. She said that the Standing Committee also approved the rest of this Committee's proposals.

(B) April 2008 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee approved a procedure for indicative rulings, to coordinate with the procedure established by the Civil Rules Committee. She said that this Committee would also address the issue of indicative rulings during the course of the meeting.

(C) June 2008 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Hopkins reported on the work of the Bankruptcy Committee. He said that it would be undertaking a time measurement study for judges, and that it discussed and supported legislation that would extend the FEGLI fix (a change relating to charges for life insurance premiums for older judges) to bankruptcy judges.

He reported that the Bankruptcy Committee also considered two requests from the Executive Office for United States Trustees. First, it had an extensive review and discussion of the EOUST's request for data-enabled forms. Although it did not recommend adopting such forms, it recommended providing most of the information requested by the EOUST through modifications to CM/ECF. Second, the Bankruptcy Committee approved a recommended change to CM/ECF that would provide for a virtual entry on the docket for chapter 7 trustee closing reports.

Judge Hopkins said that the Bankruptcy Committee did not recommend filling any bankruptcy judge vacancies at this time, and that it would assess vacancies going forward under the new case weighting standards. He said that, in light of the election cycle, judicial salary restoration was unlikely at this time.

Judge Conti added that the Bankruptcy Committee recently developed a long-range planning group, and that she anticipated that it would become a major impetus of the Bankruptcy Committee's work over the next several years.

(D) April 2008 meeting of Advisory Committee on Civil Rules.

Judge Wedoff gave the report. He observed that the default timeline in the proposed changes to Rule 56 might require changes for the bankruptcy context. The Civil Rules Committee also discussed publishing alternate proposals for whether the court "must" or

"should" grant a well-founded motion for summary judgment.

He said there were continued discussions with respect to the committee's proposal for revision of the expert witness disclosure provisions of Rule 26, including a new procedure for disclosure of the substance of anticipated testimony of an expert witness who is not required to prepare a formal report. The proposed changes to Rules 26 and 56 were published for comment in August 2008.

Judge Wedoff said that another issue concerned a proposal to eliminate bankruptcy discharge as an affirmative defense in Civil Rule 8(c) on the ground that 11 U.S.C. § 524 was self-executing and a rule could not cause a debtor to waive a right that was granted by statute. He said that the Department of Justice had opposed removing discharges from the list on the ground that some debts, such as student loan and some tax debts, are not automatically included in the debtor's discharge.

Judge Wedoff said that Civil Rules Committee ultimately decided to table the Rule 8(c) issue until they could have further discussions with representatives of DOJ to address their concerns. Judge Rosenthal and Mr. Rabiej added that, if this Committee felt strongly about removing discharges from Rule 8(c), it should formally support removal.

Several members were in favor of sending a letter to the Civil Rules Committee recommending removal of discharges from the list of affirmative defenses in Rule 8(c), but Professor Morris said that the Committee should probably more fully discuss the matter as a formal agenda item. **After additional discussion, the Chair asked Judge Wedoff and Mr. Kohn to prepare memoranda for consideration by the Committee at its March 2009 meeting.**

(E) May 2008 meeting of Advisory Committee on Evidence.

Mr. McCabe gave the report. He said the Evidence Committee considered two major issues: (1) restyling the rules of evidence, which it recommended publishing for comment next August, and (2) an amendment to Rule 804(b)(3) extending the corroborating circumstances requirement to all declarations against penal interest made in a criminal case.

(F) Bankruptcy CM/ECF Working Group.

[See Agenda Item 10].

(G) Progress report from the Sealing Committee.

Professor Gibson reported that the Sealing Committee was looking at all cases with

sealed documents in 2006. She noted that there were no cases in bankruptcy courts where the entire case was sealed.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning the 9th Circuit Bankruptcy Appellate Panel's decision in *Drummond v. Wiegand*, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008), that chapter 13 business debtors may not subtract business expenses from gross receipts in determining current monthly income on Official Form 22C.

Judge Wedoff described the issue raised by the *Wiegand* decision. In that case, the court held that a chapter 13 debtor engaged in business may not subtract business expenses from gross receipts in determining his current monthly income (CMI). That conclusion led the court to declare that Form 22C, by instructing the debtor to make such a deduction, is inconsistent with §1325(b)(2). Judge Wedoff said the Consumer Subcommittee had considered the arguments presented in *Weigand*, and that it recommended no change to Form 22C.

Judge Wedoff said that the issue of business expenses was thoroughly discussed in the course of drafting Form 22C, and that several reasons supported the Committee's decision to deduct such expenses in the calculation of CMI. One reason is that the Census Bureau uses net rather than gross income in computing median family incomes. Since those are the figures that the debtor's annualized CMI must be compared with under § 1325(b), it makes sense to calculate current monthly income in the same manner.

Another reason is that the use of gross receipts for self-employed debtors would lead to distinctions in the calculation of CMI based merely on the business form under which the debtor has chosen to operate. Under the *Wiegand* approach, for example, a self-employed debtor with gross business receipts of $250,000 would be above the applicable median family income of any state, even if his net income was only $40,000. If the same debtor organized as an LLC, however, and took a salary of $40,000, income would likely be below the applicable median family income. It seems unlikely that any such distinction was intentional, so the Committee, in approving Form 22C, chose to interpret "income" as used in § 101(10A)'s definition of "current monthly income" as net, rather than gross, business income.

Judge Wedoff said that a strict construction interpretation of § 1325(b)(3) and § 707(b)(2)(A) and (B) would also result in a self-employed debtor with an above-median family income never being able to deduct most business expenses. Section 1325(b)(3) requires an above-median-family-income debtor to determine "amounts reasonably necessary to be expended" according to "subparagraphs (A) and (B) of section 707(b)(2)." Those paragraphs of

the means test require application of "the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . . ." All of those IRS standards and categories relate to personal and household, not general business, expenses. Permissible business expenses are included in another section of the IRS Financial Analysis Handbook. Likewise, all of the other expenses expressly allowed to be deducted under § 707(b)(2)(A) and (B) are personal and household, not business, expenditures. Thus, as the Advisory Committee previously concluded in approving Form 22C, the Subcommittee concluded that the most sensible interpretation of income for a self-employed debtor is net, not gross, income.

Several committee members said that they supported the Subcommittee's recommendation, **and, after a motion was made and seconded, the Committee voted to make no change to Form 22C with respect to this issue.**

(B) Recommendation concerning use of the terms "household" and "family" on Official Forms 22A and 22C.

Judge Wedoff said that, once again, the Consumer Subcommittee had been called on to consider use of the term "household size" on Forms 22A and 22C. He said that on several lines of Forms 22A and 22C, the reference to "household size" was clearly appropriate and dictated by the statute. Section 707(b)(7) provides the safe harbor from the means-test presumption based on "household" size, and § 1325(b)(3) and (4) contain provisions that require comparing the debtor's current monthly income with the appropriate "median family income of the applicable State" based on the debtor's "household" size. The debtor's "household" size is therefore the relevant consideration by the terms of the Code itself.

In the case of means-test deductions, however, Judge Wedoff said the Subcommittee concluded that use of the term "household" size was not dictated by the Code and could result in both under and over inclusion in calculating deductions, because it was not "dependent" orientated. For example, if a debtor has dependents who are not members of the debtor's household, an instruction to take into account only household members results in a smaller deduction than the IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit. In this context, Judge Wedoff said that the statue was not dispositive. Rather, § 707(b)(2)(A)(ii)(I) simply provides that "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards . . . for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case if the spouse is not otherwise a dependent."

Judge Wedoff noted that the "National and Local Standards" are set out in the Internal Revenue Manual, and that, in the absence of a statutory provision to the contrary, the Committee

has tried to apply the standards the same way they are applied in the Manual itself. He said that a review of the Manual indicates that the concept of "dependency" was relevant in applying deductions, and he cited several examples in excerpts at page 93 of the agenda materials.

Judge Wedoff said that the Subcommittee reviewed Forms 22A and 22C and concluded that the only way to ensure the that those forms track the Manual's calculations would be to change the instructions in Lines 19A, 19B, 20A, and 20B of Form 22A and Lines 24A, 24B, 25A, and 25B of Form 22C as set forth on pages 94-96 of the agenda materials.

Some members expressed concern that the change would add confusion to the existing forms but agreed that it should be published. Others agreed that the proposal should be published, but suggested that the second paragraph in the committee note, which described why the changes were being made, should be deleted and moved to the report and recommendation for publishing the change. After additional discussion, **the Committee approved a motion to publish in August 2009 the proposed changes to Forms 22A and 22C set forth on pages 94 – 96 of the agenda materials (with the exclusion of the second paragraph of the note).**

(C) Recommendation concerning a possible national rule on post-petition mortgage fees in chapter 13 cases.

Judge Wedoff said that the Consumer Subcommittee recommended an amendment to Rule 3001(c) and a new Rule 3002.1 to address the failure of many secured lenders to disclose post-confirmation charges and fees while the case was pending. He said the problem was that the subsequent assertion of those fees and charges immediately after the debtor emerges from bankruptcy undermined the debtor's fresh start.

Judge Wedoff said that, although several courts have already addressed the issue locally, to date, no uniform solution has emerged. He said that Congress has also held hearings, but that so far no legislation had been enacted.

He said that the purpose of the proposed rule changes was to ensure that any fee or payment changes are disclosed in a timely manner, during the case, so that they can be dealt with under the plan. He said that the proposed changes were set out in detail the August 27 memo distributed at the meeting (a revised version of the memo in the agenda materials).

Several members supported publishing the rule changes, but had concerns about particular provisions. Some wondered whether there was a basis for imposing the sanctions included in the proposals. Mr. Rao responded that the Subcommittee discussed the sanctions issue extensively. He said that, ultimately, subcommittee members concluded that discovery-type sanctions, such as these, do not address the substantive rights of the parties. Rather, they merely establish a consequence for failing to follow the procedural rules governing the

presentation of evidence of substantive rights. Two members said that they were still in favor of removing the sanctions.

Another member suggested that requiring notice of a new fee or expense within 30 days of the fee or expense being incurred might be onerous in situations of small recurring changes. Judge Wedoff said the Subcommittee considered that possibility but decided in favor of 30 days to encourage early resolution of disputes.

One member recommended changing "security interest" to "claim" new Rule 3002.1, and another member proposed adding language that the notices required under the new rule were not entitled to prima facie validity under Rule 3001(f). After additional discussion, **the Committee voted, with one dissent, in favor of publishing the proposed amendment to Rule 3001 and new Rule 3002.1 as set forth in the handout with the following changes to Rule 3002.1:**

> Strikeout "and" on line 13, and add "and (3) shall not be subject to Rule 3001(f)" at the end of line 14; substitute "claim" for security interest at line 21; change "of" to "after" on line 25; add "The notice shall not be subject to Rule 3001(f)" after "incurred" on line 26; change "payments" to "amounts" on line 54; and add "and shall not be subject to Rule 3001(f)" at the end of line 57.

(D) Status of consideration of possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code.

Professor Morris reminded the Committee that § 521(i)(1) of the Code provides that if an individual debtor in a voluntary case fails to file all of the required information within 45 days of the date of the filing of the petition, that "the case shall be automatically dismissed effective on the 46th day after the filing of the petition." He reported that the courts still have not reached any consensus on the meaning and operation of § 521(i) when the debtor has not provided all the required information. Some courts have concluded that the provision requires a dismissal order effective on the 46th day after the filing of the case, while other courts have found the provision ambiguous and concluded that the dismissal is either not automatic, or that the order of dismissal need not be made effective on the 46th day after the filing of the petition. He recommended that the Committee continue to monitor the issue, and take no other action until after consensus develops. Professor Gibson agreed to continue monitoring case developments and to provide status reports at future meetings.

5. Report by the Subcommittee on Technology and Cross Border Insolvency.

Recommendation in response to suggestion by Judge Laurel Isicoff to create a new official form to be used as a petition in chapter 15 cases.

Judge Coar said that Judge Isicoff's suggestion arose in the context of a consumer case involving a foreign national who had moved to the United States after an insolvency proceeding in the United Kingdom. In an attempt to attach the debtor's assets in the U.S., the U.K. foreign representative initiated a chapter 15 case in the debtor's name in the U.S. Judge Isicoff said this resulted in the credit rating agencies picking up the chapter 15 case as a new bankruptcy filing, when, in fact, it was not really a new case. She suggested that the problem could be resolved by creating a new form to be used specifically for chapter 15.

Judge Coar said the Subcommittee recognized the potential problem identified by Judge Isicoff, but concluded that the creating a separate form to commence a chapter 15 case was not warranted. He said that, as an initial matter, chapter 15 cases are rare (in 2007, just 42 were filed), and the vast majority involve corporations. Thus, the Subcommittee concluded few individual debtors would face the problem identified by Judge Isicoff.

Judge Coar said that Subcommittee also concluded that a new form would not prevent credit reporting agencies from posting a bankruptcy filing on the debtor's credit report. He note that filing a chapter 15 petition for recognition commences a "case" under § 1504. Consequently, whether the filing is accomplished through Official Form 1, or some other form, the credit reporting agencies will simply report that a bankruptcy petition has been filed by or against the debtor. Creating a chapter 15-specific form will not change the fact that a bankruptcy case was filed. Moreover, since Form 1 already contains a checkbox that identifies the *type* of case (Chapter 7, 11, 12, 13 or 15), a form specifically for chapter 15 would not provide any new information. The Subcommittee therefore did not recommend creating a new form.

The Committee discussed the Subcommittee's recommendation, and decided not to recommend a new or separate form for initiating a chapter 15 case.

6. Report of Subcommittee on Attorney Conduct and Health Care.

> Recommendation on requests by the Bankruptcy Judges' Advisory Group and Judge Robert Kressel for further consideration of the December 1, 2007, amendment to Rule 6003.

Judge Schell described the issue. Rule 6003 became effective on December 1, 2007, as part of a package of amendments offered to address problems that had arisen primarily in large chapter 11 cases. Subdivision (a) of the rule provides that the court, absent immediate and irreparable harm, cannot grant an application for the employment of a professional within 20 days after the commencement of the case. He said that the intent of the rule was to provide a short breathing spell for the courts and parties in interest who often face a large volume of documents being filed on the first day of a case. Other subdivisions of the rule restrict the entry of orders granting relief under Rule 4001 and for some matters under § 365.

Shortly after Rule 6003 became effective, some members of the bankruptcy community expressed concern that the rule could prevent corporate debtors from being represented during the first 20 days, because it seemed to prohibit authorization of representation by counsel during that time period. Judge Schell said that some members of the Bankruptcy Judges Advisory Group (BJAG) shared the concerns raised by the bankruptcy community, and suggested that the rule be amended to make clear that it did not prohibit counsel from representing debtors during the first 20 days of the case, subject to subsequent approval.

Judge Schell said that BJAG members also pointed out that Rule 6003 might be read more broadly than probably intended because it prohibits entry of any order during the first 20 days of the case "regarding" the enumerated categories. So, for example, since the sale of estate property is prohibited under the rule for the first 20 days, an order approving bidding procedures "regarding" a sale might also be prohibited during the first 20 days, even if the sale itself was scheduled to occur after 20 days.

Judge Schell said the Subcommittee on Attorney Conduct and Health Care had met by teleconference and discussed the matter. He said that subcommittee members agreed that the intent of the Committee in recommending Rule 6003 was merely to give the court and interested parties time to review applications for professional employment during the early part of a large case. Although no subcommittee member thought that rule prevented entry of an approval order on day 21 that was *effective* on an earlier date (such as when the case was opened, or when the application for employment was filed), subcommittee members did agree that it could be clearer. The Subcommittee therefore recommended publishing the rule with the clarifying amendments set out in the agenda materials.

Judge Schell said that the Subcommittee also considered a suggestion by Judge Robert Kressel (Bankr. D. Minn.), that the 20 day "cooling off" period in Rule 6003 be tied to the order for relief, rather than the filing of the petition, so it would operate similarly in voluntary and involuntary cases. Judge Schell said that the Subcommittee did not think the same issues were present in an involuntary case. Because creditors initiate an involuntary petition, they would likely be familiar with the issues involved long before the order for relief was entered, and would also be dealing with debtor's counsel before the order for relief was entered. The Subcommittee therefore recommended no change with respect to Judge Kressel's suggestion.

After discussing the matter, **the Committee recommended publishing the Subcommittee's suggested changes to Rule 6003 as set out at pages 131 – 133 of the agenda materials.**

7. Report of Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation on a possible new rule or rules to authorize indicative rulings.

Judge Pauley said that, at the last Committee meeting, the Subcommittee on Privacy, Public Access, and Appeals had been asked to consider whether the Committee should recommend rule changes that would formalize a process practiced in many federal courts of providing an "indicative ruling" when the bankruptcy court lacks jurisdiction to grant a party's motion due to the pendency of an appeal. He said the Subcommittee had been asked to consider this issue in light of similar rules proposed by the Advisory Committees on Civil Rules and Appellate Rules: Civil Rule 62.1 and Appellate Rule 12.1.

Judge Pauley said the Subcommittee agreed that modifying the rules to formalize indicative rulings by the bankruptcy court was warranted, and, to accomplish this, it recommended publishing a new Rule 8007.1, and an amendment to Rule 9024, as set forth at pages 152 – 155 of the agenda materials. He said that, initially, the Subcommittee also recommended an amendment to Rule 9023 (included in the materials), but that it now believes no change to that rule is necessary.

The Committee discussed the matter, and voted to recommend publishing new Rule 8007.1 as set out at pages 152-154; and the amendment to Rule 9024 as set out on pages 154-155 with the following substitutes for the new (underlined) material on page 155: "If the court lacks authority to grant a timely motion under this rule because an appeal has been docketed and is pending, the court may take any of the actions specified in Rule 8007.1(a)." **Because of ongoing consideration of a complete revision to the appellate rules, the Committee decided to wait until at least the March 2009 meeting to decide whether to recommend that the proposed changes be published at the next opportunity (in August 2009), or if they should be held and published along with any global recommended revision of the Part VIII Rules.**

(B) Recommendation on suggestion by Mr. Brunstad that Part VIII of the Bankruptcy Rules be rewritten to follow more closely the Federal Rules of Appellate Procedure.

Judge Pauley said that at the last meeting, Mr. Brunstad proposed a complete rewrite of Part VIII of the Bankruptcy Rules (the bankruptcy appellate rules), so that they more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. He said that Mr. Brunstad agreed to attempt a first draft of proposed revisions, and he then asked Mr. Brunstad to report on that process so that the Committee could consider how best to review and revise the proposal before deciding whether to recommend publishing proposed changes.

Mr. Brunstad distributed copies of his draft of the proposed revisions to the bankruptcy

appellate rules and explained why he thought the revisions were needed. He said that unlike the current FRAP, the Part VIII Rules have not changed much over the years, and that he thought it made sense to try to go through the rules and harmonize the procedures with FRAP as much as possible.

Mr. Brunstad discussed the revision process by walking the Committee through proposed Rule 8001 in the handout. He noted that the language was modeled on the style used in the FRAP, as distinguished from the existing bankruptcy rule styling. He said that he recognized that the change would mean the Part VIII Rules would be styled differently than the rest the bankruptcy rules, but he said he thought it was worthwhile to conform the bankruptcy appellate styling to the other appellate rules to the extent possible. Moreover, because the bankruptcy rules would likely be restyled in the future, the proposed revisions to the Part VIII Rules could be a first step in that process.

Judge Pauley said that the question for the Committee is "where do we go from here?" He said that initially the Subcommittee was in favor of simply assigning to each Committee member, or maybe a small team of Committee members, a couple of rules with the task of reviewing Mr. Brunstad's draft, and suggesting changes at the next meeting. He said that he now thought a better approach would be to convene a focus group of some type to take a look at the suggested proposal.

Mr. McCabe suggested the following procedure: convene a "mini-conference" to discuss the proposal (maybe by extending the spring meeting by a day) and inviting BAP judges, appellate judges, lawyers and other appeals experts to review, discuss and possibly refine the proposal. **The members discussed Mr. McCabe's idea and unanimously agreed that it was a good approach and asked the Chair and AO staff to take steps to set up a mini-conference for the spring and possibly the fall meetings.** The Chair and membership also formally expressed their deep gratitude to Mr. Brunstad for the great start he has given the Committee in this endeavor.

8. Report of Subcommittee on Business Issues.

The Chair introduced Judge Hopkins as the new subcommittee chair, and she also explained that, since there was no activity by the Subcommittee over the past term, no report was needed.

9. Report of Subcommittee on Forms.

> Oral report on proposed amendment to Form 201 to advise debtors that notices to joint debtors at the same address will be mailed in a single envelope addressed to both of the debtors.

Mr. Myers explained that the Bankruptcy Court Administration Division was considering a cost saving proposal under the new Bankruptcy Noticing Center contract to provide a single notice in joint cases if the husband and wife debtors live at the same address. He said that if the proposal went forward, the AO intended to amend Director's Form B201, generally given to consumer debtors at the beginning of the case, to inform joint debtors that they should expect only a single notice of events unless they tell the court that they want to receive notices at different addresses. No member objected to the proposed changes to B201.

Discussion Items

10. Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris updated the Committee on the CM/ECF working group, the Future of CM/ECF project, and the Forms Modernization Project. She explained that the CM/ECF working group has existed for some time and that it deals with ongoing CM/ECF issues and modification requests. She said that, as this Committee's liaison to that group, her role is to communicate upcoming changes to the rules and forms that might affect ongoing CM/ECF updates. By way of example, she said she anticipated speaking with the CM/ECF working group about whether any of the proposals under consideration by the Committee for post-petition claim adjustments for mortgages in chapter 13 (see Agenda Item 6C), would require changes to CM/ECF.

Judge Perris said that, in contrast to the CM/ECF working group, which focuses on current CM/ECF issues, the CM/ECF futures project is tasked with identifying and implementing the replacement/update of CM/ECF. She said nothing is really off the table with that project, and that the steering committee would have its initial kickoff meeting next week. She said that at the kickoff meeting, participants would discuss 10 "functionalities" that the AO has identified for the new system based on comments from the field, and would also discuss additional areas that might be considered. She said that the projected time line for implementation was 2013, and that the current thinking for the next step was to write requirements for the 10 function areas that have been identified so far.

Judge Perris next reported on the progress of Forms Modernization Project. She said that project members had their second in-person meeting at the AO this summer. She said that project members were looking at all the official bankruptcy forms with an eye toward increased ease of use both for those who fill out that forms and those who pull information from the forms. She then updated the Committee on the progress of the initial two subgroups that evolved out of the first meeting.

Judge Perris said that analytical subgroup continued to evaluate the forms. Judge Klein, chair of the analytical subgroup, added that the deeper into each form the group got, the more complex and interrelated the forms seemed to become, and the harder it became to determine whether seemingly redundant information was really dealing with subtly different issues.

Judge Perris said that the second subgroup continued to look at technology solutions, and that an ad hoc group of members had attended several AO and FJC functions, gave presentations about the project, and solicited feedback from bankruptcy judges and clerks. Judge Perris said that one suggestion that came from court personnel was that project members should solicit input from professionals who specialize in creating polls and questionnaires. She said that in response to this suggestion the ad hoc "user information" group met with representatives of the Census Bureau and the Bureau of Labor and Statistics to talk about how those groups updated their forms, how they developed questions for the public, and what outside resources they used.

Judge Hopkins reported that he participated in the discussions with the Census Bureau and Bureau of Labor and Statistics, and he met some of the people who had participated in revising forms for those agencies. He said that one suggestion to improve clarity was to try to avoid making forms that are all things to all debtors. So, for example, the ultimate recommendation might be to separate form packages by chapter (7, 11, 12, or 13) or by type (consumer or business) so that information that was irrelevant to the particular user could be eliminated. He said other suggestions included prioritizing changes by identifying the most common errors in the forms, and reducing errors by telling the debtor the types of documents that might be needed before filling out the forms.

11. Oral report on planning for the future of the CM/ECF system.

[See Agenda Item 10].

12. Suggestion by Chief Judge Vincent Zurzolo that Rule 9014(b) be amended to permit service on non-debtor attorneys of a motion initiating a contested matter through CM/ECF in the manner provided in Civil Rule 5(b) rather than requiring service in the manner provided in Rule 7004 for service of a summons and complaint.

Professor Gibson noted that a supplemental memo, dated September 12, had also been distributed on this issue. She said that Judge Zurzolo's reading of Rule 9014(b) and Rule 7004 was that the rules require paper service on creditors' attorneys of a motion initiating a contested matter, but allow electronic service on the debtor's attorney in the same situation. He suggested that Rule 9014 be amended to allow electronic service of the first motion in a contested matter on either attorney (debtor's or creditor's) so long as the attorney for the defending party has entered an appearance in the case.

Some members disagreed with what seemed to be an assumption in Judge Zurzolo's analysis, that an attorney who entered an appearance in a bankruptcy case on behalf of a party for one matter – to file a claim for example – was the party's attorney for all matters. Other members pointed out that paper service of the first motion in the contested matter would still need to be made on the party, so requiring paper service on the party's attorney (assuming the attorney was known) was not a significant additional burden. Of course, if the attorney had already entered an appearance in the case, the attorney would receive electronic notice of the filing as well. **After additional discussion, the Committee decided no change should be made.**

13. Request by the Committee on Codes of Conduct for further study of policy issues concerning conflict screening.

The matter was moved to the next meeting, in anticipation of further clarification of the request by the Committee on Codes of Conduct.

14. Suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019.

The matter was referred to the Business Subcommittee in anticipation of further submissions from the National Bankruptcy Conference as well as other organizations.

15. Discussion of issues presented by Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008): (1) whether Rules should permit application for denial or revocation of a discharge based on the debtor's fraud discovered by a party during a gap period after the deadline for objecting to discharge and before the granting of the discharge; and (2) Chief Judge Frank Easterbrook's concurrence concerning the impact of the designation of objections to discharge as adversary proceedings on appellate jurisdiction.

Professor Gibson said that the first issue was whether the rules, as currently in effect, permit a party to challenge the debtor's right to a discharge if the party discovers the basis for the challenge in a "gap period" after expiration of the discharge objection period, but before a discharge is entered. She said the court in *Zedan* concluded that the discharge cannot be revoked if the fraud is discovered during this gap period because 11 U.S.C. § 727(d)(1) requires a person seeking revocation of the discharge on the ground of fraud "not know of such fraud until *after* the granting of such discharge." The *Zedan* court acknowledged that if courts entered the discharge "forthwith" after the objection period closed, as required by Rule 4004, gap issue cases would be rare. It concluded, however, that in rare gap issue situation, no remedy was available, and suggested that an amendment to the rules be made to eliminate the gap period.

Professor Gibson said that some courts have worked around this problem by "deeming"

the discharge to have been granted immediately after the objection deadline passed, even if no formal discharge order was entered. The *Zedan* court rejected this approach, however, as inconsistent with a literal reading of the rules and the statute.

Professor Gibson said that, if the Committee was inclined to make a change as suggested by the Seventh Circuit, a possible fix was incorporated in Rule 4004 at pages 211 and 212 of the agenda materials.

Some members suggested possible changes to the proposed language and, **after additional discussion, the Chair referred the matter to the Consumer Subcommittee for further review and recommendation.**

Professor Gibson said that the second issue in *Zedan* was raised in Judge Easterbrook's concurring opinion, which suggested that discharge objections should be classified as contested matters, rather than adversary proceedings.

After much discussion, the Committee decided to maintain the current procedure. It concluded that treating discharge objections as adversary proceedings is not inconsistent with their statutory classification as "core proceedings" and, because of the importance of the discharge to a debtor, the committee members favored adherence to the long-established position that the greater procedural protections available in an adversary proceeding are appropriate for the resolution of most objections to or attempts to revoke a discharge. In the relatively rare situation in which several different grounds for denying or revoking a discharge are raised by different parties, the Committee concluded, existing procedural mechanisms (such as consolidation and stay orders) can be employed to prevent premature or piecemeal appeals.

16. Discussion of Judge Paul Mannes' suggestions that Rule 3003 be amended to require chapter 11 debtors to give notice to creditors if a claim is scheduled as disputed, contingent, or unliquidated; and that Rule 2016 be amended to require the attorney for the debtor to file the § 329 statement (the statement of compensation paid or to be paid in connection with the case) with the petition, rather than being allowed to wait for 15 days.

The Committee carefully considered each of Judge Mannes' suggestions and, after extensive discussion decided that no action was needed.

17. Discussion of suggestions by Judge Eugene Wedoff and attorney Philip Martino for promulgation of a rule regarding applications for payment of administrative expenses.

Professor Gibson said that Mr. Martino had suggested an amendment to Rule 1017 that would allow a chapter 7 trustee to assert an administrative claim in a case converted to chapter 13 by filing a special administrative proof of claim form modeled on the current proof of claim

form.

Judge Wedoff said such a procedure might also be warranted for certain administrative claims in chapter 11, such as when a supplier of goods in the ordinary course to a chapter 11 debtor seeks payment for those goods after the case converts to chapter 7. He said another example would be a supplier of goods who seeks payment for goods received by the debtor during the first 20 days before commencement of the case under § 503. **After additional discussion, the Chair referred the matter to the Business Subcommittee for further consideration.**

18. Discussion of suggestions by Judges Paul Mannes, Randall Newsome, and Robert Kressel for revision of Director's Form 240, Reaffirmation Agreement.

The matter was referred to the Forms Subcommittee.

19. Discussion of Judge Colleen Brown's suggested revision of Official Form 3B, Application for Waiver of Chapter 7 Filing Fee.

Professor Gibson said that Judge Brown raised the issue of whether Official Form 3B should require more detailed financial information to aid the court in its determination of whether a fee waiver should be granted. Several members did not think a change was warranted, and that the issue was best managed at the local court level. **After additional discussion and careful consideration, the Committee decided not to change Official Form 3B.**

20. Discussion of suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 for the portion of a claim which is a general unsecured claim.

The matter was referred to the Consumer Subcommittee.

21. Discussion of suggestion by the Executive Office for United States Trustees for amendments to Rules 1017(e) and 4004(c).

Professor Gibson said that the EOUST had submitted two suggestions. She said the first suggestion was to amend Rule 1017(e) to define the term "date of the first meeting of creditors." She said that the concept of the "first meeting of creditors," which marks when the UST's declination statement is due under § 704(b)(1)(A), is ambiguous – it could be the date on the § 341 notice (whether the meeting is actually held or not), the date that the meeting is actually commenced, or the date that the meeting, if held open, concludes.

On behalf of the EOUST, Mr. Redmiles said he believed that the term could be defined

by rule and he thought that the suggested edits to Rule 1007(e) would accomplish that. However, he said that he would prefer that the issue be referred to the Consumer Subcommittee for consideration. He added that the EOUST's primary aim was uniformity among the courts concerning when the declination statement was due.

Judge Wedoff supported referring the matter. He said that he didn't think the issue is one of ambiguity, but rather a simple gap in the statute, which can be filled by rule. Judge Klein added that, if the matter was referred, the subcommittee should note that the term "first date set for the meeting of creditors" is used in Rules 4004 and 4007. **After further discussion, the Committee referred the Rule 1007(e) issue to the Consumer Subcommittee.**

The second EOUST suggestion concerned the timing of the court's entry of the discharge. As a general matter, Rule 4004 requires the court to grant the discharge "forthwith" upon the expiration of the time stated by the rule for filing a complaint objecting to discharge. Subdivision (c), however, specifies twelve exceptions to that requirement. Among those exceptions are cases in which a motion is pending to dismiss the case, to extend the time for objecting to discharge, or to delay or postpone discharge. Mr. Redmiles suggests that those provisions, Rule 4004(c)(1)(D), (E), (F), (I), and (K), be amended by adding the language "or until appellate review is no longer available." Mr. Redmiles said that the suggested change would clarify that "pending" includes the time until all appeals are exhausted, so that a discharge was not entered immediately upon, for example, denial of a motion to dismiss.

Some members said that they understood the problem, but thought that the proposed solution would cause further problems, such as, for example, extending the "gap period" identified by the Seventh Circuit's *Zedan* decision (discussed at Agenda Item 15). Professor Gibson added that she had been unable to identify any cases in which an appellate court reversed the denial of a motion to dismiss and yet considered itself bound to uphold the discharge, so she was not sure whether a change was needed. **After additional discussion, the Committee decided to table the matter until the March meeting, to allow time for a supplemental submission from Mr. Redmiles identifying the extent of the problem.**

22. Discussion of the Executive Committee's request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees.

Judge Rosenthal addressed the issue. She said that each of the rules advisory committees needed to report on how subcommittees are used to conduct business, and also to clearly address why subcommittee use is so prevalent in the work of the rules advisory committees. She asked this Committee to coordinate its response with the other advisory committees. She said that, once the draft responses were received, she would circulate those responses to the other advisory committees.

Judge Rosenthal also encouraged the Committee to review and consider recommending clarification of the conference policy regarding appointment of non-committee members to subcommittee. She said that such appointments were sometimes needed to allow the advisory committees to more closely work with subject matter experts on various topics. She said that she believed that the current language allows the Director of the AO (as the designee of the Chief Justice) to approve non-committee members to subcommittees, but she acknowledged that the language could be interpreted (and has been in the past) as requiring the Chief Justice to personally act on each such appointment. Judge Rosenthal said that she thought revision the language to make clear that the Director has authority to make such appointments would streamline the process when it is needed, and would increase the efficiency of the committees.

The Chair thanked Judge Rosenthal and said that she and Professor Gibson would draft a response for the Committee and circulate it to the membership for comments and response in the coming weeks.

Information Items

23. Rules Docket.

Mr. Wannamaker told the Committee that an updated version of the Rules Docket was in the agenda materials and asked members to report any inaccuracies.

24. Posting a list of suggested rules amendments on the Internet.

Mr. Ishida updated the Committee on three projects undertaken by the Rules Support Office. First, he said, in response to the Chair's request, the Rules Support office was now not only tracking rules suggestions, but that, like comments, it was posting suggestions on the public website as well.

He said the second project concerned gathering older committee reports and minutes. He said the AO was in the process of digitizing the older records and posting them on the internet. He said that there were fairly large gaps of records in bankruptcy, but that he hoped to obtain many historical records from the Committee's former reporter, Alan Resnick.

Finally, Mr. Ishida noted that the FJC and the AO were working on a project to post an official copy of the bankruptcy rules in WIKI format that would have links to committee notes, all amendments, comments, and other background material.

25. Preparation of letters reporting the Committee's resolution of suggestions.

Mr. Ishida and Mr. Wannamaker reported on the process for preparing letters in response to the Committee's resolution of suggestions. In general, Mr. Wannamaker anticipated at least two letters: a general acknowledgment that the suggestion was received, followed by a letter that reports that the suggestion was referred to a subcommittee or that the Committee considered the suggestion at a particular meeting.

26. Status of legislation exempting certain members of the National Guard and Reservists from the means test.

Judge Wedoff described an amendment to § 707(b) of the Code that had just passed Congress (but had not yet been signed by the President) that would give a temporary exclusion from the means test to National Guard members and Reservists who are called up for active duty. He said that the exclusion period would be in effect if a qualifying debtor is called up for active duty military service or a homeland defense activity for more than 90 days, and would last until 540 days after the military service or homeland defense activity ends.

Judge Wedoff said that because the proposed amendment provided only for a *temporary* exclusion (rather than a permanent exemption like the disabled veteran exemption), implementing it through Form 22A (the chapter 7 means test form) was difficult. He envisioned that some qualifying debtors would file near the end of their exclusion period, such that it was almost certain that the exclusion would expire while the case was still pending, and while it was still possible to bring a § 707(b) motion asserting a presumption of abuse. He said it might make sense for such debtors to complete the whole form when filing, since they could probably be compelled to complete the form once the exclusion expired anyway. Other debtors, however, would file while on active duty, or early in the 540 day period, such that it was almost certain that their case could be completed long before the exclusion expired. He said that for such debtors it was unlikely that a presumption of abuse would arise during the case, and making them complete the entire means test form seemed to defeat the purpose of the legislation.

Judge Wedoff said that the challenge was deciding at what time during the exclusion period the Committee should recommend that a qualifying debtor be required to complete the entire Form 22A. He suggested two alternative approaches: (1) allow the debtor to check a box asserting that the exclusion applies, but still require completion of the form (even if the presumption of abuse will not apply to some); or (2) allow a temporary exclusion box, but only require completing the full form if the exclusion will expire shortly after filing (within 100 days, for example).

In discussing the matter, members advocated for each of the suggestions put forth by Judge Wedoff, and additional suggestions emerged. Some members rejected the position that all qualifying debtors should be required to complete the entire form, but could not agree on appropriate cut off date. Professor Gibson suggested limiting the category of qualifying debtors

who don't have to complete the entire form to active duty debtors, while Judge Perris suggested that a qualifying debtor be allowed to check a temporary exclusion box, along with a date of separation from active service, but only be required to complete the entire form if an interested party files a motion. Ultimately, five proposals emerged for a vote:

1. all qualifying debtors complete the entire form;
2. no qualifying debtor completes the entire form unless a motion is filed;
3. qualifying debtors must complete the entire form only if filing within 100 days of the expiration of the temporary exclusion;
4. qualifying debtors must complete the entire form unless they are on active duty or performing a homeland defense activity at the time of filing; or
5. qualifying debtors must complete the entire form only if the exemption expires during the case at the time a § 707(b) presumption of abuse motion could be filed (generally 60 days after the § 341 meeting, unless extended by the court).

A vote was taken in rounds, with option 5 (only complete entire form if a § 707(b) motion could be raised) carrying by two votes over option 2 (only complete entire form if a motion is filed). Because the legislation had an effective date of 60 days after enactment, and it was anticipated that the President would sign the legislation such that the effective date would occur in December, the Chair asked Judge Wedoff and Professor Gibson to revise Form 22A to incorporate option 5, and to draft a proposed interim rule for the Committee to consider via email for a final vote as soon as possible.

After the meeting, a version of Form 22A, containing a new temporary exclusion checkbox, and a new line 1C implementing option 5 above, was circulated to the Committee and approved without objection. The Committee also considered and recommended distributing proposed Interim Rule 1007-I to the courts with a recommendation that it be adopted as a local rule to implement the change to Form 22A. Both recommendations were approved on an expedited basis by the Standing Committee and the Executive Committee of the Judicial Conference.

27. Notice to local courts concerning the need to repeal or amend local rules adopting the Interim Rules.

The Chair said that the AO recently notified the courts that, with one exception, they will need to sunset the general orders or local rules used to adopt the Interim Rules in 2005, because they would be replaced by the final BAPCPA-related amendments on December 1, 2008. She said the exception was Interim Rule 5012, which addressed Communication and Cooperation with Foreign Courts and Foreign Representatives. She said a permanent version of Rule 5012 was currently out for comment, and was on schedule to go into effect December 1, 2010.

28. Notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments.

The Chair said she anticipated that the AO would soon notify the courts to revise their local rules in contemplation of the adoption of the time-amendment rules due to take effect in December, 2009. Mr. Rabiej added that the issue was pertinent to all the federal rules, and he anticipated that there would several transmittals to the courts, as well as an article in the Third Branch.

29. *Bull Pen*: All of the proposed rules amendments currently in the *Bull Pen* are addressed above.

30. Oral report on appointment of new chairs of the Business and Forms Subcommittees and composition of subcommittees.

The Chair asked the members to review their subcommittee assignments and let her know if there any changes were needed.

31. Future meetings:

The Chair reminded the Committee that the next meeting will be on March 26-27, 2009, at Estancia La Jolla Hotel & Spa in San Diego. Possible locations for the fall 2009 meeting were discussed.

32. New business: No new business.

33. Adjourn

Respectfully submitted,

Stephen "Scott" Myers

TAB

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee
Support Office

Office of Judges Programs

December 17, 2008

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: Proposed Standing Orders Guidelines

At the request of the Standing Rules Committee, Professor Dan Capra presented a preliminary report in June 2007 on standing and general orders in district and bankruptcy courts. His report raised questions that led to a survey of courts about their uses of these orders. The survey instrument also asked judges for advice on how best to identify matters that are best addressed in local rules and those that are appropriately addressed in standing orders.

The survey results indicated that, though courts did not believe that the promulgation of rules was necessary to regulate standing order practices, the courts did favor the issuance of guidelines to help them decide which matters should be addressed in standing orders and which subjects should be addressed in local rules. The attached guidelines proposed by Professor Capra are based on his earlier report and the survey results. The guidelines also include a section encouraging courts to post standing orders in a prominent location on their websites to make them more accessible and easier to find.

The proposed Guidelines are submitted for the Committee's consideration with a recommendation that they be approved for transmission to the Judicial Conference.

John K. Rabiej

Attachments

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

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

LEE H. ROSENTHAL
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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: Standing Rules Committee

From: Professor Daniel Capra

Re: Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts

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I. Executive Summary

For years, judges and lawyers have been concerned about the proliferation of "standing orders," "administrative orders," and "general orders" in the federal district courts.[1] The concerns raised by the proliferation of standing orders are similar to the concerns over local rules that led to congressional attention and launched earlier studies by the Judicial Conference. Like local rules, such orders are meant to apply generally. Like local rules, standing orders can lead to a lack of uniformity in federal practice, undermining consistency in areas where the national rules were meant to provide it and creating traps for the unwary and even for the wary. But standing orders can raise even more serious problems than local rules, for several reasons. First, standing orders are promulgated without the benefit of public comment. Second, standing orders are often harder to find and retrieve than local rules. Third, because standing orders may be entered by individual judges as well as by a

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[1] The term "standing orders" describes orders — including "administrative orders" or "general orders" — adopted by district courts or bankruptcy courts as district-wide or division-wide orders, without an opportunity for notice or public comment. The term includes individual-judge orders that are intended to apply generally. Individual-judge standing orders are not the focus of this report but are included in the guidelines for posting orders so they can be easily located and accessed.

division or district, there is significant variation even within the same district or division. Standing orders may raise these and other problems to such a degree as to risk invalidity and to invite congressional scrutiny.

There is some case law guidance on the limits of using standing orders as opposed to local rules, but no national standards, and very few local standards, defining what subjects are appropriately addressed by standing orders and what subjects are best addressed by local rule. The Standing Committee received requests from judges on circuit councils for guidance on delineating between standing orders and local rules. In response, the Committee asked for research on standing orders and asked the Administrative Office to survey the district courts to learn how they were actually using such orders. The Committee also surveyed chief district judges to learn what information and guidance might be most helpful.

The research and survey into the use of standing orders in the district courts showed wide variance in the number of orders and topics addressed and in how lawyers and the public receive notice. The research suggested some general criteria for delineating between when standing orders are appropriate and when local rules should be used. Standing orders are most appropriate to address matters that: 1) are of no direct concern to practicing attorneys or litigants; 2) require action for too short a time period to make the use of a local rule practical; or 3) require prompt action to address an emergency. In general, three categories of subjects — internal administration, temporary problems, and emergencies — are the most appropriate for standing orders. Standing orders addressing matters outside these subjects are likely to be in tension with the interest of members of the public in commenting on matters that affect them and risk creating rules that are unnecessarily difficult or even unworkable. Standing orders are most problematic when they: 1) cover matters in which lawyers and litigants have a substantial interest but are issued without the notice and public comment that accompanies local rules; 2) modify or abrogate local rules; and, of course, 3) conflict with national or local rules. Efforts to modify or abrogate local rules should only be made through local rule, with notice and comment. The research showed that while the majority of courts use local rules, rather than standing orders, to regulate matters that directly affect the public, a small number of courts are using standing orders to address such matters.

The research also showed a wide variation in how district- or division-wide and individual-judge standing orders are made available to the public. In many districts, standing orders are easily retrievable on the district court's website. But in other districts, it is not easy to find standing orders. It is particularly difficult to search for a standing order on a

specific topic. Many standing orders are not indexed and most are not searchable by subject or topic.

Finally, the survey showed that courts would find it useful to have guidelines on delineating between matters appropriately addressed in standing orders and those that should be addressed in local rules and on the most effective and consistent way to post standing orders on court websites. Specific guidelines have been developed as to when it is appropriate to use district-wide or division-wide standing orders and when local rules should be used. The guidelines also recommend a consistent approach to posting standing orders on the websites of the district courts and in making such orders searchable.[2] If the Standing Committee approves, the guidelines will be submitted to the Judicial Conference with the recommendation that they be approved and distributed to the district and bankruptcy courts.

II. The Use of Standing Orders

The Standing Committee became aware of the increasing use of standing orders through several avenues. The Standing Committee's Local Rules Project, which ended in 2005, uncovered standing orders that addressed the same topics as local rules. The Standing Committee's work on the model rules for electronic filing, approved by the Judicial Conference in 2004, showed that although many districts were regulating electronic filing through local rules, other districts were using standing orders. Work by the Civil Rules Committee to monitor developments in electronic discovery after the December 2006 Civil Rules amendments indicated that in some districts, standing orders are being used for detailed electronic discovery "protocols," while in other districts, local rules address electronic discovery.

The Administrative Office investigated the use of standing orders in eleven district courts. The research involved collecting and reviewing the standing orders in these districts, as well as receiving information directly from clerks and judges. Thereafter the Administrative Office sent a survey to chief judges in all district and bankruptcy courts asking for input in developing guidelines on what matters are appropriately addressed in local rules and those that should be addressed in standing orders. Responses were submitted by

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[2] As noted, these guidelines do not specifically address what matters are appropriately addressed in individual-judge standing orders. The guidelines do address how individual-judge standing orders as well as district- or division-wide standing orders should be posted so that they can be easily found by lawyers and litigants.

49 district courts and 37 bankruptcy courts. The results of this and related research are summarized below.

1. Varying number of standing orders among the districts

The districts vary widely in their use of standing orders. Some districts have very few standing orders issued by the district or division. Others have standing orders in the hundreds.

2. Varying subject matters treated by standing orders

There is no standard approach to whether a particular subject matter is to be treated by standing order or local rule. For every district treating a matter by standing order, there are others treating the same matter by local rule. Examples of subjects that are addressed in local rules in some districts and standing orders in others include:

- regulation of use of electronic devices in the courthouse;
- procedure for filing documents under seal;
- rules governing applications for attorneys' fees;
- redaction of personal identifiers to comply with the e-Government Act;[3]
- attorney admissions matters;
- rules governing electronic filing;[4]
- rules on court appearances by legal interns or law students; and
- rules governing ADR, settlement, or mediation.

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[3] In one district reviewed, the standing order on redaction of personal identifiers "supersedes and vacates" the local rule on the subject, to the extent the local rule is inconsistent. This report recommends that standing orders not be used to vacate local rules.

[4] One concern with electronic filing rules is that technological developments may require constant amendment. This concern might lead a court to think about dispensing with the procedural requirements of local rulemaking in favor of using standing orders. As discussed in this memo, the better approach — used in several districts — is to post a user manual on the court's website that can be changed to accommodate technological developments and other electronic filing problems.

3. Subject matters most likely to be treated by standing orders

While there is no uniformity in the use of standing orders, certain matters are more likely to be handled by standing orders rather than by local rules. These include rules on:

- court security;
- internal personnel matters such as appointments, EEO procedures, etc.;
- referrals to magistrate judges;
- case allocations between judges and/or divisions;
- juror pools and selection;
- use of nonappropriated funds;
- Criminal Justice Act plans;
- schedules for forfeiture of collateral;
- conditions of probation and supervised release;
- Speedy Trial Act implementation;
- criteria for waiver of PACER fees;
- court reporters and transcripts;
- attorney admissions and discipline matters; and
- naturalization ceremonies.

4. Attempts by some districts to delineate the proper use of standing orders

Some districts have, by local rule, defined the type of matters to be covered by standing orders. For example, N.D. Okla. Local Civil Rule 1.1 states in part as follows:

> General Orders, which are available on the Court's website, are issued by the Court to establish procedures on administrative matters and less routine matters which do not affect the majority of practitioners before this Court.

As another example, D. Kan. L.R. 83.1.2(a) provides that the court may issue "standing orders dealing with administrative concerns or with matters of temporary or local significance." Like Oklahoma's local rule, this rule identifies administrative matters as the most appropriate use of standing orders. But the Kansas local rule also allows standing orders on "matters of temporary or local significance" and does not include "less routine matters which do not affect the majority of practitioners before the court" in the topics that standing orders should address.

The Eastern District of California, in Local Rule 1-102(a), carefully distinguishes between the content of local rules and standing orders:

> Outside the scope of these Rules are matters relating to internal court administration that, in the discretion of the Court en banc, may be accomplished through the use of General Orders, provided, however, that no matter appropriate for inclusion in these Rules shall be treated by General Order. No litigant shall be bound by any General Order.

The Eastern District of California rule is the most limited of the three examples. Its approach restricts standing orders to matters such as funding, PACER fees, evacuation plans, case assignment, personnel appointments, and the like. This local rule specifically states that nothing in the court's standing orders may directly affect a litigant.

5. Finding standing orders on a court's website

The AO reports that in the 11 districts reviewed, there was considerable variance in locating general or standing orders on the court's website. A review of a number of other district websites also found a widespread variance in the manner and web location for posting standing orders. Some districts have a link for "general orders" or "standing orders"; others do not. One district has a link entitled "local documents" that then has a sub-link to "administrative orders." Another district has a link entitled "rules." Another district locates standing orders under "general information" but a separate link to "rules" leads only to the local rules.

Once the link to standing orders is found, the question is how to find a particular order or all orders that might be relevant to a case or topic. In many courts, it is not very difficult to review the standing orders for relevance. For example, in one district, there are five standing orders on the website, and they are listed by topic:

* 06-01 Extending Suspension of Some Requirements of Local Civil Rules 10.1(b); 81.2(b); 501.1
* 05-04 Suspension of Some Requirements of Local Civil Rule 10.1(b)
* 05-03 Adoption and Implementation of the Model Third Circuit Electronic Device Policy
* 05-02 Multiple, Unrelated Defendants in Matters

* 05-01 Mandatory Electronic Filing
* Guideline Sentencing

But some districts simply list their standing orders chronologically or by number, with no indication of subject matter. This requires the practitioner to open and review every standing order to see if it is relevant and to be sure that all relevant orders have been located. Few districts provide a search function for standing orders.

Because one of the major concerns arising from standing orders is lack of notice, it is particularly important that a practitioner be able to find standing orders and review them for relevance. Those judges responding to the AO survey widely agreed that standing orders should be posted on the same locations on each court's Internet home page (87%, 74 out of 85 respondents). There was even stronger agreement that standing orders should be listed, indexed, and made searchable so that orders on particular topics are easy to locate (94%, 79 out of 84 respondents).

6. Standing orders of individual judges

In addition to standing or general orders of the district or division, most judges also issue standing or general orders to apply only to cases in their courts. Under section 205(a) of the e-Government Act of 2002, all such orders must be posted on the court's website. Nonetheless, in some districts, these individual-judge standing orders are not posted on the court's website. In other districts, the individual-judge standing orders are posted as separate documents for each judge; the link is found next to the judge's name, after "Judges" is clicked on the main web page. These individual-judge standing orders are usually long — up to 50 pages — and are in a .pdf format that is not easily searchable. These documents often repeat much of what is also in the district's or division's standing orders or local rules. But these documents also include variations from the district or division standing orders or local rules and from other judges' individual orders, ranging from significant to minor. These variations are usually not highlighted or readily identifiable. Individual-judge orders are also supplemented or revised from time to time, so that a review on one day does not assure complete familiarity on a later day. The results of the research and survey highlighted the importance of consistent posting of individual-judge standing orders as well as district- or division-wide standing orders, and of making orders on particular topics easier to find.

III. Analysis of the Case Law

The case law reviewing the content of standing orders is relatively sparse, but four basic principles can be derived:

1) Standing orders (both by the district and by an individual judge) can be an appropriate exercise of a court's inherent authority over management of its cases and control of the courtroom. *See, e.g.*, *United States v. Ray*, 375 F.3d 980, 993 (9th Cir. 2004) (standing order requiring U.S. Attorney to assemble information required by PROTECT Act to be submitted to the Sentencing Commission was upheld as a proper exercise of "the court's inherent authority to regulate the practice of litigants before it").

2) Standing orders may be found improper if they impose requirements beyond those imposed by (or in some other way conflict with) national rules or statutes. *See, e.g.*, *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) (application of standing order on Civil RICO pleading found to be improper because it imposed requirements "in excess of the essential elements of a RICO claim"); *United States v. Zingsheim*, 384 F.3d 867, 871 (7th Cir. 2004) (application of standing order found to be improper because it was used to defer downward departure decisions when deferral was not authorized by Rule 35).

3) Appellate courts have expressed concern about the lack of notice and public participation in the implementation of standing orders and have on occasion suggested that matters addressed in standing orders would be better placed in local rules. *See, e.g.*, *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 n.1 (1st Cir. 1999) (In response to appellants' claim that they were not aware of the district court's standing order on cost allocation, the court stated: "[W]e urge the district courts to avoid incipient problems of this type by incorporating standing orders into local rules or, at least, making them readily available in the office of the Clerk of the district court."). Judge Easterbrook emphasized the difference between standing orders and local rules in *In re Dorner*:

> Adopting local rules through the device of standing orders contravenes the Rules Enabling Act in several ways beyond the vice of inconsistency. First, rules must be reviewed by an advisory committee. Second, rules may be adopted only after public notice and opportunity for comment. Third, rules adopted by district courts must be submitted to the council of the

> circuit for review. Finally, all local rules must be sent to the Director of the Administrative Office, who ensures their public availability. The [court] violated all of these requirements when it used a nonpublic standing order to contradict [Bankruptcy] Rules 8006 and 8007, which like all other national rules have the force of statutes.

In re Dorner, 343 F.3d 910, 913 (7th Cir. 2003) (internal citations omitted).

4) Standing orders may be improper to the extent they impose inflexible standards that do not accommodate the particular circumstances of a case. *See, e.g.*, *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (concluding that district court's standing order on allocation of costs "raises a core concern: it does not leave sufficient room for individualized consideration of expense requests").

IV. Results of the Research and Surveys

Standing orders raise many of the same concerns as local rules as well as problems of lack of notice to, or comment from, the public. These problems are exacerbated by difficulties in finding standing orders on particular topics. The fact that individual judges as well as districts and divisions issue standing orders leads to a large number of orders. These problems can be reduced by using standing orders, as most courts do, to address only a narrow range of topics and by ensuring that the orders are easy to find.

As a general matter, standing orders are most appropriate to address matters that are of no direct concern to practicing attorneys or litigants (internal administration); that require action for too short a time period to make the use of a local rule practical (temporary problems); or that require prompt action to address an emergency (emergencies). When standing orders are appropriate, whether district-wide, division-wide, or individual-judge, they should be easy to find and search. Standing orders should be posted on websites in a consistent way from court to court and have indexes or other features that make it easier for lawyers and litigants to find and retrieve orders on particular topics.

Attached to this report are specific guidelines on distinguishing between matters that are appropriately addressed by standing orders and those that should be addressed by local rules, and on posting standing orders on websites to make them easier to locate. The Standing Committee can provide assistance, on request, by reviewing a district's standing

orders to identify those that may raise concerns because they directly conflict with a national rule, directly conflict with a local rule, or purport to abrogate or modify a local rule. In addition, the Standing Committee or AO staff can provide, on request, general advice on posting standing orders and individual-judge orders on each district's website and advice on making the contents of standing orders clearer.

Date: December 16, 2008

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

I. Guidelines for Using Standing Orders

1. Standing Orders May Be Used for Internal Administration.

The strongest case for using standing orders is for matters of internal administration. For such matters, notice and public comment are not necessary and in some cases not justified. Examples of matters of internal administration properly covered by standing orders include the following:

- Court security[1]
- Planning for emergencies[2]
- Using nonappropriated funds[3]
- General procedures for funds in court registry[4]
- Directives to court personnel[5]
- Division of workload[6]
- Referral to magistrate judges[7]
- Use of resources[8]
- Juror wheels[9]
- Setting dates for naturalization hearings[10]
- Court implementation of judicial resources for initial appearances[11]
- General scheduling of motions, such as on a particular day of the week[12]
- Appointments, such as to Criminal Justice Act Panel[13]
- PACER fee exemptions[14]
- Closing or staffing of courts on or after holidays[15]

2. Standing Orders Are Appropriate to Address Problems and Issues That Are Unlikely to Exist Beyond the Time Necessary to Implement a Local Rule.

Because of the procedural requirements for local rulemaking, a standing order may be necessary to address a problem that is anticipated to be of such short duration that it will be resolved by the time a local rule can be implemented. For example, some courts briefly suspended sentencing proceedings until the impact of *Blakely v. Washington* could be analyzed, which was completed before a local rule suspending proceedings could have been implemented.[16]

3. *Standing Orders Are Appropriate to Address Emergencies, During the Time Necessary to Implement a Local Rule.*

A third permissible use for a standing order as opposed to a local rule is to address what amounts to an emergency. For example, some district courts entered a standing order adopting the Interim Rules to Implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other courts have used standing orders to deal with unanticipated issues arising from particular kinds of cases, such as cases involving terrorism charges. If, however, the matter addressed is a continuing rather than a temporary one — and it affects members of the public — then a local rule should be developed to address it.[17]

4. *General Regulations on Courtroom Conduct Should Be Placed in Local Rules.*

There are many standing orders that concern conduct in the courtroom. These can be district- or division-wide standing orders or individual-judge standing orders. Subjects can range from procedures for transcribing audio recordings entered as evidence to limits on questions during voir dire, time limits on opening statements, preparation of exhibit notebooks, eating and drinking in the courtroom, timeliness, the use of juror notebooks, and the like. The public-comment process of local rules would appear to be useful on most if not all of these courtroom-related subjects. Such rules have a direct impact on the participants, especially counsel, in ways that may not be fully apparent to judges. But the placement of some of these procedures and rules in individual-judge standing orders as well as local rules is inevitable.

Each judge of course has the authority to control his or her courtroom in the way that works best for that judge. Despite the preference for local rules, it can be anticipated that some judges will be unpersuaded and will issue a standing order on a courtroom-related subject. In such a case, the order should not repeat any provision but only specify the ways it deviates from the district- or division-wide standing orders or local rules that otherwise govern courtroom management and conduct. In addition, finding individual-judge orders should not be difficult. The fact that many of the same topics or matters are inconsistently addressed — in local rules in some courts, in district- or division-wide standing orders in other courts, in individual-judge orders in yet other courts, or repeated with variations in some or all of these categories in some courts — adds to the difficulty lawyers face in figuring out what standards apply.

The case law makes one outer limit clear. Whether issued by a district, a division, or an individual judge, a standing order that is inflexible or idiosyncratic may be found

improper by an appellate court, particularly if there is a question as to adequate notice of the order.[18]

5. ***Rules on Filing, Pretrial Practice, Motion Practice, and Other Matters That Must Be Complied with by Litigants, Should Be Placed in Local Rules.***

There are many standing orders — both district- and division-wide and individual-judge orders — that control such matters as electronic filing; special pleading requirements (such as in civil RICO cases); sealing criteria and procedures; electronic discovery protocols; filing and litigating motions, including summary judgment motions; applications for attorney fees; and filing memoranda of law. Many of these orders differ from local or national rules and some are in tension with or even contradict those rules. Issues relating to such matters as filing pleadings and motions, litigating motions, and developing criteria for sealing documents, are so important to the practicing bar that notice and public comment are essential.

With respect to electronic filing, the argument is sometimes made that technology develops so quickly that by the time a local rule can be implemented, it is outmoded and a new local rule is needed. But the prospect of technological development does not justify the placement of all electronic filing rules in standing orders. The model local rules developed by the Judicial Conference are flexible enough to accommodate technological change. It is notable that a number of districts have mandated electronic filing by standing order rather than local rule; but a standing order on such an important (and unchanging) matter is difficult to justify as necessary to accommodate constant changes in electronic filing. Filing requirements have a significant impact on lawyers and litigants and the local-rules comment process is important to developing workable and effective procedures. It is true, of course, that the details of implementation of electronic filing may need fairly frequent updating, but that can be done by promulgating general local rules that cross reference a user's manual on the court's website, as is the practice in many districts.

6. ***Rules for Mediation and Other Forms of ADR, Sentencing, and Related Proceedings Should Be Placed in Local Rules.***

Some districts have standing orders that essentially provide a complete set of rules for such proceedings as ADR (including arbitration and mediation), sentencing (especially standards for probation and supervised release), and attorney disciplinary proceedings. Most districts have implemented such procedures in local rules, showing that standing orders are not necessary for these kinds of proceedings. It is difficult to justify the placement of an

entire set of procedural rules in standing orders. The lawyers and litigants participating in these proceedings have a legitimate interest in commenting on most of these rules.

7. Standing Orders Should Not Duplicate a National or Local Rule.

Under the terms of Civil Rule 83 and Criminal Rule 57, standing orders are not supposed to duplicate a national rule. Duplication must be distinguished from simply referring to a national rule, which is of course permissible. But if a standing order actually duplicates a national rule, it is both unnecessary and improper.

There is no similar prohibition on a standing order duplicating a local rule. But such duplication is problematic, because including the same subject matter in both a local rule and in a standing order is in itself confusing. The potential for confusion increases if one changes and the other does not, or if the standing order is close but not identical to the local rule. Minor variations, poor paraphrasing, or selective duplication will introduce even more confusion. It could be argued that duplicating some local rules in standing orders might increase the likelihood that the lawyers know of the requirements; but the risks of "incomplete" duplication, or a change in one rule but not the other, caution strongly against attempting to duplicate the terms of a local rule in a standing order.

8. Standing Orders Must Not Abrogate or Modify a Local Rule.

Some district courts have abrogated or modified a local rule by issuing a standing order, even without the justification of an emergency. Under Civil Rule 83 and Criminal Rule 57, a court may only regulate practice in a manner consistent with the district's local rules. The use of standing orders to abrogate or modify a local rule is problematic, moreover, because it requires the practitioner to master both the local rule and the standing order and then to determine how they interact. The transaction costs outweigh whatever benefit might be argued to exist from changing a local rule by way of standing order.

II. Guidelines for Posting and Providing Access to Standing Orders

Given the lack of notice and public comment before standing orders are entered, it is critical that members of the public have a ready way to find and access them. Under current practice, members of the public can find this difficult because there is no consistent, predictable approach to posting standing orders on court websites, and most courts do not have indexing or search functions that allow members of the public readily or reliably to find what they are looking for among all the posted standing orders.

In posting standing orders on court websites, the following guidelines should be followed:

1. The home page for each court's website should have a link entitled "Standing Orders."
2. The link should direct the user to a page with a further link to the court's general standing orders, and individual links for the standing orders of each judge on the court.
3. Notice of a new standing order, or a change to a standing order, should be on the court's website for a reasonable period of time.
4. The posted standing orders for the court and for each individual judge should contain an index and a word-search function that allows the user to locate and access orders on particular topics or subjects and ensure that all relevant orders have been found.

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1. *See* Southern District of Texas, Order 2001-05, In Re: Weapon Possession in Court Facilities (limits individuals who can possess a firearm in courthouses).

2. *See* Northern District of Oklahoma, General Order 01-05 (adopting Occupant Emergency Plan for occupants of the courthouse).

3. *See* Southern District of Texas, Order 1995-13, In the Matter of Operations Without Appropriations for Fiscal Year 1996.

4. *See* Southern District of Texas, Order 1992-10, Authorizing Withdrawal of Excess Securities.

5. *See* Southern District of Texas, Order 1992-22, Order for Docketing Priority (directive to court personnel re importance of prompt docketing).

6. *See* Southern District of Texas, Order 2006-1, In the Matter of the Division of Work Calendar Year 2006.

7. *See* Northern District of Florida, Order dated 5/31/2000, Referral of Civil Cases to Full-time Magistrate Judges (ordering that all new social security cases be randomly assigned, on a rotating basis, to the division's full-time magistrate judges).

8. *See* Northern District of Florida, Order dated 10/2/2006, Authorization for In-District Travel for Clerk of Court and Chief Probation Officer (also authorizing agency-financed travel to FJC or AO training sessions).

9. *See* Southern District of Texas, Order 2005-09, In Re: Refilling the Master Jury Wheels.

10. *See* Southern District of Texas, Order 1990-44, Order Setting Naturalization Hearing Date.

11. *See* Southern District of Texas Order 1991-26, In the Matter of Guidelines for Coordination of Criminal Procedures (guidelines for coordinating criminal procedures in Houston Division to ensure that an apprehended defendant is brought before a magistrate judge as quickly as possible).

12. *See* District of South Carolina, Order of Judge Anderson (providing that civil motions are heard on Mondays at 1:30 p.m., and if Monday is a holiday, the next motion day is the following Monday).

13. *See* Northern District of Florida, Order dated 12/14/2006, Criminal Justice Act Panel (appointing a new member).

14. *See* Northern District of Florida, Order dated 4/7/2006, Exemption from Fees to PACER (authorizing fee exemption for academic researcher).

15. *See* Northern District of Oklahoma, General Order 06-19 (announcing closing of court on Friday, November 24, 2006).

16. *See* Northern District of Oklahoma, General Order 04-07 (stating that it was considering a moratorium on sentencing proceedings until it could study *Blakely*, and directing the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act).

17. It could be argued that any "emergency" should be handled by an interim local rule rather than a standing order. *See* 28 U.S.C. § 2071(e) ("If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment."). But so long as there is ultimately a local (or national) rule implemented within a reasonably short time period to deal with the problem on a permanent basis, there is no real distinction between a standing order and an interim local rule — because both are implemented without a period for public comment.

18. For example, in *In re Contempt Order of Petersen*, 441 F.3d 1266 (10th Cir. 2006), the magistrate judge entered an order of criminal contempt against a government lawyer who was five minutes late to a pretrial detention hearing. The lawyer had

violated the judge's "standing policy" that any lateness would be sanctioned in the amount of $50, payable to the court — no excuses permitted. The court of appeals vacated the order, reasoning that it failed to take account of the circumstances of a particular case. It noted that the lawyer was in time to argue the motion, and that the judge made no effort to inquire into the reasons for the lawyer's tardiness. Moreover, the court was concerned that the lawyer had no notice of the "standing policy."

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FINAL REPORT ON PROBLEMS ASSOCIATED
WITH DISCOVERY IN CIVIL LITIGATION
(TO BE MAILED SEPARATELY)

AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY

AND

THE INSTITUTE FOR THE ADVANCEMENT
OF THE
AMERICAN LEGAL SYSTEM

TAB

Trial Balloon

Federal Litigation—Where Did It Go Off Track?

Editor's Note: The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Section of Litigation or the Editorial Board.

by Gregory P. Joseph

Twenty-five years ago, on January 1, 1983, it cost parties roughly the same to litigate in state and federal court. Plaintiffs sometimes chose federal court to obtain expansive discovery or a preferred judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues. What happened? Here are some highlights.

1983: Rule 11. Federal Rule of Civil Procedure 11 has become a symbol of the disesteem into which contemporary litigation has fallen. Although the rule was originally adopted in 1938, it had no real bite for 45 years. All of that changed in August 1983, when it was amended to mandate compliance with objective standards and require judges to impose sanctions if those standards were not met. There were more than 7,000 Rule 11 decisions reported on LEXIS during the first ten years following the August 1983 amendment, and it is apparent from the Federal Judicial Center's empirical studies that the actual activity under the rule dwarfed this number. (*See, e.g., FJC Directions* No. 2, at 7 (Nov. 1991) (in five districts studied, there were 66 published Rule 11 opinions from 1983-89, but the FJC found that almost 1,000 cases actually involved Rule 11 activity in the shorter period of 1987-90).) Rule 11 created a momentum for parties to seek sanctions against one another (predominantly, defendants seeking sanctions against plaintiffs) that did not abate even after the mandatory features of the rule were excised in 1993.

1986: Summary Judgment Trilogy. In 1986, the Supreme Court rendered three decisions intended to reinvigorate summary judgment practice in the federal court, and summary judgment practice has certainly been reinvigorated ever since the decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Distinguished researchers at the Federal Judicial Center take the view that the increase in summary judgment is due more to the emphasis on managerial judging and changes in the civil rules that preceded the Summary Judgment Trilogy, rather than the trilogy itself (*see, e.g.*, Joe S. Cecil, *et al.*, "A Quarter Century of Summary Judgment Practice in Six Federal District Courts," 4 *J. Empirical Legal Studies*, 821 (2007)). Whether the Summary Judgment Trilogy is the cause or was an effect, there is no doubt that summary judgment has become a centerpiece of federal litigation over the past 25 years. Coupled with subsequent developments (read: *Daubert*), summary judgment motions have become part of virtually all substantial federal civil litigation.

1991: *Chambers v. NASCO.* Just in case Rule 11 was not bad enough, the Supreme Court declared in 1991 that the rules of civil and appellate procedure do not completely describe and limit the power of federal judges to sanction litigation misconduct. In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Court described and contoured the inherent judicial power to levy sanctions in response to abusive litigation practices. If sufficient time, money, and vitriol had not been spent on sanctions motions before *Chambers*, the Supreme Court's decision accelerated the trend (with more than 2,300 reported inherent-power sanctions cases since *Chambers* was decided).

1993: *Daubert* and New Rules. The year 1993 witnessed a trifecta. First, the Supreme Court decided *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Initially, *Daubert* was perceived as liberalizing the admissibility of expert evidence—especially, novel scientific evidence—because it rejected the strictures of the *Frye* test. What a misperception. In December 2000, when the Advisory Committee on the Federal

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Rules of Evidence codified *Daubert* in Rule 702, it stressed in the Committee Note that "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a 'seachange over federal evidence law,' and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system" (citation omitted). Seven years later, compare the Third Circuit's observation in *United States v. Ford*, 481 F.3d 215, 220 n.6 (3d Cir. 2007): "Although we do not adopt the apparent *presumption of exclusion* enunciated by the Ninth Circuit, we agree with the spirit of our sister court's exhortation. In particular, district courts should tread carefully when evaluating proffered expert testimony, paying special attention to the relevance prong of *Daubert*." The sea change may have approached quietly, but it has overtaken us.

Second, the Supreme Court promulgated the first mandatory disclosure rules. The expert disclosure rule (Rule 26(a)(2)(B)) immediately went into effect nationwide, mandating detailed reports and authorizing expert depositions as a matter of course. District courts were allowed to opt out of fact disclosure (Rule 26(a)(1)) and the default pretrial order provision (Rule 26(a)(3)).

Third, the Supreme Court promulgated Rule 37(c)(1), the most important rule of evidence contained in the Federal Rules of Civil Procedure. Rule 37(c)(1) provides a self-executing sanction for a party's failure to disclose information required by Rule 26(a) without substantial justification. It bars the derelict party from using at trial, at a hearing, or even on a motion any information—including the testimony of any witness—that was not but should have been disclosed pursuant to Rule 26(a) or (e)(1).

1995: PSLRA (with RICO Bar). Over a presidential veto, Congress enacted the Private Securities Litigation Reform Act (PSLRA) to curtail securities class actions by imposing a series of procedural, pleading, and substantive hurdles. In addition, the PSLRA barred Racketeer Influenced and Corrupt Organizations Act (RICO) claims based on conduct that would be actionable as securities fraud. Putting aside the wave of litigation associated with the huge corporate scandals of the early 2000s (Enron, WorldCom, Adelphia, Global Crossing) and the thus-far unsuccessful initial public offering litigation, which are now largely behind us, the number of securities class actions has fallen substantially. And the RICO bar now extends to conduct that is not actionable by any private plaintiff, let alone the plaintiff before the court.

1998: SLUSA and Rule 23(f). To prevent plaintiffs from circumventing the PSLRA by filing class actions in state court, Congress passed and the president signed the Securities Litigation Uniform Standards Act of 1998 (SLUSA). SLUSA permits defendants to move securities cases from state to federal court, including cases brought on behalf of plaintiffs who have no standing to sue for securities fraud in federal court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). Once in federal court, SLUSA abrogates all state law claims for relief.

The 1998 amendment to Federal Rule of Civil Procedure 23(f) permitted appeals of class certification decisions, under the discretion of the appellate court. By 2006-07, this had effectively become a vehicle for appellate review of denials of motions to dismiss (which are unreviewable orders) under the Second Circuit's decisions in the initial public offering (IPO) securities litigation (*Miles v. Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006) and 483 F.3d 70 (2d Cir. 2007)) and the Fifth Circuit's decision in Enron. *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372 (5th Cir. 2007).

2000: Nationwide Mandatory Fact Disclosure. In 2000, mandatory fact disclosure became the law of the land (no more opt-outs), and additional teeth were put in Rule 37(c)(1). The self-executing preclusion sanction was expanded to cover discovery as well as disclosure. Failure to disclose the existence of a document or witness unearthed in the course of an ongoing investigation after the initial disclosures or discovery responses were filed resulted in a forfeiture of the right to use the document at, say, a deposition, or to file an affidavit from the witness at any evidentiary hearing.

2005: *Dura* and CAFA. The Supreme Court's 2005 decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), ostensibly concerned only the loss-causation requirements of the PSLRA. Much like *Daubert*, the *Dura* opinion appeared relatively uncontroversial on first reading—just a pleading decision, and not a harsh one at that. As reflected in the fact that *Dura* was cited in more than 750 cases in the first 36 months after it was decided, the case has taken on a life of its own, imposing demanding causation requirements in cases of all sorts, with rare exception (e.g., *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007)). In 2007, *Dura* became one of the progenitors of *Twombly*, a non-securities case of universal civil application.

Ever sensitive to the caseloads of state courts, Congress also enacted the Class Action Fairness Act (CAFA) in 2005 to pull into federal court as many state court class actions as possible, leading to more than 600 reported remand opinions in the first three years of the statute's existence. By April 2007, the Federal Judicial Center had empirically demonstrated that CAFA "has had its intended effect of bringing more state-law diversity class actions into federal district courts." Thomas E. Willging *et al.*, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules* at 21 (Federal Judicial Center, April 2007).

2006: Electronic Discovery Rules. The electronic discovery amendments to the Federal Rules of Civil Procedure in 2006 build additional cost into every case not only by mandating that the parties focus on electronic discovery from the outset of the litigation but also by erecting a series of battlegrounds (format, accessibility, cost-shifting) over which the parties wage war, as they search incessantly for spoliation. The lasting legal legacy of the current era of electronic discovery likely will lie in the area of spoliation and sanctions. Parties long not so much for data as for evidence that data have been lost or destroyed. The prospects for meaningful sanctions are generally much higher in federal court than in state court.

2007: Supreme Court Opinions in IPO Antitrust and *Twombly*. In 2007, the Supreme Court decided in the IPO antitrust litigation (*Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007)) that antitrust law is so complicated it could not even trust federal judges to get it right—"there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results"—leading the Court to conclude that certain behavior subject to Securities and Exchange Commission

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regulation should be permitted no matter how anticompetitive it may be.

The Supreme Court also rewrote federal pleading requirements in 2007, without even amending the pleading rules, by issuing its decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* reversed a 50-year-old precedent holding that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Instead, the plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief," and this necessitates "some factual allegation in the complaint. . . ." The new duty is to furnish factual "allegations plausibly suggesting (not merely consistent with)" an "entitlement to relief."

As of July 1, 2008—13 months after it was rendered—the revolutionary *Twombly* opinion had been cited in a remarkable 7,000 cases.

Collectively, rule changes, legislation, and Supreme Court decisions over the past quarter century have made federal civil litigation procedurally more complex, risky to prosecute, and very expensive. It is a Bentley, not a Ford. Plaintiffs who can avoid federal court do so, while defendants strain to achieve a federal forum. Forum-shopping incentives have been institutionalized.

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TAB

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OF THE
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WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
EVIDENCE RULES

December 18, 2008

To: Standing Rules Committee

From: Lee H. Rosenthal

Re: Rules Enabling Act

On June 19, 2009, the Rules Enabling Act will be 75 years old. It is entirely fitting to observe the occasion. Because the Act is itself both a reflection and a cornerstone of, the relationship between Congress and the judiciary, the observance should involve both branches. The observance that seems most appropriate is one that would serve both to reinforce and celebrate the importance of the Act and the relationship it created.

One possibility is to begin with an afternoon presentation that would be directed primarily to the members and staff of the House and Senate Judiciary Committees. At a time when some of the members and many of the staffers to these Committees are likely to be new and swamped with the stuff of today's headlines, such a presentation could serve as a reminder of the achievement the Act represents, why it has endured for 75 years, and the nature of the judiciary committees' work and role. The presentation would segue into a reception and then perhaps to a dinner, and we hope to have a speaker fitting for the occasion.

Your comments and suggestions are welcome. For inspiration, I attach two recent articles on rulemaking under the Act by two professors whose work on the Civil Rules Committee has been important. You need not wait until the Standing Rules Committee meeting to share your ideas.

Attachments

NOT DEAD YET

RICHARD MARCUS*

Over thirty years ago, Jack Friedenthal proclaimed a "crisis" in federal rulemaking.[1] Starting about fifteen years ago, this same crisis attitude began to crop up from many sources. In 1988, Congress had intervened in the rulemaking process and made it more open.[2] By 1994, Charles Alan Wright spoke of a "malaise" of the federal rulemaking process and reported that he was "gloomier about the status of the rulemakng process than [he] had ever been."[3] Professor Mullenix foresaw that the Advisory Committee on Civil Rules might go "the way of the French aristocracy."[4] A few years later, Professor Walker found "the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938."[5] Eight years ago, Professor Bone found that "today the court rulemaking model is under siege."[6]

Although the crisis clamor seems fairly universal among academics, there is some dissonance about the nature of the crisis. Professor Geyh, who worked

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Since 1996, I have served as Special Reporter to the Advisory Committee on Civil Rules, and drew to some extent on this experience in preparing these remarks. But these views are mine and not presented on behalf of the Advisory Committee or anyone else.

This piece is significantly based on work that I have published elsewhere. *See* Richard L. Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. (forthcoming 2008) [hereinafter Marcus, *Confessions*]; Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002) [hereinafter Marcus, *Reform*]; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) [hereinafter Marcus, *Of Babies*].

1. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676 (1975).

2. *See* Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 407, 102 Stat. 4642, 4652 (1988) (codified as amended at 28 U.S.C. § 2073 (2000)); *see also infra* note 41 and accompanying text.

3. Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994).

4. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

5. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

6. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888 (1999).

with the House Judiciary Committee during part of the period of reported crisis, wrote that there was "a startling transformation of the judiciary's role" due to the more active role of Congress.[7] Professor Yeazell saw the problem as isolation of the rulemakers, who are now mostly judges, from the users of court services, the lawyers.[8]

The cause of the crisis also may be debated. Professor Geyh attributed it to the "Watergate mentality" of the last thirty years,[9] while Professor Bone thought that it resulted from "the rise of procedural skepticism during the 1970s."[10] Professor Burbank noted that certain specific amendments—particularly the 1983 changes to Rule 11—created a "poisonous environment" for rulemaking.[11] Professor Resnik perceived a pervasive loss of faith in the whole project of adjudication.[12]

In sum, the topic on which we were invited to comment–federal rulemaking–comes surrounded with a great deal of negativity. As one who has been involved for over a decade in the persisting effort to accomplish things through federal rulemaking, I come before you with a simple message: it's not dead yet. And I think it's not about to die.

To support that view, I want to make four points. First, the Big Bang of the 1930s was unprecedented, and we will not see its like again. Second, much of the recent pessimism has resulted from academic dislike of certain constraints introduced in the last quarter century on the central Liberal Ethos of the 1930s revolution; and the result is often a case of the quest for the perfect drowning out the acceptance of the good. Third, the federal rulemaking activity has important structural advantages that will not go away. Finally, there is evidence—particularly the recent E-Discovery rulemaking episode—that shows the federal apparatus is not dead, either as an innovator or as a leader.

I. The Big Bang

We have all been brought up on the notion that the procedural Big Bang happened in the 1930s with the adoption of the Federal Rules of Civil Procedure. As Professor Leubsdorf has pointed out in *The Myth of Civil*

7. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

8. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998).

9. Geyh, *supra* note 7, at 1167.

10. Bone, *supra* note 6, at 891.

11. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 227-28 (1997).

12. *See generally* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

Procedure Reform, we may overestimate the significance of that event in terms of changing the practices of courts and the experiences of litigants.[13]

But it is hard to overstate the applause this Big Bang has received from the highest echelon of legal academe. Professor Hazard called the Federal Rules "a major triumph of law reform."[14] Professor Yeazell said that the Federal Rules "transformed civil litigation [and] . . . reshaped civil procedure,"[15] adding that the Rules were "surely the single most substantial procedural reform in U.S. history."[16] Professor Shapiro opined that "they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure."[17] Professor Resnik found that they even "became a means of transforming the modes of judging."[18]

More than the Field Code managed in the mid-19th century, the Federal Rules swept the land. Most states adopted procedural codes modeled on the Federal Rules for their own court systems, often copying them virtually verbatim and retaining the same numbering.[19] The Federal Rules even cast a long shadow over those states which did not copy its provisions. California, for example, continues to operate under the Field Code that was originally adopted in 1872, but the application of those code provisions has shifted with the tide of the Federal Rules' times.[20] Code pleading in California is probably

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13. *See* John Leubsdorf, *The Myth of Civil Procedure Reform*, *in* CIVIL JUSTICE IN CRISIS 53 (Adrian A. S. Zuckerman ed., 1999).

14. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

15. Yeazell, *supra* note 8, at 233.

16. *Id.* at 248.

17. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

18. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000).

19. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (examining the widespread copying of the Federal Rules).

20. Thus, although California remains a code state, its courts have adopted the same sort of liberal attitude towards the requirements of the code as the federal courts did after 1938 with regard to the Federal Rules. Thus, for example, we are told that "California's discovery system is generally less restrictive than the federal courts." WILLIAM R. SLOMANSON, CALIFORNIA CIVIL PROCEDURE 168 (3d ed. 2008). As the Supreme Court of California said in *Greyhound Corp. v. Superior Court*, 15 Cal. Rptr. 90 (Cal. 1961):

> The foregoing code sections, although substantially adapted from the federal rules of discovery, are not copied verbatim therefrom. . . . The importance of those alterations is that almost without exception they were made for the express purpose of creating in California a system of discovery procedures less restrictive than then employed in the federal courts.

less demanding than current practice in the federal courts.[21]

At the heart of this Big Bang was an attitude I have labelled the Liberal Ethos—that suits should be decided on their legal (substantive) merits and that procedure should be a Handmaid in that process.[22] The Handmaid notion was not a new idea in the 1930s. To the contrary, it lay at the heart of nineteenth century reform efforts in England.[23] But as Professor Subrin has pointed out, the Federal Rules pursued the central concept more vigorously and further,[24] particularly in accomplishing a revolution with the introduction of broad discovery.[25]

The combination of relaxed pleading, broad discovery, and deference to jury trial[26] created a procedural arrangement unknown in the rest of the world. Coupled with dramatic developments in American substantive law after World

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15 Cal. Rptr. 90, 98 (Cal. 1961).

21. Thus, in keeping with traditional code attitudes, CAL. CODE CIV. PROC. § 425.10(a)(1) requires that a complaint contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." But the California courts do not enforce this fact pleading provision with the enthusiasm that was common a century ago. In *Reichert v. General Ins. Co.*, for example, the Supreme Court of California explained:

> While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.

442 P.2d 377, 387 (Cal. 1968). When I was a practicing lawyer in California in the 1970s, it was widely believed that defendants had more success challenging the sufficiency of complaints in federal courts than in state court. Certainly the U.S. Supreme Court's recent decision in *Bell Atlantic Corp. V. Twombly* shows that the trend is not toward a more demanding attitude in federal court. 127 S. Ct. 1955 (2007); *see infra* text accompanying notes 54-58. For a discussion of the relationship between federal and California pleading requirements, see DAVID I. LEVINE, WILLIAM R. SLOMANSON & ROCHELLE J. SHAPELL, CALIFORNIA CIVIL PROCEDURE 137-53 (3d ed. 2008).

22. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986).

23. *See* Marcus, *Of Babies*, *supra* note *, at 780-82 (describing the nineteenth century reform movement in England).

24. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

25. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

26. We must not forget that for most of the mid-twentieth century the Supreme Court expanded the application of the Seventh Amendment right to jury trial. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 532 (1970) (holding that there is a right to a jury trial in a shareholder's derivative action even though derivative actions were originally creatures of equity); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) (holding that a district court may not sequence a trial so that "equitable" issues are tried first when that might foreclose resolution of those same issues by a jury).

War II—particularly in tort law, but also in statutory enactments—the new American procedure produced a litigation juggernaut unknown elsewhere in the world. In part, this juggernaut responded to a peculiarly American desire for both comprehensive governmental protections from harm and American antagonism toward concentrated governmental power.[27] Whether or not one embraces the private attorney general notion, it became ingrained in a significant measure of American litigation.

The key point of this familiar terrain for present purposes is that this sort of thing does not happen often. Indeed, it probably does not happen even twice a century. So anyone who wants to compare the present to our past is almost certain to conclude that the present comes up short. And that is a good thing. Those of us who spent our college years hearing applause for the idea of "continuous revolution" have (mostly) concluded in our more mature years that continuous revolution is more likely to be destructive than constructive.

II. Discontents of the Present: Academic Unhappiness with Recent Reform

One reaction to the Big Bang would be that it put in place a new arrangement that should remain untouched, or at least untouched by rulemakers. Intelligent and informed observers continued into the 1980s to urge that the best thing to do would be to leave the Federal Rules alone.[28] Actually, the rulemakers continued to work on their innovations, and a number of changes were made during the 1940s. Indeed, when *Hickman v. Taylor*[29] was pending before the Supreme Court in 1947, the Court also had before it a proposal to amend the rules to provide for treatment of work product.[30] On that occasion, the Court acted by decision rather than by adopting a rule change.

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27. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 15 (2001):

> American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* (or set of popular political attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.

28. *See* Marcus, *Of Babies*, *supra* note *, at 761 (reporting views of prominent Manhattan lawyer that "[t]he worst thing they ever did for civil litigation was to create a standing committee on the civil rules.").

29. 329 U.S. 495 (1947).

30. *See* Richard L. Marcus, *The Story of* Hickman*: Preserving Adversarial Incentives While Embracing Broad Discovery*, *in* CIVIL PROCEDURE STORIES 307, 313-15 (Kevin M. Clermont ed., 2004).

Maybe it would have worked to leave the Federal Rules unamended and to rely on judicial interpretation to supply needed details and evolutionary development. For whatever reason, Chief Justice Warren discharged the Civil Rules Committee in the mid 1950s,[31] and Congress then insisted that there be a committee established to give continuous study to the rules and recommend changes.[32] The Advisory Committee, re-established in the 1960s, adopted changes to Rule 23 in 1966 that contributed to a new revolution—the class action juggernaut.[33] Interestingly, in doing so it arguably overstepped the bounds of its procedure-making authority as those are now conceived, but delicacy on that front was not prominent in the 1960s. As the 1960s closed, the discovery rules also received a makeover that removed whatever constraints had been included in the 1930s.[34]

By 1970, the rulemaking process had reached the apogee of the Liberal Ethos. Building on the foundation provided by relaxed pleading (implemented by the Court's decision in *Conley v. Gibson*[35] in 1957) and the discovery provisions that were further unleashed by the 1970 amendments and strengthened by the 1966 amendments to Rule 23, the new American procedural arrangement stood ready to provide—in synergy with innovations in American substantive law in areas such as products liability, employment discrimination, and environmental and consumer protections—a true litigation juggernaut. All of this met with general enthusiasm in the academy.

The American litigation arrangement was not received with enthusiasm in all quarters, however. One noteworthy quarter is the rest of the world. As Professor Subrin has noted, with respect to discovery, a common foreign reaction to American practices is—"Are we nuts?"[36] Many countries adopted blocking statutes to prevent American discovery from being done within their

31. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1006, at 37 (3d ed. 2002) (reporting that "on October 1, 1956, the Court entered an order discharging the Advisory Committee.").

32. *See id.* § 1007, at 37-38 (describing reaction to the discharge of the Advisory Committee and passage of a statute that required the Judicial Conference to establish a body to study changes in procedural rules).

33. For discussion of the debates that attended the 1966 adoption of amendments to Rule 23, see John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*, 24 MISS. COLL. L. REV. 323, 333-45 (2005). For a discussion of the reaction to the Rule 23 amendments in the courts, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

34. *See generally* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) [hereinafter Marcus, *Discovery Containment*] (chronicling the expansion of discovery to 1970).

35. 355 U.S. 41 (1957).

36. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

borders.[37] Although the American system had features that other countries found interesting, our jury trial—particularly when coupled with lax American rules on compensatory and, more pointedly, punitive damages—excited astonishment. Thus, when the American Law Institute undertook to design proposed Transnational Rules of Civil Procedure, it left out jury trial and broad discovery, and it consciously rejected relaxed pleading in favor of more stringent fact pleading.[38]

On the domestic front, there was a reaction also. I use the word "reaction" consciously, because the reaction can be described as "reactionary." That, indeed, has been the commonplace academic reaction to this reaction. The domestic reaction was, not surprisingly, prominent among repeat defendants who felt overburdened by litigation. For any except those convinced that plaintiffs are, as a group, much more likely to advance legitimate positions than defendants, this fact should not be too troubling. Others were troubled, however. Chief Justice Burger and Attorney General Griffin Bell, for example, were prompted by such "defense" reactions to endorse constraints on discovery.[39]

There followed a number of bouts of rule reform—in 1980, 1983, 1993, 2000, 2003, and 2006. These reforms largely involved efforts to constrain or focus litigation based on experience under the wide-open 1970 version of the Federal Rules. At least some of the reforms—such as the 1983 amendment to Rule 11—were quite dubious. But for most, the reaction far outdid the actual change.

The recurrent tenor of academic commentary—as captured in the opening paragraphs of this essay—is disapproval. There seem to be at least two strands to that disapproval. The first might be called process-oriented. Many emphasize that the process of making procedural change has been "politicized." Beyond a doubt, something of that sort has occurred. In the 1960s, the Reporter was told to keep what he was doing secret until the Advisory Committee was ready to announce proposed changes.[40] By the

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37. *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 153-54 (1999).

38. *See* AM. LAW INST./INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Cambridge Univ. Press 2006) (2004).

39. *See* Marcus, *Discovery Containment*, *supra* note 34, at 752-55 (describing the 1976 Pound Conference assurances by Chief Justice Burger that revisions of the discovery rules would be considered, and the role of the Department of Justice, under Attorney General Bell's leadership, in developing those changes).

40. *See* Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991):

> I have been told by one of my predecessors [as Reporter of the U.S. Judicial Conference Advisory Committee on Civil Rules], the late Al Sacks, that he was

1970s, that era of secrecy was passing, and the 1988 legislation buried it entirely by requiring that Advisory Committee meetings be open and that there be advance notice of what would be discussed.[41] Beginning in the 1990s, the Advisory Committee convened conferences to solicit suggestions for rule changes and reactions to proposed amendments.[42] Throughout, opportunities for interested participants to know what the Committee is considering and to express views has increased.

Besides being what Congress insisted upon, this openness might be seen as a good thing. Indeed, "accountability" is a favored catch-word nowadays, so this process would appear to be desirable because it would provide additional accountability. Yet the process-based critique often seems to regard the "political" consequences of the shift to increased public access to rulemaking as bad. Frankly, it is difficult to credit the process-based criticism as a free-standing one. The basic objection is the second one—by and large, academics don't like the changes that have been made during the period of openness.

It is beyond doubt that the rule changes that have been made since 1970 have mainly sought to constrain and contain the genie released by the Federal Rules and the changes made before 1970. For those who wholeheartedly embrace the Liberal Ethos, that is a retrograde direction for change. Yet all should appreciate that even the Liberal Ethos must recognize *some* limits; if one appreciates that any change is likely to improve the lot of some and weaken the position of others in this zero-sum game, that feature matters only for those who begin with the presumption that some groups—defendants or plaintiffs, for example—are to be preferred. The rules process does not begin with that presumption, and continues to resist purely self-interested arguments for change.[43]

To my mind, the most striking aspects of the objections to recent rule changes have been (1) that they often seem to focus on the wrong things, and (2) that they often misjudge the things on which they do focus.

Often the critics of rule-change packages focus on features that are less important than others they disregard. For example, in 1993 the proposal to

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> instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation. This practice reflected, of course, the traditions of judicial institutions accustomed to keeping their adjudicative deliberations to themselves.

Id. at 164.

41. *See* 28 U.S.C. § 2073(c) (2000) (requiring that there be advance notice of meetings, that meetings be open to the public and that minutes of such meetings be maintained and open to the public as well).

42. See Marcus, *Reform*, *supra* note *, at 917-19 for a discussion of this point.

43. *See* Carrington, *supra* note 40, at 165 (noting that self-interested arguments get a deaf ear).

introduce initial disclosure raised an unprecedented ruckus.[44] But by the time it was finally adopted, initial disclosure had been watered down and was subject to a local opt-out right that permitted individual districts to decide not to adopt disclosure. Frankly, it was not a big deal, even though it prompted a legislative effort to rescind the change that came within one vote of success. The big deal in 1993 was the package of expert disclosure and discovery provisions, which has had a major impact. Even now the Advisory Committee is studying ways to deal with, and perhaps to constrain, aspects of that discovery change. But there was hardly a peep about expert disclosure and discovery provisions between 1991 and 1993.

Somewhat similarly, between 1998 and 2000 the outcry about the package of discovery rule amendments focused on the minor revision to the scope provision of Rule 26(b)(1). As we have recently been told, this change "has been universally criticized by legal scholars."[45] Outside the academic sphere, it was also severely attacked. A member of the Standing Committee labeled this change "revolutionary."[46] Frankly, it seems that this was much ado about almost nothing. The Committee Note about the change emphasized that it was a minor revision.[47] A sensible reaction would be to say, "This is no big deal." Certainly that is what experience has shown. Thus, Professor Rowe, who argued and voted against the change as a member of the Advisory Committee, soon found that it had made no demonstrable difference in decisions,[48] and federal judges continue to intone that discovery is extremely wide.[49] The big

44. *See* Marcus, *Of Babies*, *supra* note *, at 805-10 (describing the controversy in 1991-93 about initial disclosure).

45. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1186 (2005).

46. *See* Committee on Rules of Practice and Procedure, Minutes of Committee on Rules of Practice and Procedure, June 18 & 19, 1998, at 23, *available at* http://www.uscourts.gov/rules/minutes/june1998.pdf:

> One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions.

47. *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment (noting, "The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.").

48. *See* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001).

49. *See* Breon v. Coca-Cola Bottling Co., 232 F.R.D. 49, 52 (D. Conn. 2005) ("The definition of relevance continues to be liberally interpreted even after changes to Rule 26 in 2000."); *see also* Fisher v. Baltimore Life Ins. Co., 235 F.R.D. 617, 622 (N.D. W. Va. 2006)

deal in the 2000 amendments package was its handling of initial disclosure, which was recalibrated to be limited to information the disclosing party might use as evidence, and which was made nationally binding. Although that got the attention of district judges,[50] it received very little attention otherwise.

I have several reactions to these reactions to the rule-amendment experience of recent years. The first is that in this politicized environment almost everything is poisoned by suspicion; the most mundane of changes provoke strident over-reactions from those who suspect a malign hidden agenda.

The second reaction is more important: there has been no real retreat from the core views of the Liberal Ethos. To the contrary, the theme has been to preserve the basic structure but to constrain it somewhat. Arguably, the Alternative Dispute Resolution (ADR) movement of the 1980s could have introduced a new paradigm of conciliation that might have replaced the litigation-oriented Liberal Ethos, but it has not. To the contrary, (except for efforts to undercut class actions with arbitration clauses[51]) the ADR impulse has seemed to weaken in the last decade. Perhaps that is, in part, due to second thoughts among business litigants about the attractions of arbitration. But it would be hard to say that the ferocity of litigation has disappeared, or even abated. The judicial management movement, which has come under much criticism,[52] really looks more like a way to generate some control over the otherwise unfettered latitude of counsel.[53]

A third reaction is important as well: rule changes are not the only way that shifts in direction can occur. Rules are subject to interpretation and enforcement by courts. The most recent Supreme Court term emphasizes that such interpretation can change. For our purposes, the most notable decision is probably *Bell Atlantic Corp. v. Twombly*,[54] which appeared to jettison the statement in *Conley v. Gibson*[55] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

(saying that discovery rules are given a broad and liberal treatment); Anton v. Prospect Café Milano, Inc., 233 F.R.D. 216, 218 (D. D.C. 2006) (saying that the term "relevance" is broadly construed).

50. *See* Marcus, *Reform*, *supra* note *, at 915 (quoting apoplectic objections from judges).

51. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

52. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that more active judicial management of litigation creates threats to judicial impartiality without producing gains in efficiency).

53. *See* Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3 (2003).

54. 127 S. Ct. 1955 (2007).

55. 355 U.S. 41 (1957).

prove no set of facts in support of his claim which would entitle him to relief."[56] In *Bell Atlantic*, the Court declared that,

> [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.[57]

In part, the Court said that it felt that being demanding about pleading requirements was warranted because of the prospect of broad discovery if the claim was not intercepted before that occurred.[58]

In a related vein, consider *Scott v. Harris*,[59] holding that summary judgment should be granted for the defendant in a suit by a motorist severely injured when police pursuing him rammed his car and caused a single-car accident. The Court's ruling was based on a videotape of the police pursuit that persuaded it that the defendants' decision to ram plaintiff's car was reasonable.[60] The Court found the chase was "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."[61] Under these circumstances, the Court ruled, plaintiff's assertions that he was in full control of his vehicle did not present a genuine issue, and the Eleventh Circuit's decision affirming the denial of summary judgment for the defendant was wrong:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether [of] respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction.[62]

56. *Id.* at 45-46.
57. 127 S. Ct. at 1969.
58. *See id.* at 1966-67.
59. 127 S. Ct. 1769 (2007).
60. *Id.* at 1775-76.
61. *Id.*
62. *Id.* at 1776. In dissent, Justice Stevens argued that "[t]his is hardly the stuff of Hollywood." *Id.* at 1783 (Stevens, J., dissenting). He elaborated:

;b Relying on a *de novo* review of a videotape of a portion of a nighttime chase

Thus, it may be that the Court will further broaden the authority of judges to intercept weak cases rather then leaving them to jury decision.

In sum, these two decisions underscore the extent to which the actual operation of rules—while heavily influenced by their content—is hardly entirely determined by their content. Particularly for those who might have urged that the Federal Rules not be touched and left to evolve under judicial interpretation,[63] there may be reason for caution. More generally, there is plenty of room for skepticism about politicized hot-button responses to relatively minor rule changes that don't significantly alter the fundamental Liberal Ethos of the rules.

A final reaction is that the academic response of the present seems almost entirely conservative, in the sense that it opposes all change as inimical to the Liberal Ethos. But if leaving the rules unchanged is not a full protection against such developments (as the Court's recent decisions suggest it may not be), it seems odd to use unhappiness with very minor amendments as a ground for losing faith in the rules process. Besides judicial action, the alternative, it must be remembered, is legislative action. Perhaps there are those who see the Private Securities Litigation Reform Act[64] (PSLRA) and the Class Action Fairness Act[65] (CAFA) as such signal improvements on what the Advisory

> on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."
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> ;b Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," the tape actually confirms, rather than contradicts, the lower court's appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Id. at 1781-82.

63. *See supra* text accompanying note 28.

64. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.) (revising pleading standards for securities fraud suits and imposing a discovery stay until plaintiffs have satisfied heightened pleading standards).

65. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding federal-court jurisdiction to prevent plaintiffs from filing class actions in state courts

Committee has done that they show the Committee's day has passed. But for those who don't see the legislation that way, or who don't revel in the Court's handling of such issues under the current rules, perhaps another look at the existing rules apparatus is in order. At least the minor disappointments some rule changes have produced among academics should be balanced against the prospects of much more aggressive changes that could come from other sources. The adage that the perfect is the enemy of the good may apply here.

III. Reasons Why the Federal Rules Will Continue to Be Important

Professor Oakley tells us, based on an updated review of state courts' adoption of the Federal Rules, that "the FRCP have lost credibility as avatars of procedural reform. Federal procedure is less influential in state courts today than at any time in the past quarter-century."[66] Professor Koppel assures us that "[t]he 'top-down' federal rules model for achieving inter-state uniformity has failed."[67] On top of the widespread academic criticism of the Federal Rules,[68] this erosion of the Rules' following among states may be a further example of the demise of the entire project.

I don't think the project is in its death throes. For one thing, as I will explain below, the Federal Rules have taken the lead on what has been, for the bar, the most prominent litigation topic of the last decade—E-Discovery. Besides the E-Discovery experience, I think there are at least three reasons why the Federal Rules process enjoys advantages that will make it continue to be the biggest game in town, even if it is not as big a game as it was in the past.

First, the federal courts are a nationwide court system, and there is a federal court in every state. No other rulemaking body (unless you count Congress) can control the procedure in courts of more than one state. True, the Conformity Act,[69] and the Process Acts before it, abjured this natural position of leadership by requiring federal courts to adopt some form of conformity with state practice.[70] But so long as the federal courts retain a basically consistent procedural system nationwide, there will be a natural tendency for that system to influence the way the states handle their procedure. As noted

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that are allegedly unduly receptive to granting class-action status). *See also* Richard Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. (forthcoming 2008).

66. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).

67. Koppel, *supra* note 45, at 1173.

68. *See supra* text accompanying notes 34-38.

69. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

70. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-42 (1982) (describing experience under the Process Acts and the Conformity Act).

above,[71] in California the handling of pleadings under the code pleading statute has evolved to resemble the federal approach, even to exceed the federal approach in laxity. In some surprising ways, federal procedure has continued to influence the California courts. Thus, a recent article in the legal press reported that CAFA[72] has affected California state judges: "Although the federal law doesn't apply in state courts, legal experts say California Superior Court judges are following suit and using extra caution before approving coupon settlements."[73]

This structural advantage will probably be increasingly reinforced by the growing nationalization of at least some forms of law practice. Indeed, the adoption of the Rules Enabling Act[74] was opposed in part on the ground that it would facilitate multistate practices by permitting lawyers from large firms in big cities to walk confidently into federal courts across the land.[75] Certainly "national" practices today have far eclipsed those of seventy years ago, and this development has reinforced the prominence of the procedures of the national court system.

Of course, the states may decline to follow the federal lead. California offers examples of that. Recently, the California Legislature was asked to adopt a class action bill that was said to modify California class action practice to resemble federal practice, and it was rejected.[76] Similarly, some time ago

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71. *See supra* note 21 and accompanying text.

72. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

73. Rebecca Beyer, *Coupon-Based Settlements Get Tougher*, L.A. DAILY J., May 29, 2007, at 1.

74. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)).

75. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2009 (1989). Professor Subrin quotes a West Virginia lawyer, who opposed the adoption of the Rules Enabling Act, in part for the following reasons:

> [A] firm in a great city may represent a railroad, or an industrial company doing business in many states[;] if the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main parts of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors. Uniformity, therefore, increases the influence and importance of the great city firm, having as its head, perhaps, some business man masquerading as a lawyer, with his partners of first and second magnitude, law clerks, process servers, runners, etc.; would correspondingly reduce local practice, local ability and local pride and drive the practice of law further on the downward road from a profession to a business. . . . Uniformity would further augment the importance of large aggregations of men and depress the individual.

Id. (citing Letter from Connor Hall to Editor, American Bar Association Journal (Oct. 15, 1926) (on file with Library of Congress, Legislative File 1913-1933).

76. Assem. B. 1505, 2007-08 Leg., Reg. Sess. (Cal. 2007). This bill would have replaced

California, by judicial decision, chose to follow the Supreme Court's *Celotex*[77] rule on the showing required of a moving party seeking summary judgment,[78] and the Legislature responded to the objections of plaintiffs' lawyers by amending the summary judgment statute to require at least seventy-five days notice of a motion, thus offsetting somewhat the reduced showing.[79] But if anything, these examples underscore the abiding leadership role of federal procedure.

Second, the federal courts have an institutionalized and highly expert rulemaking apparatus. The Administrative Office of the Unites States Courts has a Rules Committee Support Office with a professional staff of long experience and high expertise. Each of the five Advisory Committees has a Reporter who has long experience. The Standing Committee on Rules of Practice and Procedure provides leadership and direction. Together, these people have a powerful institutional memory, and increasingly the work product of this institutional activity is available online for any who want to use it. As academics, we know that the federal rulemaking experience has been the topic of many articles. There simply is no similar procedural rulemaking apparatus elsewhere in this country.

One feature of this apparatus that should be emphasized is that it is independent and relatively apolitical. True, it may be said to be more responsive to the judiciary than some would prefer. But the judiciary itself is an independent branch of government and, despite lobbying, the rulemaking process has not displayed anything like the sorts of partisan or otherwise political traits that one would find in Congress or a state legislature.

Third, the federal rulemaking apparatus has access to the Research Division of the Federal Judicial Center (FJC), a unique resource. Access to empirical information is central to effective rulemaking nowadays. Fifteen years ago, Professor Burbank called for a moratorium on further federal rulemaking

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CAL. CIV. PROC. CODE § 1781 with a new provision and added several new sections to the CAL. CIV. PROC. CODE, including § 383 that tracked FED. R. CIV. P. 23. Gov. Schwarzenegger's office wrote to the Legislature favoring passage of the bill, noting that because California's class action statute dated from 1872 it "has largely been shaped through an ad hoc approach by court rulings." Letter from Brent J. Jarmisch, Deputy Director of Legislation, Governor's Office of Planning and Research, to Nancy Parra, Assemblywoman, California Assembly (May 4, 2007) (on file with author). In contrast, the bill "builds on the foundation laid in the federal rules." *Id.* On May 7, 2007, a committee of the California Assembly defeated the bill after it was opposed on the ground that it was "anti-consumer." *See* Cheryl Miller, *Lawmakers Reject New Class Action Rules*, RECORDER (S.F.), May 9, 2007, at 1, 5.

77. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

78. *See* Union Bank v. L.A. County Super. Ct. (*Demetry*), 37 Cal. Rptr. 2d 653 (Cal. Ct. App. 1995) (adopting *Celotex*, 477 U.S. at 317, as the rule for California).

79. *See* CAL. CIV. PROC. CODE § 437c(a).

pending development of an empirical component.[80] For a long time, and increasingly, the FJC has supplied the Advisory Committee with detailed and informative empirical information about the actual functioning of the federal court system.[81] In recent years, the existence of the OSCAR system of electronic recordkeeping for the federal courts has meant that much of this research can be initiated online for virtually all federal courts. This facility has enabled the FJC to become even more precise and comprehensive, and therefore helpful to the Advisory Committee. Although some states may make similar efforts, and the National Center for State Courts attempts to develop empirical information, it is unlikely there will be another resource to compare to the FJC's abilities any time soon.

IV. A Recent Example—E-Discovery

I said that E-Discovery was the most prominent new issue in American litigation in the last decade. For many academics, that may seem surprising; most law professors have not attended closely to this topic. But lawyers have. Since 2000, there have been about two CLE events per week in this country about E-Discovery.[82] The sums spent on outside vendors of E-Discovery services have soared, and estimates have placed the figure for 2007 at $2.8 billion.[83] Worries about the costs of this form of discovery and the risk of sanctions for loss of electronically stored information have fueled a new form of practice. Some law firms have E-Discovery departments and there is at least one law firm founded to deal only with E-Discovery issues.[84]

The federal rulemaking process has taken the lead in dealing with E-Discovery.[85] In 1996, the Advisory Committee on Civil Rules launched its

80. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

81. *See* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002).

82. *See* Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 11 & n.48 (2004) (describing FJC compilation of information on E-Discovery CLE events).

83. *See* Richard L. Marcus, *E-Discovery and Beyond: Toward* Brave New World *or* 1984?, 236 F.R.D. 598, 607 (2006).

84. *See, e.g.*, Jake Wildman, *E-Discovery: Discovering a New Practice*, CALIF. LAWYER, July 2008, at 26 (reporting that some firms have established formal E-discovery practice groups); Janet H. Kwuon & Karen Wan, *High Stakes for Missteps in EDD*, N.J.L.J., Dec. 31, 2007, at E2 (asserting that "it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law").

85. More detail on the background on the Federal Rules development of a response to E-Discovery maybe found in Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

Discovery Project, which was designed to survey and address problems with discovery. This effort led the Committee to convene conferences of lawyers to discuss discovery issues. The one new topic that emerged from these conferences was that discovery of electronically stored information was the "big new problem" that nobody had noticed yet. As of 1997, when these reports first began to surface, that was true. The Advisory Committee was not familiar with the problems, much less solutions, and nothing to deal with this form of discovery was included in the package of amendments that went forward in 1998.

Beginning in 2000, the Discovery Subcommittee of the Advisory Committee worked to acquaint itself with the issues raised by E-Discovery and their possible solutions. The Chair of that Subcommittee and I attended a leadership meeting of the ABA Section of Litigation and presided over an "open mike" session concerning E-Discovery issues. Many who buttonholed us during the meeting urged that rule amendments be adopted to emphasize to clients that discovery responses had to include electronically stored information. The Subcommittee enlisted the FJC to do research on the extent and nature of E-Discovery problems. Ken Withers—who had a unique command of these issues—joined the FJC around this time and contributed to its work. The Subcommittee also held two conferences to learn from lawyers (including representatives of lawyer organizations) and "techies" about these issues. The upshot at that time was that the nature of the problems was not clear, and the nature of appropriate rule responses was even less clear. Thus, although the discussion included a list of possible rule changes that might be helpful, no further action was taken.

Beginning in late 2002, the Committee returned its attention to E-Discovery. After reviewing responses to a letter inviting comment from lawyers around the country, the Subcommittee began an arduous drafting effort to try to distill plausible rule responses to these issues. Again, the FJC provided important assistance. After extensive review of these amendment ideas, the Committee convened a major conference on E-Discovery in February 2004 to discuss a range of issues.[86] Drafting on possible amendments began in earnest after that conference, leading to publication of a preliminary draft of proposed amendments in August 2004 and very extensive public comment and hearings through February 2005.[87] The summaries of the public comments and hearing testimony filled about 200 single-spaced pages. Using this input, the Committee returned to several key areas and revised the

86. Transcriptions of most of the proceedings of this conference were published in the Fordham Law Review. *See* 73 FORDHAM L. REV. 1-152 (2004).

87. The sign-ups for the final hearing—in Washington, D.C., in February 2005—were so numerous that an extra half day had to be added to enable the Committee to hear from them all.

proposals that had been published for comment. The revised amendments were approved by the Judicial Conference, adopted by the U.S. Supreme Court, and went into effect on December 1, 2006.

The point of this tale is that the multi-year federal effort has provided an unequaled basis for rulemaking. As a result, it has shaped proposed state-court responses. E-Discovery is not the sole preserve of the federal courts. To the contrary, it is increasingly true that business and institutional (and much personal) information is available only from electronic sources. Already, divorce lawyers are honing in on electronic sources for evidence,[88] and personal injury lawyers are likely to wake up to this source of information soon, not the least because medical records are increasingly maintained mainly or only in electronic form. For states, therefore, the same sorts of issues will be important.[89]

How then should the states approach those issues? One answer, of course, would be to follow the federal lead. And that is exactly what has happened in at least two extremely important efforts to design procedures for state courts to use in dealing with E-Discovery. First, the Conference of Chief Justices in 2006 promulgated Guidelines for state courts handling E-Discovery issues, which "should be considered along with the other resources cited in the attached bibliography including the newly revised provisions on discovery in the Federal Rules of Civil Procedure . . . ."[90] The Guidelines themselves repeatedly draw on federal sources. For example:

> Guideline 1B, defining "accessible information" is "drawn [from] pending Federal Rule 26(b)(2)(B).[91]
>
> Guideline 2 on the responsibilities of counsel to be informed on E-Discovery issues "is drawn from the Electronic Discovery

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88. *See, e.g.*, John Simerman, *Lawyers Dig Into FasTrak Data*, OAKLAND TRIB., June 5, 2007, at 1 (describing subpoenas for electronic data on use of payment devices for use of bridges in the San Francisco Bay Area in marital litigation).

89. For example, the Conference of Chief Justices' Guidelines for E-Discovery, discussed below in text, include the following observation:

> Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, in all manner of cases.

CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi-vii (2006).

90. *Id.* at vii.

91. *Id.* at 1.

> Guidelines issued by the U.S. District Court for the District of Kansas" and also relies on Federal Rule 26(f).[92]
>
> Guideline 3 on agreements by counsel combines the approaches of the Federal Rule 26(f)(3) and a standard adopted by the U.S. District Court for the District of Delaware.[93]
>
> Guideline 4 on an initial discovery hearing "is derived from Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas."[94]
>
> Guideline 6 on form of production is based on Federal Rule 34(b).[95]
>
> Guideline 7 on allocation of discovery costs is based on the analysis of a leading federal case.[96]
>
> Guideline 10 on sanctions "closely tracks" Federal Rule 37(f).[97]

The foregoing enumeration does not list all the ways in which the Conference of Chief Justices' work product builds on or follows the federal lead, but should suffice to make the point.

In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) developed draft Uniform Rules Relating to the Discovery of Electronically Stored Information.[98] The Prefatory Note acknowledges the that the Federal Rules are the foundation for these draft Uniform Rules:

> [T]his draft mirrors the spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure. The Drafting Committee has freely adopted, often verbatim, language from both the Federal Rules and comments that it deemed valuable. The rules are modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information.[99]

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92. *Id.* at 2.
93. *Id.* at 3.
94. *Id.* at 4.
95. *Id.* at 6.
96. *Id.* at 7 (citing Zubulake v. UBS Warburg L.L.C., 216 F.R.D. 280 (S.D.N.Y. 2003)).
97. *Id.* at 11.
98. *See* NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFO. (2007).
99. *Id.* at 2.

The E-Discovery experience depended on and displayed the Federal Rules' structural advantages. Because the Federal Rules apparatus engages in continuous study of issues affecting litigation nationwide, it may identify salient developments sooner than state courts do. Thus, it focused on E-Discovery more than a decade ago. Because the Federal Rules apparatus includes access to the FJC, it was able to bring singular expertise to bear on these issues. Because "cutting edge" procedural problems often emerge in federal court, various federal courts were innovating to deal with E-Discovery and could lend that experience to the effort of designing Federal Rule amendments. Because the Federal Rules amendment process involves public comment from across the country, it benefitted from reactions from all parts of the country in refining the ultimate rule amendments. And because those amendments now apply in federal courts in every state, it makes sense for the states to deal with these new issues in a similar way. Both the Conference of Chief Justices and the NCCUSL work product seem to recognize those natural advantages of federal rulemaking.

V. Conclusion—Not Dead Yet

So the federal rulemaking effort is not dead yet. To the contrary, in the last decade it has provided key leadership in addressing the most prominent new litigation issue, E-Discovery. But the era of Big Bangs is probably past, and that is probably for the best; any who grew up in the Atomic Age should beware Big Bangs. Perhaps it is time, however, for carping academics to realize that the basic core of the Liberal Ethos has not been abandoned or undermined, and also to appreciate that other sources of rules for litigation are not necessarily more sympathetic to their plaintiff-friendly views. We will not have a Golden Age of rulemaking again, but we are not entering the Dark Ages either.

JUSTNESS! SPEED! INEXPENSE! AN INTRODUCTION TO "THE REVOLUTION OF 1938 REVISITED: THE ROLE AND FUTURE OF THE FEDERAL RULES"

STEVEN S. GENSLER*

After taking effect in 1938, the Federal Rules of Civil Procedure (Federal Rules) have had a rather amazing seventy-year run. Their adoption fundamentally transformed the landscape of federal procedure. Out went the era of conformity to oftentimes inflexible and technicality-bound state court practice.[1] In came the era of uniform federal procedures modeled after flexible equity practices.[2] But it was not just federal practice that was transformed. Since 1938, the core tenets of the Federal Rules—including notice pleading, liberal amendments, and liberal discovery—have exerted a strong influence on the state-court procedural landscape as well.[3] As the original rulemakers had anticipated,[4] the Federal Rules ended up setting something of a national model for court procedures. Of course, not all states have adopted that model, and even in states that have done so, generally the state rules can vary significantly

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* President's Associates Presidential Professor, University of Oklahoma College of Law. Unlike the selected presenters, I did not earn my participation in this symposium; the privilege of introducing the symposium papers is mine solely because I served as Chair of the AALS Civil Procedure Section for 2007. Since 2005, I have served as a member of the Advisory Committee on Civil Rules. In this introduction, I speak only for myself and not for the Section or for the Advisory Committee. Thanks go to Ed Cooper and Tom Rowe for reading a draft of this paper. The errors and heresies that follow are, of course, mine and mine alone.

1. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1039 (1982) (describing practice under the Conformity Act of 1872).

2. *See* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

3. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986); *see also* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989) ("The Federal Rules have not just survived; they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.").

4. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 307 (1938); *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2005-06 (1989).

in certain areas.[5] But any such variations are inevitably compared to the Federal Rules and judged against them.

Seventy years is a long time, maybe even a lifetime. I don't mean to make a eulogy. The Federal Rules remain in effect, and indeed just emerged from a badly-needed makeover.[6] But all eras end. And for (at least) the past three decades, both the Federal Rules and the federal rulemaking enterprise have been beset with criticism.[7] Some have suggested that the status of federal rulemaking as a reform leader reached its zenith years ago and has since suffered from a long decline.[8] Is it really possible that we have seen, or are presently witnessing, the end of an era?

That question sets the stage for the topic the Executive Committee selected for the 2008 Annual Meeting Section Program. Proceeding from the recent criticisms of the Federal Rules and federal rulemaking, and following up the suggestion that both are past their prime, the Executive Committee issued a Call for Papers on the following topic: *"The Revolution of 1938 Revisited: The Role and Future of the Federal Rules."* We broadly defined the topic as questioning whether the Federal Rules and the federal rulemaking process were still equipped to lead rules reform in the United States.[9]

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5. *See* Oakley & Coon, *supra* note 3, *passim* (listing degree of conformity for each state); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2002) (finding that the trend was against conformity as the states failed to adopt the more recent amendments to the Federal Rules).

6. *See* FED. R. CIV. P. 1 advisory committee's note (discussing purpose and principles of the Style Project). Not everyone agreed that the makeover was needed, or a good idea. *See, e.g.*, Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006). I think the project was important and that its long-term net benefits will be substantial. But that's a question that can't be fully answered for another ten years at least, and even then the assessment will necessarily be impressionistic given that most of the costs and benefits will not be tracked and that many of them—e.g., improved understanding—will defy measurement in any event.

7. Professor Marcus chronicles a representative swatch of these criticisms in his contribution. *See* Richard Marcus, *Not Dead Yet*, 62 OKLA. L. REV. ____ (2008) [hereinafter Marcus, *Not Dead Yet*]. For a more detailed discourse on the rulemaking "crisis," see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U.L.Q. 901, 908-12 (2002) [hereinafter Marcus, *Reform*].

8. *See, e.g.*, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173 (2005) (arguing that the "top-down" model of procedural reform has failed to achieve the goal of national—including inter-state—uniformity); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801-02 (1991) (tracing "demise" of federal rulemaking to the 1988 Judicial Improvements and Access to Justice Act, which "politicized" rulemaking by granting the public access to the rulemaking process).

9. The full text of the Call for Papers read:

Alternatively put, if one accepted that the Federal Rules had been leading the way for the last seventy years, what was the outlook for the next thirty years? From an impressive group of submissions, the Executive Committee selected three papers for presentation at the annual meeting. They are introduced here in the order in which they were delivered at the AALS program.

Professors Rex Perschbacher and Debra Lyn Bassett lead us off with their paper titled *The Revolution of 1938 and Its Discontents*.[10] Directly taking on the challenge posed in the Call for Papers, they assess the current state of rulemaking and conclude that the Federal Rules developed in 1938 were a product of their time and that their "moment" is over.[11] To be precise, Perschbacher and Bassett contend that while the 1938 rules perfectly captured the yearning of that era to refocus on getting to the merits, they now chafe against the modern obsession with case management and judicial efficiency.[12] As Perschbacher and Bassett see it, the Revolution of 1938 ended when the dominant litigation value stopped being to advance disputes to the merits fairly (and efficiently) and turned into "ending litigation at all costs."[13] Perschbacher and Bassett invoke the imagery of the French Revolution, equating the

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> 70 years ago, the Federal Rules changed the landscape of civil litigation. Procedure in the federal courts became uniform and adopted a flexible, notice-based model that contemplated liberal access to discovery. Over time, most states followed suit. Some have called this the Golden Age of Rulemaking.
>
> What will the next 30 years of rulemaking look like? What should they look like? From pleading standards to discovery to summary judgment practice, there is no shortage of critics of the federal model. And, increasingly, questions are raised about the extent to which state practice should continue to follow the lead of the Federal Rules. States might adopt different practices out of a belief that the state and federal courts hear different types of cases and are designed to do different things. States might adopt different practices in a spirit of local experimentation, supplementing or even displacing the federal rulemaking process as the leader in innovation and reform. Or, states might simply depart from the Federal Rules model out of a belief that the federal model proceeds from flawed first principles. Different models of judicial federalism could support very different conclusions about the proper interaction between state rulemaking and federal rulemaking.

Ass'n of Am. Law Sch. Section on Civil Procedure, Call for Papers (June 12, 2007) (on file with author), *available at* http://www.concurringopinions.com/archives/2007/06/another_aals_ca_1.html. [NTA: IS THIS DATE AND THE NOTATION THAT IT IS ON FILE WITH YOU OK?]

10. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 62 OKLA. L. REV. ____ (2008).

11. *Id.* at 2.

12. *Id.* at 3-4.

13. *Id.* at 4.

transformation of the Federal Rules with the Thermidorian Reaction,[14] in which Robespierre fell victim to his own guillotine after taking his revolutionary ideals and bloody tactics too far for the tastes of the masses. In this metaphor, it is the spirit of the 1938 rules that loses its head, only instead of suffering a swift and public execution, the spirit of the 1938 rules has been gradually and quietly deposed by a thirty-year change in attitude.

In large part, Perschbacher and Bassett's article is a valediction, one in which they bid a sad farewell to the litigation values that they saw as forming the heart of the 1938 rules. This sentiment is most clearly expressed in a paragraph in which they contrast the way that litigation was perceived in 1938 with the way it is perceived today. In 1938, they assert, the original drafters viewed litigation as a positive and worthwhile endeavor; thus, the goal of the original drafters was to *facilitate* litigation by removing the technicalities that plagued code pleading, as well as by adding a liberal discovery scheme.[15] In contrast, Perschbacher and Bassett perceive a very different attitude towards litigation today—namely, that litigation is a bad thing, such that the dominant goal is to find ways to minimize our investment in litigation[16] and resolve those cases that do get litigated as quickly and cheaply as possible.[17]

Perschbacher and Bassett's article is not a call to arms. Given their fondness for the values underlying the 1938 rules, one might have anticipated a clear call to reinstate the 1938 regime and usher in a return to the good old days. Instead, Perschbacher and Bassett explore a number of reasons why a return to the 1938 rules is unlikely. Principally, they chronicle how the federal judiciary and the federal docket have changed since 1938, metamorphosing from a relatively small cadre of 179 district judges with roughly 100,000 pending cases to now comprise 667 district judges with 320,000 pending cases.[18] They also point to a stark change in what the judges do: whereas 22.3% of cases reached trial in 1938, a mere 1.3% did so in 2006.[19] Perschbacher and Bassett also carefully develop the thesis that 1938 presented a kind of perfect storm of reform factors, including the contemporaneous development of the modern Erie Doctrine and its preference for vertical uniformity rather than horizontal uniformity in substantive law.[20] While not expressly stated, the implication is that the conditions required to

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14. *Id.* at 1-2.

15. *Id.* at 29.

16. *Id.* at 20-27 (discussing the rise in private adjudication modes like arbitration and rent-a-judge).

17. *Id.* at 20, 29.

18. *Id.* at 7-8.

19. *Id.* at 8-9.

20. *Id.* at 8-15.

return to the 1938 values simply don't exist in today's world of larger courts, crowded dockets, and managerial judges.[21] Later in the paper, Perschbacher and Bassett discuss Congress's increasing meddling with federal procedure.[22] This discussion suggests a fear that any attempt to retreat from active case management would prompt Congress to intervene in ways that prevent the 1938 values from retaking the throne or, worse yet, that crown an even worse regime than the efficiency-driven system that developed during the past thirty years.

Whatever the reason, Perschbacher and Bassett stop short of calling for another revolution—one that would reinstate the deposed 1938 rules regime. While they briefly raise the prospect that a "tweaking" or "updating" might be enough to save the spirit of the 1938 rules,[23] they do so tepidly and without conviction. In the end, their paper seems more of a resigned farewell than a rallying cry. And as a farewell, it has a ring of finality—sounding more "adieu" than "au revoir"—suggesting their belief that the spirit of the 1938 rules is not merely in exile, but rather is gone for good.

Professor Marcus interrupts the processional, declaring that the Federal Rules are *Not Dead Yet*.[24] Indeed, due principally to the structural advantages of national-scope reform activities[25] and the resource wealth that has accumulated around the federal rulemaking enterprise,[26] Marcus proclaims that the Federal Rules have been endowed with a hardiness far beyond that of most septuagenarians. Citing the recent E-Discovery amendments as evidence, Marcus suggests that there is reason to believe that the Federal Rules—and the federal rulemaking process—are in a period of renaissance rather than retreat.[27] (Marcus might also have cited to the recent cooperation between Congress and the Judicial Conference to produce the proposal to create Federal Rule of

21. Professor Marcus makes a similar point in his paper, noting that the conditions that gave rise to (or at least gave fuel to) the "Big Bang" of 1938 are unlikely to occur again any time soon. *See* Marcus, *Not Dead Yet*, *supra* note 7, at ____. For related commentary linking the Revolution of 1938 with the principles underlying the New Deal, see Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-80 (1997).

22. Perschbacher & Bassett, *supra* note 10, at 29-31.

23. *Id.* at 5.

24. Marcus, *Not Dead Yet*, *supra* note 7, at 2.

25. *Id.* at 22-25.

26. *Id.* at 25-27 (discussing the support provided by the Rules Committee Support Office and the Federal Judicial Center).

27. *Id.* at 27-34.

Evidence 502.[28]) Federal rulemaking may have its limits,[29] but within those limits Marcus sees more reason for hope than despair.[30]

More fundamentally, Marcus contests the idea that the "good old days" of 1938 ever left us. In particular, Marcus questions the view that the discovery and case management reforms since 1983 have retreated from the "Liberal Ethos" embodied by the 1938 rules.[31] Marcus agrees that the discovery and case management reforms since 1980 represent a pullback from the most liberal pretrial practices. But according to Marcus, these were a retreat not from the 1938 rules or their underlying values but from reforms in the 1960s

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28. In the past, a number of commentators have complained of a lack of meaningful cooperation between the rulemakers and Congress. *See* Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 222 (1997); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996). Proposed Federal Rule of Evidence 502 reflects the sort of inter-branch cooperation that these critics hoped to see. During the development of the e-discovery rules, one of the consistent concerns voiced by litigants was the cost and time consumed by privilege review of electronic documents. *See Need for Change Balanced by Deliberate Pace: An Interview with Judge Lee H. Rosenthal*, THIRD BRANCH (Admin. Off. of the U.S. Courts, Washington, D.C.), March 2008, http://www.uscourts.gov/ttb/2008-03/article01.cfm. The e-discovery amendments included changes to Rules 16(b) and 26(f) to spur litigants to think about ways of addressing the issue. *See* FED. R. CIV. P. 16, 26, advisory committee's notes. And Rule 26(b)(5) was amended to create a mechanism for litigants to alert the other parties when they had made an inadvertent disclosure of privileged material and to place a hold on the use of that material until a court ruled on the questions of privilege and waiver. *See id.* 26(b)(5). But the Civil Rules Advisory Committee made no attempt to alter any of the underlying law of privilege or waiver, due to Rules Enabling Act limits and concern that the topic might properly lie with the Evidence Rules Advisory Committee. *See* 28 U.S.C. § 2074(b) (2000) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."). Thus, the need for further reform remained. *See* S. REP. NO. 110-264, at 1-3 (2008). At the behest of the House Judiciary Committee Chair in 2006, the Judicial Conference tasked the Evidence Rules Advisory Committee with developing a proposal to address privilege and waiver. *See* Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Senator Patrick J. Leahy and Senator Arlen Specter (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf. The proposal was forwarded to the Senate and proposed as Senate Bill 2450. *See* S.2450 110th Cong. (2007). The Bill passed both houses of Congress and was signed by the President on September 19, 2008. *See* 154 CONG. REC. S8373-01 (2008); *see also* 154 CONG. REC. H7817-01 (2008) (presentation in House, including Statement of Congressional Intent). The cooperative process used to develop and implement Federal Rule of Evidence 502 follows a path suggested by Professor Burbank among others. *See* Burbank, *supra*, at 249; Burbank, *supra* note 1, at 1195 n.775.

29. In other writing, Professor Marcus has cautioned people against expecting modern rulemaking to produce the types of dramatic breakthroughs and reforms associated with the 1938 revolution. *See* Marcus, *Reform*, *supra* note 7, at 943-44.

30. Marcus, *Not Dead Yet*, *supra* note 7, at 34-35.

31. *Id.* at ____.

and 1970s that removed even the minimal discovery limits contained in the original 1938 rules.[32] Marcus argues that, while the reforms since 1980 have empowered judges to control lawyers, the Federal Rules remain loyal to the notions of notice pleading and liberal discovery. Thus, what the critics of the changes since 1980 are actually upset about is not that the 1938 values have been discarded, but that the 1970s movement to even more liberal discovery did not stick.[33]

If Marcus is right, perhaps that makes the reference to the Thermidorian Reaction all the more apt, albeit with a small tweak. When Robespierre was guillotined on the evening of 10 Thermidor, year 2 (July 28, 1794), it was not because of any backlash to the ideals of the French Revolution, often denoted by the slogan "Liberté! Egalité! Fraternité!" Rather, it was a reaction to the Reign of Terror that had taken place under Robespierre's control of the Committee of Public Safety. Marcus's point is that the reforms since 1980 were a reaction to what he calls the "apogee" of the Liberal Ethos, which occurred not in 1938 but in 1970.[34] If that is the case, then Professors Perschbacher and Bassett may well be correct to characterize the reforms since 1980 as a type of Thermidorian Reaction, but in this version the role of Robespierre is played by the forces of discovery unleashed during the 1970 apogee (with a guest appearance by the 1966 amendments to Rule 23 as St. Just). There are certainly those who saw (and still see) "unbridled discovery" as its own Reign of Terror.[35]

In the final paper in this symposium, *Making Effective Rules: The Need for Procedure Theory*, Professor Robert Bone looks to the future of federal rulemaking and challenges us to rethink how we make and evaluate the

32. *Id.* at 11-13.

33. *Id.* at 16.

34. *Id.* at ____. Professor Subrin similarly identifies 1970 as the "apex" of the "spirit of extensive attorney latitude" in discovery. *See* Subrin, *supra* note 4, at 2022.

35. Most trace the beginnings of the backlash against discovery to Chief Justice Burger's remarks at the 1976 Pound Conference, where he noted "widespread complaints" of the misuse and abuse of pretrial procedures. *See* The Honorable Warren E. Burger, *Keynote Address*, 70 F.R.D. 79, 95-96. *See generally* Griffin B. Bell et al., *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GA. L. REV. 1, 8-11 (1992) (discussing criticisms of the discovery process); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. LAW. REV. 747, 753-68 (1998) (chronicling multiple rounds of "discovery containment" efforts that followed Chief Justice Burger's remarks). For a hot-off-the-presses call for another round of discovery reform to address the costs of e-discovery and other issues that are claimed to have "broken" the discovery system, see Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (Aug. 1, 2008), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650.

Federal Rules.[36] In 1938, the prevailing view was that procedure and substance were separate, such that the drafting of procedural rules was seen as a matter of technical expertise rather than policy. From the so-called "Handmaid" viewpoint,[37] it was only natural that court rules would be drafted by procedural experts and designed to advance procedural values like maximizing flexibility or minimizing delay and cost.[38] But today, Bone argues, now that we see clearly the interconnection between procedure and substance, the original "procedural values" justification for the design of the rules is no longer convincing or sufficient. Worse yet, Bone asserts, no other norms or values have developed to fill the void. The result, Bone contends, is that the Advisory Committee, lacking any compass to guide it, has developed a habit of sidestepping the hard questions by deferring to consensus or, where no consensus can be had, by drafting general rules that leave the hard questions to trial judge discretion.[39]

Bone seeks to fill the void. He asserts that the federal rulemakers must develop normative metrics drawn from "core features of litigation practice" to assess future rule changes.[40] And to do that, Bone argues, the rulemakers must directly confront the relationship between substance and procedure.[41]

Bone begins with the premise that whatever else rules should strive to do, they must strive to yield "quality" outcomes, with quality defined as conformity to the substantive law.[42] In other words, "good rules" will yield correct legal outcomes. While that may seem substance-neutral on the surface, Bone explains that the quest for quality outcomes leads inevitably to value questions that depend on the underlying substance. First, because we do not insist that rights be enforced regardless of cost, outcome quality must be defined—at least in part—by how well a rule enforces the policies underlying those rights in the absence of full enforcement.[43] Thus, Bone says, the rulemakers must identify the policies that the substantive law seeks to promote. Second, because outcome errors are inevitable, procedural rules

36. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 62 OKLA. L. REV. ____ (2008).

37. *See* Clark, *supra* note 4, at 304, 306.

38. Bone, *supra* note 36, at 13.

39. *Id.* at 10.

40. *Id.* at 3.

41. Bone's full thesis is broader than I describe here. He also argues that the rulemakers must directly confront the role of settlement and the value of participation. *Id.* at 39-43. While these areas are worthy of their own examination, I have focused on his comments regarding the substance-procedure relationship both because they comprise the bulk of his argument and because I think they strike closest to the heartland of ascertaining the role of the rulemakers.

42. *Id.* at 27.

43. *Id.* at 14-17.

must seek to minimize the worst types of errors.[44] And to avoid the worst errors, Bone says, the rulemakers must place relative values on different substantive rights to know how to distribute error risks away from the rights that we consider most important.[45] In summary, while Bone agrees that the pursuit of outcome quality can justify procedural rules, he cautions that any meaningful justification based on outcome quality is not substance-neutral because it still requires the rulemakers to consider substantive values in at least two ways: (1) to determine what makes an outcome a "quality" outcome; and (2) to distribute error risks according to the relative importance of the underlying substantive values. Bone then argues that once one starts looking for justification in substantive values, it is no longer tenable to cling to the principle of rule trans-substantivity.[46] Thus, the case for substantive justification becomes, at least in some sense, the case for adopting substance-specific rules.

Professor Bone's thesis is provocative on several levels. If nothing else, his vision of an Advisory Committee actively engaged in identifying substantive values, assessing their relative importance, and striving to write rules that maximize the most important values is sure to provoke a wide range of responses. Those of us who have had the good fortune to be involved in the rulemaking process probably should resist any temptation to take Bone's proposal as a vote of confidence in our abilities. In earlier work, Bone has examined whether Congress or a centralized rules committee would be better suited to perform such a task, and he concluded that it was the committee.[47] But that conclusion is perhaps more accurately seen not as a vote of confidence for the Advisory Committee but as a vote of no confidence in Congress. Needless to say, even if one agrees that a centralized rules committee could do the task better than Congress, that does not lead to the conclusion that a centralized committee could perform the task easily or well.[48]

44. *Id.* at 17-18. For a more complete discussion of this approach, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 935-37 (1999).

45. Bone, *supra* note 35, at 37.

46. *Id.* at 20.

47. *See* Bone, *Process of Making Process*, *supra* note 43, at 938.

48. The Advisory Committee's ability to fulfill that role may be just the tip of the iceberg. While the Advisory Committee bears the frontline responsibility for considering amendments, it does not have the authority to enact anything. Rather, its proposals are forwarded up the approval process to, respectively, the Standing Committee on Rules of Practice and Procedure, the United States Judicial Conference, the United States Supreme Court, and Congress. *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671-75 (1995) (describing rules amendment process). It is not immediately apparent to me what role any of these other entities would have in (1) making the substantive policy choices Bone

The task Bone envisions would be daunting, even for the "giants" of rulemaking from the past. And the idea that the current members of the Advisory Committee (giants or not) would undertake that effort is likely to be as frightening to some observers as it is tantalizing to its proponent.

Bone's proposal is provocative in yet another sense—it provokes renewed and serious consideration of a number of questions that go to the heart of rulemaking under the Rules Enabling Act. Without meaning to limit what those questions might be, I briefly explore four of them in the following discussion. These thoughts are not offered as an exhaustive critique (and certainly not as a criticism), but rather to give some content to my claim of "provocation."

First. Bone's proposal raises a fundamental question about the role of the rulemakers. Specifically: what is the job Congress gave them? As readers of this symposium will already know, the rulemaking process exists as an exercise of power delegated from Congress via the Rules Enabling Act.[49] So what exactly is it that Congress asked the Court to do? Starting with the text of the original Rules Enabling Act, Congress described the job this way: "to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[50] Of course, Congress added this proviso: any such rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[51]

The text of the original Rules Enabling Act says rather little about what *norms* the rulemakers should advance through the Federal Rules. Most discussions of the Enabling Act focus on the *scope* of the delegation; they are attempts to define the boundaries of permissible rulemaking, as set either by the grant of rulemaking power or the limiting proviso.[52] Our focus here,

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envisions; or (2) scrutinizing the Advisory Committee's proposals for fidelity to those choices.

49. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941). It is unnecessary here to consider arguments regarding whether the courts possess inherent authority over certain aspects of rulemaking. *See, e.g.*, Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472-82 (1994) (discussing extent to which court rulemaking power is an exercise of delegated versus inherent power).

50. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934).

51. *Id.*

52. Depending on one's view, that proviso may take back some of the rulemaking authority granted in § 2072(a), or it may simply restate and emphasize a limit inherent in § 2072(a). *Compare* Burbank, *supra* note 1, at 1107-08 (limiting proviso is "surplusage"), *with* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-19 (1974) (grant and limiting proviso operate separately). *See generally* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. (forthcoming Nov. 2008) (discussing different approaches to reconciling the grant in subsection (a) with the limiting proviso of subsection(b)), *available at* http://ssrn.com/abstract=1121946.

however, is to identify rulemaking criteria *within* the Enabling Act limits. (I will return later to what traditional *Erie* jurisprudence might have to say about this topic.)

In this context, the only drafting directive in the original Rules Enabling Act is the instruction that the rulemakers proceed "by general rules." While this language seems inexorably to lead us into the debate about substance-specific rules,[53] I need not rehearse that debate here. As scholars on both sides of the question have noted, both the legitimacy and the wisdom of substance-specific rules are likely questions of degree.[54] That is to say, one can accept that the Federal Rules can and should have specialized provisions for *some* matters, while still articulating generally applicable rules in the main. It seems therefore sufficient for these purposes to note that the enterprise proposed by Bone assumes (he might say, "positively yields") an unspecified number of new substance-specific rules. Whether one sees the end result as consistent with the text of the Rules Enabling Act would then likely depend on just how many—and perhaps also on which kinds of—substance-specific rules would emerge from the process Bone envisions. Beyond that question, however, the text of the Rules Enabling Act yields no normative directives for drafting the Rules.

If we go beyond the text of the 1934 Rules Enabling Act, we might find other clues about what rulemaking norms Congress might have had in mind when it tasked the Court with crafting the Federal Rules. One can find in the legislative history of the Rules Enabling Act—Professor Burbank's "antecedent period of travail"—evidence that the proponents of court rulemaking expected the rulemakers to focus on writing rules that would be simpler to follow, reduce cost and delay, and promote the resolution of cases based on the merits rather than technicalities.[55] That is how the Supreme Court characterized the mission in *Sibbach v. Wilson & Co.*, its first case to discuss the Enabling Act, commenting that "the new policy envisaged in the enabling

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53. *Compare* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074-87 (1989) *and* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989), *with* Robert M. Covert, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975) *and* Subrin, *supra* note 4, at 2048-51.

54. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 778-79 (1993).

55. *See* Burbank, *supra* note 1, at 1067 (Sutherland Bill); *id.* at 1085 n.298 (Senate Report on Cummins Bill).

act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."[56]

This is where Bone attempts to forge a new conceptual path. Accepting that "justness" is a valid goal, Bone argues that the rulemakers cannot measure "justness" without treading into the realm of substantive values. To put it in Bone's terms, because perfect "justness" is not obtainable, courts must attempt to maximize the justness that is realistically attainable by maximizing the attainment of the values underlying substantive law and by minimizing error costs in the substantive areas deemed most important. One could hardly quarrel with Bone about whether that is one way of measuring justness. Perhaps it might even be the optimal way. But is that what Congress was envisioning when it delegated rulemaking authority to the Court? Nothing like that appears in either the text of the Rules Enabling Act or the record from the "antecedent period of travail." Even accounting for changes in vocabulary between that era and our own, one finds little to suggest that Congress equated the goal of justness in the rules with a rulemaking process driven by normative metrics, the policy values underlying substantive laws, or the distribution of error costs according to the rulemakers' beliefs about which substantive laws were most important.

Second. Regardless of what Congress thought in 1934, one must consider whether subsequent developments have altered or clarified the task assigned to the rulemakers. As Bone explains, we no longer live in a world that accepts the Handmaid model of procedural rules. Perhaps Congress's views about rulemaking have changed as well. But while Congress has amended the Rules Enabling Act several times since 1934, the picture does not seem to have changed. For example, while the Rules Enabling Act was altered when it was incorporated into title 28 as part of the 1948 revision of the judicial code, none of those alterations suggest any change to the rulemakers' mission.[57] Of course, the most significant development in the life of the Rules Enabling Act occurred when Congress re-authorized it in 1988. Yet even if we focus on Congress's intent in 1988, there is good reason to believe that Congress was at least as attached—if not more so—to the view that the rulemakers stick to procedural values and not venture into substantive concerns.[58]

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56. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

57. *See* Burbank, *supra* note 1, at 1103-04. The same conclusion holds for the various technical amendments made to the Rules Enabling Act during this period. *Id.*

58. *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1030-35 (quoting H.R. REP. NO. 422, 99th Cong. 21 (1985)) (noting strong sentiment in House Report that policy choices "extrinsic to the business of the courts" be left to Congress, but recognizing that the Senate record was less clearly supportive of that view).

One more piece of evidence is worth noting. In 1956, the Supreme Court discharged the Advisory Committee created under the 1934 Act.[59] Two years later, Congress reconstituted the Advisory Committee scheme by moving it to the Judicial Conference of the United States.[60] By statute, Congress directed the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" and to make recommendations to the Supreme Court.[61] Thus, "[t]he Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference."[62] The Act transferring the frontline responsibility for rulemaking from the Court to the Judicial Conference expressly directs the Judicial Conference to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[63] Here too, there is nary a whisper about normative metrics, maximizing the policy values underlying different substantive laws, or the distribution of error costs away from the rights deemed by the rulemakers to be the most treasured or fundamental.

Third. Bone's proposal raises important questions about the relationship between our "Erie" jurisprudence and rulemaking. Bone emphasizes that, unlike the original drafters, modern procedural thinkers no longer believe that there is a clear line between substance and procedure.[64] Indeed, it is now generally accepted that one cannot draft rules based on the so-called procedural values without exerting some tug or pull at substance.[65] For many

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59. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1006 (3d ed. 2002).

60. *See id.* § 1007.

61. 28 U.S.C. § 331 (2000).

62. McCabe, *supra* note 47, at 1659. The process actually begins two stages earlier. The individual Advisory Committees—there are five: Appellate, Bankruptcy, Civil, Criminal, and Evidence—are generally responsible for fielding suggestions and developing proposed amendments. The Advisory Committees forward their proposals to a Standing Committee on Rules of Practice and Procedure, which considers them initially for permission to publish for comment and later for approval. Proposals that are approved by the Standing Committee are then forwarded for consideration by the Judicial Conference. For a more detailed description of the rulemaking process, an excellent summary is available at the Federal Rulemaking website at http://www.uscourts.gov/rules/proceduresum.htm. *See also* McCabe, *supra* note 47, at 1671-75.

63. 28 U.S.C. § 331.

64. Bone, *supra* note 36, at ____. The original drafters seem at least to have been aware of the emerging scholarly thinking on the ephemeral nature of the line between substance and procedure. *See* Burbank, *supra* note 1, at 1136.

65. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling*

years, one of the vexing questions for procedural scholars (and judges, of course) has been to try to determine how much of an impact the Federal Rules may have on substance before they are found to exceed the rulemaking authority conferred by the Rules Enabling Act.[66] So Bone is surely right that modern views on the ephemeral line between substance and procedure say something about the rulemaking enterprise. And one important manifestation lies in determining the outer limits of rulemaking power.

But does it also speak to rulemaking *within* the Rules Enabling Act limits, and if so, how? The "Erie" scholarship noted above seeks to map the outer limits of rulemaking power, whereas Bone's thesis urges the rulemakers to develop normative, substance-attentive standards for choosing rule content from among the options located within the Enabling Act limits. In other words, Bone sees the difficulties in the substance-procedure relationship not just as a basis to cabin rulemaking, but to inform it. Those are very different questions that might best be kept separate. One can accept that the absence of any clear divide between substance and procedure makes it difficult to define the outer boundaries of court rulemaking without also accepting that Congress has directed the rulemakers—in the pursuit of "justness"—to attempt to determine and weight the policy choices animating the substantive laws that the rules will be used to enforce.

Fourth. Finally, Bone's proposal prompts us to consider whether the Rules Enabling Act strikes the right note in terms of delegated authority. Underlying Bone's thesis is, I think, a belief that the traditional procedural values are not sufficient to justify or guide rulemaking and that therefore rulemakers *ought* to work from a different set of instructions—one that includes some of the normative principles he suggests.[67] Within as-yet undefined delegation limits, Congress certainly might see fit to pass a new Rules Enabling Act along those lines. But let's not be too hasty to toss aside the traditional procedural values.

Rulemaking that flows from our Rule 1 ideals—the just, speedy, and inexpensive administration of the law—is not without its benefits.[68] As all three of our presenters noted, Congress is well aware of its power to legislate procedure directly and has become more active in doing so.[69] A uniform rule designed to promote efficiency and accuracy creates a clear baseline against

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Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications, 90 MINN. L. REV. 1303, 1314-15 (2006).

66. *See, e.g.*, Burbank, *supra* note 1, at 1128; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 287; Ely, *supra* note 52, at 722-27.

67. Bone, *supra* note 35, at ____.

68. FED. R. CIV. P. 1.

69. *See also* Marcus, *Reform*, *supra* note 7, at 940.

which Congress can superimpose—by substantive or procedural legislation—the types of substantive concerns Bone raises.[70] Indeed, I suspect that to be the type of dynamic that Congress envisioned when it re-authorized the Rules Enabling Act in 1988. And, of course, there is the persistent (and, I think, substantial) risk that overt consideration of substantive policies might erode the credibility of the rulemaking process while, ultimately, serving only to invite even greater meddling by Congress.[71]

At the risk of being selectively anecdotal, it also bears mentioning that modern rule-drafting and rulemaking bodies continue to invoke the norms of justness, speed, and efficiency. The American Law Institute recently approved certain parts of the Principles of the Law of Aggregate Litigation, including a section titled, "General Principles for Aggregate Litigation." As presented in April, section 1.03 provided:

> Aggregation should further the pursuit of justice under the law by:
> (a) promoting the efficient use of litigation resources;
> (b) enforcing substantive rights and responsibilities;
> (c) facilitating binding resolutions of civil disputes; and
> (d) facilitating the accurate and just resolution of civil disputes by trial and settlement.[72]

Though there are differences, these general principles bear a strong relation to the goals Professor Bone attributes to the original drafters and memorialized

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70. The recently-approved parts of the Principles of the Law of Aggregate Litigation offer this support:

> A policy of pursuing justice under the law efficiently also creates stable and appropriate expectations within legislative bodies. These bodies must expect routine, expeditious, and improving enforcement of the laws they enact. If and when they desire something other than this, they can, within broad limits, design new, generally applicable procedures themselves and require their application. Or, knowing how courts enforce laws and not wanting particular laws to be enforced in the usual way, Congress may establish special procedures intended to better serve its policies.

Principles of the Law of Aggregate Litigation § 1.03 cmt. a, at 50 (Tentative Draft No. 1, 2008). For a recent example of federal legislation that creates special procedural rules designed to address perceived enforcement problems in a specific substantive area, see the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. §§ 77-78).

71. *See* Carrington, *supra* note 53, at 2074-79; Geyh, *supra* note 28, at 1222-23; Marcus, *Reform*, *supra* note 7, at 939-40.

72. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (Tentative Draft No. 1, 2008). In response to comments from the floor, the Reporters indicated they would revise this section to emphasize the enforcement of rights *in accordance with law.*

in Federal Rule 1.[73] A more direct example is found in New South Wales's Civil Procedure Act of 2005. In a section titled "Overriding purpose," the Act states: "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."[74] While these few modern equivalents certainly do not establish that a procedural values approach is the only possible approach, or even the best possible approach, they do illustrate that the procedural values approach remains viable in the minds of many even in a world enlightened about the impact of procedure on substance.

All of this is not to say that rulemaking must lash itself to the mast of procedural values, cutting itself off from all other considerations lest they prove too tempting. Ignorance in the content of rulemaking is surely as great a sin as ignorance in the allocation of rulemaking power.[75] Nor is there any reason to operate in a "procedural values bubble"; nothing about a procedural values-driven approach precludes either the awareness or the consideration of complementary norms. What I do mean to say, though, is that the quest to define "good" rulemaking must begin by recognizing that it is within Congress's power to define what "good" means. And in determining how Congress might have defined "good"—either in 1934 or today—one must account for the historical evidence and policy reasons that would support a finding that Congress envisioned rules designed to promote a more traditional view of the so-called procedural values.

* * *

After seventy years, and in light of the criticisms raised during the past few decades, the current health of the federal rulemaking enterprise is a fair matter for debate. So too is its future. Important questions remain to be answered regarding the success of rulemaking today and the path that rulemaking will follow in the next thirty years. The symposium contributions of Professors Perschbacher and Bassett, Marcus, and Bone provide valuable insights into these questions and are sure to stimulate and inform the continuing dialogue.

In this Introduction, I have indulged the reference—first made by Professors Perschbacher and Bassett—to the French Revolution and the Thermidorian Reaction. Such conceits can turn quickly to silliness, but I find myself drawn back to it when I think about the rallying cry of the French Revolution: "Liberté! Egalité! Fraternité!" To the extent the Federal Rules of Civil Procedure have a rallying cry, it is found in Rule 1 and it is this: "Justness!

73. *See Bone*, *supra* note 36, at ____.

74. I can give you a hard copy or a cite to the website, your choice. Just let me know. [NTA: PLEASE CITE THE WEBSITE. THANK YOU.]

75. *Cf.* Burbank, *supra* note 54.

Speed! Inexpense!" While these terms are not to be found in the text of the Rules Enabling Act, they are, as Professor Carrington has noted, the "aims of that movement" and an "expression of an ideal."[76] And as guideposts for rulemaking, they are ideals which "in the main ha[ve] been faithfully observed by the rulemakers over the years."[77]

One is unlikely to hear those ideals shouted from the barricades these days. Indeed, in the eyes of some, they may be a construct made weary by time and familiarity.[78] Yet I think they remain a powerful call. Who doesn't want their procedural system to produce just results quickly and cheaply? If there is agreement among our contributors, it may be that the future of federal rulemaking depends not on finding new ideals but on fidelity to the ones we have (though of course they vary in how they define and assess fidelity). I hope it is not too glib to say that, if the rulemaking enterprise should fail in the next thirty years, it won't be for lack of an inspiring slogan.

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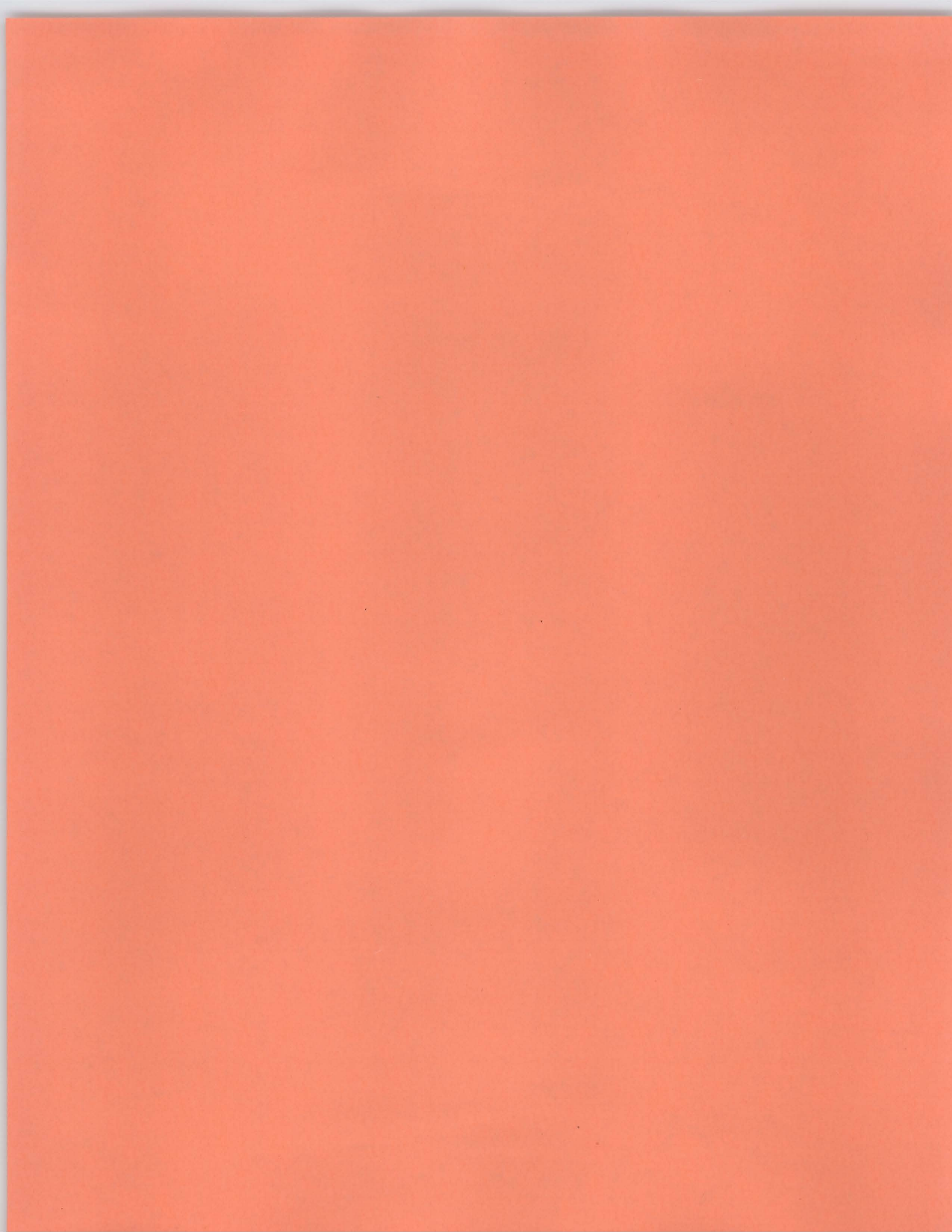
76. Carrington, *supra* note 66, at 300.
77. *See* WRIGHT & MILLER, *supra* note 59, § 1008.
78. *See* Marcus, *supra* note 54, at 813.



RENEWAL OF THE FEDERAL RULEMAKING PROCESS*

By Peter G. McCabe

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INTRODUCTION

The federal rules of practice and procedure regulate litigation in the federal courts and are designed "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." [FN1] The Federal Rules of Civil Procedure, in particular, have been described as "among the most significant accomplishments of American jurisprudence," [FN2] setting the standard "against which all other systems of procedure must be judged." [FN3] The success of the civil rules led to the establishment of federal rules for criminal, appellate, and bankruptcy procedure, as well as federal rules of evidence.

The process by which the federal rules [FN4] are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules." [FN5] The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees' drafts to the bench, bar, and public for comment; (3) fresh consideration of *1657 the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees' proposals; (5) promulgation of the proposals by the Supreme Court; and (6) "enactment" of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.

At various points over the last sixty years both Congress and the judiciary have acted to reaffirm and renew the rulemaking process, with the objective of making it more effective and more open. Significant organizational and procedural improvements have been made as a result both of self-evaluation efforts by the judiciary and criticisms from the bar and Congress. One recommendation in the *Proposed Long Range Plan for the Federal Courts*, [FN6] which was recently approved by the Judicial Conference of the United States, [FN7] reaffirms the judiciary's commitment to periodic, comprehensive reexaminations of the rulemaking process. [FN8] The Plan recommends that:

- rules of practice, procedure, and evidence should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act;
- the national rules should strive for greater uniformity of practice and procedure in the federal courts, but individual courts should have some limited rulemaking authority to account for differing local circumstances and to experiment with innovative procedures; and
- the Judicial Conference and the courts should seek significant participation in rulemaking by the

interested public and representatives of the bar, including federal and state judges. [FN9]

Part I of this Article provides a brief history of the federal rulemaking process. Part II describes the current rulemaking procedures, focusing on how they have been changed to address past criticisms. Part III discusses future initiatives in the rulemaking process.

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I. HISTORICAL BACKGROUND

Although there has been debate among scholars over the authority of the federal judiciary, vis-a-vis Congress, to promulgate procedural rules for the federal courts, [FN10] the matter was resolved by the Rules Enabling Act of 1934. [FN11] By virtue of the Act, Congress delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules. The legislation delegated to the Supreme Court the explicit power to prescribe rules for the district courts governing practice and procedure in civil actions. [FN12]

In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the first Federal Rules of Civil Procedure. [FN13] Over the next two years, the advisory committee widely circulated proposed drafts to the bench and bar for comment, and it made numerous changes to the drafts thanks to extensive assistance from the legal profession. [FN14] After the Supreme Court adopted the rules and Congress *1659 did not act to modify them, the civil rules took effect in September 1938. [FN15]

In 1940, Congress authorized the Supreme Court to promulgate rules governing criminal cases in the district courts. [FN16] The Supreme Court followed the same procedure it had used to prepare the civil rules. A distinguished advisory committee prepared and circulated draft rule proposals, received comments from the bench and bar, and submitted the proposed rules to the Court. [FN17] The Federal Rules of Criminal Procedure took effect, by operation of law, without congressional action in March 1946. [FN18]

In 1958, Congress enacted legislation transferring the major responsibility for the rulemaking function from the Supreme Court to the Judicial Conference of the United States. [FN19] The Conference was mandated to "carry on a continuous study of the operation and effect of the [federal] rules" and to recommend appropriate amendments in the rules. [FN20] The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference. [FN21]

Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees, to amend or create the civil, criminal, bankruptcy, appellate, and

admiralty rules. [FN22] The Standing Committee's mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees. [FN23]

The Admiralty Rules were merged into the Federal Rules of Civil Procedure in 1966. [FN24] The Federal Rules of Appellate Procedure took effect in 1968, [FN25] the federal Bankruptcy Rules became law in1973, *1660 [FN26] and the rules governing post-conviction collateral remedies for prisoners took effect in 1977. [FN27] The separate rules for misdemeanor and petty offense cases before magistrate judges were merged into the Federal Rules of Criminal Procedure in 1990. [FN28]

New proposed rules and amendments to the rules approved by the Supreme Court were accepted by Congress without change for approximately thirty-five years following promulgation of the Federal Rules of Civil Procedure. [FN29] The picture changed sharply in the 1970s, however, as a result of controversy surrounding the Federal Rules of Evidence.

Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence in 1965, and the Supreme Court transmitted the rules to Congress in 1972. [FN30] Immediate concern was expressed that the judiciary had exceeded its statutory authority on the grounds that: (1) the Rules Enabling Act, which authorized the Supreme Court to promulgate rules of "practice and procedure," was not broad enough to govern the promulgation of rules of evidence; and (2) the new rules had impermissibly overstepped the boundary between procedure and substance, particularly in attempting to supersede evidentiary privileges established by state law. [FN31]

Congress deferred the proposed rules indefinitely and held extensive hearings on them. Eventually, the Federal Rules of Evidence were revised by Congress and enacted into law by affirmative legislation. [FN32] The principal legislative revision was to eliminate the proposed federal evidentiary privileges, thereby continuing to leave the matter to federal common law and applicable state law. [FN33] Congress also amended the Rules Enabling Act to give the judiciary explicit authority to amend the Federal Rules of Evidence. [FN34] It provided, *1661 however, that no rule establishing, abolishing, or modifying a privilege has any force unless approved by an act of Congress. [FN35]

Following enactment of the Federal Rules of Evidence, Congress periodically intervened to delay, reject, or modify proposed federal rules. [FN36] The controversy over the evidence rules also evoked criticism directed at the procedures under which the new rules had been promulgated. Generally, the complaints were that the process was not sufficiently "open" and had not allowed for adequate public input. [FN37] Accordingly, one member of the House Judiciary Committee suggested that the time was ripe to reexamine the rulemaking process and possibly amend the Rules Enabling Act. [FN38]

Chief Justice Warren E. Burger, in his 1979 The State of the Federal Judiciary report, took note of the controversy and suggested that it was time to take a "fresh look" at the entire rulemaking process. [FN39] He requested that the Judicial Conference and the Federal Judicial Center, the judiciary's primary research arm, study the matter in light of the experience under the Rules Enabling Act. [FN40] In response, the Federal Judicial Center prepared a report to assist the Standing Committee on Rules of Practice and Procedure. [FN41] The report analyzed the strengths and weaknesses of the process and focused on those aspects of the process that had been singled out for criticisms and change. [FN42]

The Standing Committee conducted a comprehensive review of rulemaking procedures and instituted a number of changes. The innovations included making the records considered by the rules committees available to the public, documenting all changes made by the committees at the various stages of the process, and conducting public hearings on proposed amendments. The Conference also committed its procedures to writing and published them for the benefit of the bench and bar. [FN43]

In 1983, the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice initiated a comprehensive review of the rulemaking process. [FN44] The House Subcommittee conducted hearings in both the 98th and 99th Congresses, during which it invited comment on the rulemaking process and engaged in a productive dialogue with the Judicial Conference and the Standing Committee chairman. [FN45]

Following five years of study, hearings, and dialogue, the House subcommittee marked up a bill to codify formally some of the rulemaking procedures already being used by the Judicial Conference and also to require that all meetings of rules committees be open to the public and that minutes of the meetings be prepared. [FN46] The legislation ratified the Judicial Conference's authority to appoint a standing committee and appropriate advisory committees. [FN47]

The House version of the legislation specified "that each rules committee consist of 'a balanced cross section of bench and bar, and trial and appellate judges.'" [FN48] The judiciary endorsed this provision. [FN49] As eventually enacted, however, the legislation did not contain the requirement of a balanced cross section, merely providing for the committees to consist of trial judges, appellate judges, and members of the bar. [FN50]

One of the major objectives of the House sponsors of the legislation was to eliminate the "supersession" clause of the 1934 Act, providing that "all laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect." [FN51] It was asserted that the clause was unnecessary because its original purpose (to override various procedural rules scattered throughout the United States Code) had passed. [FN52] More importantly, it was argued that the provision was of questionable constitutional

validity in light of INS v. Chadha, [FN53] because the Rules Enabling Act authorizes the repeal of statutes without conforming to the requirements of Article I. [FN54] The Senate, however, did not accept the House provision, [FN55] and the Rules Enabling Act amendments were enacted in 1988 without deleting the supersession clause. [FN56]

The 1988 amendments also attempted to stem the proliferation of local rules of courts and to provide for more public participation in the adoption of local rules. The House subcommittee expressed particular concern that some local court rules were inconsistent with federal rules and statutes. [FN57] It noted, however, that the Judicial Conference had taken steps to deal with the problems of local rules by: (1) establishing a Local Rules Project to review all local rules, and (2) amending the national rules [FN58] to require that local court rules be prescribed only after giving appropriate public notice and an opportunity to comment. [FN59]

Congress codified these local rule requirements in the Rules Enabling Act. [FN60] It also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal operating procedures and make recommendations concerning them. [FN61] The legislation gave the judicial councils of the circuits authority to modify or abrogate any district court local rules and the Judicial Conference the authority to modify or abrogate the local rules of any court of appeals or other federal court except the Supreme Court. [FN62]

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Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990. [FN63] That legislation requires each district court to implement its own, individualized civil justice expense and delay reduction plan. [FN64]

II. CURRENT RULEMAKING PROCEDURES

Although many changes have been made in operating procedures, the rulemaking structure today is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules. [FN65] The Conference's Standing Committee supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice. [FN66]

The Standing Committee is assisted by five advisory committees, each of which is responsible for one set of federal rules, i.e., civil, criminal, appellate, bankruptcy, or evidence. [FN67] The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new

rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference.

A. Committee Membership

The committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a Reporter, a law professor with demonstrated *1665 expertise in the committee's subject area, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes. The Administrative Office of the United States Courts, through the Office of the Secretary and the Rules Committee Support Office, coordinates the operational aspects of the rules process, provides administrative and legal support to the committees, and maintains the committees' records.

During congressional hearings in the 1970s and 1980s, it was argued that the rulemaking committees were not broadly based and did not adequately reflect the diversity of the legal community. [FN68] In addition, there has been criticism that there are not enough practicing lawyers on the committees. [FN69] The present composition of the committees is as follows:

	Committees					
	App....	Bankr.	Civil	Crim.	Evid.	Standing
Attorneys and Professors						
Private Practice Att'ys	3	5	4	3	3	3
Government Att'ys	1	1	1	1	1	1
Law Professors	-	1	1	1	2	2
Federal Judges						
Circuit Judges	4	1	3	1	2	3
District Judges	-	2	3	5	2	5
Other Judges	-	5	-	1	1	-
Other						
State Chief Justice	1	-	1	1	1	1
Total	9	15	13	13	12	15

The advisory committee that drafted the original Federal Rules of Civil Procedure was comprised entirely of lawyers and professors. Judges were added to the committees shortly thereafter and eventually became *1666 a large majority on each committee. In the past few years, however, the number of attorneys vis-a-vis

judges on the committees has been increasing. Federal judges presently are a minority on three of the six committees, and they constitute about fifty percent of the membership of the committees as a whole.

The committees' membership is geographically balanced and increasingly represents different perspectives within the legal profession, including members of large and small law firms, government attorneys, "public interest" lawyers, teachers, federal defenders, and criminal defense attorneys. Diversity in membership has increased, but the primary criteria for membership remain professional ability and experience.

Commentators suggested that there be greater turnover in the membership of the committees. [FN70] This objective has been achieved. At present, members of the rules committees, as with almost all Judicial Conference committees, serve for terms of three years. [FN71] Only one reappointment is allowed. [FN72] Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three- year term. [FN73] The current chair of the Standing Committee is District Judge Alicemarie H. Stotler of the Central District of California, who was appointed by the Chief Justice in 1993.

Several of the committees invite persons with important and specialized knowledge to assist them as a resource at committee meetings. The appellate and bankruptcy committees, for example, have included a clerk of court in their deliberations for many years. The clerks are extremely helpful in identifying the practical impact of the rules on administrative operations and on case management. In addition, the bankruptcy committee invites the director of the U.S. trustee program to participate in committee meetings.

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B. Publication of Procedures

During the early 1980s, the Judicial Conference was criticized for not having published its rulemaking procedures. [FN74] In response, in 1983 the Standing Committee developed a written Statement of Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, which incorporated long-standing practices of the rules committees and adopted many suggested procedural improvements. [FN75] The publication requirement was codified in the 1988 amendments to the Rules Enabling Act. [FN76]

The rulemaking procedures are now published as an integral part of the public announcement of all proposed rule amendments when they are distributed to the bench and bar. A new easy-to-read pamphlet, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar, [FN77] is also included with all distributions to the public and is made available to bar groups and others as a

means of fostering knowledge about the rulemaking process and stimulating comments on the rules.

C. Soliciting Comments from the Public

A number of people complained that inadequate advance notice had been provided of proposed amendments to the rules, thereby depriving the public of a meaningful opportunity to shape the rules before promulgation. [FN78] In addition, it was said that the mailing list for distribution of proposed amendments was too limited. [FN79] Accordingly, proposals for amendments in the rules did not reach a sufficiently broad cross section of the legal profession.

Today, extensive efforts are made to reach all segments of the bench and bar, as well as organizations and individuals likely to be interested in or affected by proposed changes to the rules. The *1668 Administrative Office mails all rules proposals to about forty major legal publishing firms, and they are reprinted in advance sheets. They are also mailed to more than 10,000 persons and organizations on its rules mailing list, including:

- federal judges and other federal court officers,
- U.S. Attorneys and other Department of Justice officials,
- other federal government agencies and officials,
- federal defenders,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- any lawyer, individual, or organization who requests distribution.

In addition to circulating the full text of all proposed rule amendments and advisory committee notes, the Administrative Office now prepares "user- friendly" pamphlets summarizing the proposed amendments and highlighting the dates of scheduled public hearings and the cut off date for written comments. The pamphlets are distributed together with the full text of the amendments and advisory committee notes. The bench and bar are informed in all publications that further information and materials may be obtained from the Secretary and the Rules Committee Support Office, whose address and telephone number are provided.

To supplement the general mailings, the advisory committees have sought to obtain important input through special mailings to targeted segments of the legal profession and interested organizations. In September 1994, for example, the Advisory Committee on the Rules of Evidence solicited public comment on statutory changes to Federal Rules of Evidence 413, 414, and 415, dealing with

evidence of prior, similar acts in cases involving sexual assault or child molestation. [FN80] The mailing was sent to 900 professors of evidence, 40 women's rights organizations, and 1000 other interested individuals and organizations.

The goal of the committees is to stimulate greater participation by the bar in the rulemaking process by actively encouraging individuals and organizations to comment on specific amendments to the rules and to identify problems in the operation and effect of the rules generally. *1669 The public comments are extraordinarily helpful and are taken very seriously by the committees. They regularly result in improvements in the amendments, and have led to the withdrawal of proposed amendments. [FN81]

In addition to increasing the amount, readability, and distribution of printed information on the rules, the advisory committees seek input from the bar outside the context of specific pending amendments. The Advisory Committee on Civil Rules has invited bar organizations to send representatives to attend its meetings, and it has, in appropriate cases, solicited the views of lawyers and professors on preliminary proposals before they were drafted.

The advisory committees have also convened special meetings with lawyers and nonlawyers to assess the potential need for rule changes to certain discrete areas of practice. The civil advisory committee, for example, has invited knowledgeable, experienced lawyers to meet with it to explore the problems of class actions and mass tort litigation. The bankruptcy committee has met with chapter 13 lawyers and trustees to examine the impact of the bankruptcy rules on chapter 13 cases. It has also invited publishers to provide input on the bankruptcy forms.

D. Documentation of Changes

People had voiced complaints that the deliberations of the committees were not adequately documented and that it was difficult to discern the rationale for proposed changes to the rules and to discover the minority views of members. [FN82] Additionally, some expressed concern that proposed amendments were materially changed after they had been circulated for comment and that no opportunity for further comment had been provided. [FN83]

Under current procedures, each action taken by a committee with regard to a proposed amendment is documented and included in the public record. The advisory committees are required to submit a separate "Gap" report, summarizing the public comments and explaining any changes made following publication. The Standing Committee submits a report to the Judicial Conference setting forth the *1670 reasons for all proposed amendments and identifying any changes it made in the recommendations of the advisory committee. After the Conference approves amendments, the Administrative Office transmits to the Supreme Court the text of the proposed amendments, the advisory committee notes, pertinent portions from

the advisory committee and Standing Committee reports, and a special report identifying any controversial proposals and explaining the source and nature of the controversy.

If an advisory committee or the Standing Committee makes any "substantial" change in a rule after publication, it normally provides an additional period for public notice and comment. Changes more extensive than the original publication are republished. On the other hand, if a change is similar to, but less extensive than the original publication, it will not generally be republished. Similarly, purely technical changes and corrections are not normally published for comment.

E. Public Hearings

During the course of the controversy over adoption of the Federal Rules of Evidence in the early 1970s, there were complaints that the judiciary had not held public hearings on the proposed rules. [FN84] Written statements were seen as an inadequate substitute for the opportunity of the public to appear in person and engage in a face-to-face dialogue with decision makers. Today, public hearings are scheduled on all proposed changes to the rules. Where the subject matter of the changes is controversial, such as the 1992 amendments to Rule 26 of the Federal Rules of Civil Procedure, large numbers of individuals and organizations will ask to testify. On the other hand, many hearings attract few or no requests to testify and are canceled for lack of public interest.

F. Open Meetings

There had been criticism that the meetings of the Standing Committee and the advisory committees were not open to the public. [FN85] Until enactment of the 1988 amendments to the Rules Enabling Act, meetings of the Standing Committee and the advisory committees *1671 had generally been closed to the public. The 1988 amendments to the Rules Enabling Act require open meetings, but allow a committee to go into executive session for cause. [FN86]

All meetings of the rules committees are open to the public and are announced in advance in the Federal Register and leading legal publications. For the most part, though, public attendance is light, except when committees address controversial items. [FN87]

G. Open Records

There had been complaints that committee agendas and materials relied upon in promulgating rules were not made available to the public. [FN88] Filed comments were made available only to persons with a "legitimate purpose" in seeing them,

and minutes, reporters' notes, memoranda, and drafts were not made public until 1980. [FN89]

Today, all records are open and readily available from the Administrative Office, including minutes of committee meetings, suggestions and comments submitted by individuals and organizations, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters. In addition, the reports of the Standing Committee to the Judicial Conference and the minutes of Standing Committee and advisory committee meetings are available on-line through computer-assisted legal research.

All records more than two years old -- dating back to 1935 -- have been placed on microfiche and indexed. They are available for review either at the Administrative Office or at a government repository and may be purchased from a commercial service. Planning has begun on developing an electronic docket of all records and expanding the availability of materials electronically.

H. Length of the Process

The rulemaking process demands exacting and meticulous care in drafting proposed rule changes. It is time-consuming and involves a minimum of seven stages of formal input and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule, fourteen months of which is directly attributable to *1672 the built-in statutory period for review by the Supreme Court and Congress. This seven-step process is discussed below.

1. Initial consideration by the advisory committee

Proposed changes to the rules are initiated in writing by lawyers, judges, clerks of court, law professors, government agencies, or other individuals and organizations. The Secretary acknowledges each suggestion and distributes it to the appropriate advisory committee, whose Reporter analyzes it and makes appropriate recommendations for consideration by the committee. The suggestions and the Reporter's recommendations are placed on the committee's agenda and normally discussed at its next meeting. The Secretary now advises each person making a suggestion of its eventual disposition. When an advisory committee decides that a particular change in the rules has merit, it normally asks its Reporter to prepare a draft amendment to the rules and an explanatory committee note.

2. Publication and public comment

Once an advisory committee has voted initially to pursue a new rule or an amendment to the rules, it must obtain the approval of the Standing Committee, or

its chair, to publish the proposal for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

Once publication is approved, the Secretary arranges for printing and wide distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. The public is normally given six months to comment on the proposal. During the six-month comment period, one or more public hearings on the proposed changes are scheduled.

3. Consideration of the public comments and final approval by the advisory committee

At the end of the public comment period, the Reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of all the written comments and testimony.

If the advisory committee decides to proceed in final form, it submits the proposed rule or amendment to the Standing Committee for approval. Each proposal must be accompanied by a separate report summarizing the comments received from the public and explaining *1673 any changes made by the advisory committee following the original publication. [FN90] The advisory committee's report must also include minority views of any members who wish to have their separate views recorded. If, on the other hand, the advisory committee decides to make any substantial change in its proposal, it will republish it for further public comment.

4. Approval by the standing committee

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and its own report explaining any changes it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation made by the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

5. Judicial Conference approval

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If it approves the amendments, they are transmitted to the Supreme Court.

6. Supreme Court approval

The Supreme Court has seven months, from the time the proposed amendments are received from the Conference until May 1, to review them, prescribe them, and transmit them to Congress. [FN91]

7. Congressional review

Congress has a statutory period of at least seven months to act on any new rules or amendments prescribed by the Supreme Court. If Congress does not enact positive legislation to reject, modify, or defer the rules or amendments, they take effect as a matter of law on December 1. [FN92]
*1674
The lengthy process may be expedited when there is an urgent need to consider an amendment to the rules. This normally occurs when Congress has requested prompt consideration of a proposal or when legislation has been introduced in Congress to amend the rules directly by statute. The fourteen-month delay for review by the Supreme Court and Congress, however, is established by statute and cannot be reduced by the Judiciary. [FN93]

I. Supreme Court Review

It has been proposed that the Supreme Court be removed from the rulemaking process and that the rules be promulgated by the Judicial Conference. [FN94] The original version of the legislation that became the Rules Enabling Act amendments of 1988, for example, would have removed the Supreme Court from the rulemaking process. [FN95] The provision, however, was withdrawn after Chief Justice Burger informed the chairman of the House Judiciary subcommittee that "[t]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference." [FN96]

On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference. [FN97] Nevertheless, the Court has accorded serious, independent review to proposed amendments in the1990s, *1675 deferring a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure in 1991, [FN98] approving amendments to Rule 11 of the Federal Rules of Civil Procedure and five civil discovery rules [FN99] over three dissents in 1993, [FN100] and withholding part of the amendments to Rule 412 of the Federal Rules of Civil Procedure in 1994. [FN101] The Court's recent orders transmitting rules changes to Congress have specified that: "While the Court is satisfied that the required procedures have

been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." [FN102]

Although the length of the rulemaking process would be shortened by eliminating the role of the Supreme Court, the Court's enormous prestige clearly contributes to the legitimacy and credibility of the process.

III. CONTINUING RENEWAL EFFORTS

Most of the criticisms of the rulemaking process over the past twenty years have been addressed by procedural improvements made by the Judicial Conference and the 1988 amendments to the Rules Enabling Act. Nevertheless, the rules committees are continuing to examine other important procedural issues that have not been fully resolved.

A. Long Range Planning

The judiciary established a permanent long range planning process designed to identify the mission and future directions of the federal courts. The *Proposed Long Range Plan for the Federal Courts (Plan)* is the first major product of this planning process. With regard to the federal rules, the *Plan* encourages significant participation by the bar in *1676 the rulemaking process, exclusive adherence to the Rules Enabling Act process, and greater uniformity in federal practice and procedure. [FN103]

As part of the long range planning process, the Standing Committee on Rules of Practice and Procedure has appointed a long range planning subcommittee to conduct a study of the rulemaking process and make recommendations for procedural improvements. In addition, the advisory committees have initiated their own long range planning efforts. The Advisory Committee on Bankruptcy Rules, for example, has a standing subcommittee on automation that has been active in evaluating the impact of technology and in considering changes to the bankruptcy rules to take advantage of the benefits of automation. [FN104]

Likewise, the bankruptcy, appellate, and civil advisory committees have proposed and circulated for public comment proposed rule amendments that would allow individual courts to permit attorneys to file, sign, and verify documents with the court electronically. [FN105] If approved through the Rules Enabling Act process, the amendments would take effect on December 1, 1996. [FN106]

B. Greater Participation by the Bar

Despite substantial efforts to persuade attorneys to take the time to suggest improvements in the rules and comment on proposed amendments, the bar is

considerably less active than the committees would like. A handful of bar organizations and individuals respond regularly to requests for public comments by providing comprehensive, balanced analyses of proposed rules amendments. But most judges, lawyers, and professors simply do not respond to requests for comments, and those who do, generally oppose specific amendments on *1677 an ad hoc basis. [FN107] Accordingly, the public responses tend to be moderate in number and not necessarily representative of the bench and bar as a whole.

The *Proposed Long Range Plan for the Federal Courts* encourages an active partnership with the bar in the rulemaking process, both through membership of practicing attorneys on the rulemaking committees and greater participation by attorneys and bar associations in commenting on proposed amendments to the rules. [FN108] The *Plan* asks the rules committees to continue their outreach efforts in stimulating lawyers and bar associations to provide practical advice to the committees. [FN109]

As one of his many initiatives to improve judicial administration and service, Administrative Office Director L. Ralph Mecham established a Rules Committee Support Office in 1992 to provide legal and operational support to the Secretary and the rules committees and to provide a higher level of information services to the bar. To stimulate additional responses on rules issues by bar associations, individual lawyers, and academia, the mailing list for the rules is being expanded and rejuvenated. Every six months an additional 200 attorneys and 100 law professors selected at random will be added until an additional 2500 names are added. If no comments are received from addressees for three years, their names will be removed from the list and replaced with others.

The Standing Committee has also requested that the bar associations of each of the states designate an attorney as a point of contact to solicit and coordinate bar comments on proposed amendments. It is anticipated that the bar associations will encourage their members to discuss the rules and provide thoughtful and practical input *1678 to the advisory committees. It is also hoped that representatives of the bar will attend committee meetings and hearings.

In an effort to assess the practical operation of the rules, the Advisory Committee on Civil Rules scheduled two conferences in 1995 with members of the bar and academia to discuss class actions and the effectiveness of Rule 23 of the Federal Rules of Civil Procedure. In addition, members of the advisory committee will participate with attorneys and law professors in a conference to consider the strengths and weaknesses of the civil rules generally.

C. Frequency of Rule Changes

The 1958 statute assigning rulemaking responsibilities to the Judicial Conference requires the Conference to conduct a "continuous study of the operation and effect

of the general rules of practice and procedure." [FN110] Contemporary commentators suggested that the rules committees should have ample staff, should engage in grassroots surveys, and should conduct hearings, regional meetings, and discussions with the bar to monitor the rules in practice. [FN111] More recently, Justice Scalia stated that it is essential to have constant reform of the federal rules to correct emerging problems. [FN112]

The requirement to conduct a continuous study of the operation and effect of the rules, however, does not compel the conclusion that amendments should be frequent. Nor does it imply that all perceived problems with the rules and all conflicts in case law should be rectified. To the contrary, one of the most persistent criticisms of the rules process is that there are simply too many amendments. [FN113]

Some amendments have been criticized as mere "tinkering" with the rules. [FN114] And it has been suggested that there should be no change*1679 in a rule "unless there is substantial need for the change." [FN115] One critic even has argued for a moratorium on procedural law reform. [FN116]

Too many minor changes to the rules can lead to uncertainty and confusion in the bench and bar. [FN117] Constant changes, moreover, tend to undermine the stability and prestige of the rules as a whole. The challenge, therefore, is to weigh the benefits of a proposed improvement in the rules against the inherent cost of introducing change and possible uncertainty.

Some rule amendments, even though minor, are necessary to implement recent legislation, [FN118] to conform to modern language usage, [FN119] to correct improper statutory cross-references, [FN120] and to coordinate with pending congressional action. [FN121] As a general rule, however, there is now a reluctance to make changes to the rules unless they can be shown to be necessary to correct a serious problem in practice. Although many suggestions for improvements in the rules are received from the bench and bar to clarify or reconcile case law among the circuits, the advisory committees have generally opted to allow case law interpreting the rules take its course. [FN122]
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In September 1994, for example, the Advisory Committee on the Rules of Evidence published its tentative decisions not to amend twenty- five evidence rules. [FN123] The committee announced its philosophy that an amendment to a rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision. [FN124] The advisory committee pointed out that any amendment in the rules of evidence "will create new uncertainties as to interpretation and unexpected problems in practical application." [FN125]

To avoid the appearance of piecemeal changes, the advisory committees have begun to use the device of deferring and "batching" miscellaneous rule changes into

a single package of amendments. One possible option for the advisory committees to consider in the future is to prescribe a set schedule for submitting non-urgent rules changes -- perhaps every three to five years. This approach, although appealing, is complicated by unpredictable congressional activity that increasingly tends to interrupt any schedules or planning efforts. The 103d Congress, for example, passed a comprehensive bankruptcy reform law that will require rules changes, [FN126] and the 104th Congress, as part of the Republican "Contract with America," is considering a number of changes both in civil litigation and criminal law. [FN127]

It has also been recommended widely that rules changes be predicated on a sounder empirical basis. [FN128] To that end, the advisory committees have been increasing their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules. The Federal Judicial Center conducted a major study of Rule 11 of the Federal Rules of Civil Procedure before the Advisory Committee on Civil Rules proceeded with the 1993 amendments to that rule. [FN129] The civil advisory committee *1681 also asked the Federal Judicial Center to conduct studies on the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. The Advisory Committee on Criminal Rules considered the results of the Federal Judicial Center's study on cameras in the courtroom before approving amendments to Rule 53. [FN130]

D. Content, Organization, and Style of the Rules

Simplicity and uniformity were central goals of the drafters of the federal rules. [FN131] There are complaints, however, that the rules are no longer simple and uniform, but have become cumbersome, lengthy, and unpredictable. [FN132]

Commentators suggest that fundamental changes are needed and that it is time to take a fresh look at the rules. [FN133] It has also been suggested that it is time to reconsider the trans-substantive character of the rules, so that different categories of cases could be governed by different rules. [FN134] Obviously, such sweeping changes would take considerable time to effectuate and would require major input from the bar and academia, empirical research, substantial committee deliberations, and public hearings. The civil and bankruptcy advisory committees have, as part of their long range planning efforts, begun *1682 to think about whether changes of such magnitude will eventually be necessary or desirable.

Apart from changes to substance, there are opportunities to improve the style, consistency, and readability of the rules. Under the leadership of Judge Robert E. Keeton, former chairman of the Standing Committee, efforts have been initiated to redraft the body of rules in clear and concise English -- without substantive change

-- following the best conventions of modern statutory revision and the advice of legal writing teachers. There are no present plans to adopt the revised version of the rules, but at an appropriate point in the future -- perhaps integrated with a major revision of the rules -- the "re-styled" language could be substituted for the present language.

The Standing Committee is now assisted by a legal writing consultant and a style subcommittee, and it will publish a guide to clear and simple rule drafting. [FN135] The consultant works with the advisory committees and their reporters to promote clear and consistent language in proposed rules amendments.

As part of its long range planning efforts, the committees could also consider eventual integration of all five sets of federal rules into one. The result, for example, might be the consolidation of similar provisions that now appear separately in each of the rules, such as the provisions dealing with computation of time, [FN136] courts' and clerks' offices, [FN137] and local rules. [FN138]

E. The Judiciary and Congress

The success of the rulemaking process relies on a delicate balance of authority and continuing cooperation between the judicial and legislative branches of the government. The Rules Enabling Act of 1934, as reaffirmed by Congress in 1988, establishes a statutory structure under which the judiciary prescribes rules of procedure, practice, and evidence for the federal courts, after giving the bench, bar, and public a generous opportunity for input. Congress then retains the ultimate authority to accept, reject, amend, or defer proposed amendments to the rules. The process works exceedingly well when the procedures by which rules are crafted are credible and when mutual respect prevails between the two branches. *1683

The credibility of the rulemaking process was seriously questioned during the 1970s' controversy over the Federal Rules of Evidence. Complaints were made that proceedings before the rules committees had been closed and that changes had been made in the proposals without public notice or input. Complaints about the procedures, combined with concerns that the rulemakers had exceeded their authority and abridged substantive rights, led opponents to petition Congress to defer or reject the rules. [FN139]

The credibility of rulemaking procedures has been enhanced by its current openness and accessibility. [FN140] When proposed changes to the rules are now submitted to Congress, an extensive public record has been developed to support the changes, including careful consideration by expert advisory committees, public comments, public hearings, and four levels of review. Members of Congress can be assured that the changes received thorough consideration and that all interested parties had an opportunity to comment, both in writing and at hearings. By

comparison, it is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review.

Congress has a legitimate interest in federal rule amendments because even procedurally neutral rules may affect substantive rights, may give a practical advantage to one type of litigant over another, and may require adjustment of comfortable habits and practices. [FN141] Persons and organizations displeased with proposed amendments, accordingly, are likely to exercise their political rights by encouraging Congress to reject or modify specific amendments. Congress, of course, is free under the Rules Enabling Act to make its own independent judgment on the merits of any proposal, but it should -- and normally does -- give considerable deference to rules amendments prescribed by the Supreme Court. [FN142]

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As the *Proposed Long Range Plan for the Federal Courts* points out, however, "[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act." [FN143] In the 103d Congress, for example, at least thirteen provisions were introduced to amend the federal rules without following the prescribed statutory procedures.

Most of the provisions dealt with matters of considerable political interest, such as victims' rights, [FN144] evidence in sexual assault and child molestation cases, [FN145] and other criminal law issues. [FN146] For some controversial social policy issues, it is inevitable -- or desirable -- to have policy established by the legislature. [FN147] By avoiding the Rules Enabling Act process entirely, however, Congress loses the benefit of the extensive record developed by the rules committees, including the public comments and professional review by judges, lawyers, and law professors. Moreover, recent experience shows that some legislation amending the rules may be enacted without any hearings at all, without public input, and without thoughtful review by the bench and bar.

Two examples from the 103d Congress illustrate contrasting ways in which Congress has dealt with controversial statutory amendments to the rules. In the Violent Crime Control and Law Enforcement Act of *1685 1994, [FN148] Federal Rule of Evidence 412 was completely revised and new Rules 413, 414, and 415 were added. The former received substantial public input and careful review by bench and bar. The latter did not.

The proposed revision of Rule 412, commonly known as the "rape shield" rule, was first included in comprehensive criminal legislation introduced in the Senate. [FN149] It was designed to extend to all criminal cases and all civil litigation the rule's long-standing prohibition against admitting evidence of a victim's past sexual behavior in a case where the defendant has been accused of a crime of sexual abuse. After the Senate bill was introduced, the judiciary committees of both the

House and the Senate asked the Judicial Conference to consider the merits of the proposed rule on an expedited basis. [FN150]

The Advisory Committee on the Rules of Evidence drafted a substantially improved version of the Senate rule, circulated it for public comment, and conducted a public hearing. [FN151] The carefully crafted, revised rule met with overwhelming public approval, [FN152] including approval from women's rights groups, [FN153] and was subsequently adopted by the advisory committee, the Standing Committee, and the Judicial Conference. [FN154] As a result, the House decided not to include a revision of Rule 412 in its version of the crime legislation and chose, instead, to let the rule drafted by the advisory committee take effect in accordance with the normal operation of the Rules Enabling Act. [FN155]

In contrast to the cooperation between Congress and the judiciary in Rule 412, new Federal Rules of Evidence 413, 414, and 415 were added as floor amendments to the Senate crime control bill without public*1686 comment or hearings and without communication with the rules committees. [FN156] The new rules will admit evidence of a defendant's past similar acts in a criminal or civil case involving a sexual assault or child molestation offense "for its bearing on any matter to which it is relevant." [FN157] The rules contain no reference to Federal Rule of Evidence 403, which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless delay. Neither do they reference the hearsay provisions of Article VIII of the Federal Rules of Evidence. Congressional conferees added a provision to the Senate version of the bill specifying that the new rules would take effect 150 days after enactment, unless the Judicial Conference within that period recommends against them or submits alternate recommendations, in which case the effective date of the rules will be delayed for an additional 150 days. [FN158]

As a practical matter, the only restraints on Congress are self-imposed. They include the existence of the Rules Enabling Act, which has codified a process of openness and inter-branch coordination; the ordinary respect that one branch of government owes the others; and the quality of the work product of the rulemaking process. Obviously, political and social policy imperatives may tempt legislators to bypass the objective and orderly process of the rulemakers in favor of quick and popular results. As the recent experience with Rule 412 shows, however, legislative objectives can be achieved -- with a substantially superior product and in a reasonable time -- *1687 through adherence at least to the spirit of the Rules Enabling Act.

On occasion, members of Congress work cooperatively with the rules committees, deferring legislative proposals in order to give the rules committees the opportunity to consider them as part of the rulemaking process. [FN159] Congress also has the option of requesting that the Judicial Conference study a particular subject and

report its findings and recommendations. The 1994 crime control legislation, for example, asked the Judicial Conference to evaluate and report on whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications between sexual assault victims and their therapists or counselors will be adequately protected in federal court proceedings. [FN160]

Recent experience, thus, suggests that a de facto dual track procedure might emerge to deal with rules amendments. On the one hand, the great majority of rules changes would continue to be handled through the Rules Enabling Act procedure. On the other hand, proposed changes with political implications might be referred by the judiciary committees of Congress to the rules committees of the Judicial Conference for consideration on an expedited basis.

F. National Uniformity and Local Rules

Local court rules have been criticized by Congress and commentators as a threat to the goal of uniform, simple rules of federal practice and *1688 a serious trap for lawyers. [FN161] Criticism has also been directed at the sheer number of local rules, which makes it difficult for lawyers to practice effectively in more than one jurisdiction. [FN162] It has been argued, too, that some local rules are inconsistent with the national rules. [FN163]

The 1988 amendments to the Rules Enabling Act were designed in part to restrict the use of local rules. They set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules. [FN164] Nevertheless, there are more than 5000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements. [FN165]

The Standing Committee established a Local Rules Project in 1985 to review the local rules of the district courts and the rules of the courts of appeals. [FN166] The project's analysis of the rules and internal operating procedures of the courts of appeals led the Advisory Committee on Appellate Rules to propose various amendments to the Federal Rules of Appellate Procedure that substitute a single, national rule for local variations. [FN167] The Local Rules Project has also informed the district courts of problems with their local rules, including inconsistencies with national rules or statutes, and it has devised a uniform numbering system for local civil rules keyed to the numbering of the national rules. Through voluntary cooperation with the courts and the circuit judicial councils, progress is being made toward reducing the number of local rules and improving their content. [FN168]

Federal rule amendments are pending in the Supreme Court that would require local court rules to conform to any uniform numbering system *1689 that the Judicial Conference may prescribe, thereby making it easier for an increasingly

national bar to locate a local rule that applies to a particular procedural issue. [FN169] The amendments would also provide that no local rule imposing a requirement of form may be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. [FN170] Finally, the rules would prohibit a court from imposing sanctions or other disadvantages for noncompliance with any requirement not set forth in federal law, federal rule, or local court rule, unless the alleged violator has been furnished with actual notice of the requirement in the particular case. [FN171]

The Civil Justice Reform Act of 1990 has been seen as an even greater threat to uniformity of federal practice. [FN172] The Act encourages each court to experiment and innovate procedurally, taking into account the assessments and recommendations of an advisory group of local lawyers and litigants. [FN173] It requires the courts to consider six case management "principles and guidelines" prescribed in the statute and authorizes them to include in their plan an additional five "techniques" of litigation management and cost and delay reduction. [FN174] The principles, guidelines, and techniques set forth in the Act, if adopted by a district court, have been claimed to supersede certain provisions of the Federal Rules of Civil Procedure. [FN175]

Some commentators argue that the Civil Justice Reform Act has resulted in much greater "balkanization" [FN176] of civil practice and procedure among the ninety-four district courts. In addition, the December 1, 1992 amendments to Federal Rule of Civil Procedure 26,dealing *1690 with pretrial disclosure and discovery, authorize the district courts individually to "opt out" of its provisions, thereby adding further variations to practice among the district courts. [FN177]

The Civil Justice Reform Act, however, contemplates a possible return to greater national uniformity following a review of the results of its mandated pilot programs. The Judicial Conference will consider the results of a comprehensive empirical study assessing the extent to which costs and delays will have been reduced as a result of the Act's pilot programs and experimentation. [FN178] The Conference must submit a report to Congress by December 31, 1996, recommending whether the Act's principles and guidelines should be made mandatory and incorporated in the federal rules. The Conference is further required to "initiate" appropriate changes to the federal rules to implement any changes recommended. [FN179]

Can greater national uniformity in federal practice and procedure be achieved? Probably so -- but not before the period of experimentation and evaluation required by the Civil Justice Reform Act has been concluded. *The Proposed Long Range Plan for the Federal Courts* recognizes that some local rules are appropriate to account for differing local conditions and to allow experimentation with new procedures. [FN180] It declares, however, that the long term emphasis of the courts should be on promoting nationally uniform rules of practice and procedure. [FN181] To this end, the Plan calls for the Judicial Conference and the circuit

judicial councils to exercise their statutory authority [FN182] to review local rules and reduce the number of *1691 local rules and standing orders. [FN183]

CONCLUSION

The organizational structure and the procedural approach of the rulemaking process are largely accepted as fundamentally sound by Congress, the bench, and the bar. Nevertheless, specific procedural aspects of the process have been criticized in recent years. In response, the process has been reexamined and periodically renewed as part of: (1) the Judicial Conference's "fresh look" at the process in the 1980s; (2) the five-year review of rulemaking by Congress that culminated in the 1988 amendments to the Rules Enabling Act; and (3) the judiciary's ongoing long range planning efforts.

Enormous progress has been made toward opening the rulemaking process and to stimulating participation by the bench, bar, academia, and the public. All activities of the rules committees are documented and readily accessible. Several important opportunities and challenges, however, remain to be addressed by the rules committees. The most common complaints are that the rules are not as simple, well written, and predictable as they once were and that federal practice is far less uniform than it should be. Moreover, Congress on occasion does not adhere to the time-tested and orderly process established by the Rules Enabling Act.

The newly approved *Long Range Plan for the Federal Courts* recognizes these problems and calls upon the judiciary to place greater emphasis on adopting rules that promote simplicity in procedure, fairness in administration, and the just, speedy, and inexpensive determination of litigation. It also calls for adherence to the Rules Enabling Act process, greater uniformity in federal practice, fewer local rules, and greater participation by the bar in the rulemaking process. The recommendations of the *Plan*, together with ongoing scrutiny by the bench, bar, academia, Congress, and the public, will ensure the continuing renewal of the federal rulemaking process.

[FNa]. J.D., Harvard Law School; A.B., Columbia University. Assistant Director for Judges Programs, Administrative Office of the United States Courts and Secretary to the Judicial Conference Standing Committee on Rules of Practice and Procedure. The views expressed in this Article are the author's own.

[FN1]. 28 U.S.C. s 331 (1988).

[FN2]. Rules Enabling Act: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 12 (1983 & 1984) [hereinafter 1983-84 Hearings] (statement of Judge Edward Thaxter Gignoux, Judicial Conference of the United States). The success of the Federal Rules of Civil Procedure has been described as "quite phenomenal." Charles A. Wright, Law of Federal Courts s 62, at 429 (5th ed. 1994); see also Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U. Pa. L. Rev. 2237, 2237 (1989) (describing Rules as "a major triumph of law reform"); Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1905-07 (1989) (describing Rules as a "great success" and cautioning against utilizing Rules to erect barriers to courts).

[FN3]. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure , s 1005 (2d ed. 1987). See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988); Howard Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A. J. 579, 579 (1975).

[FN4]. The term "federal rules" is used to collectively describe the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

[FN5]. Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts recommendation 30, at 54 (2d prtg. 1995) [hereinafter 1995 Proposed Long Range Plan]; see also infra note 7.

[FN6]. 1995 Proposed Long Range Plan , supra note 5, at 54; see also infra note 7.

[FN7]. 60 Fed. Reg. 30,317 (1995). The Judicial Conference's Long Range

Planning Committee prepared the Plan following consultation with the other Conference committees, wide distribution within and outside the judiciary, and public comments and hearings.

[FN8]. See, e.g., Winifred R. Brown, Federal Judicial Ctr., Federal Rulemaking: Problems and Possibilities (1981); Warren E. Burger, The State of the Federal Judiciary, 1979, 65 A.B.A. J. 358, 360 (1979); Symposium: The Rule-Making Function and the Judicial Conference of the United States, 21 F.R.D. 117 (1957) [hereinafter Symposium].

[FN9]. See 1995 Proposed Long Range Plan , supra note 5, at 54.

[FN10]. See, e.g., Wright & Miller , supra note 3, s 1001; see generally Joseph R. Biden, Jr., Congress and the Courts: Our Mutual Obligation, 46 Stan. L. Rev. 1285 (1994); Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 291 (1958); Linda S. Mullenix, The Counter- Reformation in Procedural Justice, 77 Minn. L. Rev. 375 (1992) [hereinafter Mullenix, Counter-Reformation]; Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283 (1993); Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599 (1926); John H. Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).
The Supreme Court recognizes the ultimate power of Congress to regulate the practice and procedure of federal courts and has declared that Congress may exercise that power by delegating it to the judiciary to make rules not inconsistent with the Constitution or federal statutes. See Hanna v. Plumer, 380 U.S. 460, 472-74 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).
Judge Weinstein points out that rulemaking falls within an area where activities of the legislative and judicial branches merge and that historically there has been a "practical accommodation" between the two branches. Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 916, 922 (1976). Judge Weinstein's law review article is an abbreviated version of his book. See Jack B. Weinstein, Reform of Court Rule-Making Procedures (1977).

[FN11]. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. ss 331,2071-77 (1988 & Supp. V 1993)); see also Hanna, 380 U.S. at 472-74.

[FN12]. 28 U.S.C. s 331 (1988 & Supp. V 1993). While the 1934 Act applied

explicitly only to civil actions at law, the Court had long-standing rulemaking authority over equity and admiralty practice. See, e.g., Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

[FN13]. Order of June 3, 1935, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (ordering committee "to prepare and submit to the Court a draft of a unified system of rules").

[FN14]. Final Report of the Advisory Committee on Rules for Civil Procedure , at V (Nov. 4, 1937).

[FN15]. Fed. R. Civ. P. 86(a).

[FN16]. Act of June 29, 1940, ch. 445, 54 Stat. 688. This Act was superseded by the Rules Enabling Act amendments of 1988 and is now incorporated in 28 U.S.C. s 2072(a) (1988). The Court had been given authority in 1933 to prescribe rules for criminal proceedings after verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904.

[FN17]. Report of the Advisory Committee on Federal Rules of Criminal Procedure (1944).

[FN18]. Fed. R. Crim. P. 59.

[FN19]. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. s 331 (1988 & Supp. V 1993)).

[FN20]. Id. s 331.

[FN21]. 28 U.S.C. ss 2072, 2073.

[FN22]. Judicial Conference of the U.S. , Reports of the Proceedings of the Judicial Conference of the United States 6-7 (1958).

[FN23]. Id.; see also Albert B. Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772, 772 (1961).

[FN24]. 383 U.S. 1029 (1966).

[FN25]. 389 U.S. 1063 (1968).

[FN26]. 411 U.S. 989 (1973). Statutory authority to promulgate bankruptcy rules was provided in 1964. Act of Oct. 3, 1964, Pub. L. No. 88- 623, s 1, 78 Stat. 1001 (codified as amended at 28 U.S.C. s 2075 (1988)).

[FN27]. Act of Sept. 28, 1976, Pub. L. No. 94-426, s 1, 90 Stat. 1334 (codified as amended at 28 U.S.C. s 2254, 2255 (1988 & Supp. V 1993)).

[FN28]. Fed. R. Crim. P. 58. This rule was added in 1990 and essentially restated the prior misdemeanor rules.

[FN29]. Between 1937 and 1972, the Supreme Court transmitted new rules or rules amendments to Congress on 14 occasions.

[FN30]. Order of Nov. 20, 1972, 56 F.R.D. 183, 184 (S. Ct. 1972).

[FN31]. See H.R. Rep. No. 422, 99th Cong., 1st Sess., 12-14, 20-21 (1985); Dissent of Justice Douglas to submission of the proposed Federal Rules of Evidence, 409 U.S. 1132 (1973); see also Charles A. Wright, Book Review of Jack B. Weinstein, Reform of Court Rule-Making Procedures, 9 St. Mary's L.J. 652, 653-54 (1978) [hereinafter Wright, Book Review].

[FN32]. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 40 U.S.C. s 472 (1988)).

[FN33]. See Fed. R. Evid. 501.

[FN34]. 28 U.S.C. s 2074(b) (1988).

[FN35]. Id.

[FN36]. A list of the instances of congressional intervention is set forth in H.R. Rep. No. 422, supra note 31, at 8-9. Most recently, in 1994, Congress took the unprecedented step of enacting revised Federal Rule of Evidence 412 that had been approved by the Judicial Conference, enacting portions of the Conference proposal that had been withheld by the Supreme Court. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, s 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.).

[FN37]. See Weinstein , supra note 10, at 316-17; Lesnick, supra note 3, at 580-81.

[FN38]. William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J . 1203, 1207 (1975).

[FN39]. Burger, supra note 8, at 360.

[FN40]. Id. The functions of the Federal Judicial Center are set forth generally at 28 U.S.C. s 620.

[FN41]. See Brown , supra note 8.

[FN42]. See Brown , supra note 8.

[FN43]. See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983).

[FN44]. See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988) (describing subcommittee's review of rulemaking process from 1983 to 1988).

[FN45]. See 1983-84 Hearings, supra note 2; Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Hearings].

[FN46]. See H.R. Rep. No. 889, supra note 44, at 3-4. Congress eventually enacted the bill. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

[FN47]. 28 U.S.C. s 2073(a)(2)(b); see also H.R. Rep. No. 889, supra note 44, at 3.

[FN48]. See H.R. Rep. No. 889, supra note 44, at 3.

[FN49]. 1985 Hearings, supra note 45, at 248 (statement of Judge Edward Thaxter Gignoux).

[FN50]. See 28 U.S.C. s 2073(a)(2).

[FN51]. Id. s 2072(b).

[FN52]. See H.R. Rep. No. 889, supra note 44, at 28.

[FN53]. 462 U.S. 919 (1983).

[FN54]. See H.R. Rep. No. 889, supra note 44, at 28; see also H.R. Rep. No. 422, supra note 31, at 16-17. In Chadha, the Court held that the one-house veto provision of the Immigration and Naturalization Act, under which either the House or the Senate could by resolution invalidate an executive branch decision to allow a deportable alien to remain in the United States, was unconstitutional because Article I of the Constitution requires all legislation to be passed by both the House and the Senate and either signed by the President or repassed by both the House and the Senate over the President's veto. See INS v. Chadha, 462 U.S. 919, 956-59 (1983).

[FN55]. See H.R. Rep. No. 889, supra note 44, at 3.

[FN56]. Judicial Improvements and Access to Justice Act, Pub. L. No. 100- 702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. ss 2071- 2075 (1988 & Supp. V 1993)).

[FN57]. See H.R. Rep. No. 422, supra note 31, at 14-15, 17; see also Daniel R. Coquillette et al., The Role of Local Rules, 75 A.B.A. J. 62, 64- 65 (1989); Stephen N. Subrin, Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. Pa. L. Rev. 1999, 2018-26 (1989).

[FN58]. Fed. R. Civ. P. 83; Fed. R. Crim. P. 57 .

[FN59]. See H.R. Rep. No. 889, supra note 44, at 28-29.

[FN60]. 28 U.S.C. s 2071(b) (1988).

[FN61]. Id. s 2077(b) (Supp. V 1993).

[FN62]. Id. ss 331, 2071(c) (1988).

[FN63]. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. ss 471-482 (Supp. V 1993)). The impetus for the Rules Enabling Act amendments of 1988 came from the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. See supra notes 44-56 and accompanying text. The driving force behind the Civil Justice Reform Act was the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden, Jr. See, e.g., 136 Cong. Rec. S. 407, S. 414 (daily ed. Jan. 25, 1990)

(statement of Sen. Biden).

[FN64]. 28 U.S.C. ss 471, 472 (Supp. V 1993); see Part III, infra; see also Carl Tobias, Improving the 1988 and 1990 Judicial Improvements Acts, 46 Stan. L. Rev. 1589 (1994) (discussing inconsistencies between 1988 and 1990 statutes).

[FN65]. The 1988 amendments to the Rules Enabling Act codified the committee structure established by the Conference in 1958. See 28 U.S.C. s 2073(a), (b) (1988).

[FN66]. Id. s 331.

[FN67]. The Advisory Committee on the Rules of Evidence was discharged in 1975 and reestablished in 1993. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 80 (1992) [[hereinafter 1992 Judicial Conference Reports].

[FN68]. See H.R. Rep. No. 422, supra note 31, at 24; American Bar Association, Policy on the Rules Enabling Act, reprinted in 1983-84 Hearings, supra note 2, at 46, 51; Lesnick, supra note 3, at 581.

[FN69]. The American Bar Association, for example, has proposed that "practicing lawyers" comprise a majority of the rules committees. Resolution of the ABA House of Delegates, Aug. 9-10, 1994.

[FN70]. See, e.g., 1985 Hearings, supra note 45, at 64 (statement of the American Bar Association).

[FN71]. Judicial Conference of the U.S., Reports of Proceedings of the Judicial Conference of the United States 60 (1987) [hereinafter 1987 Judicial Conference Reports] (establishing current membership policies). It has been suggested that the terms of office of committee chairs and members, once viewed as too long in the rules context, now might not be long enough. See 1995 Proposed Long Range Plan , supra note 5, recommendation 46, at 73.

[FN72]. See 1987 Judicial Conference Reports , supra note 71, at 60.

[FN73]. See 1987 Judicial Conference Reports , supra note 71, at 60.

[FN74]. See Lesnick, supra note 3, at 580; see also 1985 Hearings, supra note 45, at 57, 70-71 (statement of Professor Paul F. Rothstein, American Bar

Association); 1983-84 Hearings, supra note 2, at 87 (statement of Rep. Kastenmeier); id. at 43-44 (statement of James F. Holderman, American Bar Association).

[FN75]. See Rules of Civil Procedure, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983). The statement, however, did not include a requirement of open committee meetings.

[FN76]. See 28 U.S.C. s 2073(a)(1) (1988).

[FN77]. Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar (1993).

[FN78]. See 1983-84 Hearings, supra note 2, at 46 (statement of the American Bar Association's Criminal Justice Section); id. at 36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group).

[FN79]. See 1985 Hearings, supra note 45, at 47 (statement of Professor Paul F. Rothstein, American Bar Association).

[FN80]. Congress enacted the new evidence rules as part of the Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

[FN81]. For example, the Advisory Committee on Criminal Rules deferred action on proposed amendments to Criminal Rules 10 and 43 in response to generally negative written comments and public testimony. The proposed amendments would have permitted the use of video conferencing in arraignments and in other pretrial sessions when the accused was not present in the courtroom. H.R. Doc. No. 65, 104th Cong., 1st Sess. 15-16 (1995).

[FN82]. See Lesnick, supra note 3, at 580.

[FN83]. See Wright, supra note 31, at 656.

[FN84]. See, e.g., 1983-84 Hearings, supra note 2, at 44 (statement of James F. Holderman, American Bar Association); Lesnick, supra note 3, at 580.

[FN85]. See, e.g., 1983-84 Hearings, supra note 2, at 34-36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group) (describing process as "secretive"); id. at 125-28 (statement of Richard M. Schmidt, Jr., General

Counsel, American Society of Newspaper Editors).

[FN86]. 28 U.S.C. s 2073(c) (1988). The authority has been exercised rarely.

[FN87]. The April 1994 meeting of the Advisory Committee on Criminal Rules, which included a discussion of cameras in the courtroom, was televised on C-SPAN.

[FN88]. 1983-84 Hearings, supra note 2, at 34, 35 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

[FN89]. See Brown, supra note 8, at 23, 27; cf. 1983-84 Hearings, supra note 2, at 36-39 (statement of Alan B. Morrison, Director Public Citizen Litigation Group) (noting that filed comments were not widely read).

[FN90]. This report is commonly known as the "Gap" report. See supra Part II.D (discussing process of "Gap" report).

[FN91]. See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

[FN92]. See id. The effective date of the Federal Rules of Bankruptcy Procedure (and other procedural requirements) were made consistent with the other federal rules by the Bankruptcy Reform Act of 1994. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, s 104(e), (f), 1994 U.S.C.C.A.N. (108 Stat.) 4106. Previously, the effective date had been 90 days after the Chief Justice reported the changes to Congress, i.e., about August 1. See 28 U.S.C. s 2075 (1988).

[FN93]. See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

[FN94]. See Weinstein , supra note 10, at 96-104, 147-49; see also Amendments to Rules of Civil Procedure for the U.S. District Courts, 374 U.S. 861, 869-70 (1963) (statement of Justices Black and Douglas) (opposing submission of proposed amendments to the Federal Rules of Civil Procedure); Reporter's Note on Order of Nov. 20, 1972, 409 U.S. 1132, 1133 (1963) (Douglas, J., dissenting) (arguing that Court is "mere conduit" to Congress and its approval of rules amendments is only perfunctory).

[FN95]. H.R. 4144, 98th Cong., 1st Sess. (1983).

[FN96]. Letter from Warren E. Burger, Chief Justice of the United States, to Chairman Robert W. Kastenmeier, reprinted in 1983-84 Hearings, supra note 2,

at 195. The Conference of Chief Justices of the States also opposed elimination of a role for the Supreme Court, arguing that "the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and ... should be vested only in the Supreme Court itself." Letter of March 6, 1984 from Connecticut Chief Justice John A. Speziale to Robert W. Chairman Kastenmeier, reprinted in 1983-84 Hearings, supra note 2, at 231.

[FN97]. In voting to prescribe the 1993 amendments to the Federal Rules of Civil Procedure, Justice White stated that the Court should defer to the Judicial Conference and its committees if they have a rational basis for the proposed amendments to the rules. Justice White saw the Court's role as limited to transmitting the Judicial Conference's recommendations without change and without careful study, as long as the rules committee system has acted with integrity. See Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. s 2072, 113 S. Ct. 476, 575, 578-79 (1992) [hereinafter Amendments to the Federal Rules of Civil Procedure] (statement of Justice White).

[FN98]. Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States to the U.S. Congress, 500 U.S. 964 (1991) (transmitting amendments to Federal Rules of Criminal Procedure).

[FN99]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 478 (granting order approving amendments to Federal Rules of Civil Procedure).

[FN100]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581-87 (Scalia, Thomas, Souter, J.J., dissenting).

[FN101]. Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. s 2076, 114 S. Ct. 682, 684- 85 (1994) [hereinafter Communication from the Chief Justice] (noting in letter to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, that Court withheld Rule 412); see infra notes 148-58 and accompanying text.

[FN102]. See Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), reprinted in Amendments to the Federal Rules of Civil Procedure, supra note 97, at 477.

[FN103]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30, at 54.

[FN104]. As a result of the subcommittee's efforts, Rule 9036 of the Federal Rules of Bankruptcy Procedure took effect on August 1, 1993, authorizing the bankruptcy courts, or their designees, to send required notices by electronic means, rather than by mail, with the consent of the recipients. Fed. R. Bankr. P. 9036. The rule is designed to expedite cases and reduce costs to litigants and the courts by allowing creditors to receive information on meetings of creditors, discharges, and other events by electronic transmission on their own computer terminals. Id. advisory committee's note.

[FN105]. See Fed. R. App. P. 25(a)(2)(D) (proposed amendments); Fed. R. Bankr. P. 5005(a)(2) (proposed amendments); Fed.R.Civ.P. 5(e) (proposed amendments), in Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 156 F.R.D. 339, 15, 113 (1994) [hereinafter Proposed Amendments].

[FN106]. See 28 U.S.C. s 2074(a) (1988 & Supp. V 1993).

[FN107]. Professor Hazard has suggested that most members of the bar and the public have little that is worth saying about procedural rules and do not take advantage of the abundant opportunity they have to provide input. Geoffrey C. Hazard, Jr., Undemocratic Legislation, 87 Yale L.J. 1284, 1291 (1978) (reviewing Weinstein , supra note 10).

[FN108]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55.

[FN109]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55. In proposing the 1958 legislation that required the Judicial Conference to conduct a "continuous study of the operation and effect of the [federal] rules," it was contemplated that the bar would have an active and important part in formulating the rules. "[E]very member of the bar [[should have] an ample opportunity to set forth his views, have them debated, and have them decided." Symposium, supra note 8, at 125 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit). "What ... lawyers expect and have a right to expect is an opportunity to state [their] view and assurances they will be given consideration." Id. at 120 (remarks of Thomas Scanlon, President of the

Seventh Circuit Bar Association, former Chairman of the Committee on Civil Procedure of the Indiana Bar Association); see also id. at 118 (statement of Chief Justice Earl Warren) (agreeing with Chief Judge Biggs that bar will have active and important part in formulation of rules).

[FN110]. 28 U.S.C. s 331 (1988 & Supp. V 1993).

[FN111]. See Symposium, supra note 8, at 123-24 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit); id. at 131-32 (statement of Professor James W. Moore). The vision of activist committees with permanent monitoring capabilities, however, never came to pass. In fact, for many years Congress included a strict limit on funding for the rules committees in the judiciary's annual appropriations.

[FN112]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581, 586-87 (Scalia, Thomas, Souter, J.J., dissenting).

[FN113]. See Wright , supra note 2, at 435. Professor Wright noted that the criminal rules "have been amended so frequently that even scholars in the field find it difficult to follow the constant changes or to be certain what a particular rule provided at a particular time." Id. Likewise, he pointed out his difficulty in knowing what appellate rules were in effect at a given time, because four different sets of amendments to the Federal Rules of Appellate Procedure had recently been adopted or were proceeding to adoption. Charles A. Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litig. 1, 9 (1994) [hereinafter Wright, Foreword].

[FN114]. Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); see also Michael E. Tigar, Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea, 14 Rev. Litig. 137, 138 (1994) (arguing that there has been such "tinkering and fiddling" with Federal Rules of Civil Procedure that rulemakers are defeating primary objective of a "just, speedy, and inexpensive determination of every action").

[FN115]. See John P. Frank, The Rules of Civil Procedure -- Agenda for Reform, 137 U. Pa. L. Rev. 1883, 1884-85 (1989).

[FN116]. See Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841 (1993).

[FN117]. See Frank, supra note 115, at 1884-85.

[FN118]. Congress, for example, enacted comprehensive bankruptcy reform legislation in 1984, 1986, and 1994, effecting both substantive and procedural changes, including establishment of a new court system, expansion of the U.S. trustee system, addition of Chapter 12 for family farmers, inclusion of numerous commercial and consumer bankruptcy changes, and addition of new procedural requirements. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088; Bankruptcy Reform Act of 1994, supra note 92. The first two statutes required extensive changes in the Federal Rules of Bankruptcy Procedure, which took effect in 1987 and 1991. H.R. Doc. No. 54, 100th Cong., 1st Sess. 152 (1987); H.R. Doc. No. 80, 102d Cong., 1st Sess. 170 (1991). Rules changes to accommodate the 1994 legislation are presently under consideration by the Advisory Committee on Bankruptcy Rules.

[FN119]. Each set of federal rules was amended in the mid-1980s to eliminate gender-specific language.

[FN120]. For example, the Judicial Conference in September 1994 approved an unpublished amendment to Fed. R. Crim. P. 49(e) to delete a reference to an abrogated section of the U.S. Code. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 67 (1994) [[hereinafter 1994 Judicial Conference Reports].

[FN121]. See infra Part III.E (discussing relationship between judiciary and Congress).

[FN122]. To the contrary, in 1992 the Advisory Committee on Civil Rules proposed a general revision of the summary judgment rule, Fed. R. Civ. P. 56, that would have codified case law. The proposal, however, was rejected by the Judicial Conference. 1992 Judicial Conference Reports , supra note 67, at 82.

[FN123]. Proposed Amendments, supra note 105, at 484.

[FN124]. Proposed Amendments, supra note 105, at 484.

[FN125]. Proposed Amendments, supra note 105, at 484.

[FN126]. Bankruptcy Reform Act of 1994, supra note 92.

[FN127]. See Common Sense Legal Reform Act, H.R. 10, 104th Cong., 1st Sess. (1995); Taking Back Our Streets Act, H.R. 3, 104th Cong., 1st Sess. (1995).

[FN128]. The 1993 amendments to the Federal Rules of Civil Procedure, for example, were criticized for being promulgated without awaiting the results of the empirical studies carried out under the Civil Justice Reform Act of 1990. See Amendments to the Federal Rules of Civil Procedure, supra note 97, at 585-86 (Scalia, Thomas, Souter, J.J., dissenting); see also Burbank, supra note 116, at 844-46; Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1396 (1994).

[FN129]. See Elizabeth C. Wiggins et al., The F.J.C. Study of Rule 11, F.J.C. Directions 3 (Nov. 1991) (summarizing results of three separate analyses of Rule 11 activity in cases filed in five federal district courts); see also Fed. R. Civ. P. 11 advisory committee's note 1993 (listing various empirical studies that committee considered).

[FN130]. Fed. R. Crim. P. 53. The advisory committee and the Standing Committee proposed an amendment to Fed. R. Crim. P. 53 that would have removed the rule's absolute prohibition on cameras in the courtroom in criminal cases, but the proposal was rejected by the Judicial Conference. 1994 Judicial Conference Reports , supra note 120, at 67.

[FN131]. See Burbank, supra note 10, at 1042-98; Lauren Robel, Fractured Procedure: The Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1447, 1449, 1483 (1994).

[FN132]. See Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1941 (1989) [[hereinafter Burbank, Transformation]; Frank, supra note 115, at 1884-85.

[FN133]. See generally Frank, supra note 115, at 1884-85.

[FN134]. See Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 547 (1986) (arguing that trans-substantive premise of rules has proved "unworkable"); Mark C. Weber, The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases, 14 Rev. Litig. 113, 114-15 (1994) (suggesting need for special rules for small cases). Compare Paul D. Carrington,

Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2067 (1989) (arguing that rules must be applied trans-substantively, and that process is not competent to develop process of rules to be applicable to only one subject area) with Burbank, Transformation, supra note 132, at 1934-35 (arguing that legislative history does not support trans-substantive application of rules). The Civil Justice Reform Act requires the district courts to consider systems to separate civil cases into different "tracks," with different pretrial requirements based on the degree of a case's complexity, the time the case requires for trial preparation, and the resources it will require. 28 U.S.C. s 473(a) (Supp. V 1993).

[FN135]. Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (forthcoming 1995).

[FN136]. See Fed. R. Bankr. P. 9006; Fed. R. Civ. P. 6; Fed. R. Crim. P. 45.

[FN137]. See Fed. R. App. P. 45; Fed. R. Bankr. P. 5001; Fed. R. Civ. P. 77; Fed. R. Crim. P. 56.

[FN138]. See Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.

[FN139]. Representative Kastenmeier suggested that "as a result of the shadowy nature of the rulemaking process, a number of proposed rules changes" were rejected by Congress in the 1970s and early 1980s. 1983-84 Hearings, supra note 2, at 154 (statement of Rep. Kastenmeir from Congressional Record of Oct. 18, 1983).

[FN140]. Professor Wright suggests, however, "that the rulemaking process worked far better when it was carried on in private." Wright, Foreword, supra note 113, at 2-3 n.6.

[FN141]. It has been suggested that some amendments pushed "the rulemaking process into controversial uncharted areas of law and this has been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response." Robert N. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 52 (1977). Any amendments, for example, that are seen as affecting the balance between the prosecution and the defense in criminal cases are likely to generate a congressional response.

[FN142]. William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J. 1203, 1207 (1975). Hungate states:

The result of [the judiciary's rulemaking] procedure is that any change proposed by the Supreme Court has received careful consideration by a number of able people. This does not mean that we in Congress should forgo our responsibility to make an independent judgment on the merit of any proposal. It does mean, however, that we should accord a healthy respect to any amendment proposed by the Supreme Court.

Id. Judge Weinstein suggests that Congress should confine itself "to the review of substantial principles," rather than "details of rules." Weinstein , supra note 10, at 963.

[FN143]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54.

[FN144]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 230101 (dealing with victim's right of allocution in sentencing).

[FN145]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

[FN146]. Legislation, however, has also been introduced as a service to particular constituents. Newly enacted Federal Rule of Bankruptcy Procedure 7004(h), for example, requires that service of process on an insured depository institution in certain matters be made by certified mail, rather than first class mail. Bankruptcy Reform Act of 1994, supra note 36, s 114. The judiciary objected to the amendment on the grounds that it violated the Rules Enabling Act, was unnecessary, and added expense to the administration of estates. 1994 Judicial Conference Reports , supra note 120, at 14.

[FN147]. Judge Weinstein has suggested that: "If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President." Weinstein , supra note 10, at 940. It has also been suggested that rulemakers should not propose changes, even in matters of procedure, if the changes will have important effects on substantive rights. Wright, Book Review, supra note 31, at 654.

[FN148]. Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).

[FN149]. Violence Against Women Act, S. 15, 102d Cong., 1st Sess. s E (1991).

[FN150]. H.R. Doc. No. 250, 103d Cong., 2d Sess. 5 (1994).

[FN151]. Id.

[FN152]. Id.

[FN153]. Id.

[FN154]. Id.

[FN155]. The Supreme Court later withheld approval of the portion of the rule approved by the Judicial Conference that extended its reach to civil cases. Members of the Court were concerned that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right," and might encroach on the rights of defendants in sexual harassment cases because it might be inconsistent with Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Letter from William H. Rehnquist, Chief Justice of the United States, to Judge John F. Gerry, Chairman of the Judicial Conference's Executive Committee (Apr. 29, 1994), reprinted in Communication from the Chief Justice, supra note 101, at 684.
Congressional conferees, however, restored the portion of the rule deleted by the Supreme Court, and Congress proceeded to enact revised Rule 412 in the form approved by the Judicial Conference. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 40141.

[FN156]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

[FN157]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

[FN158]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935. The evidence, civil, and criminal advisory committees met and considered the new rules during the 150-day statutory period. The Advisory Committee on the Rules of Evidence also solicited public comment on the rules, sending the rules to 900 evidence professors and 40 women's rights organizations. The overwhelming majority of judges, lawyers, law professors, and organizations

responding stated their opposition to the rules, principally on the grounds that they contained numerous drafting problems apparently not intended by their authors and would permit the admission of unfairly prejudicial evidence. The committee received 84 responses, representing 112 individuals and 16 organizations. Of the total responses, 100 individuals and organizations were opposed, 10 were supportive, and 18 either were neutral or recommended modifications. Law professors were opposed to the new rules by 56 to 3.
The Judicial Conference formally asked Congress to reconsider its decision to adopt the new rules, thereby delaying their effective date for another 150 days. Alternatively, the Conference recommended that Congress enact substitute language prepared by the Advisory Committee on the Rules of Evidence that would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities. Judicial Conference of the U.S. , Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995).

[FN159]. In August 1993, Senator Herb Kohl introduced S. 1404, the Sunshine in Litigation Act. The bill proposed amending Rule 26(c) of the Federal Rules of Civil Procedure to require that federal judges make particularized findings before issuing protective orders to ensure that public health and safety would not be jeopardized. S. 1404, 103d Cong, 1st Sess. (1993). No action was taken on Senator Kohl's legislation while the Advisory Committee on Civil Rules reviewed the results of a Federal Judicial Center study on protective orders. The advisory committee completed its work within the Rules Enabling Act process and transmitted proposed amendments to Rule 26(c) to the Judicial Conference for consideration at its March 1995 session. Judicial Conference of the U.S., 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 6-8 (1995). Assuming approval by the Conference, the amendments would be submitted to the Supreme Court with a recommendation that they be approved and transmitted to Congress.

[FN160]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36 s 40153(c) A similar approach has been followed by Congress on other occasions, when it has asked the Judicial Conference to report on such matters as the future of the federal defender program. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, s 318, 104 Stat. 5089; Judicial Conference of the U.S., Report of the Judicial Conference of the United States on the Federal Defender Program (1993). Also, Congress has asked the Judicial Conference to report on the impact of drug activity on the federal courts. See Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, s 6159(b), 102 Stat. 4312;

Judicial Conference of the U.S. , Report of the Judicial Conference of the United States to the Congress -- Impact of Drug Related Criminal Activity on the Federal Judiciary (1989).

[FN161]. See H.R. Rep. No. 422 , supra note 31, at 14-15; Wright , supra note 2, at 431-32; John P. Frank, Local Rules, 137 U. Pa. L. Rev. 2059 (1989); Subrin, supra note 57, at 2018, 2021. But see Steven Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A. L. Rev. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").

[FN162]. See Coquillette et al., supra note 57, at 62; Subrin, supra note 57, at 2018-26.

[FN163]. See H. Rep. No. 422 , supra note 31, at 15; Coquillette et al., supra note 57, at 62.

[FN164]. See supra Part I.

[FN165]. Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., Local Rules Project, Part I , at 1 (1988).

[FN166]. The Local Rules Project is under the direction of the Standing Committee's Reporter, Professor Daniel R. Coquillette of the Boston College Law School. The project director is Mary P. Squiers, Esquire.

[FN167]. See Fed. R. App. P. 28 advisory committee's note to 1993 amendment; Report of Advisory Committee on Appellate Rules to the Standing Committee, Dec. 1, 1992, 144 F.R.D. 459 (1992) [hereinafter Appellate Rules].

[FN168]. There is evidence, for example, that many courts are conducting thorough reviews of the content and numbering of their local rules. In addition, many courts and local rules committees have solicited assistance from the Local Rules Project's director, Mary P. Squiers, on how to re-number the rules and how to draft particular rules more precisely and coherently.

[FN169]. H.R. Doc. No. 67, 104th Cong., 1st Sess. 3 (1995) (Bankruptcy Rule 9029); H.R. Doc. No. 66, 104th Cong., 1st Sess. 5 (1995) (Appellate Rule 47); H.R. Doc. No. 65, 104th Cong., 1st Sess. 7 (1995) (Criminal Rule 57); H.R. Doc. No. 64, 104th Cong., 1st Sess. 6 (1995) (Civil Rule 83).

[FN170]. See supra note 169.

[FN171]. Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57. The amendments were approved by the Judicial Conference on September 24, 1994 and transmitted to the Supreme Court on November 2, 1994. See 1994 Judicial Conference Reports , supra note 120, at 66-67.

[FN172]. See Wright, supra note 2, at 436.

[FN173]. 28 U.S.C. ss 471-473, 478 (Supp. V 1993).

[FN174]. Id. s 473(a), (b). The Act emphasizes strong judicial case management efforts, separate procedural tracks for different categories of civil cases, and increased use of alternate dispute resolution techniques.

[FN175]. See S. Rep. No. 101-416, 101st Cong., 2d Sess. 10-11 (1990). Professor Mullenix argues that the Civil Justice Reform Act effectively repealed the Rules Enabling Act and rendered impotent the federal rulemaking process that has traditionally relied on careful study to achieve simple and uniform national rules. Mullenix, supra note 10, at 379-80. The contrary view is well expressed in Robel, supra note 131, at 1448, 1464-70, 1473.

[FN176]. See Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 Ariz. St. L.J. 1393 (1992); Article, Federal Discovery News , Dec. 1994, at 4-7.

[FN177]. Fed. R. Civ. P. 26; see Randall Samborn, Districts' Discovery Rules Differ, Nat'l L.J. , Nov. 14, 1994, at A1; Wright, Foreword, supra note 113, at 10-11.

[FN178]. The Administrative Office has contracted with the RAND Corporation to conduct the statutorily required study. See generally Terence Dunworth & James S. Kakalik, Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1301 (1994).

[FN179]. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, sec. 105, 104 Stat. 5089, amended by the Judicial Amendments Act of 1994, s 4, 1994 U.S.C.C.A.N (108 Stat.) 4343.

[FN180]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

[FN181]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

[FN182]. 28 U.S.C. ss 331, 2071(c) (1988 & Supp. V 1995). In March 1994, the Judicial Conference was asked for the first time to exercise this statutory oversight authority when five state attorneys general requested that the Judicial Conference modify or abrogate Local Rule 22 of the Ninth Circuit -- regarding the processing of capital cases -- asserting that the local rule was inconsistent with federal law. The request has been considered by the Advisory Committee on Appellate Rules and the Standing Committee and is still pending. Judicial Conference of the U.S., 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 21-22 (Sept. 1994).

[FN183]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

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TAB

AGENDA # ______

Committee on ______________________

Winter 2008-2009

SUBJECT: Long-Range Planning (Information)

The long-range planning meeting of Judicial Conference committee chairs was held on September 15, 2008 (report attached). At the meeting, Judge Charles R. Breyer, long-range planning coordinator for the Executive Committee, informed participants about the August 2008 establishment of an Ad Hoc Advisory Committee on Judiciary Planning (Ad Hoc Committee).

The Ad Hoc Committee will develop an approach to strategic and operational planning appropriate for the judiciary's committee-based policy-making system, including the formation of a longer-term steering group to spearhead the new planning effort. The Committee will also begin the development of a new strategic plan, in part by reviewing the 1995 *Long Range Plan for the Federal Courts* to identify elements that should be carried forward into new plans. The Ad Hoc Committee consists of four Executive Committee members and the chairs of six committees:

- Judge Charles R. Breyer, chair (Executive Committee)
- Chief Judge Paul R. Michel (Executive Committee)
- Judge Lawrence L. Piersol (Executive Committee)
- AO Director James C. Duff (Executive Committee)
- Judge Barbara M.G. Lynn (Bankruptcy Committee)
- Judge Julia Smith Gibbons (Budget Committee)
- Judge John R. Tunheim (Court Administration and Case Management Committee)
- Judge Rosemary M. Collyer (Information Technology Committee)
- Chief Judge George Z. Singal (Judicial Resources Committee)
- Chief Judge Joseph F. Bataillon (Space and Facilities Committee)

The Ad Hoc Committee will provide a status report to the Executive Committee in February 2009. As part of its report, the Ad Hoc Committee will consider whether some crosscutting planning activity should occur in conjunction with the March and September Judicial Conference sessions, and what that activity might be. **Therefore, no long-range planning meeting for committee chairs is currently scheduled for March 2009.**

Attachment 1. Report of the Judicial Conference Committee Chairs' Long-Range Planning Meeting, September 15, 2008.

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 15, 2008

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2008 LONG-RANGE PLANNING MEETING

The September 15, 2008 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, the Judicial Conference Executive Committee's long-range planning coordinator. Participants included Judicial Conference committee chairs, members of the Executive Committee, the magistrate judge and bankruptcy judge observers to the Judicial Conference, the Director of the Administrative Office (AO), and the Director of the Federal Judicial Center. AO staff included Cathy A. McCarthy, Brian Lynch, and Carolyn M. Peake. A list of participants is included as Appendix A.

Committee Chair Perspectives on Planning

Judge Breyer asked the chairs of several Judicial Conference committees to discuss developments in their committees' planning processes.

Committee on the Administration of the Bankruptcy System. Judge Barbara M.G. Lynn, chair, described the Committee's initiative to develop a comprehensive long-range study of the bankruptcy court system. A major impetus for the study is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which has created numerous challenges for the bankruptcy system. The long-range planning initiative will be informed by, among other things, studies of the case-weighting system used for evaluating judgeship needs, and work measurement studies of staff requirements. These studies will provide additional data about how much time judges and staff spend handling different types of cases, and the nature of the work.

The Committee has identified bankruptcy-specific and crosscutting strategic issues. Bankruptcy-specific strategic issues include assessing the impact of future changes in bankruptcy filing levels, given the increase in the amount of work per case required under BAPCPA; expanding the diversity of bankruptcy judges and law clerks; and considering the relative strengths and weaknesses of the bankruptcy administrator and U.S. trustee systems. Crosscutting issues identified by the Committee include the future of technology, the impact of *pro se* filers on the work of the courts, the future of bankruptcy CM/ECF, and the relationship between district and bankruptcy courts.

Committee on Judicial Resources. Chief Judge George Z. Singal, chair, reported on a two-day meeting in July 2008 that kicked off a renewed Committee planning effort. The meeting was an opportunity to review the Committee's responsibilities, jurisdiction

and functions, and consider a new planning approach. Regular committee meetings require the consideration of many agenda items and several significant recommendations for Judicial Conference consideration, and there is a tendency for the Committee to be reactive. A key objective of the Committee's planning effort is to consider the long-term implications of Committee actions. Another objective is to identify and study important topics before they reach a critical stage at which immediate action is required. Judge Singal observed that strategic planning is an ongoing process, and that the process of planning is more important than any resulting planning documents.

Among the strategic issues under consideration by the Judicial Resources Committee are workforce diversity, determining appropriate staffing levels, studying future approaches to compensation, challenges and opportunities associated with alternative work schedules and telework, and attracting and retaining a "next-generation" workforce.

Committee on Information Technology. Judge Thomas I. Vanaskie, chair, noted that the development of a five-year *Long Range Plan for Information Technology in the Federal Judiciary* is an annual statutory requirement, with each year's edition of the plan submitted to the Judicial Conference for approval. Since planning occurs on a regular cycle, some editions of the *Long Range Plan* include updated or refreshed strategies and objectives, with substantial revisions occurring every several years. The 2010 edition of the *Long Range Plan* will represent a major revision. In developing this edition, the Committee will consider changes to its planning process.

Among the strategic issues under consideration by the Committee are meeting the IT needs of judges and chambers, considering the possibility of an integrated case management system, helping users do work any time and anywhere (providing a "virtual desk," and supporting a broad array of mobile devices), collaborating with other branches of government, expanding services to other constituents, ensuring the long-term preservation of records and data, and achieving balance between economies of scale and the allowance for local variations in processes and procedures.

Committee on Court Administration and Case Management. Judge John R. Tunheim, chair, stated that the Committee has had a long-range planning subcommittee for many years. The subcommittee includes judges from appellate, district, and bankruptcy courts, and a clerk of court also participates. The subcommittee monitors state court developments, and seeks input from advisory groups and circuit judicial councils to identify issues that courts will face in the future. Currently, the key strategic issues for the Committee are the future of CM/ECF, courtroom usage, and access to the courts for people with limited English proficiency.

Ad Hoc Advisory Committee on Judiciary Planning

Judge Breyer spoke about the Executive Committee's review of the judiciary's planning process, and its ideas for improvement. In March 2008, it developed a proposal for the creation of a strategic and operational planning process that would involve Conference committees and operate with oversight from the Executive Committee. In August 2008, it established a short-term Ad Hoc Advisory Committee on Judiciary Planning (Ad Hoc Committee).

The Ad Hoc Committee will propose an approach to strategic and operational planning appropriate for the judiciary's committee-based system, including formation of a steering group to spearhead the planning effort. The Ad Hoc Committee consists of four Executive Committee members and the chairs of six committees:

- Judge Charles R. Breyer, chair (Executive Committee)
- Chief Judge Paul R. Michel (Executive Committee)
- Judge Lawrence L. Piersol (Executive Committee)
- AO Director James C. Duff (Executive Committee)
- Judge Barbara M.G. Lynn (Committee on the Administration of the Bankruptcy System)
- Judge Julia Smith Gibbons (Committee on the Budget)
- Judge John R. Tunheim (Committee on Court Administration and Case Management)
- Judge Rosemary M. Collyer (Committee on Information Technology)
- Chief Judge George Z. Singal (Committee on Judicial Resources)
- Chief Judge Joseph F. Bataillon (Committee on Space and Facilities)

Judge Breyer described some approaches to planning that may be considered by the Ad Hoc Committee. The Committee may consider whether to adopt a regular planning cycle that would develop strategic and operational plans. A strategic plan could stand for six to eight years and include the judiciary's mission, core values, and longer-term goals and strategies. Operational plans could have a two-to-three-year lifespan, include specific objectives and initiatives, and be responsive to changing conditions. The planning process might also emphasize the identification and analysis of crosscutting strategic issues, and the development of effective strategies to address them. The Executive Committee is hopeful that new plans can be developed and implemented quickly.

Judge Michel suggested that enhanced judiciary planning should build upon the planning that individual committees currently engage in, rather than superseding it. One of the goals of the Ad Hoc Committee will be to provide more integration to the identification and analysis of key crosscutting issues.

Judge Piersol recommended that the planning effort include environmental scanning. Environmental scanning is a process to identify events, trends, and developments shaping the future. It is similar to an academic literature review, but the issues identified tend to be more focused on the organization and driven by current events. The trends and developments are usually found in published material but may also be explored through interviews or focus groups of subject matter experts. The National Center for State Courts regularly produces an environmental scan for state courts.

Judge John Gleeson, chair of the Committee on Defender Services, said that judges on his committee had worked hard for many years on all aspects of long-range planning, and it was well worth the effort. Long-range planning has allowed the Committee to track its success in meeting its goals and objectives. Judge Gleeson noted that having a subcommittee dedicated to long-range planning has been critical to the success of the planning effort, and he advised the use of performance measures where possible.

Judge J. Frederick Motz, chair of the Intercircuit Assignments Committee, advised that any judiciary planning effort should take into account the cases handled by the Judicial Panel on Multidistrict Litigation. The effective handling of MDL cases is an important crosscutting strategic issue.

Judge Breyer stated that the Ad Hoc Committee would make a report to the Executive Committee in February 2009. Depending on the planning approach that is recommended (and approved), he anticipated that the steering group created to lead that effort should be able to develop plans in time for consideration at the March 2010 Judicial Conference session.

In its report to the Executive Committee, the Ad Hoc Committee will consider whether some crosscutting planning activity should occur in conjunction with the March and September Judicial Conference sessions, and what that activity might be. Therefore, no long-range planning meeting for committee chairs is currently scheduled for March 2009.

Appendix A: Participants in the September 2008 Long-Range Planning Meeting

Executive Committee
- Hon. Anthony J. Scirica, Chair
- Hon. Charles R. Breyer, Long-Range Planning Coordinator
- Hon. Danny J. Boggs
- Hon. Alan B. Johnson
- Hon. Paul R. Michel
- Hon. Lawrence L. Piersol
- Hon. David Bryan Sentelle
- James C. Duff, Director of the Administrative Office

Committee on the Administrative Office
- Hon. Roger L. Gregory, Chair

Committee on the Administration of the Bankruptcy System
- Hon. Barbara M. G. Lynn, Chair

Committee on the Budget
- Hon. Julia Smith Gibbons, Chair
- Hon. Robert C. Broomfield

Committee on Codes of Conduct
- Hon. Margaret McKeown, Incoming Chair

Committee on Court Administration and Case Management
- Hon. John R. Tunheim, Chair

Committee on Criminal Law
- Hon. Julie E. Carnes, Chair

Committee on Defender Services
- Hon. John Gleeson, Chair

Committee on Federal-State Jurisdiction
- Hon. Janet C. Hall, Chair

Committee on Financial Disclosure
- Hon. Ortrie D. Smith, Chair

Committee on Information Technology
- Hon. Thomas I. Vanaskie, Chair
- Hon. Rosemary M. Collyer, Incoming Chair

Committee on Intercircuit Assignments
- Hon. J. Frederick Motz, Chair

Committee on International Judicial Relations
- Hon. Arthur J. Gajarsa

Committee on the Judicial Branch
- Hon. D. Brock Hornby, Chair

Committee on Judicial Resources
- Hon. George Z. Singal, Chair

Committee on Judicial Security
- Hon. Henry E. Hudson

Committee on the Administration of the Magistrate Judges System
- Hon. Dennis M. Cavanaugh, Chair

Advisory Committee on Appellate Rules
- Hon. Carl E. Stewart, Chair

Advisory Committee on Bankruptcy Rules
- Hon. Laura Taylor Swain, Chair

Advisory Committee on Civil Rules
- Hon. Mark R. Kravitz, Chair

Advisory Committee on Criminal Rules
- Hon. Richard C. Tallman, Chair

Advisory Committee on Evidence Rules
Hon. Robert L. Hinkle, Chair

Committee on Space and Facilities
Hon. Joseph F. Bataillon, Chair

Hon. Barbara J. Rothstein
Director, Federal Judicial Center

Hon. David Stewart Kennedy
Bankruptcy Judge Observer, Judicial Conference of the United States

Hon. Robert B. Collings
Magistrate Judge Observer, Judicial Conference of the United States

Administrative Office Staff:

Jill C. Sayenga
Cathy A. McCarthy
Brian Lynch
Carolyn M. Peake

TAB

Calendar for May–July 2009 (United States)

May

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

June

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

July

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

Holidays and Observances:

May 25 Memorial Day	Jul 3 'Independence Day' observed	Jul 4 Independence Day