ADVISORY COMMITTEE
ON
CIVIL RULES

Austin, TX
April 4-5, 2011

Agenda for April 2011 Meeting
Civil Rules Advisory Committee

1. Welcome by the Chair

   a. New members
   b. Standing Committee meeting and Judicial Conference

2. Minutes for November meeting – ACTION ITEM

3. Legislative Activity

4. Rule 45

   a. Proposal to forward to Standing Committee for publication – ACTION ITEM

5. Pleading

   a. Joe Cecil's research
   b. next steps

6. E-Discovery

   a. Preservation
   b. Spoliation sanctions

7. Duke Subcommittee

   a. report regarding employment discovery
   b. report on other projects

8. Appellate-Civil Subcommittee

9. Professor Duane's suggestion – Rule 6(d) and 3 days are added

10. Next Meeting: November 7-8, 2011 in DC

ADVISORY COMMITTEE ON CIVIL RULES

Chair:	**Reporter:**
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Members:	
Elizabeth Cabraser, Esq. Lieff, Cabraser, Heimann & Bernstein, LLP Embarcadero Center West 275 Battery Street - Suite 3000 San Francisco, CA 94111-3339	Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor U. S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Honorable Steven M. Colloton United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044	Honorable Paul S. Diamond United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106
Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081	Honorable Paul W. Grimm United States District Court Edward A. Garmatz Fed. Bldg. U. S. Courthouse 101 West Lombard Street Room 820 Baltimore, MD 21201
Ted Hirt, Esq. Office of Immigration Litigation 450 5th Street, NW – Room 5312 Washington, DC 20530	Peter D. Keisler, Esq. Sidley Austin, LLP 1501 K Street, N.W. Washington, DC 20005
Honorable John G. Koeltl United States District Court 1030 Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street New York, NY 10007-1312	Honorable Michael W. Mosman United States District Court Mark O. Hatfield United States Courthouse 1000 Southwest Third Avenue, Room 1615 Portland, OR 97204-2802

Honorable Gene E. K. Pratter United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 7614 Philadelphia, PA 19106-1797	Honorable Randall T. Shepard Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204
Anton R. Valukas, Esq. Jenner & Block LLP One IBM Plaza Chicago, IL 60611	Honorable Tony West Assistant AG, Civil Division (Ex-officio) U.S. Dept. of Justice 950 Pennsylvania Ave., NW – Room 3141 Washington, DC 20530
Liaison Members: Honorable Arthur I. Harris United States Bankruptcy Court Howard M. Metzenbaum United States Courthouse 201 Superior Avenue, Room 148 Cleveland, OH 44114-1238	 Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen U. S. Courthouse 219 South Dearborn Street Chicago, IL 60604
Representative: Laura A. Briggs Clerk of Court United States District Court 105 Birch Bayh Fed. Bldg. & U. S. Courthouse 46 East Ohio Street Indianapolis, IN 46204	
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	**Chief Counsel:** Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Marilyn Huff	(Standing Committee)

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FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
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Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	2007	2011
Elizabeth J. Cabraser	ESQ	California	2010	2013
David G. Campbell	D	Arizona	2005	2011
Steven M. Colloton	C	Eighth Circuit	2008	2013
Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2012
Steven S. Gensler	ACAD	Oklahoma	2005	2011
Paul W. Grimm	M	Maryland	2009	2012
Peter D. Keisler	ESQ	District of Columbia	2008	2011
John G. Koeltl	D	New York (Southern)	2007	2013
Michael W. Mosman	D	Oregon	2011	2013
Gene E. K. Pratter	D	Pennsylvania (Eastern)	2010	2013
Randall T. Shepard	CJUST	Indiana	2006	2012
Anton R. Valukas	ESQ	Illinois	2006	2012
Tony West*	DOJ	Washington, DC	----	Open
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Principal Staff: Peter G. McCabe 202-502-1800				

* Ex-officio

TAB 1

Draft Minutes of the Standing Committee Meeting of January 6-7, 2011, will be provided at the meeting.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 2010

The Judicial Conference of the United States convened in Washington, D.C., on September 14, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake III,
Southern District of Texas

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Appellate Rules 4 (Appeal as of Right — When Taken) and 40 (Petition for Panel Rehearing), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmittal 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.

Statutory Amendment. The Committee also recommended seeking legislation to amend 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4, to clarify and make uniform the treatment of the time to appeal in all civil cases in which a federal officer or employee is a party. The Conference adopted the Committee's recommendation.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 2003 (Meeting of Creditors or Equity Security Holders), 2019 (Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases), 3001 (Proof of Claim), 4004 (Grant or Denial of Discharge), 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), and new Rules 1004.2 (Petition in Chapter 15 Cases) and 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and new rules and authorized their transmittal 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.

Forms Amendments. The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C. The Judicial Conference approved the revised forms to take effect on December 1, 2010.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 1 (Scope; Definitions), 3 (The Complaint), 4 (Arrest Warrant or Summons on a Complaint), 6 (The Grand Jury), 9 (Arrest Warrant or Summons on an Indictment or Information), 32 (Sentencing and Judgment), 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District), 41 (Search and Seizure), 43 (Defendant's Presence), and 49 (Serving and Filing Papers), and new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed amendments and new rule and authorized their transmittal 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.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed restyled Evidence Rules 101-1103, together with committee notes explaining their purpose and intent. The restyling of the Evidence Rules is the fourth in a series of comprehensive style revisions to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence. The Judicial Conference approved the proposed restyled rules amendments and authorized their transmittal 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.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, proposed revisions of Bankruptcy Official Forms 10 and 25A, and a proposed new attachment and supplements to Bankruptcy Official Form 10, and proposed amendments to Criminal Rules 5 and 58, and a new Criminal Rule 37. The comment period expires on February 16, 2011.

TAB 2

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 15-16, 2010

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 15 and 16, 2010. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John G. Koeltl; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Judge Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R. Coquillette, Reporter. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Judge Barbara Rothstein, Emery Lee, and Joe Cecil represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Katherine David, interim Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Edward Pickle, Esq.; and Jonathan Redgrave, Esq.

Judge Kravitz opened the meeting with a general welcome to all present. He congratulated Andrea Kuperman, Judge Rosenthal's Rules Clerk, on the birth of Abigail Rose — "another job well done." He noted that "the Chief Justice has been good to us" — Judge Colloton and Judge Koeltl have been reappointed for second terms. And Judge Pratter has been appointed "to maintain our Eastern District of Pennsylvania contingent."

Judge Baylson elaborated on the introduction of Judge Pratter, observing that she and he had been partners in private practice before becoming colleagues on the bench. She is an outstanding judge. Judge Kravitz noted that when the appointment was announced, Judge Baylson had sent an e-mail message reporting that Judge Pratter is brilliant, creative, scholarly, and witty. All joined in welcoming her to the Committee.

Judge Kravitz noted with sadness the death of Professor Richard Nagareda. Professor Nagareda presented an excellent paper at the Duke Conference, suggesting that procedure should be revised to focus in part on devices that will enable the parties to price the claims for settlement. He was one of the most luminous of the rising stars in the procedure heavens. Beyond his prolific writing, including service as one of the Reporters for the American Law Institute Principles of Aggregate Litigation, he was an active innovator in developing new curricular offerings to combine rigorous theory with the practical side of litigation.

Judge Kravitz also noted that Judge Baylson has concluded the allotted two terms as Committee member. He was deeply involved in all aspects of Committee work, serving on a Style Subcommittee and chairing Subcommittees on Rule 15, Rule 56, and time computation. He displayed consummate leadership skills in steering the Rule 56 project to completion, achieving success in a task that earlier efforts had left unfinished. He also collaborated actively in the Rule 45 work of the Discovery Subcommittee. He will be missed.

Two other Committee members also have completed their second terms. Chilton Varner and Daniel Girard were enormously productive members. They worked tirelessly on discovery, including Rule 26, e-discovery, and the quirks of Rule 45. They bring different perspectives to Committee work, born of different practice backgrounds, but they have left their clients at the door and worked harmoniously to forge the best rules that can be shaped for the benefit of litigants on all sides of an action. They too will be missed. New practitioner members have not yet been designated to replace them. They have generously agreed to continue to work with the Discovery Subcommittee as it refines the Rule 45 proposals and plunges deeper into its work on preservation and spoliation. The Committee is in their debt.

Judge Wedoff has contributed valuable insights on general procedural problems in his role as liaison from the Bankruptcy Rules Committee. He has been designated chair of that Committee, so will be succeeded by another liaison. His successor will have to work hard to take his place.

In a different direction, Judge Kravitz noted that Judge Walker has decided to retire from the bench as of February 28, 2011. His most prominent recent work on the bench was his decision in the case challenging California Proposition 8. Different observers react differently to the decision, but it has garnered high praise in many quarters. He handled this momentous trial with all the skill and imagination evidenced in his work with the Committee. One example of his Committee work was his steadfast but good-humored position that the "point-counterpoint" proposal for summary-judgment practice was a mistake. His court had adopted this procedure, followed it for a while, and abandoned it. In the end, his view prevailed. It will be interesting to follow the paths his career takes next.

Standing Committee

Judge Kravitz reported that the Duke Conference was discussed at the June meeting of the Standing Committee. Several Standing Committee members attended the Conference and reported highly favorable reactions. Other members had become familiar with the conference papers and reports on the panel discussions. They too were very favorably impressed.

Report to Chief Justice

Judge Kravitz congratulated Judge Rosenthal on crafting an excellent report to Chief Justice Roberts on the Duke Conference. The Report emphasizes the great value of the work done for the Conference, and emphasizes above all the importance of carrying forward on many fronts to ensure the work continues without losing momentum. The Duke Conference Subcommittee will report on this work later during this meeting.

Judicial Conference

This Committee did not have any proposals requiring action at the September meeting of the Judicial Conference.

New Rules

The expert trial-witness revisions of Rule 26 and the rewritten Rule 56 remain pending in Congress. There is every reason to expect that Congress will, by inaction, allow them to become effective as scheduled on December 1.

March 2010 Minutes

The draft minutes of the March 2010 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Working Agenda

Judge Kravitz noted that the agenda does not include any proposals for action. The purpose of this meeting is to gather advice from the full Committee on the work being developed by subcommittees or more informally. Some truly difficult problems are being addressed. Deliberate action will be required to address them, often in multiple stages.

Rule 45

Judge Campbell, chair of the Discovery Subcommittee, introduced the Rule 45 work by observing that the Subcommittee is working toward making recommendations next April for publishing proposed Rule 45 amendments.

The Rule 45 work began two years ago by making a broad survey of Rule 45 issues in response to a variety of suggestions for revision. An initial list of 17 possible issues was winnowed down to the four issues still under consideration. The work was carried on through telephone conference calls. A miniconference was held in Dallas at the beginning of October, bringing together a good cross section of lawyers and judges. Their contributions were very helpful in advancing the work.

One of the four proposals is easy to grasp. The last sentence of Rule 45(b)(1) explicitly states that notice must be served on each party before a party serves a subpoena to produce documents. Just as explicitly, lawyers complain that frequently they do not receive the required notice. When the complaint is registered with a court, it is remarkable that the party who served the subpoena frequently responds that notice is not required. This proposal seeks to give greater prominence to the notice requirement by moving it up to become a new Rule 45(a)(4). In addition, the proposal requires that a copy of the subpoena be served with the notice. The Subcommittee also considered proposals that would require the party who served the subpoena to give notice to other parties when documents are produced in response. The Subcommittee concluded that adding to the notice requirements would generate additional fractious disputes. In addition, materials are often received in batches — multiple notices often would be required. It seems better to rely on the initial notice of service, leaving the other parties responsible to follow up by inquiring as to materials received.

The second proposal provides for transfer of enforcement disputes when a subpoena issues from a court apart from the court where the action is pending. Participants in the miniconference agreed that transfer to the court where the action is pending can be a good idea. At the same time, it is important to set a standard that discourages routine transfer simply to get rid of the dispute.

The third proposal deals with a question made prominent by the ruling in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). The Vioxx court ruled that by negative implication, Rule 45(c)(3)(A)(ii) authorizes nationwide subpoenas that direct a party or a party's officer to appear as a trial witness. Other courts have disagreed; there is a "pretty even split of authority" in the reported cases. It seems clear that the Vioxx ruling defies the intent of Rule 45 as revised in 1991. The Subcommittee expects to recommend that Vioxx be undone. Nonetheless, powerful arguments have been made for recognizing some expanded power to compel appearance of a party at trial. The Subcommittee expects to recommend publication of a version that will incorporate its judgment on the best way to go beyond Vioxx, so as to prompt comments and testimony on which approach is better.

Finally, the Subcommittee has studied multiple methods of restructuring Rule 45. Many comments urge that Rule 45 is complex. If it is well understood by a few who work with it regularly, it is difficult for others to work through it. One approach, suggested by Judge Baylson, would dramatically shorten Rule 45, in part by relying on cross-reference to the body of discovery rules set out from Rule 26 through Rule 37. This approach runs the risk of forcing courts to recreate answers to questions that caused trouble in earlier days and were addressed by rule text to provide readily available solutions. Another approach would move part or all of the discovery subpoena provisions directly into the discovery rules. Subpoenas to produce documents, for example, could be incorporated with the document-request provisions of Rule 34. This approach drew some support, but many participants at the miniconference thought it would not reduce the overall complexity of the rules. Unless there is a clear and strong advantage, further, it is better to avoid proposals that inevitably generate a risk of unanticipated consequences. A more modest approach is being actively pursued. This approach seeks to eliminate the "three-ring circus" aspect of present practice that provides multiple definitions of the issuing court, of the place of service, and of the place of performance. All subpoenas would issue from the court where the action is pending. The place of performance can — and probably will — be kept as it is in the present rules. And enforcement can

be provided in the place of performance, subject to adding the transfer provisions that will be proposed quite apart from the restructuring proposal.

Professor Marcus developed these themes.

Notice. The notice question has been extensively discussed at earlier meetings. Adding a requirement that the notice include a copy of the subpoena serves the purpose of the notice requirement. As obvious examples, it will provide other parties an opportunity to object or to propose that the subpoena be expanded to include additional materials. A minor drafting issue also is presented — "then" was added in restyling present Rule 45(b)(1), but it is not clear whether it serves a desirable purpose. One issue is whether the Committee Note should say anything about the consequences of failing to give the required notice. The Subcommittee concluded that it is better not to add sanction provisions to rule text; it may be better to avoid the question in the Note as well. And the prospect of requiring additional notices each time materials are produced in response to a subpoena was abandoned as too complicated.

The notice proposal elicited brief discussion. Two judges voted in favor of retaining "then." Two other judges agreed that complaints that notice has not been provided are made so frequently that it will be good to see whether some gain may be achieved by moving the requirement to a more prominent place in the rule.

Transfer. Transfer issues arise because a discovery subpoena ordinarily issues from the court for the district where performance is required. The court may have no other connection to the action. For that matter, it does not know that the subpoena has issued, even though nominally the subpoena is issued in its name. Enforcement at the place of performance is nonetheless appropriate in many circumstances because the performance issues bear only on local events. On the other hand, performance issues may have important ramifications for the action. It may be that the issue has already been ruled upon by the action court, and is tendered to the issuing court in hopes of winning a conflicting ruling. Or a complex action may lead to issuance of similar subpoenas from several different courts around the country, creating the opportunity for inconsistent rulings. Decision of many performance issues may turn on a firm grasp of the substantive issues in the action, and in any event may affect case management by the action court. These concerns have led some courts to transfer enforcement issues to the action court, despite the apparent lack of authority in present rules.

Judge Campbell offered examples of the problems that can be ameliorated by transfer. In one case expert witnesses testified at a TRO hearing in a court on the east coast. The plaintiff then subpoenaed the experts in the courts where the experts were located, seeking their full reports and all relevant materials. One of the experts was in the District of Arizona. The defendant moved to quash the subpoena, arguing that it was not clear whether the expert would be a trial-witness expert and that discovery must be barred until that was decided. A magistrate judge in the court where the action was pending was considering the question whether the limits on consulting expert discovery were waived by using the expert to testify at the TRO hearing. The same issue was raised in a district court in Texas and in yet another court. It makes no sense to require all these courts to rule, perhaps inconsistently, on the same question as presented in the same action.

Another case was brought by a Los Angeles plaintiff against "Doe defendants" for anonymous on-line defamation. The plaintiff then subpoenaed an internet service provider in Arizona to compel disclosure of the names of the bloggers who posted the challenged statements. The First Amendment protection of anonymous blogging can be defeated by showing a prima facie claim. The discovery ruling would be dispositive. And the same question would be presented to other courts where other internet service providers are located. It would be much better to have the ruling on the prima facie case issue made by the court where the action is pending.

In a third example, a tight schedule was established to move toward determination of a motion for class certification. The parties subpoenaed records in two federal courts in the midwest. Those courts still had not ruled after four months. The orderly management of the class-certification issue would have been much advanced by enabling the class-action court to rule on the subpoena issues. This example prompted an observation that ancillary discovery motions are treated as miscellaneous motions that do not show up on the six-month list. There is no external pressure for timely disposition. So the lawyers at the miniconference protested that it is difficult to "get the attention" of the ancillary discovery court.

These persuasive examples are offset by the concern that some judges will have a reflexive knee-jerk tendency to transfer all disputes in ancillary discovery proceedings to the court where the action is pending. Nonparty witnesses may have a strong interest in achieving local resolution of the issues.

The draft transfer provision invokes the "interest of justice" standard that is part of the formula guiding venue-transfer decisions under 28 U.S.C. § 1404(a). It was suggested that these words do not give much guidance. Should the rule at least add the "convenience of parties and witnesses"? Or perhaps refer directly to the convenience of the person commanded to provide discovery? Or require "compelling reason" to transfer? The draft Committee Note discusses these issues. One variation may be that it is a party, not the witness, who wants a decision in the ancillary court — perhaps because it fears an adverse ruling by the court where the action is pending. Examples could be given — resistance based on a witness's medical condition is a good reason to resolve the issue where the witness is located.

The draft rule does not speak of a motion, whether to compel or for a protective order. It addresses the court: "the issuing court may * * * transfer." The Note says the burden is on the party seeking transfer to make the case for transfer, but often it may be the judge who initiates the transfer question. Rather than refer to burdens on parties and witnesses, would it be better to frame a presumption? And perhaps to include it in the rule text?

Another possible transfer standard would be "when appropriate." "Appropriate" does not much provide much guidance; as the stylists observe, it is awkward to frame a rule that does no more than guard against inappropriate rulings. But "appropriate" is used to express standards in some rules. And it avoids the difficulty of articulating a useful standard.

"The interests of justice" standard was defended as "striking the right note. It is familiar from § 1404(a). Judges behave responsibly." They take account of where issues were first raised, of who it is that first seeks transfer or chooses a court by applying for an order. If anything, the presumption should be for transfer to the action court. The issues are tied to the pending action — the importance of the discovery must be weighed, and that must be measured by its place in the overall litigation. The ancillary court should be asked to rule only on clearly local interests of a local witness, and even then the interest in a local ruling may not be great. The burden of securing a ruling in the action court may be no greater, given modern communications technology. Overall, it is important to add a transfer provision to Rule 45. Ordinarily the parties agree to submit disputes to the action court, but at times someone refuses.

One potential difficulty arises if an action court in Seattle directs a nonparty witness in Miami to provide discovery. How is the order enforced? In the ancillary court in Miami? Suppose the issue is contempt — do we want to drag the witness across the country?

An alternative may be to attempt to provide greater precision in the rule itself. For example, it could provide for transfer to the action court if the dispute is between the parties, rather than one initiated by the nonparty witness. Transfer also would be provided if the dispute substantially affects

the merits of the action, or if the same issues will arise in other courts, or if there are other compelling reasons. As often happens, the desire for guiding detail fights with the desire to avoid further complicating the rule text — Rule 45 is already complex, and the wish for specific guidance confronts the value of supporting discretion to deal with circumstances that cannot be anticipated in rule text. The basic idea may be one that is awkward to frame in rule-speak: "really good reason" for transfer.

This discussion was summarized as leaving it still uncertain whether, "all else being equal," disputes should be resolved by the ancillary court. The draft Note seems to make this "the locus of inertia." Perhaps it would be better to be completely neutral.

The suggestion that the rule should refer to the burden on the nonparty witness was repeated. This was elaborated: transfer should be strongly discouraged if the nonparty witness can show that transfer would impose an unfair burden. The problem that the ancillary court may take too long to decide, interfering with progress in the action court, could be addressed by establishing a firm deadline to decide — perhaps 30 days. But "I know this would be unpopular."

The time-to-ruling problem was addressed from a different perspective. Issue the subpoena. Eventually you will get the documents. If you want to get them promptly by getting a ruling from the action court, the party issuing the subpoena should be required to show why the dispute should be transferred. The Committee Note can cover the problem. So for the case where the action is pending in Seattle, the witness is in Miami, and the witness has no interest in the parties' dispute. The burden should be on the party to justify dragging the nonparty before the distant action court.

A third member spoke in favor of focusing on the nature of the dispute. Transfer seems appropriate when the issues are not peculiar to the nonparty witness, or when some form of forum shopping is going on. Frequently the "nonparty" witness is related in interest to a party, and may be raising issues at the party's behest rather than from any particular interest of its own. "Most issues really belong in the action court." Questions of the scope of discovery often have been decided in the action court before the issue arises in the ancillary court.

A judge observed that the lawyers' discussion was helpful. But it is also useful to think of the impact on the judge in the ancillary court. Often an ancillary-court judge will pick up the phone and talk with the judge presiding over the action. That opportunity should remain available even when there is a rule providing for transfer. The judges can reflect on "what is really driving the dispute," and their conversation may enable coordination that facilitates a sound ruling by the ancillary court without the need to transfer.

Another judge agreed that when acting as the ancillary court, "I call the presiding judge." Perhaps the rule could distinguish between "local" issues and those that are more tied to the merits.

Turning back to the draft rule and Note, it was observed that they seem to express a mild weight in favor of retaining the dispute in the ancillary court. "But the range of circumstances is broad." Often the nonparty local witness is aligned with a party who wants to defeat the discovery, or to make it as difficult as possible. But it may be difficult to draft rule text that usefully distinguishes between local disputes and those that tie more directly to the action court. And the discussion has not produced any consensus as to the choice between transfer and no transfer "when the arrow points 55/45." Some comments seem to prefer transfer to the action court, others to prefer retaining the dispute in the ancillary court. And there is a risk that the longer the rule is — the greater detail it provides to "guide" a transfer decision — the greater will be the tendency just to decide the motion without wading through the elements of a transfer order.

The difficulty of framing detailed rule text led to another suggestion that the details should be addressed in the Note. And it may be better to avoid any reference to a burden or presumption.

"Once the obvious cases are sorted out, perhaps there should not be a burden." In the same vein, it was suggested that the balance will be different in different cases. Perhaps the Note could be limited to making that point, without suggesting any presumption.

"Jurisdiction" over the nonparty witness came back for more detailed discussion. Referring back to the example of an action pending in Seattle and a nonparty witness in Miami, it has been protested that the court in Seattle does not have jurisdiction over the nonparty in Miami. Related questions were raised at the miniconference. Can the Florida lawyer appear in the Seattle court? Many courts, for example, allow e-filing only by a lawyer who is admitted to practice in that court. The Subcommittee believes there is no real jurisdiction problem. And it believes that often transfer will generate few practical problems or burdens. Briefing of the transfer motion in the ancillary court often will address the merits of the dispute so thoroughly that there is no need for extensive additional briefing in the action court after transfer. The briefs are easily transmitted. Argument can be made by telephone. Enforcement of an action court's order against a distant witness "will be worked out in practice."

Support for this view was voiced by suggesting that the judge in Seattle is not at all likely to require the Florida lawyer to associate local counsel. "This should get worked out."

The jurisdiction question was further addressed by observing that Rule 45 now allows the lawyer in Seattle to issue a subpoena in the name of the Florida court. Although the rules do not now provide transfer authority, and many courts conclude that transfer is not possible, other courts have made transfers without creating apparent issues of jurisdiction.

Time to object. The discussion of transfer orders led to discussion of the time allowed to object to a subpoena. Rule 45(c)(2)(B), addressed only to document subpoenas, provides for an objection that suspends operation of the subpoena until the serving party moves for an order compelling inspection or production. The objection "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." It has been protested that this time is very short, and some lawyers who consult Rule 45 only occasionally have been known to misread it as saying that 14 days is always the outer limit. There is a reason for the 14-day limit. The requesting party may "be in a hurry." But Rule 34 allows a party 30 days to object; why is a nonparty given less time? So it was suggested that 14 days is a very short time for people truly not connected to the action. A witness who knows nothing of the litigation needs to wade through the subpoena, consider whether to get a lawyer, and prompt the lawyer into action. Why not set the limit at the time to comply, just as Rule 34 sets a single period to respond by stating that inspection and related activities will be permitted, or by objecting?

It was noted that lower courts have divided on the question whether failure to object in 14 days results in waiver. And those that find a waiver then generally excuse the waiver.

So, it was asked, what happens if the witness gets a couple of extensions of the time to comply without registering an objection, and then objects?

A judge observed that the problem is similar to the common encounters with motions to extend the time to file a brief made on the day before the brief is due, or a similarly late motion to file an over-long brief. "We need to be able to say no." "It's easier if there's a deadline."

It was agreed that these problems should be considered further. A nonparty subpoena can be for simple things, easily identified and produced. An objection under Rule 45(c)(2)(B) is a potent thing because it stops all compliance automatically. And it is better to avoid a situation in which some material is produced promptly, while other material is held up.

The internal puzzle of Rule 45 was expanded. Rule 45(c)(3) addresses all subpoenas, not just document subpoenas. Subparagraph (A) begins by stating that the court must quash or modify a subpoena "on timely motion." Although arguments can be made either way, this seems to be independent of the time to make an "objection" under (c)(2)(B) — remember that an objection is made without a motion, and that the burden of making a motion is put on the party who seeks to compel production. (c)(3)(B) says the court may quash in other circumstances "on motion," without specifying that the motion must be timely. Nothing in (c)(2)(B) suggests waiver, unless it be by implication that the peculiar right to suspend the effect of the subpoena can be claimed only by a timely objection. Courts have not been able to figure out a uniform answer to the waiver question, although those that find waiver generally excuse the waiver. This should be straightened out.

An observer noted that the ABA Litigation Section is considering the waiver problem. Most courts do find waiver if the time to object is not met. But if the subpoena is really overbroad, "courts cut a break." One recent case rejected objections made after 14 days, but when compliance was due. This problem should be solved.

A Committee member agreed that as a practical matter, the 14-day limit does create a problem. But this is balanced out by negotiating over protection against compliance costs. "There is more balance in a practical sense." Another member agreed that there is little practical difficulty: "I've never had a judge find a waiver. These things are negotiated. Objections typically are made in a brief two-paragraph letter. Phone calls follow."

The Subcommittee included these questions in its initial list of 17 Rule 45 questions. Lawyers said it is not a problem and it was dropped. But then it came up again in the miniconference. The Subcommittee will consider it once more.

Party as trial witness. As noted in the introduction, the Vioxx decision has become famous, attracting followers and also stimulating disagreement. The Subcommittee proposes to restore what it believes was the intent of the 1991 amendments. Rule 45(b)(2) service requirements limit the reach of all subpoenas. Neither a party nor a party's officer can be compelled to appear at trial unless the trial is held at a place where service could be made under Rule 45(b)(2). The preface of (b)(2), "[s]ubject to Rule 45(c)(3)(A)(ii)," is meant to incorporate the restrictions of (c)(3)(A)(ii), not to expand the reach of (b)(2). The provision in (c)(3)(A)(ii) that directs the court to quash a subpoena that requires a person who is neither a party nor a party's officer to travel more than 100 miles, but allows the person to be commanded to attend trial by travel within the state where trial is held, does not imply that a party or a party's officer may be commanded to attend trial no matter where the subpoena is served.

Although the Subcommittee is clear on the original intent of these rule provisions, there are plausible arguments that the rule should be changed. Some of the courts that disagree with the Vioxx decision rest on faithful reading of the rule text, but reflect a wish that the court could command a party and some persons identified with a party to appear as witnesses at trial no matter where served. A number of lawyers at the miniconference thought this would be a good idea when there are strong reasons to want trial testimony, not deposition testimony. Many lawyers agree that when good reasons appear, judges often "jawbone" an agreement to produce the party as trial witness.

An alternative that would expand authority to compel appearance as a trial witness is presented in the agenda materials. The draft does not rely on a party-issued subpoena. Instead it requires a court order based on showing "a substantial need that cannot otherwise be met without undue hardship." The order is always directed to a party. The order may direct the party to appear to testify at a trial or hearing, or may direct the party to produce a person employed by the party. The direction to produce a party's employee is subject to further limitations. One version would require

that the employee be subject to the party's "legal control." An alternative version would be limited to a person who is an officer, director, or managing agent of a party. The draft rule also directs the court to consider substitutes for appearance at trial — audiovisual deposition under Rule 30, or contemporaneous transmission of testimony from a different location under Rule 43(a). Reasonable compensation may be ordered. Rule 37(b) sanctions may be imposed for disobedience, but only on the party. This alternative is not the Subcommittee's recommendation, but it has seemed important to develop a workable alternative if further work or public comment make the case that a trial court's reach should be expanded.

The first question was why the draft refers to testimony at trial or hearing. Most cases seem to involve appearance at trial. But Rule 45(a)(2) describes a subpoena for attendance at a hearing or trial, issued by the court where the hearing or trial is to be held. Testimony may be important at some hearings that are not yet trials. A Rule 65 hearing on a preliminary injunction is an illustration, whenever the hearing is not combined with the trial on the merits.

The second question was whether courts actually have authority now to compel a party to appear. Rule 16(c)(1) recognizes that a court may require that a party or its representative be present or reasonably available by other means to consider possible settlement. More broadly, the court has jurisdiction over the parties by virtue of their party status. But these analogies do not extend to a person who is not a party, but only a party's officer — the witness in the Vioxx case was not a party. Jurisdiction to enter an in personam judgment, further, need not automatically extend to authority to compel appearance as a trial witness; even if the authority exists absent some limit, the Subcommittee view of Rule 45 is that the rule is designed to limit this authority. And as for Rule 16, the authority to compel a party to be "present or reasonably available" — although not a limit on inherent authority — emphasizes the need for flexibility. It seems better to determine what the trial court's authority over a "party" witness should be and to express it in rule language.

Opposition to extending authority to compel a party's appearance as a trial witness commonly rests on the fact that trial subpoenas may impose severe burdens on high-level officials within many organizations. Often the best witnesses with the greatest knowledge of the issues in suit are lower-level employees more directly involved with the underlying events. Some lawyers seem unable to resist the temptation to subpoena higher-level officials for strategic advantage in settlement negotiations.

Alongside the fear of strategic misuse lies the perception that the advantages of live trial testimony are often exaggerated. Video depositions have become routine. No study has shown that live trial testimony provides a better foundation for challenging the testimony and evaluating credibility. Contemporary jurors are accustomed to receiving information "through a flat screen." "It is a myth that you need the company president before the jury."

So too, it was observed that "these issues get worked out." If a particular officer or employee is in fact an important witness, it is in the party's interest to produce that witness. Failure to produce the witness may look bad.

A related thought was that the logic of identifying an organization as a party can be carried too far when it extends to identifying the organization's agents as if parties. Officers and agents are human beings. They deserve protection as individuals.

It was agreed that the Subcommittee should develop an alternative draft that in some way adopts the Vioxx view that there should be a means to compel party witnesses to appear at trial when that is important. That led to considering the means of presenting the alternative for public comment and testimony. Different modes can be used to present alternatives for public comment. One is to present them as equals, with the Committee undecided which seems better. Or one can be presented

as preferred, but asking for comments on the alternative. If the alternative is presented in fully developed form, it may be possible to respond to the comments by recommending the alternative for adoption without a second round of publication. It will be important that the alternative presentation reflect the seriousness of the issue — rather than a lengthy footnote, it would be better to present it in text form. The letter soliciting comments can explain the Committee's preference and explore the most likely arguments on all sides.

A few detailed drafting issues were also discussed. The question whether the order to appear should apply to a "hearing" as well as a trial was renewed. The discussion has repeatedly referred to the value many lawyers place on presenting a live witness to a jury. Juries do not hold hearings. This led to the suggestion that perhaps the authority should extend only to "a jury trial." But it may be that a trial judge would prefer to see the witness in a bench trial. And it may be better to retain the authority for a hearing as well. A judge is not likely to order an appearance unless there are strong reasons.

It also was asked whether it is wise to track the "substantial need and undue hardship" formula of Rule 26(b)(3) in this setting. Use of the same formula may imply to some courts that the tests are the same. The questions are quite different, essentially unrelated. Perhaps some better formula can be found to avoid confusion. "Cause," "substantial cause," or the like are familiar alternatives. The direction to consider such alternatives as a video deposition or testimony by contemporaneous transmission will help to give meaning and direction to whatever words are chosen. The Note can explore these matters further.

The discussion concluded by reaffirming the Subcommittee recommendation that the Vioxx rule be overruled. At the same time, an alternative that embodies some part of the Vioxx approach will be prepared for publication. But the alternative will be clearly billed as a less-preferred approach.

Simplifying Rule 45. The agenda materials include a draft that adopts the least "aggressive" of the several approaches that have been considered for simplifying Rule 45. The idea is to reduce the number of combinations of authority the present rule provides for action court, issuing court, and place of performance. All subpoenas would issue from the court where the action is pending. Among other advantages, this will eliminate the prospect of service "within" the state by tagging a passenger in an airplane flying over the state. Separate provisions in Rule 45(c) would address the place where performance is required. Some drafting accommodations will be required — references to the "issuing court," for example, must be reconsidered. Transfer authority will be worked into the draft. The result will not significantly reduce the word count of Rule 45, but it will simplify its operation.

Judge Campbell underscored the value of simplification by stating that for years he has regularly found it necessary to read through the rule to identify the place of compliance, visiting subdivisions (a), (b), and (c) to identify the issuing court, the place of service, and limits on who is required to do what, where. The complexity can be reduced even if there is no change at all in the places where performance is required. And there is value in doing so. Quite recently a big Arizona firm issued a subpoena for a nonparty in Los Angeles from the District of Arizona; it was necessary to explain the ruling refusing to enforce the subpoena because it must issue from the district court in California. Even the sophisticated firms may misread the present rule.

This proposal has met the same questions about "jurisdiction" as the transfer proposal. But in a real sense we have the same jurisdiction now, albeit in indirect form. A lawyer who has an action pending in Arizona can issue a subpoena from any federal court in the country. The court in

the Southern District of Florida, for example, does not even know that a subpoena has been issued in its name. Filling in its name is a fiction. The functional question is where disputes about performance should be resolved. That is the same question raised by transfer.

Criminal Rule 17(e)(1) provides for service of a subpoena anywhere in the United States. It suggests that such provisions can be adopted under the Rules Enabling Act. Committee members were uncertain, however, whether the Criminal Rule rests on statutory authorization. (Brief research after the meeting showed that the advisory committee said that Rule 17 "continues existing law, 28 U.S.C. 654." Section 654 has since been repealed, and in any event Rule 17 went further than the statute by disregarding limits on a subpoena issued at the request of an indigent defendant. See 2 Wright & Henning, Federal Practice & Procedure: Criminal 4th, § 277.) It will be desirable to develop further the explanation of the reasons for finding Enabling Act authority to support nationwide subpoenas. The draft Committee Note for the transfer provisions addresses the question, and can be developed further. But it may prove better to set out this explanation in the letter transmitting a final proposal for publication and comment, rather than enshrine it for posterity in the Note.

The most significant reason to hesitate over simplification is the fear of unintended consequences. There should be little risk on this score if the job is done carefully.

A Committee member suggested that this approach sounds like a style project. What is the intended long-term benefit?

A court official immediately responded that there are many lawyers who do not practice regularly in federal court and who simply do not understand Rule 45. A judge agreed. Many lawyers in small bankruptcy cases, for example, are not sophisticated in federal practice. Revising Rule 45 can help them. Another judge observed that the draft is a real improvement. "Even a small dose of simplification is welcome."

A countering suggestion was that sophisticated lawyers will rejoin: "We know how it works. Why take a chance?"

The place of performance provisions, drawn from present Rule 45(c)(3), prompted a suggestion that perhaps the idea of "substantial expense" should be incorporated as a limit on the transfer provision.

A deeper question was whether the simplified rule should simply carry forward the present limits on place of performance. Whatever the conclusion, it is assumed that the court for the place where performance is required can quash or modify a subpoena. It also is assumed that an order made by the court where the action is pending can be enforced by the court where performance is required. The local court in the place of performance will, just as now, open a miscellaneous docket number. And it seems fair to understand that a subpoena addressed to a nonparty in Los Angeles is performed in Los Angeles, even if the subpoena directs that documents be mailed to Phoenix. The present draft does make adjustments in the present rule by providing that a subpoena to produce electronically stored information can direct production "at any location reasonably convenient for the producing person." That may create some ambiguity about the place of performance. And it raises the question whether it is desirable to allow the party serving the subpoena to determine the place of performance. We do not want to enable manipulation.

A detailed question asked why draft Rule 45(c)(1)(B) provides only for a nonparty subpoena to attend a trial, not also a hearing. The answer was that this provision simply carries forward the provision of present Rule 45(c)(3)(B)(iii).

Judge Campbell concluded by observing that the discussion will greatly help the Subcommittee in preparing a Rule 45 proposal for the April meeting.

Preservation and Spoliation

Judge Kravitz recalled the groundswell of ideas at the Duke Conference and the strong support for undertaking rules amendments to deal with the duty to preserve evidence and with corresponding sanctions for spoliation. The Discovery Subcommittee has agreed to consider these questions, recognizing that it is not clear whether it will prove possible to craft useful rules. It has begun work through telephone conferences and a meeting in Dallas on the eve of the Rule 45 miniconference.

The Subcommittee has put aside for the moment a nagging question about the authority to make rules addressing conduct before an action is filed in a federal court. The federal courts clearly recognize that the duty to preserve potential evidence arises when there is reason to anticipate litigation that has not yet been filed. How far does the Rules Enabling Act authorize rules that address preservation conduct before any action has been filed, and that will become relevant only if an action is in fact filed and is filed in a federal court? There are strong reasons to believe that there is authority to frame such rules, but the question of authority may depend in part on the nature of the rule. It has seemed better to work at developing the best rule possible before confronting the question of authority head-on.

Judge Campbell described the initial work. The Subcommittee has held four telephone conferences and one meeting. That has sufficed to make it through the issues one time. The purpose of reviewing the issues today is to gather reactions to the tentative beginnings, not to decide anything.

The Duke Conference panel on these issues was very strong. It was the only panel at the Conference to make a strong and unanimous recommendation. It even provided a detailed sketch of the issues that should be addressed by a comprehensive set of rules. Spurred by this help, the Subcommittee has decided that there should be rules to address these issues if good rules can be drafted and put forward with confidence.

The setting is familiar. The volume of electronically stored information has exploded. Much of it may be relevant in litigation. It is easily destroyed, and that leads to destruction. Business and government systems often are designed to delete information automatically during routine ongoing operations. Deletion also occurs as a matter of conscious choice. All of this leads to spoliation problems. Many potential litigants are deeply concerned about the consequences. But it will be difficult to draft an effective rule. The circumstances that arise across the spectrum of litigation are too varied to be captured in precise guidelines. It may be that rules directing "reasonable" behavior would provide little help or protection.

Despite these concerns, judges in many large districts report that they do not encounter these issues very often. Adopting express rules may create more discovery disputes than they eliminate.

Case-by-case development of the law may prove wiser than an attempt to adopt explicit rules. Nonetheless, the Subcommittee is committed to the attempt. Although the problems have been expressed in relation to electronically stored information, it seems likely that any rules will be more general. At least everything within the scope of Rule 34 and the corresponding provisions of Rule 45 is likely to be covered.

It is important to continue to gather information. Emery Lee is conducting an FJC study to determine how often preservation and spoliation issues arise. Andrea Kuperman has searched the case law for decisions on each element on the Duke Panel's list; the law seems to be consistent on

some issues, but inconsistent on others. Katherine David is helping to develop a general description of other laws that impose duties to preserve information. A complete catalogue will not be possible, but the general landscape can be sketched.

The question whether a rule can regulate conduct before an action is filed in federal court is serious, but the Subcommittee has decided to undertake the drafting project without reaching a firm conclusion. If in the end it seems possible to create a good rule, but significant doubts about Enabling Act authority persist, it may be appropriate to ask Congress to clarify the Committees' authority.

It also will be important to attempt to find out what happens in corporations and other institutional litigants before litigation is filed. There are many complaints that vast amounts are spent on preservation in the shadow of uncertainty. Some information has been available from RAND, the Sedona Conference, and IAALS studies, but more information will be useful.

Emery Lee then presented the state of his research as of November 16. He emphasized repeatedly that the work is still preliminary, and is in a stage that represents only his own efforts, not anything the Federal Judicial Center can endorse. These cautions were expressed several times as the presentation went on.

The study was based on a text search of CM/ECF records looking for specific words and rule numbers. It extended to cases filed in 2007 or 2008 in 19 districts. The districts were chosen primarily by looking for big districts; they do not constitute a representative sample. The focus is on motions for spoliation sanctions. Of 131,992 cases, the issue was located in 209. That is 0.15% of the total cases. The issue tended to come up late in the course of the litigation.

These are "very odd cases." Typically they are cases in which the parties had a hard time agreeing on the price of the claims. For the cases that have reached disposition, the average disposition time is 649 days — 1.8 years; that compares to 253 days for all cases in the districts. The mean time to the motion for sanctions is 513 days. Of the cases that terminated, 16.5% went to trial; that compares to 0.6% for all other cases in the sample, although it seems likely that as time goes on the other cases that progress to a conclusion will rise to a trial rate somewhere in the typical range of 1% to 2%.

Of the 209 cases, 153 rose on motions for sanctions. The others involved sanctions requests in conjunction with motions for summary judgment, requests for jury instructions, or motions in limine looking toward an impending trial.

Remembering again that the research is in a preliminary phase, a variety of things can be counted. The slides summarizing the figures are attached to these Minutes as an appendix. Among other things, they compare the frequency of spoliation motions to other types of motions as counted by recent surveys. The IAALS surveys found that all types of discovery sanctions are rarely sought, and are even more rarely granted. The FJC 2009 closed-case survey did not ask about motions. It did ask whether spoliation claims were raised in cases that had any discovery. Plaintiffs said such claims were raised in 8% of the cases, and defendants said 5%. Including cases in which there is no discovery, spoliation claims would be made in 2% to 3% of all.

This snapshot study cannot account for trends, whether spoliation issues are arising more or less often over the years. The Willoughby and Jones paper at the Duke Conference did find an increase in reported decisions over time.

It may help to remember that the closed-case survey showed that each dispute about discovery of electronically stored information, whatever the type of dispute, increased case costs by 10%.

And lawyers repeatedly report that fear of sanctions drives behavior even if sanctions are rarely imposed.

Of litigated spoliation disputes, 40% involve only electronically stored information, 13% involve electronically stored and other information, 21% — in many ways the most interesting — involve tangible property, 18% involve paper documents only, and 9% involved materials that could not be identified (inability to identify the materials arose from sealed motions, motions that did not clearly identify the materials thought to have been lost, and the difficulty of categorizing such items as photographs).

The cases can be broken down by case types for all types of materials; for electronically stored materials only; by the moving party; by types of moving plaintiffs and nonmovants; by types of moving defendants and nonmoving defendants; by grant, denial, pending, or no action or mootness, and so on. For comparison, the dispositions in the reported cases gathered in Andrea Kuperman's memorandum were counted — they showed a far higher rate of motions granted, at 60%; looking only to reported cases gives a distorted picture. The most common sanction was a spoliation instruction; precluding evidence and cost awards came next; reopening discovery was fourth.

Comparing claims of spoliation before an action was filed with spoliation after filing, 25% of the cases surveyed involved only pre-filing claims.

Often the motions do not cite a legal basis for imposing sanctions, or cite only a decision in another case. Rule 37 and inherent authority are invoked with nearly equal frequency.

The study could, with enough time, be expanded to count more courts, and to track the cases over a longer period.

The preliminary data must be audited to see whether anything has been missed the first time through.

The motions and files do not give any sense that local rules of attorney conduct were invoked. Nor do they give any hint whether there were collateral state professional-conduct complaints.

Judge Campbell summarized the presentation as suggesting that sanctions motions are very rare; that they are even more rare in cases involving electronically stored information; that sanctions are still rarer. It is interesting that lawyers report so earnestly that the fear of sanctions drives behavior. Perhaps that is because the selective basis for reporting decisions creates an impression worse than the reality. And caution was expressed about reading too much into the reported cases.

Another Committee member responded that "the consequences are so horrific you don't want to go even close." The fear may be important in deterring misconduct. It can help when talking to clients to tell them that they can destroy a good case by spoliation.

It was observed that the category of spoliation instructions is itself variable. The court may decide on an instruction that directs the jury to presume the lost information was harmful to the spoliator or helpful to the would-be discoverer. Or it may leave it to the jury to make that determination as an open-ended inference.

The Committee expressed great thanks to Dr. Lee for excellent work and a lively presentation.

Discussion was opened on the general questions: is it desirable to attempt to draft a rule? How many of the elements described by the Duke Conference Panel should be included? The elements are described in the agenda materials beginning at page 147.

The first question, tied to the problem of reaching pre-litigation conduct, is how to identify the "trigger" that starts the duty to preserve. Is it at all helpful to rely on "a reasonable expectation of probable litigation," and if helpful is that an accurate formulation? Should the trigger, or application of a general reasonable expectation standard, depend on whether the litigant is a sophisticated business enterprise or an individual?

And what is the scope of the duty to preserve once it is triggered? How far back in time should materials be preserved, and on what subjects when there is only a vague general idea of the events giving rise to the expectation of litigation? How long must the material be preserved going into the future? The variation in circumstances is as enormous as the range of topics that can be litigated in federal court. Uncertainty can increase cost, perhaps enormously. The concept of proportionality is difficult to apply at this stage. And there is no court to ask for guidance

The fear of sanctions for failing to comply with the indeterminate duty seems to be the source of collective angst. But the questions in framing a rule begin with determining what counts as a "sanction." Is an order allowing further discovery as a response to spoliation a sanction, or is it simply wise administration of the rules guiding proportional and reasonable discovery? Or what of an award of the expenses of attempting to recreate the lost information by other means? Any rule that limits or bars sanctions must be carefully drawn to preserve remedies designed to offset the inability to discover the lost materials. As to orders that really are sanctions, is it possible to calibrate in general terms the severity of the sanction with the culpability of the conduct and the importance of the loss? Loss and prejudice are regularly balanced against each other in determining spoliation sanctions, but framing meaningful guides, much less anything like "guidelines," will be difficult.

A first observation was that spoliation is an area where prevention can be important. Businesses have compliance programs to protect against violation of substantive law. Antitrust compliance programs are a familiar example. Perhaps no compliance program can be effective against all possible violations, but establishing a good and generally effective program can reduce the wrath of enforcement authorities when a violation does slip through. There is a thriving business in helping design compliance programs. The same approach may prove valuable in addressing spoliation problems. If businesses can be encouraged to design and implement good preservation systems, the sanctions for occasional failures may be reduced. And good behavior may be significantly advanced.

The need for a rule was raised by observing that the statistics tend to suggest there is no need. But the perceptions of the bar, and of their clients, suggest that perhaps it would be good to develop a rule. It might help to go back to the Duke panel for further input, perhaps asking them to draft their proposed elements in rule language. It is not likely that any precise matrix can be developed to measure out sanctions. But some guidance is possible, perhaps beginning with emphasis on proportionality measured by the degrees of culpability and prejudice. The more specifics that can be put into the rule, the better. It is unfortunate that judges have had to develop responses without the help of a rule.

The consequences of having no rule were emphasized by noting that different circuits have quite different standards for tailoring sanctions to misconduct. A nationwide organization — business, government, or other — has to tailor its conduct to the most severe, which may be the Second Circuit.

The Department of Justice is perhaps the leading example of a firm that litigates all around the country, appearing both in the service of the government as plaintiff and the government as defendant. But given the FJC findings as to the infrequent imposition of sanctions or even sanction requests, it may be wondered whether a rule is needed. The problems seem to be case- and fact-

specific. Crafting a traditional one-size-fits-all rule will be difficult. Would education of the judiciary work better? Even if there is to be a rule, education may be important in the interim.

The idea that compliance programs should count in favor of a spoliator was translated into the suggestion that it would be good to provide safe harbors so that organizations sufficiently sophisticated to take advantage of the programs would know what their obligations are. But that will be difficult to accomplish in face of the fact-specific nature of the questions.

The Northern District of California is developing model protective orders. The bar has accepted the templates, and they have greatly reduced attorney work and disputes. So it may be that for spoliation, the best idea is a template rather than a rule. But the effort to develop a rule is worthy. The model would not distinguish between the government and other entities — if the government is constantly in a state of preparing for litigation, so are many other organizations.

This discussion prompted the reminder that education programs and support materials are being worked on. The pocket guide on e-discovery is being revised, and the revised version will discuss sanctions.

It was further observed that the case law is approaching the idea of safe harbors for those who make careful and good-faith efforts to comply with preservation obligations, but the approach is incomplete. The approach could be that there is a safe harbor for complying with an established set of expectations, while failure to comply would not establish a presumption of bad faith. This result would depart from the cases that seem to suggest there is a real exposure to sanctions for failing to do what a judge says a litigant should be doing.

John Vail, speaking for the American Association of Justice, said that the plaintiffs' bar agrees that these are serious issues. But in some cases sanctions, such as adverse inferences, are a matter to be governed by state law in diversity cases. There may be real Enabling Act questions, similar to those raised by Evidence Rule 502. He further observed that the duty to preserve may be triggered by private contract obligations. Most commercial insurance contracts impose on the insured a duty to report likely litigation to the insurer. The contract language is not likely to be changed no matter what rule might be adopted. Finally, the plaintiffs' bar "is waking up to the idea that plaintiffs too have preservation obligations." It will be important to ensure that proportionality concepts are invoked to regulate the obligations.

Alfred Cortese, speaking for defense groups, suggested there are several issues a rule should address. Among them are defining the triggering event, defining the scope of the duty to preserve once it is triggered, and the standard for imposing sanctions. It will be important to have specific data on the costs of preserving information in deciding on these issues. An effort is under way to get better data; all that can be said confidently at the moment is that the cost of preservation is enormous. The Searle Institute study will be followed up; the study itself gathered information from 36 or 37 companies, each of which devoted what must have been several hundred thousand dollars just to gather data on their own experience with preservation costs. It is hoped to show why preservation costs are so high, and also to show how they relate to total enterprise profits. The figures in hand now suggest that litigation costs run from 16% to 20% of total profits. It seems likely that most of these costs are preservation costs, and mostly internal costs.

It was suggested that the information on preservation costs will be more useful if it covers the costs of all preservation activities, without regard to whether they are incurred for litigation. It also will be important to know what preservation costs would be if much-improved preservation systems were prepared. But the overall cost of American litigation may present problems that the Committee cannot do much about, whether through preservation and spoliation rules or otherwise.

Returning to the trigger question, it was asked what the standard should be: a reasonable expectation of litigation? Knowing that litigation will be filed — a certainty? Guidance is important.

As to scope, it is important to define the duty to preserve. Scope links to discovery, and can be addressed even if the discovery rules are not changed. It is important to remember that business records are ordinarily maintained for business purposes, not for litigation.

And it was urged that the standard for sanctions should be intent. Data are produced and destroyed every second. Non-intentional destruction should not be the occasion for sanctions.

The intent test was met by asking whether the same test should apply to destruction of tangible things. Some kinds of potential evidence may be so important as to require a duty of care. One of the cases described in the materials imposed sanctions for destroying an automobile before the defendant could have an opportunity to inspect the allegedly defective airbag system. Mr. Cortese responded that he had not thought about the standard for such problems, but that is important to distinguish the loss of data. As compared to the automobile, often it is impossible to know whether the supposedly lost data ever existed.

It was agreed that purposeful destruction is different, and clearly an appropriate subject for sanctions.

An observer noted that it will take time to develop a rule, if it is possible to create one at all. It is important to develop education programs now. The Committee should push others to do so. The standard of culpability "is chaotic." The same problems are answered differently by different courts. Directly contradictory results are often found.

The same observer suggested that the trigger issue also will be difficult. One example is the question whether common knowledge throughout an industry that litigation has been brought against one member should put all other members on notice that they too may be sued — even when one them first becomes a defendant after the original action was filed. One court found there was a duty to preserve. That is inappropriate. Everyone has to work to the most demanding standard. But unsophisticated lawyers, and even plaintiffs who know when they start to think about filing an action, remain unaware of the duty to preserve.

Continuing, this observer illustrated the costs of preservation by describing a big company that is storing 135,000 backup tapes because of a government investigation. The storage costs alone are $1,000,000 a year. "People preserve a lot because they're scared to death."

This discussion prompted a further question: should "big" cases — perhaps defined by the volume of potentially preservable information — be addressed by adopting a two-part rule?

Thomas Allman, another observer, noted that Gregory Joseph did a wonderful job in leading the Duke Conference panel to overall consensus on preservation issues. But differences remain on what should be in a rule. The "front end" cannot be resolved by rule, but the "back end" can. The standard of care for preservation should be good-faith, reasonable conduct proportional to the dispute once litigation seems inevitable. The panel thought about developing processes that would define the pre-litigation duty to preserve, but abandoned the effort in favor of relying on common sense. Rule 37(e) is starting to come into its own; the cases are ruling that it means what it says. But Rule 37 should be amended to cover preservation as well as discovery — it is limited too narrowly by applying only to "sanctions under these rules." The rules do not address preservation absent a prior order. The question whether sanctions should be limited to cases of intentional destruction is difficult; innocently destroying the wrecked automobile with the air bag presents a hard choice. The rules in any case should be general, transsubstantive. The front-end problem, the trigger, will remain

a burden that attorneys and litigants have to carry. The Committee Note might explore the factors that bear on defining the trigger.

A different observer said there is a huge difference between battles pitting large entities against each other and battles that involve individuals. It has been asserted recently that tools are now available to retrieve information from a backup tape for $500; the cost is in reviewing the information once it is retrieved. The key to preservation obligations should be good faith in the normal course of operations, retaining whatever is retained in the course of business. But technology continues to change rapidly; enterprises planning preservation programs should keep abreast of the changes. The cost of preservation for litigation declines drastically if the defendant negotiates and acts transparently. The parties should agree on search terms. But cooperative conduct is rare. A plaintiff in a small-stakes case who does not know much about a defendant's system cannot afford to hire an information technology consultant. The people who complain about the costs of e-discovery focus on the top 5% of the cases that cause 50% of the problems. It would be a mistake to draft general rules for 5% of the cases. There should be a separate rule for the problem cases. The problem cases may be identified in part by the amount of damages sought. In the problem cases it would be really helpful to have an IT master who can mediate or arbitrate the disputes. The parties would behave better if subject to such control. Paying for it should not be an unreasonable burden in cases that involve a lot of money.

A member asked whether part of the problem is diffusion of information within an organization — the more diffuse, the greater the difficulty? It was agreed that this can be part of the problem of complexity. Another observer suggested that the problems can be reduced by taking seriously the Rule 26(f) conference and the general proportionality principles of Rule 26.

Another member suggested that "different realities" are reflected in different settings. But most complex cases do not need a special master. The small fraction of cases that lead to demands for sanctions are those in which the defendant fundamentally does not believe it should be in court, does not respect the court's authority. A new sanctions rule will trigger strategic motions. Most defendants, on the other hand, take preservation obligations seriously. That lends support to the idea of a safe harbor. "We can leave the bad actors out." Still, it is surprising how often people refuse Rule 26(f) obligations to describe what is preserved, how systems work, how to frame search terms. There should be a rule that "gives comfort to parties that they have done what is required, without encouraging motions."

Still another member agreed with these observations. "The corporations I represent are looking for rules and guidelines. They want to comply. Reputable companies have compliance programs." But creating a new rule is not necessarily the answer. Aside from the triggering problem, the parties are willing to consult once litigation begins. "No one expects to get everything." "The rogues are the problem, but they are rare" and the problems they create can be resolved. Lawyers also want to do it right, but do not know what is right. Protective order templates may be an answer. New rules may not.

An observer noted that the adverse-inference instruction can be considered an evidence problem, not merely a discovery sanction.

A judge member noted that the case that caused the greatest difficulties in her experience involved one plaintiff. The plaintiff's entire business involved computers that he changed continually. It would be difficult to write a rule that captures cases like that.

It also is important to remember the differences between lawyer and client. Rule 37 does refer to lawyers as well as parties. The obligation on lawyers must be borne in mind.

Judge Campbell asked what is the greatest source of anxiety: Is it the sanctions decisions? The standards of conduct? The intent required to impose sanctions? The case law seems to be pretty consistent on the events that trigger an obligation to preserve, and on the scope of the obligation. Would it be wise to address only Rule 37(e), providing that reasonable conduct does not warrant sanctions, intentional conduct does warrant sanctions, and recognizing the ambiguity of conduct that is perhaps not reasonable but also is not intentional?

One observer suggested that prompt revision of Rule 37(e) along these lines would do more good than a long drawn-out project to develop more elaborate rules.

Another observer suggested that we do need a rule that recognizes the duty to preserve, and defines it as a reasonable duty. That could be lodged in Rule 26 or in Rule 34.

Returning to Rule 37(e), it was asked whether it could be framed to define preservation duties in terms of sanctions, and should then be made all-inclusive so as to preempt deviations in the name of inherent authority? A response was that inherent authority is invoked now only in cases of intentional misconduct. It is not a real problem. There are some "loose expressions" in some of the cases, but they "do not portend much." But rules sanctions do oust inherent authority. To that extent, revising Rule 37(e) could help.

An observer agreed that Chambers v. Nasco can arguably be read to impose a bad-faith threshold for invoking inherent power. California and at least one other state have omitted "under these rules" from their equivalents to Rule 37(e) for this reason.

Another observer suggested that this approach would be comforting only if the Second Circuit could be persuaded to fix its Residential Funding decision.

Another observer noted that the Duke Conference panel on preservation was unable to agree whether the standard of culpability should be negligence or wilfulness.

The history of the 2006 work on Rule 37(e) was recalled. The Committee added "under these rules" in part from concern about Enabling Act limits. It knew that the 2006 e-discovery rules were not likely to be the last word. Instead, the basic hope was that they would survive over a few years of continual changes in technology, recognizing an obligation to monitor practice and to revisit the questions when useful changes might become possible. The present discussion is exactly the process that was contemplated. "As we come to understand more, we might be able to do more." It was not only the Advisory Committee that took this view. The Standing Committee also recognized that the 2006 amendments "were a start." If we can find appropriate language for uniform national rules changes, "we can affect conduct."

Jonathan Redgrave, an observer, noted that "divergent standards are the bane of corporate programs." Probably it is better to have a single rule for all litigation, not a separate rule for a subclass of cases that are somehow described as complex or likely to generate problems. Defining the subclass would be difficult. But real help can be had. Rule 37(e) could be elaborated to distinguish between case-altering sanctions and other orders that involve only money or other less severe consequences. But, it was asked, how would "case-altering" be defined? The list of sanctions in Rule 37(b) suggests a hierarchy, but how would it be separated for this purpose? Suppose the sanction is that an expert is not allowed to discuss something that is not in the report or a supplemental report? A money sanction of $10,000,000 — whether in a case involving $100,000,000 or a case involving $1,000,000? Mr. Redgrave recognized the difficulty, but thought a list of sanctions would do it: default, dismissal, adverse inferences would clearly be in the restricted class. Some others also might be added. Part of the problem is that individual litigants often have large amounts of information, and have no inkling of preservation obligations.

A Committee member observed that an adverse-inference instruction logically makes sense only if there is intentional destruction. Would it help if a rule said that an adverse-inference instruction is appropriate only if the spoliator was aware of, or appreciated, the harmful character of the lost evidence? Mr. Redgrave said it would. The dialogue continued with the observation that this ties to Rule 37(e)'s provision that routine good-faith operations are protected. There is no need to change this language, but a Committee Note could give guidance on the limits of inherent authority.

And perhaps some of this should be lodged in Rule 16, looking for discussion of the number of custodians whose information must be preserved, and other elements of the time and scope of preservation. The Rule 16 process forces courts to address these issues early. And Rule 26(c) also can be used.

This discussion led back to Rule 26(f), which directs the parties to discuss preservation. Is there a way to know whether that has made a difference? RAND found in a general way, before the 2006 amendments, that it could measure no difference from Rule 26(f). Mr. Redgrave said that anecdotal evidence suggests that Rule 26(f) has made a difference when the conference is followed by exchanging "day one" letters. There are no reported decisions, but parties who deal with the Rule 26(f) conference in good faith work it out. Too many parties, however, treat Rule 26(f) as a "drive-by." "Judicial management to prevent parties from gaming the system is important."

So it was asked again whether a rule can deal with issues such as the number of custodians whose information must be preserved, preserving backup tapes, types of sources — voicemail? PDAs? And so on? The suggestion was that at least Rule 16 can give guidance as to the issues that should be discussed: the types of media, numbers of custodians, and scope in subject and time. A Note might observe that it is not really useful to make forensic images of hard drives. But beyond that, it would be difficult to spell things out in the discovery rules themselves. Who and what is a custodian? Technology can change even that. Real safe harbors in Rule 37(e) will help.

Emery Lee reported a statistically significant finding that parties are more likely to discuss e-preservation since the 2006 revision of Rule 26(f).

Another observer noted that a large group of attorneys representing all sides of litigation, house counsel and independent counsel, has found that Rule 26(f) conferences to discuss discovery do help. There is much more discussion.

Judge Campbell concluded the discussion by observing that it had been very helpful.

Judge Kravitz concurred, adding that this is an ongoing process. It may be that the Subcommittee can prepare some illustrative language on sanctions in time for the April meeting, recognizing that sanctions provisions will affect conduct on the front end.

Rule 26(c)

The March meeting carried forward a perennial draft of Rule 26(c) protective-order revisions. The draft has roots in the extensive work done in the mid-1990s. It is supported by continuing revisions of the work Andrea Kuperman is doing on the law and practices in all of the circuits.

Consideration of Rule 26(c) has not been prompted by any sense that it is not working well. The Committee has not found any significant problems, despite regular inquiries. Nothing at all was said about Rule 26(c) in the Duke Conference studies of ways to improve the Civil Rules. The work instead has been inspired by concerns reflected in bills that have been regularly introduced in Congress since 1991. These bills reflect a fear that discovery protective orders are defeating dissemination of information needed to protect public health and safety. Sealed settlements also are included in the bills.

The Judicial Conference has continually opposed these bills, in part on the fundamental ground that they are inconsistent with the Rules Enabling Act process that Congress created to provide well-informed, disciplined, and painstakingly careful development of procedural reform. One illustration of the advantages of the Enabling Act process is found in the FJC study of protective orders undertaken at the Committee's request. The study found that most protective orders enter in litigation that has no connection to concerns about public health or safety. Even when the litigation does involve such issues — product liability actions are the examples most often cited by the proponents of legislation — there is no basis to find that protective orders deprive the public of information required to protect health or safety. Documents in the public court file, beginning with the complaint, ordinarily include all the information needed for this purpose. And information can be disseminated by many other means without violating a protective order. Beyond that concern, the provisions of the bills also are inconsistent with a speedy and inexpensive discovery process.

Judge Kravitz testified against bills pending in 2009, and activity seemed to relax for awhile. More recently a substitute bill has been introduced. The new bill is narrower than earlier versions. It no longer applies to all civil actions, but only to actions with pleadings showing claims that impact public health or safety. Product cases, environmental cases, and like cases would be familiar examples. In these cases the court still would be required to find, before entering any protective order, that the order would not affect the public health or safety, or that the order is the narrowest order possible to protect interests in confidentiality that outweigh the possible impact on public health or safety. Judge Kravitz and Judge Rosenthal have met with Congressional staff to discuss the shortcomings in the revised bill. Representatives of the American Bar Association Section of Litigation also have presented different but complementary negative reactions. They agree that there is no problem that needs a solution, and that the proposed solution will create problems far worse than the bill's proponents imagine.

The transparency of the world has increased greatly since 1991 when the bills were first introduced. It is not clear that all information potentially affecting public health and safety is available when every action that might involve such information is filed, but the means of dissemination and the interest in dissemination are great. In many ways, the need to protect privacy and confidentiality has increased.

Judge Kravitz noted that the staff member who talked with him and Judge Rosenthal asked who has the burden of justifying protection if a confidentiality designation is challenged. The answer was that the proponent of confidentiality has the burden, that this is well established in the cases, but Rule 26(c) does not expressly say that. Another question was whether a nonparty can challenge the order. The answer was that intervention is readily allowed, although that does not appear in Rule 26(c). Other good questions were asked, presenting a concern that although the case law may be well established, it is case law, not part of the rule.

These staff concerns raise a familiar question. When should a rule be amended to incorporate well-settled interpretations? Some parts of the rule, read in isolation, seem archaic. The enumerated reasons for protection, for example, do not include the common and highly important need to protect individual privacy. Protective orders are routinely entered to protect personal privacy in employment litigation, in litigation involving physical or mental conditions, and so on. On the other hand, there is a remarkable consistency in the law across all the circuits. There is no indication that important interests are being ignored, whether they weigh for or against protection, and however they bear on shaping protection that is granted.

Continued examination is warranted. Indeed, it is vital to continue monitoring the case law and any signs that important interests are being slighted.

Discussion concluded with related observations. The importance of these problems will lead the Committee to continue to pay careful attention to Congressional concerns and to monitor the case law. Rule 26(c) will continue on the agenda.

Pleading

Judge Kravitz launched the discussion of pleading by observing that "All law professors know what Twombly and Iqbal mean. Mere mortals do not." The agenda materials include three recent appellate opinions that invoke the Twombly and Iqbal opinions. This small sample provides some indication of what is going on as courts come to terms with the new pleading discourse. Two of the opinions avoid the "plausibility" password that has figured so prominently in many opinions. The Third Circuit has stated that the Court has not silently overruled its own decision in the Swierkiewicz case. The general questions will continue to simmer in the lower courts. It is possible that the Supreme Court will offer new guidance in the Al-Kidd case, but there is little point in speculating about that possibility before the Court issues its decision.

Joe Cecil's research project is not finished. It would be unfair to ask for any premature impressions. But the report should be ready in time for submission to the Standing Committee for its January meeting; it will be sent to all Advisory Committee members at the same time. One of the difficulties has been that it is difficult to track down what happens by way of amendments after part or all of a complaint fails on a first motion to dismiss.

Andrea Kuperman continues to update her memorandum on the case law, focusing primarily on the courts of appeals.

Joe Cecil spoke briefly of his ongoing project at the Federal Judicial Center. The plan is to study all orders resolving motions to dismiss in 23 districts — for the most part, the districts are the two largest districts in each circuit. The focus is on January 2010, a month when the district courts had guidance from some post-Iqbal appellate decisions. The study includes orders that are not published. If a motion to dismiss is granted, the first question is whether it dismissed only part of a case or instead, standing alone, dismissed all of the case. Then it will be asked whether leave to amend was granted. Preliminary study suggests that leave is very often granted. That makes it all the more important to find out whether an amended complaint was filed, whether it was met by another motion to dismiss, and what happened after that.

Judge Kravitz noted that the Committee continues to reap great benefits from FJC research, including the work done by Joe Cecil and Emery Lee.

The FJC focus, going beyond the reported docket descriptions, focuses on Rule 12(b)(6) motions. To that extent the report will be more refined than the docket-based statistics being collected by the Administrative Office. The Administrative Office figures include the rates of all motions to dismiss. One common question is whether motions to dismiss are made more frequently after the Twombly and Iqbal decisions. The sudden increase in the number of appellate opinions on pleading is not of itself a good measure; it is to be expected that courts will write more opinions, and longer opinions, as they work through the early years of teasing out the consequences of the Supreme Court's new guidelines.

One specific appellate response to the prospect of more frequent pleadings appeals was suggested by Judge Newman at the Duke Conference. Judge Newman has developed his suggestion by drafting a Second Circuit rule for expedited disposition of appeals from case-ending rulings on the pleadings. He also has asked the clerk's office to gather statistics. He believes that it is possible — and desirable — to provide fast disposition of appeals that present only questions of law based on the pleadings alone.

Beyond these general observations, the agenda materials sketch a number of possible approaches to pleading practice and related discovery practice. Surveying the field does not imply a suggestion that the time to act has come. To the contrary, it is important to allow time for lower courts to work through the Twombly and Iqbal invitation to reconsider pleading practices as they existed on May 20, 2007. These decisions have launched a common-law process of development that will mature only after some years yet. The end point may be little different than the rather uneven practices that prevailed before the Supreme Court expressed its uneasiness with the prospect that inadequate pleading thresholds make it too easy to impose heavy discovery burdens on defendants for little reason. Or it may be that pleading barriers are significantly raised. Whatever happens, it will be important to determine, as carefully as possible, whether the general run of decisions can be improved by amending the civil rules; whether amendments are desirable; and how to craft any amendments that may seem desirable.

Looking first at pleading standards, the agenda sketches cover a wide range. At one end lie attempts to articulate "a standard that never was" — literal implementation of the "no set of facts" dictum in the Conley opinion that the Court retired in the Twombly opinion and that had not been taken literally by the lower courts. At the other end lie illustrations, several of them drawn from proposals by leading research and bar groups, that would raise the pleading threshold higher than anything that can fairly be found in the Twombly and Iqbal opinions. Many variations lie between these end points. Among them are proposals that, to the extent possible, would seek to restore pleading practice to whatever it was, with all its variability, as of May 20, 2007.

Drafts focused on Rule 8(a)(2) are easily multiplied. But there are powerful reasons to hesitate before moving in this direction. The Twombly opinion is expressly framed as an interpretation of present Rule 8(a)(2), and the Iqbal opinion embraces Twombly. When Rule 8(a)(2) was written, the drafters understood the great difficulty of attempting to express in rule language the concept that, however accurately, has come to labeled as "notice pleading." As Judge Clark put it, the Forms annexed to the Rules were provided in part to overcome this difficulty, providing "pictures" to express ideas that are not readily captured either in rule text or in Committee Note. Any revised language in a Committee Note, however carefully explained (and perhaps inadvertently expanded), would face comparable difficulties. Certainly new rule language would create a new period of uncertainty, even if the Note said the language was intended only to confirm whatever range of practices had emerged by the time the new rule was adopted. Lower courts, moreover, would know that the Supreme Court would be providing the ultimate and authoritative interpretation of the amended rule. The Twombly and Iqbal opinions would continue to influence their reactions.

Apart from Rule 8, other pleading approaches are possible. From the time of the Leatherman decision, the Committee has considered — and shied away from — the prospect of adding particular categories of claims to the Rule 9(b) list of matters that must be pleaded with particularity. A converse approach would be to list particular categories of claims that, most likely because of difficulty in acquiring fact information, can be pleaded more generally than most claims. Proposals of this sort would be seen to reflect an intent to favor, or disfavor, the substantive law underlying the specified claims.

Still other pleading approaches are possible. Again, they can be taken up as growing experience may suggest the need.

Beyond pleading, a variety of approaches could be taken to integrate pleading motions with discovery opportunities. Discovery in aid of framing a complaint might be provided before an action is filed. Or a preliminary complaint might be authorized in a form that identifies matters that the pleader cannot plead adequately without an opportunity for sharply focused discovery. Or an opportunity for court-directed discovery might be integrated with Rule 12 procedures on a motion to dismiss. The integration with discovery might extend to recognizing or expanding the opportunity

for an early summary-judgment ruling that moves beyond the difficulty of pleading to the difficulty of proving the critical facts. These possibilities too may be better postponed while the courts continue to reshape pleading practice.

An observer suggested that the great concern with Twombly, and more particularly the "judicial experience and common sense" phrase in Iqbal, is that they free trial judges to dismiss cases based on subjective views. It will be important to learn how district judges come to understand these words, and the more general "plausibility" standard.

It was agreed that "plausible" may seem to suggest a subjective standard. It should not be read that way. It would help to find a way to make it clear that these are objective standards.

An apparently important foundation of the Twombly and Iqbal opinions, moreover, is the Court's concern about the costs of discovery. The FJC data in the closed-case study suggest that for most cases, discovery costs are not as dramatic as the Court may have supposed.

A Committee member asked whether there are data on the time it takes to get from filing the complaint to discovery. His experience has been that a court may avoid dismissing on the pleadings, but ask the plaintiff to state more facts in deference to the perceived new standard. This approach is accompanied by a stay of discovery. The delay in beginning discovery is a reason to go to state court. And the situation is made worse as defendants have come to ask certification for a § 1292(b) appeal from denial of a motion to dismiss. Certifications are not being granted, but the process adds to the delay.

A judge responded: "I don't stay discovery." But the concern was repeated that in complex cases, discovery is effectively stayed "until you get through the motion to dismiss." "Time is the ultimate killer for the plaintiff's side." This problem is so urgent that the Committee should take up pleading amendments sooner, not later.

A different response was that any change in the rules will generate new uncertainty that in turn will augment delay. But it was rejoined that establishing an objective standard will help. "We need to get the motions decided."

The distinction between complex cases and ordinary cases also bears on the problem. There are a lot of straight-forward cases that do not involve much discovery. Discovery often is allowed to go forward while a motion to dismiss remains pending in these cases. Frequently there is a strong prospect that although the motion may be granted in part, it will not support dismissal of the entire action. Some of the six defendants and eighteen claims will be dismissed, but not all.

Another judge suggested that some members of the bar are asking that Twombly standards be imposed on pleading affirmative defenses. "Do we want this"? A judge responded that "I do make defendants spell out an 'error' defense in FDCPA cases."

More general questions were raised after a reminder that there were no proposals for action presented by the pleading agenda. Should the Committee consider further the possibility of adding to the categories specified by Rule 9(b) for particularized pleading? Or develop a rule on discovery in aid of pleading? If a plaintiff is being strangled for inability to plead facts controlled by the defendant, should there be a provision for targeted discovery in a short time frame?

Although discovery in aid of pleading may seem desirable, a supporter observed that in some cases it may be difficult to establish effective discovery limits. Imagine a vehicle rollover case asserting a design defect. In a recent case targeted discovery on this issue has taken nearly a year, and only in the closing months was evidence discovered to show that there well may be a claim. This caution was supported by the observation that the same problem will emerge in many complex cases. Shaping "targeted" discovery on the conspiracy issue presented by the Twombly case would

be difficult. And a comparison was drawn to the attempts to distinguish between "class" discovery and "merits" discovery at the certification stage of a class action; the attempted distinction often is not helpful. Any scheme of targeted discovery will depend on judge control.

As for adding to Rule 9(b), conspiracy cases (Twombly) and official immunity cases (Iqbal) may seem likely candidates. Some observers believe that most of the force of the Supreme Court decisions will be spent on cases like these. But doubt was expressed whether the answer lies in expanding Rule 9(b). "It will be very hard to select additional categories for Rule 9(b)," at least if the list is not to become very long. Discovery may be the key. The focus might be on what you have to show to be entitled to discovery that will help in fashioning a pleading. Parallel amendments to Rule 8(a)(2) might be in order. The central question is how much information a plaintiff must have to be able to invoke a court's assistance. Courts now have discretion to permit discovery while a motion to dismiss is pending. The discretion can be exercised by listening to what the parties have to say.

A lawyer said his experience has been that courts generally do not stay discovery pending disposition of a Rule 12(b)(6) motion. Twombly is not much of a problem. The problem is the cost of discovery. Settlements are often reached in order to avoid discovery. Courts do order expedited discovery on a crucial point. But the concept of "targeted" discovery is difficult to manage. It will add to the problem.

A judge responded that one example of focused discovery arises from limitations defenses. It is very difficult to be confident that a limitations defense can be resolved on the pleadings. It works to allow discovery on the limitations issues alone, to be followed by a motion for summary judgment if the defendant thinks it appropriate.

Another judge noted that in Pennsylvania an action can be commenced by filing a "summons" without a complaint, and that discovery can be had on the basis of the summons. "Lawyers try very hard to remove" to federal court. In the Eastern District of Pennsylvania, Twombly and Iqbal have made no difference. Although the language of the opinions "can be very disturbing," the Eastern District judges are not reading the opinions in the ways that cause alarm.

The discussion of pleading concluded with several reminders. The FJC study will be completed soon. Andrea Kuperman will continue to update her fabulous memorandum of the emerging cases. A look at the briefs in the Al-Kidd case may give some hint whether the Supreme Court is likely to confront issues that will drag it once again into the fray. Meanwhile, all Committee members are urged to think further about pleading issues and to send their thoughts to Judge Kravitz and the reporter.

Duke Conference Subcommittee

Judge Kravitz noted that after the Duke Conference concluded he asked Judge Campbell to lead the Discovery Subcommittee into a study of preserving documents and e-files, and related spoliation issues. Those issues were prominent in the discussions. Pleading proposals will continue to evolve as more information comes in. As for everything else, he asked Judge Koeltl to chair a subcommittee charged with ensuring that the momentum imparted by the Conference does not wane. The empirical work done for the Conference, and the hosts of ideas presented, should not be allowed to waste away.

Judge Koeltl listed Subcommittee members as Gensler, Grimm, Keisler, and Pratter. Judge Rothstein and Judge Wood are also participating.

The Subcommittee goal is to build on the energy generated by the Conference, and to advance its goals. Many of the most prominent issues involve pleading and discovery, and those are being addressed outside this Subcommittee.

The Subcommittee has had two phone conferences, and will meet at breakfast before the start of the Committee meeting on November 16.

Some of the ideas advanced at the Conference might be addressed by rules amendments. A lengthy but incomplete list of possible rules proposals is presented by the "menu" in the agenda materials. Suggestions for added rules changes will be welcomed. Among the discovery proposals are several outside those now being considered by the Discovery Subcommittee. Specific rules changes might help make discovery quicker, less expensive, and more efficient. It might help to make the concept of proportionality more prominent. Judge Grimm has suggested changes that would codify the importance of cooperation. Daniel Girard suggested specific changes to deter obstructive discovery responses of the generalized sort often encountered — "overbroad, not calculated to lead to admissible evidence, irrelevant, immaterial, and otherwise objectionable." The generalized responses are then often copied into the answer to each question, which is made "subject to these objections."

Other discovery suggestions would impose specific numerical limits on rules that do not now have them. One proposal, for example, is to allow only ten Rule 34 requests to produce. Others would limit the number of requests for admissions. Compared to these proposals is the interesting FJC finding that there is little discovery in most cases, and that most lawyers think the level of discovery is appropriate to the circumstances of the particular cases in the closed-case survey. The problems tend to concentrate in high-stakes cases, where lawyers tend to be more assertive.

Related suggestions would require a meet-and-confer before making any motion, or would require lawyers to meet and confer before a pretrial conference — and would require that a pretrial conference be held in every case.

The rules possibilities are long-term work, but it is important to begin now and to capture the enthusiasm generated by the conference.

Apart from rules changes, there may be many ways to identify and foster best practices that work better and faster than rules changes. Many of the Conference suggestions could be included in the Civil Litigation Management Manual. The Second Edition of the Manual has just appeared. The Subcommittee would be glad to work with the Committee on Court Administration and Case Management to incorporate ideas from the Conference if CACM would welcome the collaboration. The Manual does refer to the Boston College discovery conference; the Duke Conference could readily fit in. Professor Gensler and Judges Grimm, Rosenthal, and Rothstein are reviewing the Manual to identify opportunities to add Conference-inspired material.

The FJC is working on revising pocket guides. New best practices can be incorporated, drawing from the Conference.

Pilot projects also may prove useful. The IAALS continues several projects. The Seventh Circuit e-discovery project is continuing, and the FJC is collaborating in it. The possibility of other pilot projects is being pursued. The Southern District of New York is anxious to do a pilot project. A Judicial Improvements Committee brought lawyers together to talk about motions practice and complex litigation. If a project is undertaken, it would be undertaken in conjunction with the FJC. Judge Grimm and the Sedona Conference are thinking about pilot projects on e-discovery. The National Employment Lawyers Association has started work on a set of form interrogatories for employment cases that would be presumptively proper; when the work is completed, a pilot project might be a good way to test the idea.

Opportunities thus are presented for rules amendments, education programs and materials, and pilot projects. Questions remain as to which subjects should be developed by which means, and which should be addressed first.

Abel Matos of the Administrative Office noted that the Civil Litigation Management Manual is available online. CACM hopes to keep updating it for new rules and the like. A panel chaired by Judge Leighton is charged with keeping the Manual current. Judge Koeltl added that the Manual is indeed an excellent resource.

Judge Rothstein said the Manual is good because of a lot of hard work by CACM and the FJC and the Administrative Office. It is important to get it to work in judges' hands. The FJC is looking for ways to present it more effectively. The FJC e-discovery pocket guide needs updating, and work is being done. As to pilot projects, many districts are trying things. The FJC can try to tune in, finding ways to be helpful in designing the projects and reviewing the results so there is rigorous evaluation and learning. Many of the Conference ideas are great; ways must be found to get them into wider circulation. Improving the way things are done now, under the present rule structure, will help forestall more drastic proposals for change.

Judge Koeltl added that the Manual grew up under the Civil Justice Reform Act. It is directed to judges as guidance, disclaiming to be "authority" or "law." With this focus, it is not distributed in bound form to lawyers, and lawyers are not in a position to cite it to judges as a guide to good practices. The original Manual was available on WestLaw; it may be that the Second Edition also will be available on line. The FJC, moreover, is working with the circuits in an attempt to persuade them to present serious programs on case management. The Manual could be showcased in these conferences.

More general discussion began with a question drawn from the notes on the Subcommittee's September 10 conference call. The Subcommittee concluded then that the time has not come to undertake a fundamental reconsideration of the basic structure embodied in the 1938 rules. Substantial improvements may be possible in the package of notice pleading, broad discovery, and summary judgment, but the package should survive. The question was whether this conclusion is premature. A lot of dissatisfaction was expressed at the Conference. Arizona, with searching disclosure requirements, thinks its system is a real improvement. Oregon, with fact pleading, is similarly proud of its system. Some participants urged adoption of "civil Brady" disclosure requirements. Perhaps fundamental rethinking should have a place on the agenda.

This challenge was met by observing that the Conference generated a consensus that the general structure of the rules should survive. It is too early to run the risks of throwing it out and starting anew. Even the panel on discovery, an area of great concern, emphasized the opportunities to find solutions in vigorous exercise of the authority and discretion conferred by the present rules. There was a division of views on pleading standards in the wake of the Twombly and Iqbal decisions. That topic will continue to be studied vigorously — for now, the Committee chair and reporter constitute the working group. There is continuing concern about cost and delay, as always. Whether cost and delay can be reduced by rethinking the structure of the rules remains uncertain. Fundamental changes also might be required in the culture of the lawyers and judges who enforce the rules.

Professor Gensler has provided some thoughtful responses, including a package of changes that would be acceptable across a broad spectrum of the bar. It is important to think about the possibilities for a package that would be realistic and would receive broad support. It was encouraging to find lawyers agreeing on some changes at the Conference, but it also seems clear that lawyers and judges have to do a better job.

A related response was that a three-year debate on reformulating the Federal Rules of Civil Procedure may be a good idea, but it is not clear that this Committee is the best group to do it. The Committee can propose useful changes. Pleading is under active consideration. The discovery rules are continually reconsidered and regularly changed. Summary judgment has just been studied at length and a new rule is on the verge of taking effect. "It is better to focus on things that can be done in our life time."

This observation was supplemented by noting that "there are people out there pursuing broader projects. We can keep following them and inviting them to speak with us."

Another Committee member returned to the question of basic structural reform by recalling the results of the FJC closed-case survey. A large number of the lawyers said that the cost of the case actually involved in the survey was appropriate. At the same time, they suggested that overall the system is too expensive, that litigants are being priced out of federal court. Trials may be vanishing because of the cost of getting to trial. The conference materials on the local practice in the Eastern District of Virginia were impressive. Perhaps the "rocket docket" should be studied further, as well as the practices in various states that depart significantly from the federal model.

This contrast between the evaluation of experience with a specific case and overall impressions was probed further by noting that the results of the ACTL/IAALS survey, the ABA Litigation Section survey, and other surveys also yield impressionistic responses that the system is "too expensive." The FJC survey itself found very expensive litigation "at the high end." The problems of the most expensive cases may well deserve study and attempts to find remedies. But attempted reforms "should not mess up things that people are satisfied with." If additional requirements are imposed, they should not be imposed on the simpler cases that work well now.

The sense of simpler cases was examined from a different angle. The $15,000 cost reported for median cases in the FJC survey seems relatively modest to many lawyers. But for many litigants it is prohibitive. Absent public subsidy, it does not seem possible to design procedures that will bring costs down to a level that can be managed by most potential litigants. It remains important to attempt to control costs as far as can be done.

A different standard of evaluation is to compare costs in federal court with costs in state court. The survey asked about the relationship between these costs, on a scale that rated "4" as "just right." The majority — about three quarters — of the lawyers gave answers of 3, 4, or 5. "Too high" responses of 6 or 7 were limited to about 15% of the respondents, and those were in the cases with higher discovery costs.

As to absolute costs, practitioners invariably report that litigation is too expensive. Arizona lawyers and Oregon lawyers, working in systems quite different from each other and also quite different from the federal model, say that litigation is too expensive. So we regularly hear that education is too expensive, health care is too expensive, national defense is too expensive, and so on. Responses at this level of generality are useful reminders that we have not achieved an ideal system and that reform work must continue.

The surveys asked about the advantages of developing new limits on discovery. Both Arizona lawyers, with searching disclosure requirements, and Oregon lawyers, with fact pleading, say that their procedures limit the amount of discovery, and focus the discovery that does occur. But they split evenly on whether this reduces cost or delay, and even on whether their procedures reduce the pressure to settle.

In a different direction, it was suggested that encouraging more basic research on what is really happening may be an important response to the Conference materials. One recent study sought to measure the effects of procedure on cost and delay by separating case factors from system factors.

The conclusion found that case factors account for about 75% of the variations. Another study looks at factors that make settlement more likely; there is a lot of room to pursue these questions. We do not know much about the impacts of procedure on litigation of complex commercial transactions as compared to the cases that are priced out of court by costs of $15,000. There is a lot we do not know about the operation of the rules, and a lot to be learned. All of the Duke surveys were directed at lawyers; clients were represented only by surveys that include corporate counsel. And the information that general counsel think litigation is too expensive is hardly news. "We're talking to ourselves, not to the consumers."

These questions prompted the observation that it is one thing to say the system is too expensive and quite another thing to solve the problem. The complexity of the rules could be trimmed drastically. Or an attempt should be made to require all judges to be actively involved in planning discovery. One-size-fits-all discovery rules can be made to work with active case management, and this approach may be better than imposing strict and narrow limits. The Committee can think about these things.

A different summary of the same proposition suggested that "everyone is right. We will never be in a position to declare our work done." The Committee must not forget that everything that affects the courts' business continues to change. The need for dramatic revision may arise, and if the lessons of history are any guide the need will arise. It is important to continue improving the disciplined, empirical information that will support continual evaluation of the system. The Committee is "the only group involved with reform that is involved without hope for advantage." If we often wind up talking to ourselves, the Conference went far beyond that.

The impact of a $15,000 cost figure came back with the observation that newspaper articles reporting that cost as a substantial barrier to access focus on the middle of the pyramid. Many people cannot afford an attorney at all. The Western District of Washington, as many courts, has a huge influx of foreclosure cases. The defendants cannot pay attorneys. "$15,000 can make the difference in losing your home." Committee discussions, and lawyer dissatisfaction, regularly focus on the top of the pyramid. "Federal court will always be a luxury court to the ordinary citizen. Revising the rules will not affect that problem."

Nonetheless, there is a connection between the cases at the apex of the pyramid and those at the lower levels. Only aggregate litigation will bring many ordinary people to court. General counsel surveys do not reflect this reality.

State courts were brought back by noting that Massachusetts courts are experimenting at both the low and high ends. They are providing a speedy path to trial in complex cases that is drawing cases away from the federal court. We must pay constant attention to state-court developments.

All of this discussion will provide support for the further work of the Duke Conference Subcommittee.

Civil-Appellate Issues

Judge Colloton reported that the Civil-Appellate Subcommittee has two active items on its agenda. Each item originated with the Appellate Rules Committee.

One problem arises at the intersection of Appellate Rule 4 with Civil Rule 58. The potential problem with Appellate Rule 4 arises when a post-judgment motion is decided on terms that require entry of an amended judgment but the precise terms of the judgment are not yet fixed. The running example is an order granting remittitur and allowing the plaintiff 40 days to decide whether to accept. It is not clear whether the 30-day appeal period begins to run on entry of the order, or is deferred until the plaintiff makes the choice. If Rule 4 is amended, it may be useful to amend the Rule 58

provisions on entry of judgment in parallel. These issues have been described at earlier Committee meetings and will be brought back once the Appellate Rules Committee has decided the Rule 4 question.

"Manufactured finality" is the other issue. The core example is a case with one plaintiff, one defendant, and two or more claims. The court dismisses one claim while the other claim remains alive. If the plaintiff believes that the dismissed claim is the principal claim, and perhaps that the remaining claim is not worth litigating in isolation, the plaintiff may seek to achieve finality so as to appeal. Rule 54(b) is the primary source of authority, but it depends on persuading the court to enter a partial final judgment. If the court is not willing, or if it is uncertain whether the two "claims" are actually separate for purposes of Rule 54(b), the plaintiff may prefer to dismiss the remaining claim. Three basic variations can be identified.

First, it is reasonably well established that finality can be established by dismissing all remaining claims with prejudice. Still, it may be useful to confirm this practice by express rule provisions.

Second, the plaintiff may prefer to dismiss the remaining claims without prejudice, hoping that "cumulative finality" will support an appeal. Most of the circuits reject this ploy, although it has occasionally succeeded. The Subcommittee is inclined to think this is not a proper means of achieving finality. It would be possible to adopt a rule making that point clear.

Third, the plaintiff may seek to dismiss the remaining claims with prejudice, subject to revival if the order dismissing the main claim is reversed. The Subcommittee refers to this tactic as "conditional prejudice." The courts of appeals have divided on this tactic; the clearest acceptance is in the Second Circuit.

The central question is whether it would be helpful to adopt a rule, or perhaps rules, regulating manufactured finality. The Rules Enabling Act, § 2072(c), authorizes rules that define finality. It can be done.

The agenda materials include sketches of various approaches to these issues, confined to relatively simple situations. Even with the simpler situations, there are concerns about the prospect of multiple appeals. Still, a rule could be framed that reaches the simple cases without undertaking to address all of the problems that can arise in cases that involve multiple claims among multiple parties. The Subcommittee believes these questions should be explored further. It will be useful, for example, to find out what can be made of experience in the Second Circuit. There is a fair amount of case law to consider, although it is drawn out over a period of fifteen or twenty years.

A member asked whether these questions tend to arise after a district court has entered a partial final judgment under Rule 54(b), only to have the certification rejected by the court of appeals. Judge Colloton answered that the cases generally have not come up in this posture.

Another member observed that interlocutory appeals by permission under § 1292(b) do not respond to all needs. And it is harsh to require dismissal of living claims that may well be valuable claims as the price of appealing a dismissed claim that is still more important.

A judge seconded this observation by noting that the Seventh Circuit does not grant many of the infrequent petitions for leave to appeal under § 1292(b). On the other hand, it does accept most "good" Rule 54(b) judgments. There has been pressure to increase the availability of interlocutory appeals. That can impose real burdens on the court of appeals. But the burdens can be reduced to some extent by assigning successive appeals to the panel that heard the first appeal.

The limits of Rule 54(b) were noted again. A party may wish to manufacture finality after a ruling that does not dispose even of a single claim, but that has a drastic effect in limiting what

remains. A major theory of damages may be rejected, for example, leaving only a relatively minor amount available. In other cases it may be uncertain whether there are two claims, or two theories offered to support a single claim. And even when the technical requirements are satisfied, the rule was designed to make the district court the "dispatcher" of appeals; refusal to certify defeats finality. In one way, the question of manufactured finality is which — if any — of the alternative manufacturing methods compensates for the unavailability of appeal under Rule 54(b).

Another judge observed that instinctively, "manufactured" sounds fishy. If the trial judge has rejected all alternative regular paths to appeal, appeal should be unavailable. But further reflection shows this is an interesting question. There will be an appeal on the principal claim in any event; the question is when. Immediate appeal may be to the advantage of the trial court, sparing it the need to work through the rest of the case before there can be an appeal that may change the game and require that everything be redone. Further work may result in a manufactured finality rule that does good things.

Still another judge noted that one problem arises when the parties have completely resolved their claims. The present situation puts the burden on the parties to decide what is peripheral: why not force them to make the choice?

An attorney member found reasons to favor conditional prejudice dismissals. Nothing happens further unless the plaintiff wins an appellate ruling that dismissal of the principal claim was wrong. If the plaintiff then believes that the peripheral claims are worth litigating along with the principal claim on remand, the full trial should be available. The more complex cases, however, present a problem. One approach would be to recognize a dismissal with conditional prejudice only if all parties consent, thus recognizing that the final-judgment rule protects the parties as well as the court system. But a consent requirement could open the way to gamesmanship, in which parties who have no real interest in the appeal seek to trade consent for some other concession. And if the trial court's consent is required, the result will be little more than creation of a new opportunity for interlocutory appeal. "The desire for a single definition of finality for all federal courts may not be enough" to justify new rules.

A judge from the Second Circuit suggested that if the district court thinks an appeal would be meritorious, the judge can send it up. "If not, the parties should have to make the hard choices." An appellate judge noted that this happens regularly in the Seventh Circuit, which recognizes manufactured finality only by way of unconditional dismissal with prejudice of all that remains in the action.

The Subcommittee will continue to work on these issues.

Pattern Discovery

Judge Kravitz introduced the pattern discovery project undertaken by the National Employment Lawyers Association. The idea was presented at the Duke Conference. The hope is to develop sets of interrogatories and document requests that are presumptively valid and can be used without objection in every case that comes within the set. The idea is promising, but it will work only if plaintiffs and defendants can agree on what is acceptable.

Joseph Garrison and Chris Kitchel have headed the effort, and have helped form an advisory committee composed of richly and impressively experienced plaintiffs' and defense lawyers.

Joseph Garrison introduced the first drafts, observing that if consensus can be achieved on pattern discovery, the goals of Rule 1 will be advanced. The Institute for the Advancement of the American Legal System is available to help the project. The committee hopes to develop a set of

pattern interrogatories within a year, and perhaps to reach agreement on some items by next April. The first draft, prepared by the plaintiffs' lawyers, is likely to be sorted into three categories: requests that are acceptable on all sides; those that seem sufficiently promising to warrant further drafting efforts; and "nonstarters." The management subcommittee is reviewing the plaintiffs' draft, and will prepare their own proposals within the next two months.

The committee will need some help. It may prove important to consult with some judges to determine what works from the judicial perspective.

Chris Kitchel said that the group has talked about an effort to find what should be acceptable in all cases. The work must aim to identify the kinds of information that professional specialists should be willing to give over without a fight.

Once agreement is reached, it will be important to think about the best means of introducing the pattern discovery questions in practice. It may be that the way to begin will be with local rules or standing orders. Perhaps the exercise should become a pilot project, so that it can be designed to provide rigorous information and review. In the longer term, it may be useful to ask whether the national rules should reflect the use of pattern discovery. Serving interrogatories and document requests with the complaint seems to run counter to Rule 26(d), unless there is a court order. That question may become ripe, however, only when several sets of pattern discovery requests have been developed for different areas of practice.

The effort for employment cases may well come to prompt similar efforts in other fields.

Adjournment

The meeting adjourned. The next meeting will be on April 4 and 5, 2011, in Austin, Texas, at the University of Texas Law School.

Respectfully submitted

Edward H. Cooper
Reporter

TAB 3

SUNSHINE IN LITIGATION

H.R.592 is the current generation of the "Sunshine in Litigation" bills that have commanded the Advisory Committee's attention for many years. The November 2010 agenda materials provided ample background. Correspondence opposing enactment of the bills introduced in the 111th Congress was included. The draft Minutes for the November meeting reflect the Committee's deliberations. The most important conclusion was that there still is no need to revise the protective-order provisions of Rule 26(c). Courts in all the circuits understand well the importance of public access to information that may bear on public health or safety. There is no persuasive information that protective orders actually impede the full flow of all information useful to protect public health and safety.

H.R.592 is different in many details from its predecessors. It carries forward a provision from H.R.5419, 111th Congress, that narrows the scope of application, applying only "[i]n any civil action in which the pleadings state facts that are relevant to the protection of public health or safety." This limitation may reflect a sense that pleading in the era of *Twombly* and *Iqbal* will generally include "facts" that identify any public health or safety concerns. However that may be, courts would have to refine the concept. An antitrust claim against pharmaceutical manufacturers, for example, could easily be found to affect public health or safety. As could a securities fraud claim based on the market effects of a pharmaceutical manufacturer's reports of a drug's efficacy.

Other differences from earlier bills will deserve careful analysis and comment when the legislative process moves ahead. They need not be explored now.

Many of the problems identified in earlier bills persist in this one. In any covered action, the court is required to make findings about the effect of a protective order and the interests in confidentiality before entering any Rule 26(c) order. The difficulty of making "independent findings of fac+t" about the information to be revealed by discovery that has not yet occurred is apparent. And the disruptions of discovery practice that will occur if the parties must begin discovery without a protective order are equally apparent.

These bills command continuing respectful attention. It is important to maintain close contact with Congress, and also to carry forward the study of current practice to ensure that actual administration of Rule 26(c) addresses all realistic concerns about public health and safety as effectively as H.R.592 would do. But no present Committee action seems called for.

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112TH CONGRESS
1ST SESSION

H. R. 592

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 2011

Mr. NADLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order otherwise authorized approving a settlement agreement that would restrict the disclosure of such information, or an order otherwise authorized restricting access to court records unless in connection with such order the court has first made independent 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 past, present, or potential public 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 order is no broader than necessary to protect the confidentiality interest asserted.

"(2) No order entered as a result of the operation of paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

"(b) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enforce any provision of an agreement between or among parties to a civil action, or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, between or among parties that prohibits one or more parties from—

"(A) disclosing the fact that such settlement was reached or the terms of such settlement (excluding any money paid) that involve matters relevant to the protection of public health or safety; or

"(B) discussing matters relevant to the protection of public health or safety involved in such civil action.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) Notwithstanding subsections (a)(1)(B)(i) and (c)(2)(A), when weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified infor-

mation (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

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(Original Signature of Member)

112TH CONGRESS
1ST SESSION

H. R. _____

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on _____

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking "may" and inserting "shall";

(2) in paragraph (2), by striking "Rule 5" and all that follows through "motion." and inserting "Rule 5."; and

(3) in paragraph (4), by striking "situated" and all that follows through the end of the paragraph and inserting "situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court".

(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

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112TH CONGRESS
1ST SESSION

S. 533

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9, 2011

Mr. GRASSLEY (for himself and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

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(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

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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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RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

March 14, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicated that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;

- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;

- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

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

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.

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

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SIDNEY A. FITZWATER
EVIDENCE RULES

March 14, 2011

Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Conyers:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

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The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

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Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

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

Enclosure

cc: Honorable Jerrold Nadler

Identical letter sent to: Honorable Lamar S. Smith

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

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Federal Judicial Center
2005

This Federal Judicial Center publication was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee or of the Federal Judicial Center.

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Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id.* at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? [Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?] Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? [Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?] Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substantially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

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March 11, 2011

Honorable Trent Franks
Chair, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Dear Mr. Chairman:

I am writing to express the views of American Bar Association on H.R. 966, the Lawsuit Abuse Reduction Act of 2011, which is the subject of today's hearing before your subcommittee. I request that you make this letter part of the hearing record.

H.R. 966 seeks to amend Rule 11 of the Federal Rules of Civil Procedure through the legislative process by reinstating a mandatory sanctions provision, which was adopted in 1983 and eliminated in 1993. It also would require, rather than permit, the imposition of monetary sanctions, consisting of attorney's fees and other costs resulting from the violation, and eliminate a provision adopted in 1993 that allows parties and their attorneys to avoid sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

While we appreciate that this latest version of the Lawsuit Abuse Reduction Act does not contain provisions present in earlier bills that would have applied Rule 11 to civil actions brought in state courts and imposed venue requirements under certain conditions, we still consider the bill to be ill-advised and unnecessary.

The ABA opposes enactment of H.R. 966 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate or needs to be amended. Third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, there is a real risk that the proposed changes would result in unintended adverse consequences that would encourage additional litigation and increase court costs and delays.

H.R. 966 contravenes the established Rules Enabling Act process for amending the Federal Rules of Procedure.

As a threshold matter, the ABA opposes the legislation because it circumvents the Rules Enabling Act, 28 U.S.C. §§ 2072-74, a balanced and inclusive process established by Congress to assure that amendment of the Federal Rules occurs only after a comprehensive review is undertaken.

This well-settled, congressionally specified procedure contemplates that evidentiary and procedural rules or amendments will in the first instance be considered and drafted by committees of the Judicial Conference of the United States. Thereafter, they will be subject to thorough public comment and reconsideration, and then, if approved by the Judicial Conference, will be submitted to the United States Supreme Court for its consideration and promulgation. Finally, proposed rules or amendments will be transmitted by the Supreme Court to Congress, which retains the ultimate power to reject, modify, or defer any rule or amendment before it takes effect.

This time-proven process is predicated on respect for separation-of-powers and recognition that: 1) rules of evidence and procedure are matters of central concern to the judiciary, lawyers and litigants, and have a major impact on the administration of justice; 2) each rule constitutes one small part of a complicated, interlocking system of court administration procedures, all of which must be given due consideration whenever Rules changes are contemplated; and 3) judges have expert knowledge and a critical insider's perspective with regard to the application and effect of the Federal Rules.

The Proposed Revisions to Rule 11 are Unnecessary and Counterproductive

On its face, H.R. 966 seems straightforward and has an understandable appeal. To those who believe frivolous lawsuits have skyrocketed, it seems equally reasonable to believe that the problem will be alleviated if attorneys who violate Rule 11 know they will be sanctioned and will have to pay for resulting attorneys' fees and court costs.

Unfortunately, the premise is not based on an empirical foundation, and the proposed amendments ignore lessons learned.

There is no dispute that the filing of frivolous claims and defenses is an important issue that deserves attention. We do, however, question assertions there has been a significant increase in the filing of non-meritorious litigation in the 18 years since Rule 11 was revised to permit the discretionary imposition of sanctions. While anecdotal stories can be riveting and take on a life of their own, they are an inadequate substitute for concrete empirical data of lawsuit abuse.

During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time. The Judicial Conference of the United

States, in a 2004 letter to Hon. James Sensenbrenner, noted that a mandatory application of Rule 11 created

> a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers, who advised withdrawal of particular claims despite the clients' preference; and provid[ed] little incentive...to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit after determining that it no longer was supportable in law or fact.

Judges, lawyers and clients all found the Rule to be counterproductive and harmful to the resolution of civil litigation. According to academics and court administration scholars who have previously testified before Congress on this issue, multiple empirical studies of the experience under the 1983 Rule support these conclusions.

Even if the filing of frivolous lawsuits has increased recently -- which, again, has not been substantiated -- the ABA is not convinced that the proposed changes to Rule 11 would act as a deterrent or reduce the incidence of frivolous or non-meritorious filings. In fact, past experience strongly suggests that, if enacted, these proposed changes will encourage additional litigation and increase costs and delays without accomplishing the stated goal of deterrence.

Rule 11, of course, does not operate in a void but rather is one part of a complex, coordinated and sometimes overlapping system that governs court administration. Often ignored is the fact that a court may invoke other rules of procedure, statutes, or its own inherent authority to prevent frivolous or non-meritorious lawsuits from going forward or impose sanctions when appropriate.

The ABA is not aware of any compelling evidence that there is a demonstrable need to revise Rule 11 or that the proposed amendments would remedy alleged problems. However, if legitimate concerns are raised, we urge Congress to defer to the Rules Enabling Act process to assure a comprehensive and dynamic examination of the issues and avoid taking action that results in unintended or adverse consequences.

Sincerely,



Thomas M. Susman

cc: Members, House Judiciary Subcommittee on the Constitution



March 18, 2011

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Re: H.R. 966, the Lawsuit Abuse Reduction Act

Dear Chair Franks, Vice Chair Pence, and Ranking Member Nadler:

The purpose of this letter is to express the views of the American College of Trial Lawyers regarding the proposed Lawsuit Abuse Reduction Act. The American College of Trial Lawyers is an honorary, invitation-only organization composed of leading trial lawyers and is widely considered to be the premier professional trial organization in

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America. Founded in 1950, the College is neither plaintiffs' nor defense oriented. It is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. Its membership cannot exceed one percent of the total lawyer population of any state, and in virtually every state is a fraction of that number.

The College firmly opposes enactment of H.R. 966. We respectfully submit that the bill is unnecessary and will impair the administration of justice in federal courts. The current version of Fed. R. Civ. P. 11 achieves the objective of providing for appropriate sanctions for abusive and frivolous claims and defenses. Fed. R. Civ. P. 11(c)(1) provides the federal courts with discretion as to whether to impose sanctions upon attorneys, law firms, and parties to cases. Fed. R. Civ. P. 11(c)(2) contains a "safe harbor" provision which enables a party whose pleading has been challenged by an opponent to withdraw the challenged pleading within twenty-one (21) days after the challenge. The current version of Rule 11 is efficient, enabling attorneys to voluntarily withdraw pleadings which are the subject of challenges, and also enabling federal judges to impose appropriate monetary sanctions and other sanctions if they find that pleadings are abusive, frivolous, or designed "to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1).

H.R. 966 would largely revert from the 1993 version of Fed. R. Civ. P. 11 to the 1983 version. The 1983 version of the Rule created numerous problems and difficulties for federal judges, attorneys, and parties to civil litigation, without conferring any benefit in fact to any litigant. Among other problems, mandatory sanctions were particularly pernicious, requiring every violation, no matter how trivial or marginal, to be sanctioned. Federal courts were required to engage in extended analysis to decide, for example, whether it was sanctionable for a lawyer to fail to read the final word processing printout of a complaint which, due to a computer glitch, included extraneous matter; whether punishment was warranted for a misstatement in a pleading that was clearly corrected by appended exhibits; and whether to penalize inclusion of a single losing argument in a brief that contained many substantial arguments.

The 1983 Rule created additional problems for parties and judges, impeding settlement and imposing additional transaction costs. Parties could not even control the litigation by conclusively deciding to settle it and withdraw all pending sanctions issues. Once a sanctions issue had been flagged, the judge was not merely empowered by the Rule to enter

an award *sua sponte*, but was affirmatively required to impose a sanction if he or she concluded that a violation had occurred. Even the attempt to withdraw or settle a claim was viewed as evidence of culpability on the part of the alleged offender.

By contrast, the 1993 amendments to Fed. R. Civ. P. 11 have had the salutary effect of encouraging parties and attorneys to withdraw those pleadings challenged by opposing parties or counsel, in good faith, as abusive, frivolous, or otherwise lacking in merit. Moreover, Fed. R. Civ. P. 11 has restored the necessary discretion to federal judges to impose sanctions on a case-by-case basis where judges find that sanctions are appropriate. Thus, the current version of Fed. R. Civ. P. 11 contains built-in mechanisms to deter abusive, frivolous, or otherwise inappropriate claims and defenses.

For all of these reasons, we respectfully request that the Subcommittee vote against H.R. 966. The proposed legislation will have negative unintended consequences for the administration of justice in our federal courts and will be counterproductive.

Sincerely,

Gregory P. Joseph, Esq.
President

TAB 4

RULE 45 ISSUES

Since the Committee's November meeting, the Discovery Subcommittee has done further work on the proposed Rule 45 amendments. This work has included a conference call on Dec. 29, 2010, and a meeting on Feb. 21, 2011. In addition, it has received a research memorandum from Kate David, interim rules law clerk for Judge Rosenthal, on jurisdictional issues raised in connection with the proposal to authorize transfer of subpoena-related motions. It has also received a letter from Council and Federal Practice Task Force of the ABA Section of Litigation about the rule-change ideas. Included with these agenda materials should be the following:

Notes on Feb. 21, 2011, meeting of Discovery Subcommittee

Notes on Dec. 29, 2010, conference call of Discovery Subcommittee

Dec. 15, 2010, memorandum from Katharine David about Rule 45 jurisdictional issues

Feb. 23, 2011, letter from ABA Section of Litigation Council and Federal Practice Task Force about Rule 45

Below is a package in a format that could be used to forward Rule 45 amendment proposals to the Standing Committee with a recommendation for publication. It is expected that the transmittal memorandum would address issues of jurisdiction that have been raised during the consideration of the rule changes, as well as the question (raised again by the ABA letter) whether further notices should be required (if the Committee does not decide to include such a requirement in an amendment proposal).

The amendment package has four parts. For purposes of orientation, it may be helpful to outline them now before turning to them:

I. Comprehensive Amendment Proposal -- Alternative A: This proposal includes all of the various changes we have discussed and tentatively approved at previous meetings of the full Committee: removing the "three ring circus" aspect of Rule 45 by replacing the complex provisions on issuance and service of subpoenas, providing for possible transfer of subpoena-related motions to the court where the underlying action is pending, overruling decisions holding that parties or party officers may be subpoenaed to testify at trial in distant fora, and clarifying the notice requirement.

II. Comprehensive Amendment Proposal -- Alternative B: This proposal includes all the features in Proposal I except overruling cases allowing distant party officers to be subpoenaed for trial. Instead, this proposal adds authority in limited instances for the court to order a distant party to attend trial and testify, or to produce its officer to testify at trial. The Subcommittee does not recommend adoption of this provision, but suggests including it in the published package because some judges and attorneys have favored addition of such power. If the approach is strongly favored during the public hearing process, this feature could be added without the need to republish for a further round of comment.

III. Less Comprehensive Amendment Proposal -- Alternative A: This proposal includes all of the changes in Proposal I except eliminating the three-ring circus. If the Standing Committee decides not to eliminate the three-ring circus, this version could be published with all of our other proposed amendments.

IV. Less Comprehensive Proposal -- Alternative B: This proposal includes all of the features in Proposal III except overruling cases allowing distant parties and party officers to be subpoenaed for trial. Like Proposal II, this proposal adds authority in limited instances to order a distant party to attend trial trial and testify, or to produce its officer to testify at trial. The Subcommittee does not recommend including this feature in an amended rule, but is presenting this alternative so that it can be commented on during the public comment period.

A basic decision will be whether to propose the more aggressive amendment package (Proposals I and II) or the less aggressive package (Proposals III and IV). If the more aggressive package is sent forward for public comment, a further question is whether to send the Standing Committee the less aggressive package as well. Should the Standing Committee not be persuaded that the more aggressive reforms are needed, it might prefer to use only the less aggressive package. Alternatively, if it is persuaded that the changes in the more aggressive package are warranted, it may also conclude that publication of the less aggressive package is warranted as well so that it could be adopted if the public comment period shows that the more aggressive package is, ultimately, not justified. One goal of this memorandum, therefore, is to present an overall amendment package that would be usable on a "pick and choose" basis, either before or after publication for public comment.

In connection with the basic question whether to endorse the more aggressive package, it may be useful to refer to something that was written about the current rule at the time it went into effect. Siegel, Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure, 139 F.R.D. 197 (1991), provided a critique of Rule 45 when it was last comprehensively amended. Siegel emphasized the challenges posed by the provisions the "three ring circus" that Proposal I addresses (id. at 209):

> In some situations when one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited [current (b)(2), (c)(3)(A)(iii) and (c)(3)(B)(iii)], the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues.

More generally, Siegel's analysis sounded a tocsin for simplification of the sort we are trying to accomplish with the more aggressive package below. Consider the following (id. at 214):

> Rule 45 on subpoena service, like Rule 4 on summons service, is not some obscure provision hiding in a corner of the Federal Rules of Civil Procedure with an occasional guest dropping by. Rule 45 is a daily fundamental in civil trial practice, and yet it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena "from" and where to effect its service with some assurance that the subpoena will be backed by the contempt sanction if it should be disobeyed.

Perhaps some of these sentiments should be included (probably in less alarmist terms) in the transmittal memorandum to the Standing Committee if the Advisory Committee decides to go forward with the more aggressive simplification ideas in Proposal I below.

Surely we can aspire to do better. The Rule 45(c) treatment in Proposal I below therefore does not attempt to replicate the current rule. Instead, it includes provisions that are very similar to the current rule but simpler. Thus, it does not make service within the district significant in terms of where compliance is required, as the current rule does. As a result, it will not be necessary for an attorney to "issue" a subpoena from a given district court and then ensure that the witness, who may be peripatetic, is actually served in that district. Similarly, it does not make the requirement that a party or party witness show up if served within a given state depend on state law. Probably most

states have such requirements, but in any event it is an extra (and perhaps sometimes difficult) complication for lawyers trying to use the federal rule to determine what state law on the same subject provides. Regarding documents, electronically stored information, and tangible things, the Rule 45(c) approach in Proposal I is designed to avoid disturbing what we understand to be a functioning reality under current practice.

I. COMPREHENSIVE AMENDMENT PROPOSAL -- ALTERNATIVE A

This proposal would make significant changes to Rule 45, replacing the complex provisions on issuance and service of subpoenas with simplified provisions for nationwide service and specified places of compliance; providing for possible transfer of subpoena-related motions to the court presiding over the litigation; moving and emphasizing the notice provisions; and making other less significant changes. It would also effectively overrule decisions holding that parties or party officers may be subpoenaed to appear at trial in distant fora.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(dc) and (ed).

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person ~~party~~ to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing ~~Issued from Which~~ Court.*** A subpoena must issue from the court where the action is pending. ~~as follows~~:

~~(A) for attendance at a hearing or trial, from the court for the district where the~~

~~hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the court where the action is pending. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.~~

(4) ***Notice to other parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises ~~before trial~~, then before the subpoena is served, a notice including a copy of the subpoena must be served on each party.[1] [2]

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[1] The words "before trial" have been stricken from this proposal although they appear in the current provision in Rule 45(b)(1). The Subcommittee concluded that notice of "documents only" subpoenas for production at trial is just as important as notice of subpoenas for pretrial discovery purposes.

[2] Some members of the Standing Committee have suggested that parties who receive documents pursuant to a subpoena should also be required to give notice of their receipt. We previously have concluded that such a second notice should not be necessary if the original notice is given. The original notice will alert parties to the need to monitor document production. In addition, a notice of receipt requirement could become burdensome when a rolling production of documents occurs, and could generate additional disputes between the parties. But we should revisit this issue in Austin in light of the Standing Committee comments.

The ABA Feb. 23 letter urges that this proposal be changed as follows:

(4) ***Notice to other parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then the subpoena issuer:

(A) before the subpoena is served, must serve a notice including a copy of the subpoena, on the other party;

(B) must give the other party reasonable notice of any

(b) Service.

(1) ***By Whom and How; Tendering Fees; ~~Serving a Copy of Certain Subpoenas.~~*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court[3] a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

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written modification of the subpoena or any new date and time of inspection or production; and

(C) must make available the documents, electronically stored information, or tangible things produced for inspection and copying by the other party in a timely fashion.

[3] Below, the term "issuing court" is changed to "court for the district where compliance is required under Rule 45(c)" to take account of the changes effected by this set of amendments and recognize that court as the one where applications may be made to enforce, or for relief from, a subpoena. A similar change could be made here, but it seemed on reflection preferable to call for filing proof of service in the court where the action is pending (the "issuing court" under these amendments) because CM/ECF would then provide notification to the other parties to the action.

(c) **Place of compliance.**

(1) ***For a trial, hearing, or deposition.*** A subpoena may require a person to appear at a trial, hearing, or deposition as follows:

(A) For a party or the officer of a party, within the state where the party or officer resides, is employed, or regularly transacts business in person, or within 100 miles of where the party or officer resides, is employed, or regularly transacts business in person;[4]

(B) For a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business in person; except that such a person may be required to attend trial within the state where the person resides, is employed, or regularly transacts business in person, if substantial expense would not be imposed on that person.[5]

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[4] This provision comports with the pre-*Vioxx* limitation of Rule 45 and would therefore effectively overrule *Vioxx*. If the Committee decides ultimately to include authorization for the court to order a distant party witness to appear at trial, that change could be accomplished as set forth in Proposal II below.

It is also worth noting that currently Rule 45(b) makes the requirement to comply with a subpoena turn initially on place of service. Rule 45(b)(2)(C) makes that work anywhere in a state, in turn, if the statutes or rules of the state in question so provide. Current Rule 45(c)(3)(A)(ii) then provides protection against that burden for witnesses who are not parties or officers of parties when they have to travel more than 100 miles.

This revision may change things. First, it does not condition the obligation to comply anywhere in the state on a state statute or rule. For that reason, it could be that an officer of a party who is served with a state-court subpoena in the state would have different obligations from an officer of a party served with a federal-court subpoena. Second, it does not look to service in the state. Third, a party or officer of a party could no longer be required to comply with a subpoena in a distant state merely because the party or officer was served while there (on business, on vacation, or even on an airplane flying over the state). Under the new rule, regardless of where served, the party or officer could be required to comply only where the party or officer resides, is employed, or regularly transacts business in person, or within 100 miles of that location. In this respect, the new provision has a narrower requirement of compliance than the existing rule.

[5] This version of proposed 45(c)(1)(B) does not include the qualification that testimony anywhere in the state is required only where state law has a similar requirement, as does the current rule. The Subcommittee preferred to drop the invocation of state law as unduly complicating the task of determining where a subpoena was effective.

Adopting this version might produce differences between the state and federal courts in a given state, although it is not known how many states lack such a statewide subpoena provision. On the other hand, given the provision that courts must protect against "substantial expense," it is unclear why federal subpoenas should be dependent on state law. It might be noted that Rule 45's provision permitting subpoenas running outside the state (within 100 miles of the place of

(2) ***For other discovery.*** A subpoena may require:

(A) Production of documents, tangible things, or electronically stored information at a place reasonably convenient for the producing person.

(B) Inspection of premises, at the premises to be inspected.

(d)~~(c)~~ **Protecting a Person Subject to a Subpoena; Enforcement.**

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for the district where compliance is required under Rule 45(c)[6] must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things

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trial) may also produce a difference between state and federal court practice.

(B) could be revised to incorporate the state-law limitation in current Rule 45(b)(2)(C) as follows:

(B) For a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business in person; except that such a person may be required to appear anywhere within the state where the person resides, is employed, or regularly transacts business in person if the subpoena was served within the state and a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the trial, hearing, or deposition, providing that substantial expense would not be incurred.

Retaining the link to state law -- as this alternative formulation does -- complicates drafting (and the task for lawyers trying to figure out what Rule 45 authorizes). Probably most states have such laws, so this is a fairly pointless exercise. Given the protection the amended rule provides against substantial expense, a federal rule that is not conditioned on provisions of state law seems to provide sufficient protection. But dropping the state-law link would be a change.

[6] This change reflects the shift to having the "issuing court" be the court where the action is pending. Similar changes are made later in the rule. As noted above, the Rule 45(b)(4) requirement that proof of service be filed in the "issuing court" has been retained even though the amendments change that to the court where the action is pending.

or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the ~~issuing~~ court for the district where compliance is required under Rule 45(c) for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

~~(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iiiv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.; ~~or~~

~~(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(dc)(3)(B), the court may, instead of quashing or modifying a

subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(ed) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Production.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the

information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court for the district where compliance is required under Rule 45(c)[7] under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transfer of Subpoena-related Motions. If a motion is made under this rule in a court other than the issuing court, the court where the motion is made may, considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management, transfer the motion to the issuing court.[8] [9] If the motion is transferred, an attorney

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[7] Would it be better to direct that this submission be to the issuing court? Often the dispute will be between the parties, and the nonparty served with the subpoena will be indifferent. So the "local" interests in the place identified under Rule 45(c) may be minimal. And the delay attending getting the matter resolved there may be considerable. Note the possible effect on the "choice of law" issues addressed in ftn. 9 below.

[8] This transfer standard has been revised by the Subcommittee since the November full Committee meeting.

The Feb. 23 letter from the ABA Section of Litigation (included with these agenda materials) proposes a more demanding standard, using the existing Rule 45 framework in which the "issuing court" is the court for the place where the discovery is to take place. Although Proposal I changes the "issuing court" designation, the standard for transfer would be the same under our new approach, and it is quoted here as put by the ABA Section:

> If the motion is made in a court other than the issuing court, the court where the motion is made may, upon consent of the parties and the person subpoenaed, or in exceptional circumstances and subject to Rule 45([d])(1), transfer the motion to the court where the action is pending.

The ABA letter emphasizes that the word "exceptional" conveys how rare transfers should be. It explains as follows (p. 4):

> Use of "exceptional" allows transfer in those situations that have been identified as favoring transfer: (a) there is a risk of inconsistent rulings by a number of issuing courts where the same subpoenas have been served on multiple parties and objected to in multiple jurisdictions; (b) the resolution of objections would materially affect the merits of the action and not the merits of the subpoena; or (c) the issuing court cannot timely address objections thereby creating prejudice from material delay of the action.

The letter continues with an explanation of the proposed invocation of the protections now in proposed 45(d)(1):

> The issuing court still [even in exceptional circumstances] has the obligation under Rule 45([d])(1) to enforce the duty of the party or person responsible for issuing and serving the subpoena to take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Using terms like "in the interest of justice" or "upon

for a person subject to a subpoena may, if authorized to practice in the court [where the motion is made], file papers and appear in relation to the motion as an officer of the court in which the action is pending.[10]

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conditions that are just" might not protect the person subpoenaed from undue burden or expense.

[9] An issue that recently emerged is whether any note should be taken of the possibility of disputes about whether, after transfer, the law of the issuing court or the court for the place of compliance should be applied if it is claimed that they are different. Although it is to be hoped that such arguments are rare, they can occur.

An example is provided by Jimenez v. City of Chicago, 733 F.Supp.2d 1268 (W.D. Wash. 2010), in which a nonparty witness was subpoenaed in the Seattle area for information pertinent to a 42 U.S.C. § 1983 case pending in Chicago. The witness had gathered seemingly relevant information while a journalism student at Northwestern University in Chicago. Defendant city sought by subpoena to compel her to reveal it. The witness resisted the subpoena, relying on Ninth Circuit journalist privilege law. The city argued in response that the court should apply the law of the Seventh Circuit, which it said had rejected the journalist privilege, stressing that all the "journalistic" activities had occurred in Chicago, which is within the Seventh Circuit.

The Seattle district judge rejected the city's argument, saying that "subpoenas are subject to the precedent binding their serving court, regardless of their origin," citing McCandless v. Beech Aircraft Corp., 697 F.2d 1156, 1157 (D.C. Cir. 1983), and In re Ramaeckers, 33 F.Supp.2d 312, 315 (S.D.N.Y. 1999).

Adding transfer provisions may increase the occasion for such issues to emerge, although that may not be the case since it is already possible for a subpoena to seek discovery in one district in relation to an action pending in another, as in the case mentioned above. Under proposed Rule 45(c), the motion court would usually be the same as before.

It is unclear presently what should be the rule on such "choice of law" issues. Privilege issues, for example, may be governed by state law under Fed. R. Evid. 501. Questions of reliance on privilege law may loom large in deciding what state's law applies. With regard to divergent interpretations of federal law, transfers under existing provisions can lead to perplexing debates. For discussion, see Marcus, Conflicts Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677 (1984), which deals with the question presented by transfers of entire cases under 28 U.S.C. § 1404(a) or for pretrial centralization under 28 U.S.C. § 1407.

Neither § 1404(a) nor § 1407 addresses this question, and it is unclear how this Committee should address it. One possibility would be for the Committee Note on the standard for transfer to note this possible consideration; a judge asked to transfer might be alert to the possibility that the effect would be to change the law applied to the underlying discovery dispute. But without such a comment, it is to be assumed that the parties could bring this issue to the court's attention, and it certainly seems to fall within the listed criteria for transfer. Saying more may not be useful.

[10] This provision is modeled on the authorization in current Rule 45(a)(3), permitting attorneys to serve subpoenas from issuing courts in which they are not admitted. It responds to concerns that attorneys for nonparty witnesses might encounter difficulty acting on behalf of their

Alternative 1. If appropriate {necessary} to enforce its order on the motion, the issuing court may retransfer [the motion] {its order} after entering its order.

Alternative 2. If the issuing court orders discovery from a nonparty [not subject to its jurisdiction], it may retransfer [the motion] {its order} for enforcement after entering its order.[11]

(ge) Contempt. The court for the district where compliance is required under Rule 45(c) -- or, after transfer of the motion, the issuing court -- may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~[12]

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clients were transfer granted.

Whether it is important to add such provisions could be debated. The transfer decision would likely happen after the motion is briefed, so further filings in the issuing court might be rare. And appearances by video or telephonic means might be preferred for distant issuing courts, if an appearance were needed. In the 1970 amendments, the Committee Note said the following regarding Rule 26(c): "The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." We have no way of knowing how often that occurred before or after 1970, but we have not heard of resulting problems for lawyers who represented such local witnesses in distant courts. On the other hand, some lawyers at the Dallas mini-conference expressed concern about such issues. And it may be crucial to include a provision in the rule to prompt the designers of CM/ECF to enable filing by such attorneys.

[11] These alternatives address an issue that has arisen in the Subcommittee's discussion of the transfer provision. The order may need to be enforced against a person that is not a party in the district where the person is located (and where performance would be required under Rule 45(c)). If a motion has been transferred by the local court to the court presiding over the action, however, there will no longer be a motion in the local court and therefore, arguably, no basis for the local court to act to enforce the order if needed. Lawyers presumably could solve this problem by bringing a second motion in the local court to enforce the order entered by the issuing court upon transfer of the first motion. These alternative rule provisions suggest another possible solution -- retransfer to the local court for enforcement purposes.

The proposed alternatives contain alternative statements about what is transferred -- the motion or the order. Since the retransfer is solely for purposes of enforcement, it would seem that the order is what is being transferred. As mentioned in the Committee Note below, one district judge cannot compel another district judge to enforce her order, but the reason for the retransfer is not to reopen the merits of the motion. Hence "the order" might be preferred. Alternatively, both phrases could be omitted, and the provision could simply authorize retransfer for enforcement.

[12] A question has arisen concerning the authority of one district court to hold a person in contempt for failing to obey the order of another district court. This issue could arise when a motion is transferred, the court presiding over the action orders production, and the subpoenaed person refuses to comply, leading to an effort to have that person held in contempt in the court for the place where compliance is required. The amended version of Rule 45(g) would deem failure to comply with the issuing court's order a contempt of both courts. The issue is also addressed in the draft Committee Note for Rule 45(f) and in the draft Committee Note for the

COMMITTEE NOTE

Rule 45 is a workhorse in civil litigation; nonparty discovery based on a subpoena is a frequent event in the federal courts. It was extensively amended in 1991. Some issues have emerged since the 1991 revision, and the current amendments respond to those issues.

First, they abandon the notion that the court where discovery is to take place is the "issuing court." Because attorneys are authorized to "issue" a subpoena in the name of any court on the strength of admission in the court where the action is pending, the reference to the local court as "issuing" the subpoena is unnecessary. That court learns of the subpoena only if there is a dispute about the subpoena that is submitted to it for resolution. In place of referring to the local court as the "issuing court" for discovery subpoenas, these amendments provide that the issuing court is the court in which the action is pending.

Second, these amendments greatly simplify the place of service provisions of the current rule by providing that a subpoena issued by the court in which the action is pending may be served anywhere in the United States. The amendments make explicit what was effectively accomplished by the 1991 amendments. The Committee Note to the 1991 amendments stated: "In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party." These amendments authorize the same nationwide service of subpoenas, but without asserting that the subpoenas are "issued" by local courts. The amended rule also parallels Fed. R. Crim. P. 17(e), which provides nationwide service for subpoenas in criminal cases. But unlike the Criminal Rules, the amended provisions of Rule 45 do not require compliance in the issuing court. Instead, a new Rule 45(c) preserves essentially the same geographic scope of obligations to comply with a subpoena that exist under the current rule, and motions regarding subpoenas will still -- as before -- be filed in the court in which performance is required under the subpoena.

Third, the amendments consolidate and simplify the complicated former provisions on place of compliance in new Rule 45(c). New Rule 45(c) largely continues the existing geographical limitations, but removes the need to consult state law to determine when the rules's provisions apply. It also removes the former need to refer to multiple provisions of the rule to determine where compliance could be required.

Fourth, in the process of making these changes, the amendments reject a line of cases that arose under the 1991 version of the rule. The 1991 amendments to Rule 45 required that a subpoena be quashed if it required a nonparty to travel more than 100 miles to attend trial (except that nonparties could be required to attend trial anywhere within their state if so authorized in the state's courts and undue expense would not be incurred), but did not require quashing the subpoena if the person subpoenaed were a party or a party's officer. Former Rule 45(b)(2) -- relating to place of service of a subpoena -- provided that it was "subject to" Rule 45(c)(3)(A)(ii)'s provisions, including the ones about parties and officers of parties.

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation was that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) operated within those limitations. See Johnson v. Big Lots Stores, Inc., 251 F.R.D.

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conforming amendment to Rule 37(b) below. The retransfer provisions above address this issue in an additional way by providing a method of ensuring local enforcement.

213 (E.D. La. 2008) (holding that opt-in plaintiffs in a Fair Labor Standards Act action could not be compelled to travel more than 100 miles from a place outside the state to attend trial because they were not served with subpoenas in accordance with Rule 45(b)(2)). Another interpretation was that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) meant that attendance at trial of these witnesses could be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring officer of defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served in accordance with Rule 45(b)(2)).

The Committee has concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas on an adverse party or its officers without regard to the geographical limitations of Rule 45(b)(2) -- Rule 45(c) under the amended rule -- would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Officers subject to such subpoenas might often be able to secure protective orders against having to attend trial, but the motions would burden the courts and the parties. In addition, in many cases a party's other employees, not its officers, are the best witnesses about actual matters in dispute in the case. To the extent that a party's or officers' testimony is truly needed, there are alternatives to compelling their attendance at trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(c), which are modeled on those of former Rule 45(b)(2).

Fifth, because there have sometimes been situations in which the court where compliance with a subpoena is required should refer the subpoena-related motion to the court in which the action is pending for resolution, the amendments add authority to make such a transfer. But it is not expected that this authority will be used frequently; at least when the person served with a subpoena is a local nonparty, the amendments recognize that person's interest in local resolution of subpoena-related issues and place a substantial burden on the party seeking transfer.

Finally, the amendments reallocate and clarify the requirement that parties give notice to other parties when they serve a subpoena.

Subdivision (a). As part of the simplification of Rule 45, subdivision (a) is amended to provide that a subpoena issues from the court in which the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in the court in which the action is pending may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice provision first included in the rule in 1991. The 1991 amendments added a requirement to Rule 45(b)(1) that prior notice of the service of a "documents only" subpoena be given to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that the notice to the other parties must be served before the subpoena was served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. This amendment responds to that concern by moving the notice

requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. The amendment also deletes the words "before trial" that appear in the current rule. Notice of trial subpoenas for documents is as important as notice of discovery subpoenas.

The Committee Note to the 1991 amendments observed that "other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced." Rule 45(a)(4)'s added requirement that the notice include a copy of the subpoena should enable the other parties to address these concerns. Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the subpoena to obtain such access. When access is requested, the party serving the subpoena should make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, thereby removing the complexities prescribed in prior versions of the rule. Rule 45(c) is added to specify the place of compliance required under the amended rule, and is designed to simplify the geographical requirements for compliance in the current rule.

Subdivision (c). Subdivision (c) is new. It has been added to collect the various provisions on where compliance can be required, and to simplify them. Rule 45(b)(2) is amended to permit service of a subpoena anywhere within the United States, thereby obviating the complicated provisions of the 1991 version regarding place of service. Unlike the prior rule, however, place of service is not critical to place of compliance, which is instead governed by Rule 45(c). Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under the provisions of Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. It provides that compliance is only required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and officers of a party subject to a subpoena, compliance may be required anywhere in the state in which they reside, are employed, or regularly conduct business in person. Nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if "substantial expense would not be imposed on that person." When it appears that travel over 100 miles could impose substantial expense on the witness, one solution would be for the party that served the subpoena to pay that expense, and the court could condition enforcement of the subpoena on such payment.

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at the premises to be inspected, and that production of documents, tangible things, and electronically stored information occur at a place reasonably convenient for the producing person. The Committee is informed that under the current rule the place of production has not presented difficulties, and the flexibility of this provision is designed to ensure that it does not present difficulties in the future. For electronically stored information, for example, it may often be that the materials can be produced on a compact disc or delivered electronically. For documents and tangible things, the place for production must be reasonably convenient for the producing person. If issues about place of production arise, the party that served the subpoena and the person served with it should be flexible about a reasonable place for production, keeping in mind the assurance of Rule 45(d)(1) that undue

expense or burden must not be imposed on the person subject to the subpoena. In some instances, it may be that documents or tangible things are located in multiple places and that producing them all in a single location would be unduly burdensome, but generally it is to be hoped that inspections at multiple locations can be avoided.

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to take account of the recognition of the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required, which renders some provisions of the former rule superfluous.

Subdivision (f). Subdivision (f) is new. Rule 45(a) provides that the court where the action is pending issues all subpoenas, but Rule 45(c) provides direction about where compliance with a subpoena may be required. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for the court where compliance is required to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c).

In unusual circumstances, however, transfer to the court where the action is pending may be warranted. Rule 45(f) therefore permits transfer in light of the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management.

The starting point in applying this standard should be to recognize the important interest a local nonparty often has in obtaining a ruling on its subpoena obligations close to home. The burden is therefore on the party seeking a transfer of the motion to demonstrate that transfer is justified. Often the issues raised in relation to enforcement of a subpoena implicate only the local nonparty served with the subpoena. Objections based on medical issues, for example, are likely to be confined to local matters. Questions of burden of compliance -- an important concern recognized in Rule 45(d) -- often focus mainly on the local circumstances of the nonparty subject to the subpoena. In such situations, the motion court normally should not transfer the dispute to the court presiding over the action. If the issues raised are essentially "local," the burden to justify a transfer is heavy.

On occasion, however, the issues are not essentially local. Resolving disputes about subpoenas in the motion court may sometimes risk interfering with the management of the underlying case, or may call upon the court where the motion is made to address issues already addressed, or also to be addressed, by the court presiding over the main action. Such problems may arise in a wide variety of circumstances. Rulings already made by the judge presiding over the main action may have resolved identical or closely analogous issues. Subpoenas presenting identical issues may be served or expected in many districts, making consistent resolution of these recurrent issues urgent. Sometimes the local nonparty may prefer to submit the issue to the court presiding over the main action, whose views may already be known, and it could be the party to the main action that seeks instead to proceed before the local motion court. Proceeding before the court where the motion is made could create a risk of handling a discovery matter in a way inconsistent with rulings of the court presiding over the main action. These various circumstances may all bear on the interests of effective case management pertinent to the transfer motion.

The court may also consider the interests of the parties. If some of the parties are local, that

may strengthen the argument against transfer. Even if all the parties favor transfer, that should not overcome important convenience concerns of the local nonparty witness if case management benefits would not result from transfer. If all parties and the nonparty witness favor transfer, on the other hand, that unanimity may provide a strong argument for transfer.

A rule cannot capture all these varying circumstances. The transfer standard -- particularly reference to "the interests of effective case management" -- is designed to recognize the local nonparty's interest in local resolution but also call for appropriate consideration of other matters. The interests in local resolution may sometimes not be strong. For example, if the local nonparty is actually closely linked to one of the parties to the litigation, or engages in substantial relevant activities in the district where the action is pending, those factors may reduce the importance of resolving the matter locally. If the nonparty actually favors a transfer, and the objection to transfer comes from the party who served the subpoena, the possibility that party may want to avoid resolution by the judge presiding over the main action may support transfer. If there are concerns about consistency in resolving discovery matters, either because they have already been addressed by the court presiding over the main action or because they are likely to recur in a number of districts in which subpoenas have been served or are anticipated, those case-management considerations may weigh in support of transfer.[13]

If the motion is transferred, it should often be true that it has already been fully briefed, but on occasion further filings may be needed. In addition, although it is hoped that telecommunications methods can be used to minimize the burden a transfer imposes on nonparties, it may be necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce that order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. See 18 U.S.C. § 401 (limiting power to impose criminal contempt sanctions); Rule 4.1(b) (stating that civil-contempt orders "may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was

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[13] As mentioned in ftn. 9 above, another possibility is that transfer could alter the legal rules applicable to the underlying motion. Although that possibility seems to be encompassed within the stated criteria in the rule and the current Committee Note, some further mention could be made along the following lines:

> If the transfer might alter the legal standards governing the motion, this factor might affect the desirability of a transfer.

This language does not say which way the wisdom of transfer would be affected. In some cases, this possibility might argue against transfer. In others, it might be a reason for transfer in order to obtain consistent resolution of common issues.

issued").[14] If such circumstances arise, the rule provides authority for retransfer for enforcement. It is possible that a nonparty subject to such an order would, after retransfer, try to persuade the judge in the Rule 45(c) district to modify the order. Ultimately, district judges exercising their broad jurisdiction to regulate discovery may come to differing conclusions. See, e.g., Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1996) (after case was reassigned to a different district judge in the same district, the second judge permitted expert testimony the first judge had excluded as a discovery sanction). But since that court originally transferred the motion to the issuing court, instances of refusal to enforce the resulting order would likely be very rare.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas, or of orders enforcing them, as contempt. It as amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) (which transferred the motion), and the issuing court. If necessary for effective enforcement, Rule 45(f) authorizes retransfer after the motion is resolved. The second sentence of former subdivision (e) is deleted as unnecessary.

Conforming Amendment to Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(b) Failure to Comply with a Court Order.

(1) ***Sanctions Regarding ~~in the District Where the~~ Deposition of Nonparty Witness ~~is Taken~~.*** If the court where the discovery is taken -- or, upon transfer under Rule 45(f), the court where the action is pending -- orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either court.

(2) ***Sanctions Against Party or Party Witness ~~in the District Where the Action is Pending~~.***[15]

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COMMITTEE NOTE

Rule 45(f) is added to permit a court located where discovery is to occur pursuant to a subpoena to transfer a subpoena-related motion to the issuing court before which the underlying

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[14] This discussion addresses an issue that may warrant discussion at the Austin meeting, as doubts about enforcing the issuing court's order may arise during the public comment period. That the federal courts could have full authority under the Constitution to enforce their orders is not in serious doubt, but the welter of existing non-constitutional provisions and expectations of lawyers (and perhaps others) are another matter. The likelihood of actual problems -- either because people will obey orders, or because local judges will readily enforce the orders of distant judges to whom they transferred the matter -- may be quite low.

[15] The revision of the tag lines for (1) and (2) is designed to make them correspond to the provisions of those rules.

action is pending under certain circumstances. If such a transfer occurs with regard to deposition discovery and the issuing court orders a nonparty witness to answer, the witness's refusal to obey the order may be treated as contempt of either court. Parallel contempt authority regarding transferred motions has been added to Rule 45(g).

In some instances, there may be a question about enforcement by contempt by the court to which a subpoena-related motion was transferred. See 18 U.S.C. § 401 (limiting power to impose criminal contempt sanctions); Rule 4.1(b) (stating that civil-contempt orders "may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued"). In such instances, Rule 45(f) also authorizes retransfer if needed to enforce the court's order.

II. COMPREHENSIVE AMENDMENT PROPOSAL - ALTERNATIVE B

This proposal would include all of the changes set forth in Proposal I above, with one difference. The proposals in Proposal I incorporate the Committee's recommendation that amended Rule 45 effectively overrule cases holding that parties and party officers may be subpoenaed to appear at trial in distant fora. In contrast, this additional provision would, in effect, codify authority for courts to require such testimony under the specified criteria. For simplicity, only the provisions of Rule 45(b) are reproduced here.

As noted above, the Committee recommends that Rule 45(b)(2) be amended to authorize nationwide service of subpoenas issued from the court in which the action is pending. New Rule 45(c) limits the geographic scope of the duty to comply with a subpoena in ways that eliminate the authority some judges found in the 1991 version of the rule to compel parties and party officers to testify at trial in distant fora. After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party witness to attend and testify at trial, the Committee determined that it might be worthwhile to offer alternative language adding such a power to the rules. Therefore, for purposes of public comment only, the Committee invites public comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment.

Rule 45. Subpoena

* * *

(b) Service.

* * *

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(5) ***Order to party to testify at trial or to produce employee to testify at trial.*** For good cause, the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.[16]

COMMITTEE NOTE

[This Note language would be integrated into the Note above were this provision added to the amendment package]

Subdivision (b)

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Rule 45(c)(1) places geographic limits on where subpoenas can require witnesses to appear and testify. These amendments disapprove decisions under the 1991 version of the rule that found it to authorize courts to require parties and party officers to testify at trial without regard to where they were served or where they resided, were employed, or transacted business in person. The amended provisions in part reflect concern that unrestricted power to subpoena party witnesses could be abused to exert pressure, particularly on large organizational parties whose officers might be subpoenaed to testify at many trials even though they had no personal involvement in the underlying events.

On occasion, however, it may be important for a party or party officer to testify at trial. New Rule 45(b)(5) therefore authorizes the court to order such trial testimony where a suitable showing of need is made. There is no parallel authority to order testimony by party witnesses at a "hearing," although in some cases a hearing may evolve into the trial on the merits. See Rule 65(a)(2) (court

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[16] We have previously discussed including this additional provision regarding orders to parties to attend and testify at trial, or to produce officers to testify, as a part of Rule 45(b), which addresses service of a subpoena. This new provision is not really about service, since it depends on a motion and not a subpoena. It might, therefore, better be included elsewhere in Rule 45, although all the other provisions presently are about those subject to a subpoena rather than parties subject to such a court order. The new provision might seem most relevant to new Rule 45(c), but that deals with the place of compliance with a subpoena, and is mainly about discovery. Proposed (b)(5) could be made a new subdivision, which would make it clear that it is different from the subpoena provisions, but it might best be left in subdivision (b), which could be where lawyers would look for such authority.

may advance the trial on the merits and consolidate it with the hearing of a motion for a preliminary injunction).

The starting point in deciding whether to use the authority conferred by Rule 45(b)(5) is to determine whether there is a real need for testimony from the individual in question. The rule permits such an order only for good cause. The burden is on the party seeking the order to show that attendance of this specific witness is warranted. In evaluating that question, the court must consider the alternative of an audiovisual deposition or testimony by contemporaneous transmission. If the potential witness's deposition has not been taken, that may raise questions about why there is a need for the trial testimony of the witness, and if the witness's deposition has been taken that may indicate that there is no need for live testimony at trial as well. In making this determination, the court may consider whether live testimony of this witness will significantly assist the factfinder in deciding the issues in the action. In some cases, the court may ask whether a different witness could be used to address the issues on which this witness would testify. The court should be alert to the possibility that a party may be attempting to place settlement or other pressure on the other party by seeking to force a busy officer to travel and to testify at trial.

Whether the witness is a party or the party's officer, the court's order is directed to the party. If the witness does not obey the order, the court may impose the sanctions authorized by Rule 37(b) on the party; the rule does not create authority to impose sanctions directly on a nonparty witness. In determining whether to impose a sanction for failure of a nonparty witness to appear and testify -- or which sanction to impose -- the court may consider the efforts the party made to obtain attendance of the nonparty witness at trial.

III. LESS COMPREHENSIVE AMENDMENT PROPOSAL - ALTERNATIVE A

This proposal would provide for possible transfer of subpoena-related motions to the court presiding over the litigation, move and emphasize the notice provisions, and make other less significant changes, but not change the provisions on issuance, service, or compliance with subpoenas. It would also effectively overrule decisions holding that officers of parties may be subpoenaed to appear at trial in distant fora.

Rule 45. Subpoena

(a) In General.

* * * * *

(4) *Notice to other parties.* If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises ~~before trial~~, then before the subpoena is served, a notice including a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom; Tendering Fees; ~~Serving a Copy of Certain Subpoenas.~~*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** ~~Subject to Rule 45(c)(3)(A)(ii), a~~A subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

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(c) **Protecting a Person Subject to a Subpoena.**

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(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena served where authorized by Rule 45(b)(2) that:

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(e) Transfer of Subpoena-related Motions. If the action is pending in a different court, the issuing court may, considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management, transfer any motion under this rule to the court where the action is pending. If the motion is transferred, an attorney for a person subject to a subpoena may, if authorized to practice in the issuing court, file papers and appear in relation to the motion as an officer of the court in which the action is pending.

Alternative 1. If appropriate [necessary] to enforce its order on the motion, the court where the action is pending may retransfer the motion after entering its order.

Alternative 2 If the court where the action is pending orders discovery from a nonparty [not subject to its jurisdiction], it may retransfer the motion for enforcement after entering its order.

(fe) Contempt. The issuing court -- or, after transfer, the court where the action is pending -- may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

COMMITTEE NOTE

Rule 45 is a workhorse in civil litigation; nonparty discovery based on a subpoena is a frequent event in the federal courts. In 1991, the rule was extensively amended. Some issues have emerged since the 1991 revision, and the current amendments respond to those issues.

Subdivision (a). Rule 45(a)(4) is added to highlight and slightly modify a notice provision added to the rule in 1991. Rule 45(b)(1) directed that prior notice of the service of a "documents only" subpoena be given to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that the notice to the other parties must be served before the subpoena was served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. This amendment responds to that concern by moving the notice requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. The amendment also deletes the words "before trial" that appear in the current rule. Notice of trial subpoenas for documents is as important as notice of discovery subpoenas.

The Committee Note to the 1991 amendments observed that "other parties may need notice

in order to monitor the discovery and in order to pursue access to any information that may or should be produced." Rule 45(a)(4)'s added requirement that the notice include a copy of the subpoena should enable the other parties to address these concerns. Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the subpoena to obtain such access. When access is requested, the party serving the subpoena should make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

The amendments to Rule 45(b)(2) and 45(c)(3)(A) also make clear that the Rule 45(b)(2)'s limitations on where a subpoena may be served apply to all subpoenas, including those directed to parties or their officers. The 1991 amendments to Rule 45 required that a subpoena be quashed if it required a nonparty to travel more than 100 miles to attend trial (except that nonparties could be required to attend trial anywhere within their state if so authorized in the state's courts and undue expense would not be incurred), but did not require quashing the subpoena if the person subpoenaed were a party or a party's officer. Rule 45(b)(2) -- relating to place of service of a subpoena -- provided that it was "subject to" Rule 45(c)(3)(A)(ii)'s provisions, including the ones about parties and officers of parties.

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation was that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) operated within those limitations. See Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel more than 100 miles from a place outside the state to attend trial because they were not served with subpoenas in accordance with Rule 45(b)(2)). Another interpretation was that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) meant that attendance at trial of these witnesses could be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring officer of defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served in accordance with Rule 45(b)(2)).

The Committee has concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas of an adverse party or its officers without regard to the geographical limitations of Rule 45(b)(2) would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Officers subject to such subpoenas might often be able to secure protective orders against having to attend trial, but the motions would burden the courts and the parties. In addition, in many cases a party's other employees, not its officers, are the best witnesses about the actual matters in dispute in the case. To the extent that a party's or officer's testimony is truly needed, there are alternatives to compelling their attendance at trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(b)(2).

Subdivision (c). Subdivision (c) is amended to make clear that its provisions about when a subpoena must be quashed due to the distance the witness must travel apply only to subpoenas properly served under Rule 45(b)(2). This change is made in conjunction with the amendment to

Rule 45(b) to restore geographical limitations on the duty to comply of party witnesses comparable to those on nonparty witnesses.

Subdivision (e). Subdivision (e) is new. It authorizes an issuing court to transfer any motion under this rule to the court in which the action is pending. It applies to all motions under this rule, including motions to quash or enforce a subpoena under Rule 45(c) and an application under Rule 45(d)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties; for discovery occurring outside the district in which the action is pending, they must be issued by the court for the district in which the discovery is to occur. Rule 45(c) therefore provides that motions to quash or enforce subpoenas must in the first instance be directed to the issuing court. In some instances, that requirement can constitute an important protection for local nonparties subpoenaed to provide discovery for use in litigation in a distant district.

Rule 45(e) directs a court considering transfer to consider the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management. The starting point in applying the transfer standard should be to recognize the important interest a local nonparty often has in obtaining a ruling on its subpoena obligations close to home. The burden is therefore on the party seeking a transfer of the motion to demonstrate that transfer is justified. Often the issues raised in relation to enforcement of a subpoena implicate only the local nonparty served with the subpoena. Objections based on medical issues, for example, are likely to be confined to local matters. Questions of burden of compliance -- an important concern recognized in Rule 45(d) -- often focus mainly on the local circumstances of the nonparty subject to the subpoena. In such situations, the motion court normally should not transfer the dispute to the court presiding over the action. If the issues raised are essentially "local," the burden to justify a transfer is heavy.

On occasion, however, the issues are not essentially local. Resolving disputes about subpoenas in the issuing court may sometimes risk interfering with the management of the underlying case, or may call upon the issuing court to address issues already addressed, or also to be addressed, by the court presiding over the main action. Such problems may arise in a wide variety of circumstances. Rulings already made by the judge presiding over the main action may have resolved identical or closely analogous issues. Subpoenas presenting identical issues may be served or expected in many districts, making consistent resolution of these recurrent issues urgent. Sometimes the local nonparty may prefer to submit the issue to the court presiding over the main action, whose views may already be known, and it could be the party to the main action that seeks instead to proceed before the issuing court. Proceeding before the issuing court could create a risk of handling a discovery matter in a way inconsistent with rulings of the court presiding over the main action. These various circumstances may all bear on the interests of effective case management pertinent to the transfer motion.

The court may also consider the interests of the parties. If some of the parties are local, that may strengthen the argument against transfer. Even if all the parties favor transfer, that should not overcome important convenience concerns of the local nonparty witness if case management benefits would not result from transfer. If all parties and the nonparty witness favor transfer, on the other hand, that unanimity may provide a strong argument for transfer.

A rule cannot capture all these varying circumstances. The transfer standard -- particularly reference to "the interests of effective case management" -- is designed to recognize the local nonparty's interest in local resolution but also call for appropriate consideration of other matters. The interests in local resolution may sometimes not be strong. For example, if the local nonparty is actually closely linked to one of the parties to the litigation, or engages in substantial relevant

activities in the district where the action is pending, those factors may reduce the importance of resolving the matter locally. If the nonparty actually favors a transfer, and the objection to transfer comes from the party who served the subpoena, the possibility that party may want to avoid resolution by the judge presiding over the main action may support transfer. If there are concerns about consistency in resolving discovery matters, either because they have already been addressed by the court presiding over the main action or because they are likely to recur in a number of districts in which subpoenas have been served or are anticipated, those case-management considerations may weigh in support of transfer.

If the motion is transferred, it should often be true that it has already been fully briefed, but on occasion further filings may be needed. In addition, although it is hoped that telecommunications methods can be used to minimize the burden a transfer imposes on nonparties, it may be necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce that order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(f). Rule 45(f) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena is contempt of the issuing court and the court where the action is pending. In some instances, however, there may be a question about whether the court where the action is pending can impose contempt sanctions on a distant nonparty. See 18 U.S.C. § 401 (limiting power to impose criminal contempt sanctions); Rule 4.1(b) (stating that civil-contempt orders "may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued"). If such circumstances arise, the rule provides authority for retransfer for enforcement. It is possible that a nonparty subject to such an order would, after retransfer, try to persuade the judge in the issuing court to modify the order. Ultimately, district judges exercising their broad jurisdiction to regulate discovery may come to differing conclusions. See, e.g., Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1996) (after case was reassigned to a different district judge in the same district, the second judge permitted expert testimony the first judge had excluded as a discovery sanction). But since that court originally transferred the motion to the issuing court, such instances would likely be very rare.

Subpoena (f). Subdivision (f) carries forward the former provisions of Rule 45(e). It is also amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the issuing court (which transferred the motion), and the court where the action is pending. If necessary for effective enforcement, new Rule 45(e) authorizes retransfer after the motion is resolved. The second sentence of former subdivision (e) is deleted as unnecessary.

Conforming Amendment to Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Regarding ~~in the District Where the~~ Deposition of Nonparty Witness ~~is~~***

~~*Taken.*~~ If the court where the discovery is taken -- or, upon transfer under Rule 45(e), the court where the action is pending -- orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either court.

(2) *Sanctions Against Party or Party Witness ~~in the District Where the Action is Pending~~.*

* * * * *

COMMITTEE NOTE

Rule 45(e) is added to permit the issuing court to transfer a subpoena-related motion to the court where the action is pending under certain circumstances. If such a transfer occurs with regard to deposition discovery and the court where the action is pending orders a nonparty witness to answer, the witness's refusal to obey the order may be treated as contempt of either court. Parallel contempt authority regarding transferred motions has been added to the contempt provisions of Rule 45.

In some instances, there may be a question about enforcement by contempt by the court to which a subpoena-related motion was transferred. See 18 U.S.C. § 401 (limiting power to impose criminal contempt sanctions); Rule 4.1(b) (stating that civil-contempt orders "may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued"). In such instances, Rule 45(e) also authorizes retransfer if needed to enforce the court's order.

IV. LESS COMPREHENSIVE AMENDMENT PROPOSAL - ALTERNATIVE B

This proposal would make all the changes in Proposal III above, and would add authority for courts to order parties and party officers to testify at trial in distant fora. It would place specific limits on that power, however. For simplicity, only the provisions of Rule 45(b) are reproduced here.

As noted above, the Committee recommends that Rule 45(b)(2) and 45(b)(3)(A) be amended to clarify that all subpoenas are subject to the distance limitations prescribed in Rule 45(b)(2) and effectively to overrule cases holding that parties and party officers may be subpoenaed to appear at trial in distant fora. In contrast, this additional provision would, in effect, codify limited authority for courts to require such testimony under specified criteria.

After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party witness to attend and testify at trial, the Committee determined that it might be worthwhile to offer alternative language adding such a power to the rules. Therefore, for purposes of public comment only, the Committee invites public comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment.

Rule 45. Subpoena

* * *

(b) Service.

* * *

(2) ***Service in the United States.*** ~~Subject to Rule 45(c)(3)(A)(ii),~~ A~~a~~ subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a

subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(5) ***Order to party to testify at trial or to produce employee to testify at trial.*** For good cause, the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to order the attendance at trial of a person, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or person be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.[17]

COMMITTEE NOTE

[This Note language would be integrated into the Note above were this provision added to the amendment package

Subdivision (b)

* * * * *

Rules 45(b)(2) and 45(c)(3)(ii) are amended to clarify that all subpoenas -- even for party witnesses -- are subject to the geographical limitations of Rule 45(b)(2). This amendment responds in part to the concern that unrestricted power to subpoena party witnesses could be abused to exert pressure, particularly on large organizational parties whose officers might be subpoenaed to testify at many trials even though they had no personal involvement in the underlying events.

On occasion, however, it may be important for a party or party officer to testify at trial. New Rule 45(b)(5) therefore4 authorizes the court to order such trial testimony where a suitable showing of need is made. There is no parallel authority to order testimony by party witnesses at a "hearing," although in some cases a hearing may evolve into the trial on the merits. See Rule 65(a)(2) (court may advance the trial on the merits and consolidate it with the hearing of a motion for a preliminary injunction).

The starting point in deciding whether to use the authority conferred by Rule 45(b)(5) is to determine whether there is a real need for testimony from the individual in question. The rule permits such an order only for good cause. The burden is on the party seeking the order to show that attendance of this specific witness is warranted. In evaluating that question, the court must consider the alternative of an audiovisual deposition or testimony by contemporaneous transmission. If the potential witness's deposition has not been taken, that may raise questions about why there is a need for the trial testimony of the witness, and if the witness's deposition has been taken that may indicate that there is no need for live testimony at trial as well. In making this determination, the court may consider whether live testimony of this witness will significantly assist the factfinder in deciding the issues in the action. In some cases, the court may ask whether a different witness could be used to

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[17] As noted in footnote 16 in Proposal II above, this new provision could be inserted into another subdivision of Rule 45 or as a new subdivision unto itself.

address the issues on which this witness would testify. The court should be alert to the possibility that a party may be attempting to place settlement or other pressure on the other party by seeking to force a busy officer to travel and to testify at trial.

Whether the witness is a party or the party's officer, the court's order is directed to the party. If the witness does not obey the order, the court may impose the sanctions authorized by Rule 37(b) on the party; the rule does not create authority to impose sanctions directly on a nonparty witness. In determining whether to impose a sanction for failure of a nonparty witness to appear and testify -- or which sanction to impose -- the court may consider the efforts the party made to obtain attendance of the nonparty witness at trial.

Notes of Meeting
Discovery Subcommittee
Advisory Committee on Civil Rules
Dallas, TX
Feb. 21, 2011

The Discovery Subcommittee met in Dallas, TX, on Feb. 21, 2011. Those participating were Hon. David Campbell (Chair, Discovery Subcommittee); Hon. Lee Rosenthal (Chair, Standing Committee); Hon. Paul Grimm (by telephone), Chilton Varner, Daniel Girard, Anton Valukas, Elizabeth Cabraser, Prof. Edward Cooper (Reporter of the Advisory Committee), Peter McCabe (Administrative Office), Jeffrey Barr (Administrative Office), Andrea Kuperman (Chief Counsel, Rules Comm. Support Office), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Campbell introduced the meeting as focusing on finalizing the Rule 45 package for the full Committee; the goal will be to have a finished product for the Austin meeting. It seems that there are five topics to address: (1) the relocated notice provision; (2) the transfer provision; (3) the Vioxx provision; (4) the various features of the simplified rule presented in Part I of the memo; and (5) any general comments or further ideas.

Notice provision

The first topic raised was one that the Subcommittee had previously discussed -- whether additional notices should be required beyond the one now required before the subpoena is served. The relocation of the notice requirement and the requirement that the notice include a copy of the subpoena had both been approved by the full Committee.

The pending question was whether a further notice should be required. Early in the Subcommittee's consideration of Rule 45, suggestions were made that there should be a requirement that parties serving subpoenas also give notice when they received production, and perhaps also provide specifics about the materials produced. It was also suggested that notice of negotiations of the scope of a subpoena with the person served might warrant notice to other parties.

The Subcommittee had discussed these possibilities at some length in the past and concluded that adding them might produce more negative than positive consequences. During the Standing Committee meeting in January, 2011, however, a prominent lawyer who was on a panel making a presentation to that committee urged that such a provision would be very valuable. This lawyer finds too often, after deposing a witness, that a subpoena had led to production before the deposition of additional documents of which he was unaware because he had not been advised that production had occurred. When this problem arises, the question is whether to re-depose the witness. Yet informal efforts to obtain notice of production often yield no results; sometimes opposing counsel even say "We don't have to do that." The rule itself should say, he urged, that they do have to do that.

A member of the Standing Committee from another part of the country agreed that failure to give such notice regarding production caused many problems. So this is reportedly a problem in more than one part of the country, and concerns a number of lawyers.

These reactions call for revisiting the issue. Already, the idea had been to invite comment on this possibility in the invitation for comment to accompany a preliminary draft of amendments that do not include such a requirement.

An initial reaction was that we were right the first time not to add notice requirements. For one thing, it would be very difficult to draft such a rule. Probably production in many instances is something of a rolling process. How frequently must the notice be given? What is the consequence if it is not given frequently enough?

Another reaction was that the problem we were asked to solve was failure to give the notice that is presently required before service of the subpoena. Far too often, parties are not doing even that, even though the requirement has been in the rule for nearly 20 years. Better to relocate and expand the current notice requirement and see whether this change produces good effects. If there is then a need for further notices, that can be addressed later.

Another member agreed, emphasizing the responsibility of the lawyer who receives the notice currently required -- "What is the function of the lawyer?" The lawyer is not an inactive person who simply awaits notice. The lawyer can act in response to the notice currently required to obtain the materials produced. Adding another notice will complicate things considerably. There are indeed rolling productions, and decidi
ng when and whether to give notice that ten more documents were produced is a headache we do not want to enshrine in a rule. Attorney persistence in following up on requests for produced information should suffice much better than a rule requirement, and produce less negative fallout. This is a solution in search of a problem. One alternative is to call up the nonparty served with the subpoena and ask that it provide copies. One can then say "Do you want me to serve a subpoena on you also?"

Another member observed that he began the process thinking that it would be important to ensure that all the parties were part of the negotiation of the terms of compliance with the subpoena. But he had changed his mind. "If you are running into resistance, you need to go to the court." A rule is not the right way to handle this problem when it arises.

The consensus was not to add a further notice requirement to the rule. This conclusion should be relayed to the Standing Committee, if the full Committee approves the rule amendments for publication.

"before trial"

A different issue was that, as currently written, the notice requirement only applies to subpoenas for production "before trial." That limitation is in the current rule. The question was raised: Is notice of subpoenas to produce documents at trial not important? Would there be a value to require notice of those subpoenas also?

An immediate reaction was that notice of trial subpoenas is more important than notice of discovery subpoenas. Maybe failure to list documents in the Rule 26(a)(3) disclosures would prevent use at trial of such materials, but they could be used at least for impeachment.

A consensus emerged to removed the words "before trial" from Part I and Part III of the draft publication package. Committee Note recognition of this change would probably be appropriate, but language has not yet been drafted for that purpose.

Draft Committee Note

Regarding the draft Committee Note, an objection was expressed to the statement that failure to give notice as required by the current rule caused serious problems. It was agreed that the Note would be revised:

> The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties~~, and that this failure can significantly interfere with the trial preparation of the other parties~~.

Transfer

[Eventually -- as reflected below -- it was decided to relocate the transfer provision to or toward the end of the rule and to have only one transfer provision, which could be applied to all subpoena-related motions, including disputes about whether allegedly privileged materials that were inadvertently produced had to be returned.]

"where the motion is made"

Discussion focused on the phrasing of the transfer standard. An initial topic was the bracketed phrase "where the motion is made." That phrase was used to clarify when two courts are involved and which is which. An initial alternative considered was "the motion court," which seemed inferior to referring to the court "where the motion is made." It was noted that in the first sentence of the rule, there presently are two courts mentioned; having this clarifying phrase seems valuable.

Another language concern was the use of "different from." Would it not be better to say "other than"? As an alternative, it might be that the first sentence would be rewritten to say "If the motion is not made in the issuing court, the court . . . " but that might still benefit from inclusion of the phrase "where the motion is made."

The consensus was to use "where the motion is made" and "other than."

Standard for transfer
"convenience of the parties"

Based on the Subcommittee's last conference call, the standard for transfer was revised. A bracketed phrase raised the question whether "the convenience of the parties" should be part of the transfer standard.

One reaction was that it would be odd to include this factor in the transfer provision, which should mainly emphasize the interest of local nonparties served with subpoenas and the orderly management of the case. At least one party presumably wanted the case to be pending in the court where it is now pending. The parties probably have lawyers in that district to handle the case; for them, having disputes resolved there would surely be convenient. For the nonparty, being in a home court with a local lawyer could often be important; suggesting that this concern is to be balanced against (and may be equivalent to) the parties' convenience seems contrary to the general attitude sought to be furthered by this provision. The Subcommittee has agreed that transfer is not the ordinary thing; making the interest of the parties important is too likely to install it as routine.

A contrary view was that listing various criteria does not mean that they are equal in every case. Leaving out the parties' convenience may be misleading; surely it counts for something. Moreover, it does not follow that the parties are all in favor having the matter resolved by the issuing court. Some of the parties may actually be local to the district where the production is to occur. Should that not strengthen the arguments against transfer even if another party would find it convenient to litigate the subpoena motion in the court where the action is pending.

A question was raised: Are the parties' only interests convenience? How about effective case management? Isn't that something that the parties may consider important? That prompted the reaction that the rule should say "interests" rather than "convenience" of the parties.

Another reaction was that "Most third party witnesses are not really third parties." They usually have a connection -- frequently an important connection -- to a party. They may be at the beck and call of one of the parties; focusing on their convenience actually involves emphasizing party convenience.

The resolution was to remove the brackets around "convenience of the parties" but change the reference to party "interests" rather than "convenience."

Unanimous support for transfer

Another question regarding the transfer standard was whether transfer is allowed if all parties and the witness favor it. Should the Committee Note address that?

An initial response was that there surely is authority under the rule to transfer when there is unanimity in favor of transfer. "Whenever you get a stipulation, the court will accept it unless it's totally unreasonable or threatens the rights of somebody not before the court."

Another suggestion was that the way to address this question is in the Note, not in the rule. There could be a situation in which the court would have a strong reason not to transfer even though all before the court favored transfer. Putting a provision into the rule might support arguments that the court had no choice.

Professor Marcus would consider whether a statement could be added to the Note to address this concern.

Addressing right of nonparty's attorney to act
in court in which action pending

Based on comments received from attorneys, a provision was added to the draft rule directing that the attorney for a person subject to a subpoena could file papers and appear in relation to the motion in the transferee court "as an officer of the court." This raised two questions -- (1) whether such a provision is needed, and (2) whether the provision drafted effectively does the job we want done.

We have not been told that subpoena motions have caused significant problems of this sort in the past, although there have been some efforts to transfer without explicit authority of the sort now to be added to the rule. But attorneys mentioned that in some states the state bar may say that "appearing" in the state more than a small number of times in a year raises unauthorized practice issues. A federal rule can't control what a state bar does, but it can at least affect what a clerk's office does.

One reaction was that this is really an CM/ECF problem: Can the distant lawyer file papers in the court where the action is pending? A rule on the subject would be sufficient to cause the designers of CM/ECF to redesign the system to permit that. Without a rule change, that might be difficult to achieve.

Another reaction was that "This problem is not district-specific; it's judge-specific." It may be easier to affect clerk's offices than individual judges' habits, but the provision would not cause difficulties.

Another reaction was that attorney admission issues are a sensitive area, but that this should be worth doing as a solution to a CM/ECF problem.

The consensus was to add the proposed language, including the directive that the actions were "as an officer of the court in which the action is pending." In that way, the judge presiding will be recognized as having some authority over the actions of these lawyers, in the unusual case where that matters.

Retransfer

The discussion shifted to a different question: "What if the judge presiding over the action in Houston enters an order on the transferred motion directing that a witness in Phoenix produce something or answer deposition questions. What if the nonparty refuses to comply? Can the Houston judge hold the witness in contempt? Can the Phoenix judge hold the witness in contempt?"

One possibility would be to "retransfer" the matter to Phoenix for enforcement of the Houston judge's order. Is that necessary? Certainly retransfer would not be the norm. Often there will be nothing further to be done after the motion is resolved (as where the discovery is denied), or the order applies to a party, in which case it does not call for further action by a nonparty. But the contempt power may be important with orders directed to nonparties.

One worry was that if the nonparty is resistant there is a risk it will renew all the same arguments before the judge in Phoenix even though they did not work before the judge in Houston. Having authority to enforce without another step would be superior.

A reaction was that this is another solution in search of a problem. "I've never seen this happen." But it was objected that the transfer provision is new; the occasion for the problem has not really arisen. A response was that the matter only ended up before the court presiding over the underlying action because the local judge transferred it there. It would be odd indeed for that judge then to second-guess or refuse to accept the resolution reached by the transferee judge. Ultimately, there may be no way to compel one district judge to enforce another judge's order, but since the one asked to enforce would usually be the one who originally concluded that the motion should be referred out, the risk of dissent seems minimal.

Another reaction was that keeping a tie to the place of compliance seems important here. But maybe it is sufficient for the judge in Houston to order: "Comply in Phoenix." Perhaps it would suffice for the Committee Note to recognize and address these issues.

The consensus was not to include explicit provisions for "retransfer" in the rule.

Rule 37 conforming changes

The discussion turned to some ideas for conforming changes to Rule 37 that were circulated on Feb. 19.

One conforming change would be to revise current Rule 37(b)(1) to provide that failure to answer a question in a deposition is contempt of the transferee court if the answer is compelled by the court to which the motion is transferred. That could be accomplished by inserting a new phrase in the rule "or, upon transfer under Rule 45_, the court where the action is pending." Such a change would address the authority of that court to hold the nonparty ordered to comply in contempt.

With regard to other discovery, the Feb. 19 memo also included a possible change for the "documents only" subpoena which is not addressed in Rule 37. Rule 45's contempt provision might be revised to direct that transferee court could hold a person who fails to obey such a subpoena in contempt.

Related to these two possible amendments is the directive of Rule 4.1(b) that "[an] order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued."

There was discussion of how best to handle these issues. One possibility would be to say in the Committee Note could say that the transferor court may enforce the order of the forum court.

Another suggestion was that the revisions suggested could be improved by saying that "either" court could hold failure to obey the order to be contempt.

The initial resolution (subject to further examination in the drafting process) was to retain the changes suggested in the Feb. 19 memo, and also to address the problem in the Committee Note. The Rule 37(b)(1) revision would be:

> If the court where the discovery is taken -- or, upon transfer under Rule 45_, the court where the action is pending -- orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either court.

The Rule 45 contempt provision could be revised as follows:

> Either t~~T~~he ~~issuing~~ court for the district where compliance is required under Rule 45(c) -- or, upon transfer under Rule 45_, the court where the action is pending -- may hold in contempt a person who, having been served fails without adequate excuse to obey the subpoena.

There was also discussion of a possible change to current Rule 37(a)(2) to substitute the phrase "compliance with a subpoena is required under Rule 45(c)" for the current phrase "the discovery is or will be taken." A reaction to this possible change was that it is not needed, and may be undesirable. "Suppose that we agree that the witness from Chicago will be deposed in Detroit, and there are objections and instructions not to answer. Can't we go to the federal court in Detroit to get those resolved?" The resolution was to leave Rule 37(a)(2) as currently written.

The *Vioxx* Solution

The discussion began with the resolution of the *Vioxx* problem in the aggressive package set forth in Part I. That change is in proposed 45(c)(1)(A), which limits the obligation of a party or party officer to comply to the state in which the person resides or is employed, or within 100 miles of that place. The solution to the problem in the less aggressive package (Part III) is different because it retains the structure of the current rule, which emphasizes place of service.

It was asked whether there was any problem with this proposed rule change, or with the explanation in the Committee Note of the goal of overruling *Vioxx*.

The rule change prompted no concerns. But the Note's reference to "governmental and corporate officers" caused discomfort. It suggested that they were special, or that their time was more valuable than the time of others. This language could support finger-pointing. Another member supported taking this language out -- it would be "a flash point for criticism." It was agreed that the language at lines 83-87 of the Note should be removed.

Additional small changes were accepted: In line 79, change: "an adverse party~~'s~~ or its officers . . ." In line 81, remove the word "often" before "raise a risk of tactical use . . . ."

Subject to these changes in the Note, the draft was found acceptable.

Alternative discussion draft to authorize
order that party witness testify

The alternative of codifying some of the authority involved in *Vioxx* involved questions of presentation and standards for such orders. The alternative was in Part II of the memorandum for the meeting.

Regarding presentation, it was emphasized that this idea should not be presented as something that the Committee endorsed. Attention was focused on the introductory paragraphs of Part III of the package; suggestions on how to improve the explanation of why this provision is in the published package would be helpful.

In particular, it should be made clear that the statement that the public comment might show that the provision should be adopted does not mean that a "counting noses" method of determining whether the public comment supports a change would be used.

On "counting noses," reassurance was offered that the number of comments supporting or opposing a specific provision was not determinative. Indeed, the draft rules for rules committees explicitly recognize that duplicative comments need not even be individually summarized. Members can submit suggested improvements in the Part II Introduction to the Reporter.

"for good cause"
limitation to officers

Regarding the standard for ordering a party witness to appear and testify, one choice was between "for good cause" and "if a party shows a substantial need." The basic emphasis was on ensuring that any such motion would focus on whether the trial testimony of this witness is really needed. The former phrase ("for good cause") might be regarded as too indefinite.

One reaction was that "for good cause" is better because it is flexible. Another member agreed. Another reaction was that "If we are going to keep the good cause standard, we should limit this authority to parties and their officers."

Discussion shifted to the breadth of the power to order a party witness to testify -- should it be limited to parties and their officers, or be expanded to include others, perhaps to include any employee subject to the control of a party?

One reaction was that all *Vioxx* addressed was party officers, so we should not be any broader in codifying it. A response was that the limitation to officers is a product of the particular provisions of Rule 45 presently; the breadth of the new rule need not be the same.

One concern is that "We have found that officers tend to get de-officered" so that subpoenas suddenly don't work for them. That raised the question whether we knew exactly who is an officer. How, for example, is that notion interpreted for a non-corporate entity? In a corporation, it can sometimes seem almost "accidental" whether a person is or is not an "officer." How about a bank with 5,000 "vice presidents"?

An analogy was drawn to the U.S. Government. Who is an "officer" of the Government? Only cabinet-level people? How about a U.S. Marshall? A Marshall is likely to want to be called "Officer."

One possibility would be to publish both the narrower and the broader versions, inviting comment on both of them. It was objected that "If we include ordinary employees, we'll hear a lot from defense attorneys. It's better to publish limited to 'officers' and see if that elicits comment."

Another member pointed out that often officers have no useful knowledge, while the employees who have that knowledge are not officers. And there are often not clear lines between officers and others. "This is not like the military, where you know who is an officer."

Another reaction was that the need for this sort of power is very uncertain. Videotaped testimony is very common, and becoming more common. And remote transmission of testimony is increasingly significant. Recently, a witness testified by Skype.

The question was put to a vote, with the result that the draft would be limited to officers, with "good cause" as the standard in the rule.

Compensation for expenses

The draft also addresses compensating the witness for "expenses incurred in attending the trial." The question was whether to say the court "must" or "may" require the party seeking to compel testimony to compensate.

The reaction was that "may" is far superior. "Must" could lead to imposition on impecunious parties who need to obtain the testimony of corporate officers. The consensus was to use "may."

Rule 45(c) -- witness testimony

The discussion of the *Vioxx* issues had addressed proposed (c)(1)(A). Proposed (c)(1)(B) addresses nonparty witnesses. It permits they to be required to attend trial from anywhere within a state where they reside or work "if substantial expense would not be incurred."

This limitation is a paraphrase of the current provision permitting the court to quash a subpoena if "a person who is neither a party nor a party's officer [will] incur substantial expense to travel more than 100 miles to attend trial." The current proposal is not as focused.

One question is how to determine what is "substantial." For a poor person, the sum might be substantial although inconsequential to a wealthy person.

Another question is whether the problem can be solved by having the party seeking the person's attendance defray the expense. Can the court condition the order.

The solution adopted was to revise the rule to say ". . . , if substantial expense would not be imposed on that person." This would not address the question what is "substantial" expense, but neither does the current rule. It should suffice to permit the moving party to volunteer to pay the costs, and to permit the court to condition the order to attend on defraying the costs. The Committee Note might elaborate on those points.

Location for other discovery -- (c)(2)(A)

Four alternatives were offered for other discovery (not witness testimony). Under the current rule, this situation was not directly addressed. The focus was instead on place of service and on place of residence or employment. The revised rule does directly address these questions. It was noted also that the selection of the place of enforcement involved a choice that applies also to the

place in which subpoena-related motions are to be filed. Various "game-playing" consequences might follow from the choice of one or another provision.

One starting point is that the subpoena itself can command performance at a specific place; the first move belongs to the party serving the subpoena.

The four alternatives were (1) at the place where documents or tangible things are located, or within 100 miles, and at a convenient location for ESI; (2) at a convenient location for any such material; (3) within 100 miles of where the producing person lives or works, or (4) at or within 100 miles of where the documents or things are located for documents or tangible things, and at or within 100 miles of the producing person's place of residence or employment for ESI.

An immediate reaction was that the place of producing documents has never been a problem. Another member agreed; this is not an issue now. Both supported Alternative 2:

> Production of documents, tangible things, or electronically stored information at a place reasonably convenient for the producing person.

This approach is "simple and straightforward."

Another member agreed that this is not a problem in complex litigation. Is there a problem in noncomplex litigation? If so, we should find that out during the comment phase.

The consensus was to use Alternative 2.

The Committee Note must be revised to conform to the selected rule provisions.

Quashing to protect privilege

The draft retains the provision now in Rule 45(c)(3)(A)(iii) requiring quashing a subpoena that requires disclosure of privileged material. This might be deleted because it seems incomplete and possibly misleading.

Provisions added to Rule 45 since (c)(3)(A)(iii) was first added require that a person withholding materials on grounds of privilege provide a privilege log. Failure to provide a log may produce a waiver. Additionally, although the rule now permits a claw-back pending a ruling on whether privilege applies (and whether it has been waived), it is possible that production of some privilege material may itself lead to a subject matter waiver calling for production of more privileged matter. Thus, to the extent (iii) says the court must quash a subpoena, it seems to be wrong with regard to a person who has not provided a privilege log or who has produced some privileged materials.

Nonetheless, including this provision may serve a valuable purpose in alerting nonlawyer nonparty witnesses to the issue and assuring them that their privilege rights will be respected.

The resolution was to keep the provision whether or not it is redundant. It serves a notice function.

Place for resolution of claw-back issues

Attention turned to the provision in proposed (e)(2)(B) for claiming privilege. In parallel with Rule 26(b)(5)(B), this provision says that after production of allegedly privileged material, the

privilege-holder may give notice of the claim of privilege, resulting an "embargo" on use of the material in question. But it also says that if one of the parties challenges the claim of privilege it may "present the information to the court" for resolution.

The question was asked whether this application should be to the court for the district where compliance is required or the court before whom the action is pending.

One possibility, easily disposed of, was that the current language (which says only "the court") was meant to resolve this issue. Careful review of the recent drafting history established that there was of such conscious intention.

A starting point is that this provision looks to a submission by the party that served the subpoena (or another party that received the materials produced) in reaction to the claim of privilege by the person subject to the subpoena. Thus, if one authorizes submission to the court where the action is pending, that would mean that the nonparty could be required to litigate the privilege issue on the other side of the country. This seems an undesirable result.

Another consideration supporting having this matter before the judge where compliance is required is that state privilege law may apply under Fed. R. Evid. 501. If so, that is much more likely to be the law of the state in which that court sits than the one in which the action is pending. So judicial efficiency would be served.

This raised the question whether the local judge could transfer the motion to the court where the action is pending. Presently, the transfer provisions are not about this situation.

The suggestion was made that it would be better to provide for transfer here, and to avoid duplication by having a single freestanding transfer provision for all Rule 45 motions, probably located either just before or just after the contempt provision.

A question was raised -- is this a motion? The rule says the party may "promptly present the information to the court under seal for a determination of the claim [of privilege]." The response was that under Rule 7 this is a motion because it is a request to a court for an order.

The consensus on the location for resolution of this motion was that it should initially (subject to transfer) be the court in which compliance was required.

The consensus on the proper location of the transfer provision was that it should be in one place and applicable to all subpoena-related motions.

Final sentence of contempt provision

Since the first version of the more aggressive revision of the rule was circulated, the last sentence of current Rule 45(e) has been marked for deletion. The sentence says that the court must excuse the failure to obey a subpoena if it commanded compliance beyond the geographical area authorized in the rule.

The question was raised whether this sentence should be retained. It seems that it was included in part due to the complication of the current rule on where compliance is required. We hope that we have simplified that. And the provision can be attacked as making compliance uncertain unless the party who served the subpoena also obtains an order for attendance.

The resolution was to delete the sentence, as indicated. But the Committee Note (not yet written) should explain that it was deleted as unnecessary, not to change anything.

Committee Note

There was discussion about the Committee Note.

One question was the handling of cooperation. The suggestion was made and accepted to revise the Committee Note as follows:

> Parties and those served with subpoenas should strive to avoid unnecessary expense and difficulty in providing access to electronically stored information.

Concern was raised about imposing duties on nonparties, particularly through the Note, not the rule. A response was that the Note already contains a lot of language about the interests of the nonparty witness and the importance of "bending over backwards" to protect those interests. It was agreed that some recognition of the importance of cooperation of a nonparty is justified.

Burden to justify transfer

At the full Committee meeting in November, 2010, there was some support for a transfer rule that either favored transfer or was neutral about whether it should occur. But the current draft Committee Note says "The burden is therefore on the party seeking transfer of the motion to demonstrate that transfer is justified."

For purposes of confirmation that this was the unanimous attitude of the Subcommittee, the question was raised whether this Note language accurately reflected its preferred interpretation. The unanimous conclusion was that the proposed language does reflect the view of the Subcommittee.

Further issues or ideas

The question was asked whether any additional Rule 45 issues or ideas warranted discussion. None were raised.

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Dec. 29, 2010

On Dec. 29, 2010, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Lee Rosenthal (Chair, Standing Committee), Hon. Paul Grimm, Daniel Girard, Anton Valukas, Elizabeth Cabraser, John Rabiej (Administrative Office of the U.S. Courts), Andrea Kuperman (rules law clerk to Judge Rosenthal), Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Associate Reporter of the Advisory Committee). Chilton Varner was unable to participate.

Judge Campbell introduced the call by suggesting that although the draft Committee Notes for Rule 45 revisions were among the things to be discussed it would be more sensible for members to communicate their comments on those to Professor Marcus by email so that the call (which had limited time) could focus on rule language issues. It would be best if Prof. Marcus could receive those communications by January 7. The call would focus on the rule, with the objective that, based on the results of this call, a draft "final" could be circulated in January, looking to a further conference call in early February. Ideally, that February call could complete most or all the issues relating to Rule 45 that needed to be addressed before the full Committee's April meeting.

Relocated Notice Provision

The current draft notice provision appeared on p. 94 of the agenda materials for the November meeting. The only rule-language issue was restoring the word "then," which was left out of the initial redraft and appeared in brackets on p. 94. Prof. Kimble, the Standing Committee's style consultant, indicated in response to an inquiry that he favored retaining "then." The question seemed one of style, and it was agreed to restore "then" to the rule language.

Transfer -- Standard for transfer

The main issue regarding the proposed authority to transfer subpoena motions had to do with the standard or attitude toward such transfers. That set of questions seemed to raise issues of policy and wording. By way of introduction, it was noted that the Subcommittee initially considered a draft that used language parallel to the language in 28 U.S.C. § 1404(a) -- "convenience of the parties and witnesses, and in the interests of justice." After Subcommittee discussion, that standard was narrowed to the "interests of justice."

Whether going back to the § 1404(a) standard, or to a different standard, would change the handling of transfer issues involved reference to the draft Committee Note, particularly the language at the bottom of p. 98 of the agenda materials for the November meeting. By way of background, the normal interpretation of § 1404(a) is that one seeking a transfer must shoulder a fairly heavy burden to demonstrate that transfer is warranted in light of the convenience of the parties, the convenience of the witnesses, and the interests of justice. Put differently, there is a considerable "thumb on the scale" against transfer in that setting. But that bias against transfer is not so much an inevitable consequence of the statutory wording as it is the result of decisions based on the statute's legislative history.

Obviously, a Rule 45 provision would have a different legislative history. The consequences of a transfer in that setting would be considerably less significant than a § 1404(a) transfer. A § 1404(a) transfer means that the parties must retain counsel who can practice in the transferee district, that all remaining decisions in the case will be made in the transferee district, and that any appeal

will be to the court of appeals for that district. Transfer of a motion regarding a subpoena seems a much less disruptive event, perhaps calling for nothing more than a telephonic "appearance" before the judge presiding over the main action.

This background on the wording of the rule seems not to address a diversity of opinions that emerged during the full Committee meeting about what the rule's attitude should be toward transfer. At least three attitudes seemed to attract some support during the Committee's November meeting -- (a) complete neutrality, (b) favoring transfer in most instances, and (c) permitting transfer only in narrowly defined situations. It may be that the actual application of the § 1404(a) standard resembles attitude (c). In relation to attitude (c), the materials leading up to the call included a sketch of rule language that could be used to limit transfer more explicitly:

> If the action is pending in a court different from the issuing court, the issuing court may transfer the motion to the court in which the action is pending if (a) the dispute is between parties to the action and no local interests are affected by the subpoena, (b) resolution of the motion could significantly affect the merits of the action, (c) disputes are likely to arise in other districts from subpoenas in the same action, and the court in which the action is pending has stated a desire to resolve all such disputes, or (d) other compelling reasons support the transfer.

Such an approach might suitably constrict the transfer decision while identifying the circumstances that would seem ordinarily to justify transfer and permit transfer in other "compelling" circumstances.

During the Dallas mini-conference, and at other times, one concern of lawyers has been that judges might too often be inclined to "get rid" of noisome subpoena disputes by sending them to the judge presiding over the main action. A possible counter to this concern is to recognize that judges may fairly often have legitimate reasons for regarding transfer as justified, even if not supported by "compelling" reasons. Do judges who would overuse the transfer power outnumber those who need it for legitimate purposes, it was asked.

A different take on rule language suggested that something different from the current draft and from the § 1404(a) formulation might be considered. Perhaps the rule should authorize transfer after "considering the convenience of the parties and the witnesses, and in the interests of justice" possibly adding that "good cause" would be needed to support transfer.

Against that background of the rule and policy choices, an initial reaction was that busy district judges may well be tempted to transfer too frequently. A starting point probably should be that when the local nonparty witness has valid disputes about the subpoena, the issue should be kept in the local district court. Put differently, one should err on the side of resolving subpoena disputes locally if that is the desire of the local nonparty witness. That seems that inclination of the current draft Note language on p. 98 of the agenda materials, although some members of the full Committee expressed reservations about that inclination during the November meeting. Some even seemed to prefer a pro-transfer stance.

Another participant agreed. There are two end-points, and then many in-between points. One end-point is the case where the dispute is entirely local. For example, the question is whether the witness's medical condition would be adversely affected by a proposed deposition. At the other end of the spectrum is a complicated case in which the judge presiding over the underlying action has already invested substantial time into regulating discovery and addressed issues also touched by the subpoena, and the entire dispute is between the parties to the underlying case, with the local nonparty witness simply abiding the court's resolution of a dispute on which it has no position. In

between, there is a range of circumstances, but the starting point is evaluating those circumstances should be a thumb on the scale in favor of local disposition and against transfer -- the general position in the current draft Note on p. 98. It therefore is not enough to say only that transfer is permitted when that would be "in the interests of justice."

This discussion brought forth the suggestion that a better standard would be something like "for good cause considering the convenience of the witnesses and parties and in the interests of justice." A reaction was that it might be desirable to focus directly on the case-management concerns that could loom large in some cases. Another contribution suggested adding "and considering the relationship to the underlying action, particularly avoiding inconsistent or conflicting rulings."

Another member agreed that there should be some emphasis on the difficulties of managing complex cases. At the same time, if the standard is 50/50 -- complete neutrality -- there is too high a likelihood of transfer.

Another member urged that it should be made clear that a "local matter" is resolved locally, while the active case management of the judge presiding over the underlying action is protected against disruption. That prompted the follow-up that the rule should send a clear signal that a "second bite" regarding issues already resolved by the judge presiding over the underlying action should not be a reward for serving an out-of-district subpoena. Could the rule itself say so?

Recognizing these concerns, another member emphasized that there should be a comparable effort to ensure that the concerns of the nonparty witness are respected. In particular, issues of burden or privilege should almost always be reserved for local resolution.

The emerging consensus was for a rule to permit transfer but with a substantial bias against transfer if opposed by the local nonparty witness. It was agreed that Professor Marcus would attempt to develop a composite rule standard addressing these concerns for the January "final" draft -- perhaps presenting alternatives -- and that the Subcommittee would return to these issues and select wording for a rule standard during its conference call in early February.

The *Vioxx* Issue

This issue was introduced on the basis that the full Committee had agreed with the Subcommittee's recommendation that the rule be changed as indicated on p. 101 of the agenda materials to disallow the argument used in the *Vioxx* case to justify requiring the corporate officer to testify at trial. Assuming the Committee recommends publishing an alternative that creates authority to command testimony at trial, it should be made clear that the Committee's recommendation is to overrule the *Vioxx* line of cases, not to create the authority to command testimony at trial.

The alternative provision --
Focused authority to command live testimony

Discussion focused on the draft language on p. 104 of the agenda materials for the November meeting. Three topics call for discussion: (1) whether the authority should be only for trial, or for a "hearing" also, (2) what the standard should be for determining when to order attendance, and (3) how broad the authority should be -- only for officers, or also for managing agents, or perhaps for those under the party's control or all employees.

An initial reaction was that the provision should be limited to officers, which is what the provision in the current rule used to support the *Vioxx* ruling says. "The further you expand this, the

worse it becomes." Consider a small company. It would be hurt by having one of its officers required to testify, but consider how crippling it could be if all the employees had to leave their work and attend trial.

A reaction was to focus on the limiting language: To obtain a court order that any such person testify, the proponent must show "substantial need" for the testimony, and also show that this need cannot otherwise be met without undue hardship. Furthermore, the court is to consider alternatives to live testimony even where those standards are satisfied.

A counter was that some judges might nonetheless be moved to find the prerequisites satisfied in certain cases. This would invite gamesmanship.

Another reaction stressed concerns with the language used for the showing of need. The draft invokes terms derived from Rule 26(b)(3) and found also in Rule 45(c)(3)(C), where they refer to ordering a person to disclose expert information or trade secrets not developed for this litigation, matters somewhat akin to the work-product concern. That may not be the right referent for this situation. On the scope of the provision, "party's officer" seems relatively clear; adding "managing agent" may introduce considerable uncertainty. Including all employees seems overbroad, but the "control" concept in Rule 35 is very narrow. Perhaps the rule should apply to a "person subject to the control of a party."

Another member agreed that it would be desirable to avoid getting too close to the work-product formulation.

Discussion shifted to the question whether "hearings" should be included as well as trials. One example of an important hearing is to determine whether proposed expert testimony is admissible under *Daubert*. But that example drew the reaction that the witnesses at such hearings are almost always hired experts or others subject to the directives of the party who wants to call them. This is not a big problem. They can also testify by video deposition. They are in the profession of testifying; we don't need this power for them.

Another point was that this is really about jury trials; the view is that the jury should have the "real" witnesses in court. And this is a leverage point. Even without such a provision in the rules, a judge who is convinced a given witness should be at trial can be extremely effective in prompting the lawyers to get that witness to trial. This drew the concession that, as practical matter, the problem has not come up in hearings.

The question was raised whether these thoughts suggested that the references to "hearings" in the current rule be stricken. But the consensus was that there is no reason to delete them; they have not caused problems, and may sometimes have proved useful.

It was noted that it might seem odd for the rule to treat hearings and trials as comparable in some provisions but not others. It was suggested that the Note might make some mention of the omission of "hearings" from the new provision, which was being drafted only as a disfavored alternative anyway.

The consensus was that the draft alternative language would be limited to trial testimony, that it should include a demanding standard for need, and that the range of people subject to required testimony under the rule remained somewhat uncertain. Professor Marcus will attempt to provide alternatives in the January redraft.

Simplifying the three-ring circus
Clarifying place of performance

Proposed new Rule 45(c), on p. 111 of the agenda materials for the November meeting, was intended to correspond exactly to the provisions of the current rule. Professor Marcus is to review proposed 45(c) carefully to make sure that it does so.

Proposed manner of presentation to Standing Committee

This set of proposals is the most aggressive Rule 45 change under consideration by the Subcommittee. It is possible that either the Advisory Committee or the Standing Committee will not want to go forward to publish them. But even if they are not put forward, the other proposals under consideration should go forward, a circumstance that creates some logistical difficulties.

Various features of the other proposals under consideration would have to be altered to fit into the three-ring circus set of proposals. For example, the handling of the *Vioxx* issue would be different if the "issuing court" for all subpoenas were the court before which the action is pending. Similarly, the question of returnability of motions for protective orders and to compel would be different. Other discontinuities will likely crop up. As a result, if a single proposal including all changes were presented to the Advisory Committee or the Standing Committee, it would prove difficult to "unscramble the egg" were the three-ring circus proposal not accepted for purposes of publication.

The proposed solution is to prepare two parallel packages, one without the three-ring circus set of changes and the other including those changes as well as the notice, transfer, and *Vioxx* changes. Although that would involve some additional work and be longer, it would permit greater flexibility at the Advisory Committee and Standing Committee meetings.

The Subcommittee reaction was that this proposed method of presenting the proposals made sense even though it would involve some additional work.

14-day period to object
and related issues

During the Dallas mini-conference and the November meeting of the full Committee, there was considerable discussion of the 14-day period to object in Rule 45(c)(2)(B). The Subcommittee had discussed related issues early in the Rule 45 project. In particular, the original list of 17 issues included the following:

(1) Use of Rule 45's 14-day objection deadline to get around the 30 days allowed in Rule 34 for producing documents.

(4) Time for producing a privilege log in response to a subpoena. Is it only 14 days?

(5) Whether a motion to quash must be filed within 14 days even if the return date for the subpoena is a longer time.

More generally, the question whether the 14 days allowed nonparties is too short, given that Rule 34 allows 30 days for parties to respond to a document request, was discussed. At the same time, the Subcommittee invited suggestions from lawyer groups about Rule 45 issues that it should consider in its review of the rule. It was not advised of additional issues relating to the 14-day provision.

Relatively recently, however, renewed attention has focused on this timing provision. In particular, the recent discussion has raised three somewhat separable issues: (a) whether to extend the 14-day period, (b) the consequences of missing the time limit -- is this a waiver of all objections?, and (c) more generally whether the timing provisions of the rule make sense and fit together.

(a) Extending the 14-day period: The easiest way to deal with the these issues would be simply to change the number in Rule 45(c)(2)(B). It might be increased to 28 or 30 days, for example. Changing to 28 would be consistent with the general attitude of the time-counting project to use multiples of seven and thereby minimize due dates falling on a weekend. Changing to 30 days would be consistent with Rule 34's provision for responding to document requests.

An initial reaction was that it would be best to leave the period at 14 days. "People get more time when they need it. We don't want to string this out."

Another member agreed. Rule 34 is not exactly parallel; under that rule's provisions it is necessary to do more than merely object; one must fully respond by indicating what will or will not be produced, etc. Under Rule 45, all you have to do is object, and from that moment the burden rests on the party seeking to enforce the subpoena to take further action. The person served with the subpoena need do nothing more. "If we extend the period, the whole thing starts to slide."

It was asked whether the rules specify a time shorter than 14 days for taking any action. Under Rule 45(c)(2)(B), it is implicit that a time for compliance shorter than 14 days could be specified in the subpoena. The rule says the objection must be served before 14 days elapses if a shorter period for compliance is specified. The circumstance where that might happen that comes to mind is a subpoena for trial (or, perhaps, a hearing). A response was that, with trial subpoenas, lawyers usually get them out in plenty of time because they know that postponing the trial date will be almost impossible and want to make sure they have their witnesses and exhibits ready to go.

After discussion, however, the conclusion was that there was no sufficient reason to change the 14-day period now in the rule. Various members recalled canvassing attorneys about the rule when the Rule 45 project was getting under way, and this provision did not attract comment. There may be as many potentially adverse consequences for providing a longer period as there are possible benefits. No further action would be taken.

(b) The problem of waiver: During the November full Committee meeting, the concern was raised that the 14-day provision caused inappropriate waivers because judges would rule that failure to object within 14 days precluded later objection.

An initial reaction was that in real life, this never really happens. "This is an example of an issue that doesn't need to be addressed in a rule change." Another member agreed: "This is a solution without a problem." No further action will be taken.

(c) Divergent timing provisions: During the full Committee's November meeting, related timing concerns were raised about how the timing requirements specified in Rule 45 fit together. As noted, Rule 45(c)(2)(B) says that a person asked to produce documents or electronically stored information must object in 14 days. That objection halts the subpoena process in its tracks pending further action by the party who served the subpoena. Rule 45(c)(3)(A) then says that the court must grant a "timely" motion to quash on specified grounds, but is not precise on what "timely" means there. Rule 45(c)(3)(A)(i) says that a "timely" motion to quash must be granted if the subpoena "fails to allow a reasonable time to comply." (That relates to the 14-day provision in Rule 45(c)(2)(B), which seems -- as noted above -- to permit a subpoena that specifies a compliance time shorter than

14 days). Rule 45(c)(3)(B) says that the court may grant a motion to quash on other grounds, but does not say that motion must be "timely." It might be that these provisions could be modified to make them more consistent with each other.

An initial reaction was that other features of the rule might also be modified to achieve complete consistency. For example, Rule 45(c)(3)(A)(iii) requires the court to grant a "timely" motion to quash if the subpoena requires disclosure of privileged material. But Rule 45(d)(2)(A) says that a person responding to a subpoena must prepare a privilege log, implicitly meaning that failure to do so waives privilege objections. Perhaps that activity occurs after the time for a "timely" motion, but it does seem that Rule 45(c)(3)(A)(iii) fails to take account of the provisions of Rule 45(d)(2)(A). And the likely explanation for that slight discontinuity is that Rule 45 has evolved over time, and existing provisions were not always pruned to make them totally consistent with new provisions.

Another reaction is that these seeming discontinuities regarding timing may not clash but instead reflect a rational set of judgments about timing questions. The 14-day period to object (only with respect to a documents-only subpoena) is very brief because it calls a halt to the entire process. The "timely" motion requirement of Rule 45(c)(3)(A) recognizes that it mandates granting such a motion to quash; a judge would not want that to arise on the eve of trial if the matter had been apparent for a long time. A motion invoking the judge's discretion to quash under Rule 45(c)(3)(B), on the other hand, might be denied if delayed too long; there is no imperative to grant under that provision. So these seemingly divergent provisions may not be divergent but instead deal with different issues.

The consensus was that these issues did not warrant action at this time. Until very recently no concerns had been raised about them. The lawyers and the lawyer and judge groups canvassed earlier in the Rule 45 project did not indicate any concern about these possible discontinuities. They would not now be pursued.

Jurisdictional issues

Kate David, who served as Judge Rosenthal's interim rules law clerk during Andrea Kuperman's maternity leave, prepared a memorandum examining "jurisdictional" issues that might arise due to changes the Subcommittee was considering recommending for Rule 45. In particular, during the Dallas mini-conference, a number of lawyers expressed concern that a transfer provision or the adoption of the three-ring circus amendments might be stymied by jurisdictional obstacles.

The David memorandum sets out a firm basis for rule provisions like the ones under consideration. During the conference call, there was little discussion of the content of the memorandum. There was some discussion, however, about the manner of addressing these considerations as the rule change proposals move forward.

On p. 99 of the agenda materials for the Committee's November meeting there appeared a bracketed paragraph in the draft Committee Note sketching reasons for believing that the rulemaking process can authorize transfer of motions to the court presiding over the underlying action. But discussion of this topic in no way assists a court applying that transfer authority in deciding whether to transfer in a case involving a subpoena outside the district in which the action is pending. Instead, it anticipates an argument against the validity of the entire transfer idea on grounds that would be irrelevant to the judge asked to rule on the question of transfer.

The suggestion was made that discussion of "jurisdictional" issues should probably not be included in a proposed Committee Note. At the same time, given the points made in the David

memorandum, some expansion of the discussion beyond that on p. 99 of the agenda materials was probably in order. That discussion should be elsewhere in the transmittal package for the Standing Committee (and, assuming publication, in the published invitation for comment).

Although there was limited further discussion of the "jurisdictional" issues, it seemed useful to include a brief Appendix about those, which appears below.

APPENDIX

Comments on "Jurisdictional" Issues

The memorandum on jurisdictional concerns from Kate David explores and addresses a variety of possible arguments. In particular, it overcomes the sort of "structural" arguments that were made by some participants in the Dallas mini-conference about difficulties that could result from the adoption of either the transfer or the three-ring circus approach. That sort of objection might be summed up by the recurrent comment during the mini-conference that a nonparty served with a subpoena in Miami in relation to an action pending in Seattle would say "I've never been to Seattle, and a judge in Seattle can't tell me what to do."

On reflection, it seems that the basic attitude behind that objection is unsupported. At the same time, the discussion does point up at least one actual change that seemingly would result from the adoption of the three-ring circus approach.

The fundamental problem with the jurisdictional objection is that it assumes that the jurisdiction of a federal court is limited by the Constitution in the same way that the jurisdiction of a state court is limited. But there is no such limitation, as pointed out on p. 99 of the agenda materials. Within a year of deciding Pennoyer v. Neff, the Supreme Court so affirmed in United States v. Union Pacific R.R., 98 U.S. 569 (1878), which said that Congress could have established a single federal trial court with nationwide jurisdiction. Indeed, the Court of Federal Claims was such a court. The limitation on state court jurisdiction depends on the more circumscribed sovereignty of individual states, and is grounded ultimately on the 14th Amendment due process clause, which does not apply to the federal government.

For many reasons, however, the scope of personal jurisdiction exercised by U.S. district courts is usually the same as that exercised by state courts. Otherwise, one might encourage parties to go to federal court to obtain nationwide jurisdiction. Thus, Rule 4(k)(1)(A) provides that usually a summons is effective to require a response from a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." That way, forum shopping to get into federal court is not rewarded with broader jurisdictional reach.

At the same time, the Constitution imposes no "structural" limitations on the exercise of broader jurisdiction. That explains the existence of a variety of statutes authorizing nationwide service of process. It also explains provisions of Rule 4. Rule 4(k)(2) provides that, with respect to any claim arising under federal law, a defendant "not subject to jurisdiction in any state's courts of general jurisdiction" is subject to the jurisdiction of a U.S. district court so long as "exercising jurisdiction is consistent with the United States Constitution and laws." Rule 4(k)(1)(B) also provides that a party joined under Rule 14 or Rule 19 is subject to the district court's jurisdiction so long as served within 100 miles of the district courthouse. That means that -- even though the Constitution might forbid a state court in Connecticut from exercising jurisdiction over such a party served and resident in New York -- the District of Connecticut could exercise jurisdiction in the circumstances identified in Rule 4(k)(1)(B).

What might be called a "structural" attitude toward personal jurisdiction limitations on state courts has an uneasy history. On occasion, the Supreme Court has suggested that state courts' jurisdictional limitations under the Constitution flow from federalism principles, but on other occasions it has affirmed that they are personal rights of defendants (not rights of states) that defendants are free to waive and can lose by failing to assert them. The point for present purposes is that the entire United States is a single sovereignty, and the Constitution has never placed a limitation on the exercise of federal judicial power over a person who has sufficient contacts with

the United States to make permissible the exercise of jurisdiction. Hence the provision in Rule 4(k)(2)(B) that jurisdiction must be consistent with the Constitution. "National contacts" are sufficient.

A different question sometimes exists about whether the power has been employed. In Robertson v. Railroad Labor Board, 268 U.S. 619 (1925), the Court said that the territorial limits of the federal courts are not limited by the Constitution, but held that the statute in question -- authorizing a subpoena served anywhere in the country to compel attendance anywhere in the country -- was implicitly intended to be limited to federal courts of "competent jurisdiction," which the Court said was limited to those in which the person was served within the district. (Of course, the old Pennoyer v. Neff requirement of service within the district was jettisoned by International Show Co. v. Washington in 1945.) The fact that the power exists does not mean that it has been used.

When it is employed, the full power of the federal court system is not subject to the limitations that apply to state courts. Thus, 28 U.S.C. § 1404(a) permits a federal court to transfer a case across the country. True, the statute limits that transfer to a district in which personal jurisdiction and venue could have been satisfied had the suit been filed there, but that limitation is not required by the Constitution. 28 U.S.C. § 1407 authorizes transfer to any district, without such a jurisdictional or venue limitation, and it has been upheld as constitutionally valid. See David memorandum at p. 8.

Fed. R. Crim. P. 17(e) applies the full power of the federal court system to obtain the attendance at trial of witnesses needed in criminal cases. One reason for employing this power is the Confrontation Clause; alternative methods to present testimony may not suffice in criminal trials (a question perhaps under study by other rules committees looking at how testimony in criminal cases should be handled).

The transfer proposals the Subcommittee is considering does not go as far as Criminal Rule 17(e). The proposed transfer provision only authorizes a district judge in the district in which performance is to occur to consign the resolution of a subpoena dispute to the judge in another district who is presiding over the underlying action. The subpoena still issues, as a matter of form, from the district where the discovery is to occur. The three-ring circus revision discards the fiction that the "issuing court" really has any connection to the subpoena issued by the distant lawyer in its name and, in that sense, seems as a matter of form to resemble Criminal Rule 17(e). But proposed Rule 45(c) on where compliance may be required makes clear that the actuality is quite different; the required action is only in the locality not where the distant "issuing court" is located. And the goal is that first resort in the event of a dispute also be to the district court where the person subject to the subpoena is located, subject to a transfer provision analogous to the transfer provision already developed independent of the three-ring circus idea.

Relatedly, the alternative amendment to Rule 45(a) to authorize courts to order a party to testify at trial or to produce its officer or employee to testify at trial does not depend on exercise of the court's "power" over anyone but the parties already before the court. Accordingly, it should raise no such concerns. And those proposals appear only as disfavored alternative ideas that may be published for public comment without an endorsement from the Committee.

The transfer proposals seem unlikely to result in circumstances that might raise a different type of due process argument. As Part III of the David memorandum explains, there is a division among courts on whether it can ever be true that nationwide exercise of jurisdiction violates 5th Amendment due process (which does apply to the national government). That would not be on the "structural" ground that a state line intervened; there is no objection to a federal court in Connecticut

requiring a third-party defendant or a witness from New York City to defend or appear and testify. But it may be that in some circumstances the actual burden on a person subjected to the federal court's generally unquestionable authority would be so great as to violate that person's due process rights. That possibility explains the difference of opinion between the courts that say individual circumstances may never create a due process objection to a federal court's exercise of jurisdiction conferred by statute or rule (see David memo at pp. 16-18) and those that regard fairness considerations as creating at least the possibility of such an objection (id. at 18-21). But even the latter courts note that such circumstances are "highly unusual."

It is difficult to imagine that the modest changes to Rule 45 that are under consideration would ever create such circumstances, and if they did they would need to be addressed on a case-by-case ground. Cf. First American Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998) ("a person who is subjected to liability by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents and testimony"); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (contrasting the burdens on an unnamed class member subjected to a state court's jurisdiction with those on a named defendant). In any event, these possible case-specific fairness concerns do not create a general limitation on the power of a rule to make fuller use of the federal court system's powers in this regard.

The discussion of these issues does identify one way in which the three-ring circus revisions may sometimes produce a change, however. The current rule stresses the place of service of the subpoena as crucial to its enforceability and the place where performance is required, at least as to parties and party officers. See Rule 45(b). The three-ring circus revisions permit nationwide service but, in proposed Rule 45(c), place limitations on where performance is required. What's missing from the three-ring circus approach is authority to compel discovery from one who can be served locally with the subpoena but who is not required to comply locally under proposed new Rule 45(c). For nonparty witnesses, that power is probably nullified by current Rule 45(c)(3)(A)(ii), which requires that a court quash a subpoena that calls for a nonparty witness to travel more than 100 miles.

It is not certain how proposed Rule 45(c) would handle these issues. For a trial, hearing, or deposition, it seems that proposed 45(c)(1) would not provide a basis for requiring a French citizen served locally with a subpoena (perhaps while on vacation) to testify here. For production under 45(c)(2)(A), it seems there is no ground for insisting on production locally of documents or tangible things located in France even though the French citizen who has custody or control of those items can be served locally with a subpoena. The handling of electronically stored information is uncertain.

In contrast, local service seems to suffice to support personal jurisdiction over our French citizen if sued and served here. In Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that service of a California summons on a husband from New Jersey while he was visiting California sufficed to support California jurisdiction in an action against him by his estranged wife. Under current Rule 45(b), service on one temporarily in the jurisdiction would also suffice to require local compliance with a subpoena. But it seems that under the revised rule that would not be true.

First American Corp. v. Price Waterhouse LLP, 154 F.3d 16 (2d Cir. 1998), provides an illustration. That litigation arose out of the collapse of the Bank of Commerce and Credit International (BCCI). Price Waterhouse United Kingdom (PW-UK) was BCCI's worldwide auditor. In connection with BCCI litigation in the D.D.C., First American obtained subpoenas from the S.D.N.Y. directed to PW-UK seeking production of documents located outside the U.S. Among other efforts, First American served subpoenas on an English citizen who was a partner of PW-UK working at the Manhattan office of PW-US, the American affiliate. This Englishman was served

with one copy of this subpoena at the PW-US offices in Manhattan, and another at his temporary home in Connecticut. The district court held the service in Connecticut ineffective because the subpoena was issued by the S.D.N.Y., but found the subpoena generally enforceable because Price Waterhouse "does business" in New York through PW-US. Price Waterhouse appealed.

The Second Circuit declined to resolve the "complex, possibly unique, and sharply disputed issue of how the Price Waterhouse accounting firms around the world relate to each other." Id. at 19. Instead, it held the subpoena enforceable against PW-UK due to service in New York on one of its partners. Citing Burnham v. Superior Court, the court reasoned the "PW-UK knew, or should have known, that by seconding one of its partners to the New York office of an affiliate, PW-UK was risking exposure to personal jurisdiction in New York." Id. at 20-21. Under the three-ring circus approach, this sort of ground would not seem to suffice to support production in the U.S. by a non-American entity or person.

The problems of subpoenas on entities and place of compliance with subpoenas for documents seem not to be addressed with precision in the current rule. For example, where does General Motors conduct business "in person"? Where can General Motors be required by subpoena to produce documents that are in its offices in Asia? For present purposes, the point is that the transfer provision does not appear to complicate the handling of those issues.

On one matter, however, the transfer provision may benefit from some emendation. It may be desirable to address retransfer in some instances where enforcement would be assisted by such retransfer. One issue raised by lawyers in Dallas was whether a judge in Seattle could order compliance by a nonparty witness in Miami. To the extent the contempt power is central to such enforcement of the Seattle judge's order on the transferred motion, it is worth noting that Rule 4.1(b) says that an "order in a civil-contempt proceedings may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued." It may be that a provision for retransfer is worthwhile to address situations calling for enforcement by contempt against nonparties served with subpoenas. Note that, before transfer, the "issuing" court or the court where compliance is required must have opened a file of some sort to address the subpoena-related motion that it later transferred to the court presiding over the underlying action. So there would already be an open file to which retransfer could be made.

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Enforcing Subpoenas Nationwide

This memorandum addresses whether a rule can overcome jurisdictional issues that might arise when a court serves a subpoena in an out-of-state district. The Discovery Subcommittee is currently examining the possibility of amending Rule 45 to provide courts with the ability to serve subpoenas nationwide. The Discovery Subcommittee asked me to research whether a rule can constitutionally provide federal district courts with the ability to enforce subpoenas that are issued outside of the state where the district court is located. This memo summarizes my findings.

I. History of Limited Subpoena Power

From the beginning, subpoenas, inventions of the 14th Century English judicial system, had geographically limited enforceability which was tied to the jurisdiction of the issuing court. James B. Sloan and William T. Gotfried, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (citing Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 43-46 (1989). At the time:

> [T]he trial process in England involved the selection of jurors qualified to serve by their being members of the community who either had personal knowledge of the matter brought before the tribunal or who could conduct an independent investigation of the incident. "Witnesses" as separate actors in the trial process were of lesser critical value than under modern justice systems.

Id.

In 1793, Congress enacted a statute enabling federal courts to issue subpoenas for trial witnesses residing within 100 miles from the site of the court. *Id.* at 35 (citing Act of March 2, 1973, ch. 22, § 6, 1 Stat. 333, 335 (1793)). In 1922, responding to protests by the Justice Department about its inability to assure the appearance and testimony of all necessary witnesses in actions against war materials contractors who had defrauded the United States, Congress amended the general subpoena statute to allow nationwide service of process, "upon proper application and good cause shown." *See id.* at 36 (citing 62 CONG. REC. 12,368 (Sept. 11, 1922) and Act of September 19, 1922, ch. 344, Pub. No. 310, 42 Stat. 848 (1921-23)).

Soon after, the Rules Enabling Act was passed, and the Federal Rules of Civil Procedure became effective as of 1938. *See id.* From the beginning, the Civil Rules incorporated the 100-mile-limit expressed in statute (thereby allowing service within 100 miles of the place of hearing or trial, regardless of state boundaries), and provided a general exception for other Acts of Congress expanding the court's ability to serve subpoenas. FED. R. CIV. P. 45(e)(1) (1934) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.").

Current Rule 45(b)(2) continues to impose the 100-mile-limit, despite the fact that Great Britain modernized its procedures in 1854, "to provide that in actions or suits pending in the courts of England, Ireland and Scotland, judges of those courts could compel the personal attendance at trial

of witnesses by subpoena which could be served in any part of the United Kingdom." Sloan and Gotfried, 140 F.R.D. at 36-37.

II. The Power To Authorize Nationwide Service

Unless expanded by Congress, the jurisdiction of district courts is limited to its territory. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district"); *State of Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.").

Congress has the power to extend a district court's reach by authorizing nationwide service: "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has the power, likewise, to provide that the process of every District Court shall run into every other part of the United States." *Robertson*, 268 U.S. at 622; *see Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 403-04 (1927) ("That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued in another district in which the defendant resides or is found, is not open to question."); *Coleman v. Am. Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 252 (2d Cir. 1968) ("Congress has power to provide that the process of every District Court shall run into every part of the United States....") (internal quotation omitted). As one court explained:

> [I]t is a matter of general agreement that the discretion of Congress 'as to the number, the character, [and] the territorial limits' of the inferior federal courts is not limited by the Constitution. Congress might have established only one such court, or a mere handful; in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution. That it was considered expedient to establish federal judicial districts in harmony with state

> boundaries, did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.

Briggs v. Goodwin, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *rev'd on other grounds sub nom*, *Stafford v. Briggs*, 444 U.S. 527 (1980); *see also U.S. v. Union Pac. R.R. Co.*, 98 U.S. 569, (U.S. 1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government.").

A. Statutes Expanding Territorial Jurisdiction.

Congress has authorized nationwide service in "a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam*." *Robertson*, 268 U.S. at 624. Some early examples were described in *Robertson*:

> In one instance, the Credit Mobilier Act March 3, 1873, c. 226, § 4, 17 Stat. 485, 509, it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney Gengeral [sic] in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States v. Union Pacific Railroad*, 98 U. S. 569, 25 L. Ed. 143. Under similar circumstances, but only for the period of three years, authority was granted generally by Act Sept. 19, 1922, c. 345, 42 Stat. 849 (Comp. St. Ann. Supp. 1923, § 1035), to institute a civil suit by or on behalf of the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act (Act July 2, 1890, c. 647, § 5, 26 Stat. 209, 210 [Comp. St. § 8827]), provides that when 'it shall appear to the court' in which a proceeding to restrain violations of the act is pending 'that the ends of justice require that other parties should be brought before the

> court,' it may cause them to be summoned although they reside in some other district. The Clayton Act (Act Oct. 15, 1914, c. 323, § 15, 38 Stat. 730, 737 [Comp. St. § 8835n]), contains a like provision.

Robertson, 268 U.S. at 624.

Congress continues to enact statutes authorizing nationwide, and in some cases worldwide, service. *See, e.g.*, 15 U.S.C. § 22 (providing worldwide service of process in antitrust cases); 15 U.S.C. § 23 (providing nationwide subpoena power in antitrust cases); 15 U.S.C. § 49 (granting nationwide subpoena power to the Federal Trade Commission); 18 U.S.C. § 78aa (providing for nationwide service of defendants in securities cases); 18 U.S.C. § 1965(d) (providing for nationwide service of process in RICO cases); 25 U.S.C. § 1451(d) (providing for nationwide service on defendants in ERISA actions); 28 U.S.C. § 1695 (providing that, in derivative action, process may be served nationwide upon the corporation) 28 U.S.C. § 2361 (authorizing nationwide service in actions brought under 28 U.S.C. § 1335, statutory interpleader); 28 U.S.C. § 3004(b) (authorizing nationwide service in FDCPA actions); 29 U.S.C. § 521 (granting nationwide subpoena power to the Secretary of Labor); 29 U.S.C. § 1132(e)(2) (providing nationwide service of process in ERISA enforcement actions); 29 U.S.C. § 1451(d) (providing nationwide service in ERISA civil actions); 28 U.S.C. § 1692 (authorizing nationwide service of process in actions to recover property by a receiver appointed by the court); 38 U.S.C. § 1984(c) (authorizing nationwide service of subpoenas in suits involving claims for war risk insurance); 42 U.S.C. § 9613 (authorizing nationwide service in certain CERCLA actions); 47 U.S.C. § 409(f) (granting nationwide subpoena power to the Federal Communications Commission).

These provisions have been deemed to "comport with all constitutional requirements." *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035

(7th Cir. 2000) (collecting cases); *see Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 125 (D.D.C. 1984) ("The Congress may constitutionally authorize extraterritorial service of process."); *see also Federal Trade Comm'n v. Tuttle*, 244 F.2d 605 (2d Cir. 1957) (holding that Federal Trade Commission Act's nationwide service provision is "not unconstitutional" and District Court for the Southern District of New York erred in refusing to compel Boston resident to comply with subpoena duces tecum); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 473-77 (1894) (rejecting constitutional challenge to statute authorizing Interstate Commerce Commission to invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of books and papers).

Courts around the country have repeatedly rejected arguments that a district court, after issuing service pursuant to a statute providing for nationwide or worldwide service, cannot exercise personal jurisdiction over an out-of-state defendant/witness. *See Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) ("[T]he district court has personal jurisdiction over the defendants insofar as the MPPAA includes a provision for nationwide service of process."); *see, e.g., Elite Erectors*, 212 F.3d at 1037 (holding that service pursuant to nationwide service statute provided Eastern District of Virginia with personal jurisdiction over Indiana company and resident "even on the assumption that neither has any 'contacts' with Virginia"); *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (holding statute providing for worldwide service valid in connection with subpoenas duces tecum served in Nassau,

Bahamas); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822, 825-26 (5th Cir. 1996) (holding Southern District of Texas properly exercised personal jurisdiction over defendant corporation operating exclusively within the State of Michigan when defendant was served pursuant to statute providing for nationwide service); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir. 1940) (affirming Northern District of Illinois's order requiring Missouri plant to comply with subpoena issued pursuant to Fair Labor Standards Act); *Combs*, 597 F.Supp. at 125 (holding D.C. District Court had jurisdiction over Kentucky residents who were served pursuant to statute authorizing nationwide service of process).

There are also statutes giving certain courts nationwide jurisdiction. For example, the Court of Federal Claims has nationwide jurisdiction. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 499 (Ct. Fed. Claims 2010); *see* 28 USC § 2505 ("Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment."); *Union Pacific R.R.*, 98 U.S. at 603-04("The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion."); *Sabella v. Sec'y of Dep't of Health & Human Servs.*, 86 Fed. Cl. 201, 205 n.2 (2009) ("the jurisdiction of the United States Court of Federal Claims is not limited to a particular geographic area within the United States."). "A concomitant aspect of that jurisdiction is the power to issue a subpoena requiring a witness to appear and testify at a trial to be held more, and in some instances considerably more, than 100 miles from the witness' residence." *Scott Timber*, 93 Fed. Cl. at 499.

The multidistrict litigation statute also authorizes federal courts to exercise nationwide personal jurisdiction. *Howard v. Sulzer Orthopedics, Inc.*, 382 Fed. Appx. 436, 442 (6th Cir. 2010) ("The MDL statute (28 U.S.C. § 1407) is, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"); *see In re FMC Corp. Patent Litig.*, 422 F.Supp. 1163, 1165 (J.P.M.D.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of *in personam* jurisdiction and venue.").

Due process challenges to Section 1407 have been universally rejected. *See In re "Agent Orange" Prod.Liab.Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. One such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.") (citations omitted); *see, e.g., Howard*, 382 Fed. Appx.at 442 (6th Cir. 2010) (rejecting Oklahoma plaintiff's due process challenge to jurisdiction of Ohio court exercising jurisdiction under § 1407); *In re Sugar Indus. Antitrust Litig.*, 399 F.Supp. 1397, 1400 (J.P.M.D.L. 1975) (per curiam) (rejecting due process challenge of "Eastern Defendants" to transfer from Eastern District of Pennsylvania to Northern District of California).

B. Rules Expanding Territorial Jurisdiction.

Territorial jurisdiction may also be extended by rule. *See Coleman*, 405 F.2d at 252 ("Since Congress has power 'to provide that the process of every District Court shall run into every part of the United States,' the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes....") (quoting *Robertson*, 268 U.S. at 622); *McGonigle v. Penn-Central Transp. Co.*, 49 F.R.D. 58, 62 (D. Maryland 1969) ("Nor is the validity of [the 100-mile bulge provision for federal service of process] drawn into question

because it was enacted as a rule of procedure rather than a statute."); *see also Resolution Trust Corp. v. McDougal*, 158 F.R.D. 1, 2 (D.D.C. 1994) ("The Court may reach parties like Tucker who live outside the jurisdiction only if it is authorized to do so by a federal statute, the local long-arm statute, *or the Federal Rules of Civil Procedure*.") (emphasis added).

As described above, the power to expand the territorial jurisdiction by rule has been exercised from the beginning. In civil cases, a district court's territorial jurisdiction has been extended to the 100-mile-limit, or further, when provided by statute. *See* FED. R. CIV. P. 45(b). And in criminal cases, Rule 17(e) authorizes district courts to exercise nationwide subpoena power: "A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States."[1]

The validity of these rules has long been accepted. In 1833, the Circuit Court of the District of Columbia noted that a federal court has "a right to send its subpoena into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this court ever since its establishment in 1801." *U.S. v. Williams*, 28 F. Cas. 647, 657 (D.C. Cir. 1833).

The original, 1938, Federal Rules of Civil Procedure also provided for service of defendants located beyond the district court's territory. Federal Rule of Civil Procedure 4(f) provided that "[a]ll service other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Challenges to the expansion of district court jurisdiction to allow

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[1]Bankruptcy Rule 7004(d) allows national service of process of "summons and complaint and all other process except a subpoena...." Courts have concluded that nationwide service of process under Rule 7004(d) is constitutional. *See In re Federal Fountain, Inc.*, 165 F.3d 600 (8th Cir. 1999) (en banc).

service outside of the district have been universally rejected.

For example, in *Mississippi Pub. Corp. v. Murphree*, the Supreme Court rejected the argument that Rule 4(f) could not authorize a district court to serve a defendant located in another district, where defendant was located in the southern district of Mississippi and was served by the District Court of the Northern District of Mississippi pursuant to former Rule 4(f). 326 U.S. 438, 439-40, 443 (1946). The Court first decided that Rule 4(f) was not inconsistent with Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." *Id.* at 443-45. The court explained:

> It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, ss 51 and 52 of the Judicial Code, 28 U.S.C.A. ss 112, 113, in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

Id. at 444-45 (internal citation omitted); *see also Ransom v. Brennan*, 437 F.2d 513, 518 n.6 (5th Cir. 1971) ("Fed. R. Civ. P. 82 says that the Rules are not intended to affect the jurisdiction of the federal courts. But this relates only to subject matter jurisdiction rather than the means of bringing the

defendant before the court."); *H & F Barge Co., Inc. v. Garber Bros., Inc.*, 65 F.R.D. 399, 405 (E.D. La. 1974) ("The term 'jurisdiction' as used in Rule 82 refers only to the subject matter jurisdiction of the courts, not the method of exercising personal jurisdiction through service of process.").

The Court next decided that Rule 4(f) was "in harmony" with the Rules Enabling Act:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11-14, 655, 61 S.Ct. 422, 425-427, 85 L.Ed. 479. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to 'the manner and the means by which a right to recover ... is enforced.' *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 1470. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

Murphree, 326 U.S. at 445-46.

Other courts have acknowledged that the Rules of Civil Procedure can constitutionally extend a district court's reach beyond state boundaries. *See Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1169, 1176 (10th Cir. 1986) (rejecting argument that Rule 4(f) was unconstitutional if interpreted so as to extend personal jurisdiction beyond a state's boundaries); *Coleman*, 405 F.2d at 252 ("Since Congress has power to provide that the process of every District Court shall run into every part of the United States, the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes...."); *Jacobs v. Flight Extenders, Inc.*, 90 F.R.D. 676, 679 (E.D. Penn. 1981) ("It is clear that Congress can extend the

territorial jurisdiction of a federal district court, regardless of state boundaries."); *McGonigle*, 39 F.R.D. at 61-62 ("Given the power of federal Congress to extend, nationwide, the territorial jurisdiction of a federal district court, regardless of state boundaries ... the constitutionality of the 100-mile bulge provision for federal service of process is, *a fortiori*, unquestionable."); *see also Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000) ("Congress has authority constitutionally to permit service in federal court beyond any state's boundaries."); *Sprow v. Hartford Ins. Co.*, 594 S.W.2d 412, 416 (5th Cir. 1979) ("the 100 mile bulge provision has effectively expanded the territorial jurisdiction of a federal district court beyond state lines"); *Williams*, 28 F. Cas. at 656 (Each state, "by adopting the constitution of the United States,'" has given permission to the court of the United States to send their process into that state, "in all cases of which the judicial power of the United States has cognizance.").

These courts permit the exercise of jurisdiction over out-of-state defendants. *See, e.g.*, *Quinones*, 804 F.2d at 1172, 1178 (reversing trial court dismissal of third party complaint where third party resided and was served process in El Paso, Texas, within 100 miles of the United States District Courthouse in Las Cruces, New Mexico); *Coleman*, 405 F.2d at 252 (reversing trial court dismissal of third-party complaint filed in Southern District of New York, where third party defendant was served at its Philadelphia office, which was within 100 miles of the Southern District of New York); *Jacobs*, 90 F.R.D. at 679 (denying third party defendant's motion to dismiss plaintiff's complaint in Pennsylvania where third party defendant had minimum contacts with the "bulge area" in New Jersey); *McGonigle*, 49 F.R.D. at 61-62 (denying third party defendant's motion to dismiss where it was served in Pennsylvania, within the "100-mile bulge area" around the situs of the Maryland District Court).

C. Enforcing Subpoenas Nationwide

When a court serves a subpoena outside of the state in which it is located pursuant to a rule or statute authorizing nationwide service, the court has the power to enforce the subpoena. *See Williams*, 28 F. Cas. at 654 ("The subpoena would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that congress intended to authorize the court to issue a command, the obedience to which it could not enforce.").

The Supreme Court explained:

> There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 330-332(1947) (Black and Douglas, JJ., concurring in part and dissenting in part); *United States v. Barnett*, 376 U.S. 681, 753-754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

Shillitani v. United States, 384 U.S. 364 (1966)); *accord Spallone v. United States*, 493 U.S. 265, 276 (1990).

A subpoena is enforceable in the court which issued it. *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1495 (11th Cir. 1986); *see* FED. R. CIV. P. 45(f) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."); FED. R. CRIM. P. 17(g) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate."). "Once [the court's] authority is invoked by service of the subpoena, the court under whose seal the subpoena was issued must have jurisdiction to enforce its subpoena and

vindicate its own process, as Fed. R. Civ. p. 45(f) and Fed. R. Crim. P. 17(g) recognize." *In re Certain Complaints Under Investigation*, 783 F.2d at 1496.

When authorized by statute, courts other than the issuing court may enforce a subpoena even if the enforcing court is in another state. For example, 28 U.S.C. § 1407(b) authorizes an MDL judge to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.'" This includes the power to enforce a subpoena or rule on a motion to quash a subpoena. *See In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670, (5th Cir. 2007) (per curiam) (holding that MDL court in the Eastern District of Pennsylvania had power to rule on a motion to quash subpoena issued through the United States District Court for the Southern District of Texas); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litiagation*, No. 07-20156, 2009 WL 5195783, at *1 n.1 (E.D.Pa. Dec. 22, 2009) ("As the court presiding over the MDL, we have authority to enforce the subpoena issued out of the Southern District of California."); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 586 (E.D.Pa. 1989) ("[A] multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts."); *see also Howard*, 382 Fed. Appx. at 442 ("The MDL statute (28 U.S.C. sec. 1407) in, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"). As one treatise explains:

> [Section 1407(b)] therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted). This explanation was embraced by the Fifth Circuit in *Baron & Budd*, and is also supported "by the convincing analysis of myriad district courts." *Baron & Budd*, 478 F.3d at 672 (collecting cases).

III. Due Process Limits on Exercising Nationwide Personal Jurisdiction

While rules and statutes authorizing nationwide service of process confer a basis for jurisdiction, the exercise of such jurisdiction may be subject to basic due process limitations.

The United States Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *see Omni v. Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 n.5 (1987) (plurality op.) (declining to address the constitutionality of the national contacts test); *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (same). And the circuit courts considering the issue have split over the scope of the limits imposed by the Fifth Amendment when jurisdiction is established via a nationwide service of process provision – some (Second, Fifth, Sixth, Seventh, Eighth, and Ninth) apply a pure national contacts approach and hold that due process is satisfied if the party has "minimum contacts" with the United States, while others (Fourth, Tenth, and Eleventh) consider minimum contacts plus whether a party would be unduly burdened if forced to appear or defend in an inconvenient forum.[2]

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[2]While all of the cases discussing Fifth Amendment due process limits on personal jurisdiction do so in the context of determining whether the court has personal jurisdiction over an out-of-state defendant, a number of cases recognize that due process also imposes a limit on personal jurisdiction over nonparty witnesses. *See, e.g. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (holding that service of a subpoena on a foreign nonparty physically present in the district satisfies due process); *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (requiring that foreign nonparty subject to an

A. Pure National Contacts Approach

Most circuits that have considered the issue have adopted the "pure national contacts approach" and hold that due process is satisfied when the party is served under a nationwide service of process provision and resides within the United States or has "minimum contacts" with the United States as a whole. *See, e.g., Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (applying national contacts test); *Elite Erectors, Inc.*, 212 F.3d at 1035-36(same); *In re Federal Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (adopting national contacts test); *Bellaire General*, 97 F.3d at 825-826 (applying national contacts test); *Busch*, 11 F.3d at 1258 (holding due process satisfied when defendant resides within the United States); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (deciding that "minimum contacts" with United States satisfies due process); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (applying national contacts test); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (deciding that "there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of

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administrative agency subpoena possess minimum contacts with the United States); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (quashing a subpoena based on the nonparty's lack of contacts with the forum); *In re Jee*, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989) (acknowledging the need for personal jurisdiction over nonparty witnesses); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (quashing document subpoena based on lack of contacts with the forum); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.125 (3d ed. 2003) (stating that "[a] nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court"). The burdens on a nonparty witness of testifying in a distant forum are arguably less than the burdens faced by a nonresident defendant. Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Voyage*, 74 MINN. L. REV. 37, 94-97 (1989); *see also Price Waterhouse*, 154 F.3d at 20 ("PW-UK is a non-party, but it is unclear which way that should cut; a person who is subjected to liability by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.")

jurisdiction over him by a United States court"); *Mariash v. Morill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (explaining that "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present."); *see also Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (holding that authority to enforce a federal grand jury subpoena depends upon appellant's contacts with the entire United States, not simply the state of New York).

These courts reason that the test that developed in state litigation – whether a defendant has adequate contacts with the forum – related to the court's jurisdictional power over non-residents and that the same concern is not present when a federal court exercises jurisdiction over a United States resident. The *Elite Erectors* court explained:

> Linking personal jurisdiction to a defendant's "contacts" with the forum developed in state litigation. Due process limitations on adjudication in state courts reflect not so much questions of convenience as of jurisdictional power. Barrow, Alaska, is farther from Juneau than Indianapolis is from Alexandria, and travel from Barrow to Juneau is much harder than is travel from Indianapolis to Alexandria (there are no highways and no scheduled air service from Barrow to anywhere), yet no one doubts that the Constitution permits Alaska to require any of its citizens to answer a complaint filed in Juneau, the state capital, just as the United States confines some kinds of federal cases to Washington, D.C., on the eastern seaboard. Conversely Kentucky's proximity to southern Indiana (Louisville would be more convenient for residents of New Albany than tribunals in Indianapolis) does not permit Kentucky to adjudicate the rights of people who have never visited that state or done business there; its sovereignty stops at the border. Limitations on sovereignty, and not the convenience of defendants, lie at the core of cases such as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and their many predecessors.
>
> No limitations on sovereignty come into play in federal courts when all litigants are citizens. It is one sovereign, the same "judicial

> Power," whether the court sits in Indianapolis or Alexandria. *Peay* did not deny this. Instead it relied on the observation in *Omni Capital*, 484 U.S. at 104, 108 S.Ct. 404, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have "contacts" with a particular federal judicial district and does not block litigation in easy-to-reach forums. A defendant who lives in Springfield, in the territory of the United States District Court for the Central District of Illinois, may be required to defend in Chicago (part of the Northern District) without any constitutional objection on the ground of undue inconvenience - even if the defendant has never been to Chicago and has no "contacts" with the Northern District - just as Illinois could allocate the bulk of litigation among its citizens to Chicago (or require residents of Chicago to visit Springfield, where the Supreme Court of Illinois sits).

212 F.3d at 1036; *see also Federal Fountain*, 165 F.3d at 602 ("We think, in sum, that the fairness that due process of law requires relates to the fairness or the exercise of power by a particular sovereign and there can be no question that the defendant has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.") (internal quotations omitted); *Mariash*, 496 F.2d at 1143 ("Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.")

B. Considering Fairness to Defendant

In addition to minimum contacts, when determining whether due process is satisfied, the Fourth, Tenth, and Eleventh Circuits consider whether the defendant would be unduly burdened or inconvenienced if forced to defend in an inconvenient forum. *See Peay*, 205 F.3d at 1212 ("[W]e

hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) ("The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals against unfair burden and inconvenience."); *Republic of Panama v. BCCI Holdings (Luxembourg)*, 119 F.3d 935, 947 (11th Cir. 1997) ("A defendant's "minimum contacts" with the United States do not, however, automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.").

In *Republic of Panama*, the court emphasized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern" because "modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum." *Id.* at 947-48. And it placed the burden on the defendant "to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id.* at 948 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (citations omitted)). If the defendant makes this showing, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id.* "In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the

relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy." *Id.*

Applying these standards, the *Republic of Panama* court held that the Southern District of Florida erred in granting defendants' motion to dismiss for lack of personal jurisdiction because there was no "constitutional impediment" to jurisdiction where defendants were "large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard" who were properly served under the RICO statute authorizing nationwide service of process, despite the fact that defendants may not have had significant contacts with Florida. *Id.* at 948. In reaching this conclusion, the court noted that "the fact that discovery for the litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country." *Id.*

Similarly, in *ESAB Group*, the Fourth Circuit held that the Fifth Amendment's Due Process Clause "protects the liberty interests of individuals against unfair burden and convenience," (126 F.3d at 626), but recognized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Id.* (quoting *Republic of Panama*, 119 F.3d at 947). The *ESAB Group* court decided that the South Carolina District Court could constitutionally exercise personal jurisdiction over a New Hampshire company and a New Hampshire/Florida resident because there was no evidence of "such extreme inconvenience or unfairness" to either defendant as would outweigh the congressional policy choice to allow nationwide service in RICO actions. *Id.* at 627.

In *Peay*, the Tenth Circuit also analyzed whether plaintiff's choice of forum would be "fair and reasonable" to defendant, so as to satisfy due process. *Peay*, 205 F.3d at 1212 ("Like the

Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'")

Like the Fourth and Eleventh Circuits, the *Peay* court emphasized that the inconvenience would rise to a level of constitutional concern "only in highly unusual cases." *Id.* And concluded that the defendants' liberty interests would not be infringed if defendants were forced to litigate in Utah, because the *Peay* defendants (headquarted in Alabama and Georgia) were "large corporations operating throughout the southeastern United States" and administering a multi-state insurance plan regulated by federal law who "rendered benefits in Utah." *Id.*

By E-Mail and U.S. Mail

February 23, 2011

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Civil Rules Advisory Committee
Richard C. Lee United States Courthouse
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Honorable David Campbell, Chair
Rule 45 Subcommittee
Civil Rules Advisory Committee
Sandra Day O'Connor U.S. Courthouse
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Re: **Rule 45**

Dear Judges Kravitz and Campbell:

We write as members of the Council and Federal Practice Task Force of the Section of Litigation of the American Bar Association to follow up on comments made at the Rule 45 mini-conference in Dallas on amendments to Rule 45 that are being considered by the Rule 45 Subcommittee for presentation to the Advisory Committee at its April 4-5 meeting. From the reports issued by the Rule 45 Subcommittee, we applaud the outreach and productive dialogue that has been conducted by the Subcommittee to improve Rule 45. We also recognize that each part of Rule 45 proposed for amendment can be modified in more than one way to achieve the Subcommittee's goals to simplify Rule 45 and improve its functionality. We are hopeful that these comments will assist the Subcommittee and the Advisory Committee in deciding on the best choice among those amendment options.

Notice Under Rule 45

Currently, Rule 45 provides at the end of subparagraph (b)(1) a requirement that a subpoena issuer must give notice to "each party" before the subpoena is served. There is no obligation to provide a copy of the subpoena. To give this requirement more prominence, it is our understanding that the Subcommittee will recommend that the notice provision be moved to the end of Rule 45(a) as a new stand-alone subparagraph (4) with a subheading. The text will remain the same except for adding a requirement that a copy of the subpoena accompany the notice. Likely proposed text would read as follows:

> (4) ***Notice to other parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, [then]

> before the subpoena is served, a notice including a copy of subpoena must be served on the party.

The word "then" is bracketed because we understand it may be eliminated from the proposed rule, although we believe that the "if...then" construction makes sense and "then" should be retained.

We urge the Subcommittee and the Advisory Committee to go one step further. Nearly all subpoenas relate to production of documents or electronically stored information. Ensuring that all parties to an action receive notice of and access to the production without the need to issue multiple subpoenas reduces both the burden on the subpoena-respondent and the cost of litigation on the parties.

We also think that there is merit in adding to Rule 45 a requirement that the issuer of the subpoena provide notice of any written modifications to the subpoena that may be made after the subpoena is issued. In the electronic world in which we live, it is not difficult to give notice of a modified subpoena or of compliance with the subpoena. In most cases an email or simple letter sent by facsimile would suffice. Giving notice of a modification will also reduce the cost of litigation and eliminate the gamesmanship that can sometimes accompany subpoena issuance and negotiation.

We therefore believe that this part of Rule 45 should also state that the subpoena issuer will give notice of written modifications to the subpoena and make available for inspection and copying documents or electronically stored information produced in response to the subpoena. The proposed text might read:

> (4) ***Notice to other parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then the subpoena issuer,
>
> (A) before the subpoena is served, must serve a notice including a copy of the subpoena, on the other party;
> (B) must give the other party reasonable notice of any written modification of the subpoena or any new date and time of inspection or production; and
> (C) must make available the documents, electronically stored information, or tangible things produced for inspection and copying by the other party in a timely fashion.

In considering "best practices" in litigation, we acknowledge that seasoned lawyers will reach agreement on these items. When such *ad hoc* conduct is endorsed as a best practice,

we believe it makes sense to adopt a rule embodying it rather than assume that it will occur whenever a response to a subpoena is made.

Transfer of Motions to Presiding Court

Under Rule 45, a subpoena is "issued" by an attorney in the name of the district court where the subpoena-recipient is located. If there is compliance with the subpoena, the "issuing" court never learns of the subpoena. If there is a motion to quash or a motion to compel filed, the motion is filed in the "issuing" court.

Judge Campbell and other judges on the Advisory Committee have expressed strong reasons to give the issuing court, under very limited circumstances, the option of transferring such a motion to the trial court. The current text of Rule 45 does not appear to permit such a transfer.

Rule 45 is an integral part of federal litigation. It seeks to balance parties' needs for information from nonparties with protection of the nonparty from undue burden or expense. Assignment to the issuing court of motions to compel compliance with, or to quash or modify a subpoena makes sense "since it is the issuing court that has the needed jurisdiction to enforce the subpoena, and therefore is the logical forum for altering its terms or rendering it nugatory." 9A Wright & Miller, Fed. Prac. & Proc. Civ. § 2463.1 (3d ed.).

We are concerned that, irrespective of restrictions that might be imposed on transfer, an *exception* to Rule 45 to permit the issuing court to transfer a motion to the trial court will become the *rule* to the detriment of nonparties who already face the burdens of subpoena compliance. Many of us, therefore, feel strongly that the current structure of Rule 45 should be maintained.

However, if the issuing court is to be given discretion to transfer a motion to the trial court, we believe that the right to transfer has to be strictly limited to circumstances so compelling that, if a transfer is not made, it would be so prejudicial to the administration of justice, unreasonably increase the time needed to resolve claims, or raise the costs of litigation as to outweigh the burden on the nonparty.

To capture this very narrow exception, a possible new Rule 45(c)(2)(B)(iii) might read:

> If the action is pending in a court different from the issuing court, the issuing court may, upon consent of the parties and the person subpoenaed, or in exceptional circumstances and subject to Rule 45(c)(1), transfer the motion to the court in which the action is pending.

Possible new Rule 45(c)(3)(D) would provide:

> *Transferring Motion to Court in Which Action Pending.* If the action is pending in a court different from the issuing court, the issuing court may, upon consent of the parties and the person subpoenaed, or in exceptional circumstances and subject to Rule 45(c)(1), transfer the motion to the court in which the action is pending.

This text covers the situation where everyone associated with the subpoena consents to the transfer.

The use of "exceptional" is intended to convey how rare transfers should be. The word is used elsewhere to convey a similar direction to the district courts (Rule 53 uses the word "exceptional" to highlight the high burden that has to be satisfied before a Special Master is appointed in situations other than an accounting or "difficult" damage computations or where courts cannot effectively or timely address pretrial or posttrial matters).

Use of "exceptional" allows for transfer in those situations that have been identified as favoring transfer: (a) there is a risk of inconsistent rulings by a number of issuing courts where the same subpoenas have been served on multiple parties and objected to in multiple jurisdictions; (b) the resolution of objections would materially affect the merits of the action and not the merits of the subpoena; or (c) the issuing court cannot timely address objections thereby creating prejudice from material delay of the action.

The issuing court still has the obligation under Rule 45(c)(1) to enforce the duty of the party or person responsible for issuing and serving the subpoena to take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Using terms like "in the interest of justice" or "upon conditions that are just" might not protect the person subpoenaed from undue burden or expense.

We think it is important further to note that a transfer does not subject a subpoena-recipient to jurisdiction in the trial court in future unrelated actions, and that the issuing court must, in evaluating a transfer, determine if there are any pro hac vice impediments to an appearance in the trial court by counsel for the person subpoenaed.

The *Vioxx* Amendment

We endorse the Rule 45 Subcommittee's belief that the district court in *In Re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006) misinterpreted Rule 45. We also endorse an amendment that would result in deletion of the "subject to" language in Rule 45(b)(2) and requiring in Rule 45(c)(3)(A) that the subpoena be "properly served under Rule 45(b)(2)."

We understand that the Subcommittee might propose for consideration by the Standing Committee alternative language suggesting a contrary result. We believe that doing so would create confusion and unnecessarily complicate a simple fix.

Time for Objections

Currently, Rule 45 gives the subpoena-recipient the *earlier* of 14 days after service or the "time specified for compliance" to make objections. A subpoena returnable in 7 days would require objections to be served within 7 days. One returnable in 30 days would require objections to be served within 14 days.

The 14-day time period was increased from 10 days in the 1991 Rules' amendments (which also required a subpoena to include a statement of the rights and duties of witnesses). This amendment prompted courts to conclude that it was "reasonable to construe the new time limits more strictly so that failure to timely file an objection will result in a waiver of the right to object to enforcement of the subpoena and of the right to recover costs of production." *Angell v. Shawmut Bank Connecticut National Association*, 153 F.R.D. 585, 590 (M.D.N.C.1994). *See also McCabe v. Ernst & Young, LLP*, 221 F.R.D. 423, 425-27 (D.N.J. 2004) (absent objections within 14 days or absent a court order compelling production, a nonparty bears its own production expense).

We acknowledge that there is, at times, a need to obtain information rapidly from a subpoena-recipient. We also acknowledge that in most cases subpoenas are served and complied with without debate or cost demands. Finally, we acknowledge that many subpoena-recipients are able to work out with subpoena-issuers modifications to subpoenas to reduce the cost of compliance or will negotiate for reimbursement of reasonable production costs.

Nonetheless, 20 years have passed since the last review of this time period. The corporate world has become more global. We have been told by corporate counsel that subpoenas might not even arrive in the correct corporate office location for close to 14 days. In the electronic world, subpoena-recipients may not be able to determine if they have objections, particularly based on privilege grounds, for more than 14 days, and this is especially true if the subpoena legitimately implicates electronic backup storage media or a number of custodians with varying storage habits that have to be determined. In addition, in the electronic world, subpoena-recipients may need to engage outside vendors to assist them in responding to subpoenas and 14 days may not allow enough time to determine what the costs of responding to the subpoena will be so as to evaluate whether they will make an objection. If 14 days remains the rule, as electronic discovery continues to grow, sophisticated parties will automatically object until they can determine costs, and unsophisticated parties may find themselves facing waiver arguments and having to bear the cost of production.

Parties have 30 days to respond to a request for production under Rule 34. This time period can be extended or shortened by agreement of the parties or by court order.

We see no reason why a similar time period should not be applicable to subpoena recipients. Such an approach has the added benefit of making the time to object or for compliance the same which would eliminate confusion and inadvertent loss of objections by nonparties who think they can preserve objections by moving to quash by the date of compliance. Lawyers will adjust to such a rule by issuing subpoenas earlier in the discovery process. If there is genuine urgency, the trial court can be approached to shorten the time for response before a subpoena is issued. We urge the Rule 45 Subcommittee and the Advisory Committee to consider such an amendment.

Simplification of Rule 45

Rule 45 has become the "add-on" Rule. We recognize the laudable goal of a simplified Rule 45 that fairly balances the interests of parties and nonparties, promotes justice, speed, and lower expense in conducting litigation in federal court, and does not unduly burden nonparty subpoena-recipients. We have concerns that simplification can be accomplished without compromising third parties' rights so we appreciate the care with which the Subcommittee is considering a simplification undertaking. If the Subcommittee decides to offer a simplified version of Rule 45, we will look forward to reviewing it and offering comments then to assist the Advisory Committee.

Thank you very much for consideration of these comments. We would be pleased to discuss any of them further with the Subcommittee or the Advisory Committee.

Sincerely,

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[1] As noted above, the signatories to this letter are officers and members of the Council of the Section of Litigation of the American Bar Association or members of the Section's Federal Practice Task Force. We submit these comments in our individual capacities. They have not been approved by the ABA as ABA policy.

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TAB 5

Pleading-Discovery Approaches

This memorandum provides an incomplete and preliminary overview of some of the approaches that might be considered in reacting to the continuing expressions of concern about the development of pleading practices in response to the Twombly and Iqbal decisions. Incomplete both for want of imagination and for fear of unseemly proliferation. Preliminary because practice continues to evolve, and more importantly because even the first rigorous efforts to evaluate practice are still under way.

The Federal Judicial Center study, "Motions to Dismiss for Failure to State a Claim after *Iqbal*," will be distributed electronically before the April meeting. Joe Cecil will present the report at the meeting.

Andrea Kuperman's massive survey of lower-court decisions, focusing primarily on the courts of appeals, continues to grow, as supplemented by Kate David and Jeff Barr. The March 2011 version is available on the Administrative Office site; new portions are highlighted for easy identification. Many will find it — at least in large part — reassuring. But not even scores of appellate opinions can provide clear evidence of what is happening in law offices and in the district courts. It is easily possible that in the end the cases will seem to have done as good a job of integrating the Supreme Court's pronouncements into working practice as could be done by amending any Civil Rule. But it is important to continue to focus on these questions so as to be ready to propose rule amendments if the need appears.

The FJC survey is based on federal district court records, reaching many cases that do not lead to published opinions. The Kuperman memorandum is based on published opinions, primarily in the courts of appeals. By the time of the April meeting, lower courts will have had nearly four years to assimilate the *Twombly* decision and nearly two years to assimilate the *Iqbal* decision. This may be experience enough to support serious consideration of the question whether these decisions and their aftermath warrant changes in any of the Civil Rules. Answering the question whether to propose changes will depend in part on identifying the changes that might be made. A wide array of possible changes is sketched here.

PLEADING: CLAIM

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a Committee Note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the Twombly and Iqbal opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty — and likely some real confusion — would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the Twombly decision seem to ask for restoration of the dictum in Conley v. Gibson that a complaint may be dismissed for failure to state claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: "a short and plain statement giving notice of the claim."

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the Twombly decision. This approach is more realistic only if it

is accepted that there can be no precise definition of the practice in place at the time Twombly was decided. The idea would be to "go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the Twombly or Iqbal decisions that might point you in a different direction." Even then it is difficult to believe that lower courts, recalling the Twombly and Iqbal opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

"a short and plain statement of the claim, showing that the pleader ~~is~~ may be entitled to relief."

"a short and plain statement of the claim — regardless of its nonconclusory plausibility — showing * * *." (Clermont & Yeazell, 95 Iowa L.Rev. 821, 859 n. 135 (2010))

A less reverent approach might be to republish present Rule 8(a)(2), with a Committee Note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

"Notice plus": The ABA Section of Litigation paper, "Civil Procedure in the 21st Century" proposes this as a mid-ground between their perception of Twombly-Iqbal standards and the notice pleading practice that prevailed on May 20, 2007:

"A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery."

Twombly-Iqbal in Rule Speak: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent — that the Court was right to make the attempt, and also right to express the new approach in capacious language leaving the way open for lower-court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

"a short and plain statement showing a plausible claim for relief."

"a short and plain statement of facts and context showing the pleader is entitled to relief"

"a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief"

"a short and plain nonconclusory statement showing the pleader is entitled to relief"

"a short and plain statement of a transaction or occurrence showing * * *."[1]

"a short and plain statement of acts or events showing * * *"

[1] An early draft of Rule 8(a)(2) required a "statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief." Without "showing that the pleader is entitled to relief," this would be quite relaxed.

"a short and plain nonconclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought"[2]

"a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief," defining "material fact" as "one that is necessary to the claim and without which it could not be supported."[3]

More than Twombly-Iqbal: "The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief."[4]

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called "fact pleading." The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between "fact," "ultimate fact," and "evidence."

"a short and plain statement of facts showing that the pleader is entitled to relief."

"a short and plain statement of facts constituting the claim"

"a short and plain statement of the claim, including facts showing that the pleader is entitled to relief"

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: "a short and plain statement of the elements of the claim."

Pre-filing pleading: Alan Morrison's Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim. Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendants alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present evidence countering the claims, then the plaintiff must present "some basis * * * to avoid dismissal, rather like a mini summary judgment."

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[2] This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation; see letter of July 13, 2010, Samuel F. Abernethy, Esq., to Judge Mark R. Kravitz. Bringing "notice" into rule text is evocative, perhaps too evocative — it may imply a more general relaxation of pleading standards than actually existed before Twombly and Iqbal.

[3] This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

[4] This is ACTL/IAALS Pilot Project Rule 2.1.

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and "articulates a reasonable basis for the information's existence and the defendant's control over it," "it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate." The court could allow further discovery. 60 Duke L.J. 1 at 110.

Appellate Review: Professor Miller asks whether the "subjective appraisals" that inhere in "judicial experience and common sense" will lead to diluted appellate review. Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

RULE 9(b)

From time to time thought has been given to adopting "heightened pleading" standards for specific kinds of claims, expanding the Rule 9(b) requirement that "fraud or mistake" be stated "with particularity." (Rule 9(c) also requires that a party denying that "a condition precedent has occurred or been performed * * * must do so with particularity.") One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated "with particularity," the main challenge would be finding a way to identify the claims. Would it suffice to list "antitrust" claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify — civil RICO would be an example. But what of "environmental" claims — statutory, common-law (e.g., nuisance), or perhaps administrative? "Institutional reform"? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the Iqbal opinion. Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Court rejected the argument that this provision makes adequate a bare allegation of "intent." "'[G]enerally' is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8." The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.

REVERSE RULE 9(b): SPECIAL RELAXED PLEADING RULES

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of "class-of-one" equal-protection claims?), intent to discriminate,

"civil rights," claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within meaningful bounds — "civil rights" is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on "favored" claims, or "real people" claims. It would be possible to adopt an express pro se rule — but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold pro se parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

OFFICIAL IMMUNITY

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a "public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer's behalf."

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: "(8) a reply to an official immunity defense." If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): "(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity." "Official" is placed in brackets to indicate one of the drafting dilemmas — what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? "Official" itself would lead to such questions as Eleventh Amendment "immunity," claims against foreign sovereigns, and various immunities under state law. Without "official," all sorts of questions would arise: workers' compensation immunity? Charitable immunity if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

RULE 12(d)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts "well pleaded." The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

> **(d) Preliminary Summary Judgment.** A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the nonmovant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the "matters outside the pleading." Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but

might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

RULE 12(e)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a "Motion to Particularize a Claim for Relief," allowing a plaintiff to anticipate a motion to dismiss by moving for "plausibility discovery." 60 Duke L.J. 1, 112-113.

RULE 12(b): TIED TO DISCOVERY

A great part of the dismay engendered by the Twombly and Iqbal decisions arises from concerns about "information asymmetry." The concerns tend to focus on categories of claims — product liability, some forms of employment discrimination, conspiracy, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow — probably not require — the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f) — subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this: "(g) *Discovery in Aid of Pleading.* Before ruling on a motion under Rule 12(b),(c), or (f), the court may allow discovery [under Rules 26 through 37 {and 45}] to aid [more detailed pleading][amendment of the pleading]."

RULE 27.1 DISCOVERY IN AID OF PLEADING

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may involve the plaintiff who does not know the identity of the defendant — which officer in a large police department shot the plaintiff's decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identify of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support "better" pleading.

The ABA proposals include: "The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient information to satisfy the" pleading standard. Examples are antitrust cases and discrimination cases where intent is an element of the claim.

INITIAL DISCLOSURE

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called "pleadings," by obligations of unitateral disclosure. This approach might address the concerns that underlie the Twombly and Iqbal decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of "plausibility" in light of "judicial experience and common sense" will devolve into poorly supported speculation about the "facts" that have been pleaded and the inferences that can be drawn from them.

The Duke Conference reflected competing views on present Rule 26(a)(1) initial disclosures. One view is that they are useless. Another is that they are helpful. A third is that they could become useful if the more searching 1993 version were restored, requiring disclosure of information that a party hopes will not be used as well information it may use.

PLEADING IN RESPONSE

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. (3) requires that a party that does not intend to deny all allegations "must either specifically deny designated allegations or generally deny all except those specifically admitted." (4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the Twombly and Iqbal decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

PLEADING AFFIRMATIVE DEFENSES

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence — is there any reason to require greater detail than we require of a plaintiff pleading negligence? Or a defendant may plead laches — should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2): "In responding to a pleading, a party must ~~affirmatively~~ state in short and plain terms any avoidance or affirmative defense * * *."

APPENDIX

ACTL/IAALS Pilot Project Rule

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by discovery; (b) the moving party has probable cause to believe that the information sought by discovery will enable preparation of a legally sufficient complaint; (c) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e) the moving party's need for the discovery outweighs the burden and expense on other persons and entities.

3.1 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR __.

3.2 Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

MOTIONS TO DISMISS
INFORMATION ON COLLECTION OF DATA

The following tables and graphs on motions to dismiss before and after *Twombly* and *Iqbal* are based on data collected electronically from the 94 district courts' docket entries. This information is not routinely included in the Administrative Office statistical reports for the courts. Though the data was reviewed for accuracy, some quality control steps that are part of the Administrative Office's reports were not applied. The electronically collected information is from the courts' docket entries, and the underlying docketed motions and orders were not read. As a result, if there are errors in the docket entry, those errors are in the data. The Federal Judicial Center is engaging in a study that will include reviewing underlying motions to dismiss and orders in a large number of randomly sampled cases, providing more information and an additional check on accuracy.

Certain information could not be collected electronically from the docket entries and is not reflected in the data. The data do not distinguish among the different types of motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Though most motions to dismiss are filed under Rule 12(b)(6) for failure to state a claim on which relief can be granted, motions to dismiss filed under Rule 12(b)(1)–(5) and (7) are included in the data. The assumption, which has not been verified, is that the rate of motions to dismiss under Rule 12(b)(1)–(5) and (7) has remained stable during this period.

The data do not reveal whether motions to dismiss were granted with or without leave to amend, and, if with leave to amend, whether the case continued with an amended complaint. The Federal Judicial Center study will include information on whether motions were granted with leave to amend. The Center will be engaging in a follow-up study on whether cases involving motions granted with leave to amend continued with an amended complaint.

The courts do not rule on a significant number of motions to dismiss, often because the case settles without court intervention. Although the data include the filing of these motions, they do not include the disposition of these motions.

Finally, the data exclude Multi-District Litigation (MDL) cases.

Cases and Motions to Dismiss Filed from January 2007 through December 2010 by Quarter

	2007				2008				2009				2010			
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
CASES FILED	53,698	56,285	56,727	56,320	58,897	58,628	54,792	53,526	57,624	60,162	63,653	58,859	56,420	61,736	62,560	62,309
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	5,962	6,082	5,944	6,037	9,749	7,727	5,853	5,535	6,115	8,295	10,733	9,935	7,257	8,519	8,705	8,960
Prisoner Petitions	13,334	13,961	13,818	13,292	14,519	13,710	13,090	12,502	13,001	13,473	13,248	12,143	12,862	13,446	13,363	12,768
Civil Rights Employment	3,134	3,270	3,426	3,318	3,001	3,386	3,555	3,488	3,121	3,644	3,787	3,587	3,327	3,694	3,972	4,025
Civil Rights Other	3,858	4,131	4,077	4,031	4,046	4,002	4,171	4,102	3,974	4,095	4,349	4,017	3,986	4,185	4,300	4,173
Civil Rights ADA	518	584	627	591	672	648	768	806	787	753	901	821	780	1,065	1,170	1,060
Antitrust	183	107	115	106	249	239	150	119	170	150	159	135	95	127	122	147
Patent	679	777	665	750	712	748	641	657	717	716	704	670	803	850	967	1,012
Labor Laws	4,150	4,084	4,026	3,961	4,232	4,302	4,190	4,035	4,580	4,339	4,745	4,393	4,439	5,331	4,474	4,487
Contracts	7,336	8,555	8,639	9,799	7,480	8,936	7,893	8,146	10,816	8,389	8,297	7,646	7,671	7,805	7,936	8,212
All Others	14,544	14,734	15,390	14,435	14,237	14,930	14,481	14,136	14,343	16,308	16,730	15,512	15,200	16,714	17,551	17,465
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
MOT. DISMISS FILED	18,231	19,649	18,956	18,752	20,073	20,550	19,594	19,874	20,029	22,545	23,086	22,150	21,715	22,286	22,203	21,885
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	1,925	2,036	1,832	1,723	1,835	1,923	1,852	1,912	1,738	2,850	2,580	2,160	2,217	1,960	2,196	2,216
Prisoner Petitions	2,885	3,399	2,965	2,894	2,894	2,887	2,950	2,799	2,690	2,874	2,941	2,726	2,788	2,783	2,675	2,540
Civil Rights Employment	1,584	1,507	1,455	1,435	1,450	1,444	1,434	1,538	1,464	1,613	1,684	1,554	1,585	1,616	1,701	1,650
Civil Rights Other	2,595	2,738	2,555	2,521	2,769	2,877	2,930	2,652	2,719	2,776	2,871	2,758	2,920	2,887	2,825	2,850
Civil Rights ADA	215	216	214	199	211	292	248	268	253	246	312	295	295	342	361	322
Antitrust	85	97	100	89	79	138	106	113	114	110	106	94	106	95	69	100
Patent	336	333	390	393	379	372	449	391	424	473	453	479	478	768	743	779
Labor Laws	960	1,016	1,006	984	1,033	1,055	1,056	1,015	1,011	1,038	1,158	1,258	1,067	1,151	1,147	1,100
Contracts	3,265	3,497	3,479	3,760	3,819	3,981	3,572	3,672	3,769	4,336	4,526	4,420	3,962	3,923	3,919	3,788
All Others	4,381	4,810	4,960	4,754	5,604	5,581	4,997	5,514	5,847	6,229	6,455	6,406	6,297	6,761	6,567	6,540
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
GRANTED	7,338	6,791	7,111	6,525	7,977	7,320	7,808	6,646	8,044	7,781	8,837	7,845	9,183	7,937	8,969	7,621
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	949	866	812	771	796	836	807	812	875	860	841	910	883	811	917	847
Prisoner Petitions	1,141	858	1,095	807	1,205	852	1,115	779	1,191	833	1,201	824	1,339	870	1,152	791
Civil Rights Employment	627	563	528	463	513	509	524	482	517	561	592	509	603	521	616	553
Civil Rights Other	1,026	1,035	918	761	1,037	938	1,077	897	1,096	927	1,125	925	1,143	1,068	1,142	971
Civil Rights ADA	83	92	77	68	77	103	83	87	92	112	108	118	101	141	164	122
Antitrust	24	33	56	28	14	21	24	20	31	17	39	26	30	30	21	13
Patent	128	138	167	151	149	159	260	175	222	251	221	215	287	282	307	263
Labor Laws	327	323	303	315	381	364	368	324	378	316	336	434	419	380	458	386
Contracts	1,273	1,251	1,317	1,342	1,654	1,585	1,614	1,419	1,585	1,614	1,790	1,562	1,578	1,383	1,486	1,273
All Others	1,760	1,632	1,838	1,819	2,151	1,953	1,936	1,651	2,057	2,290	2,584	2,322	2,800	2,451	2,706	2,402
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
	2007				2008				2009				2010			

Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts.

Cases and Motions to Dismiss Filed from January 2007 through December 2010 by Quarter

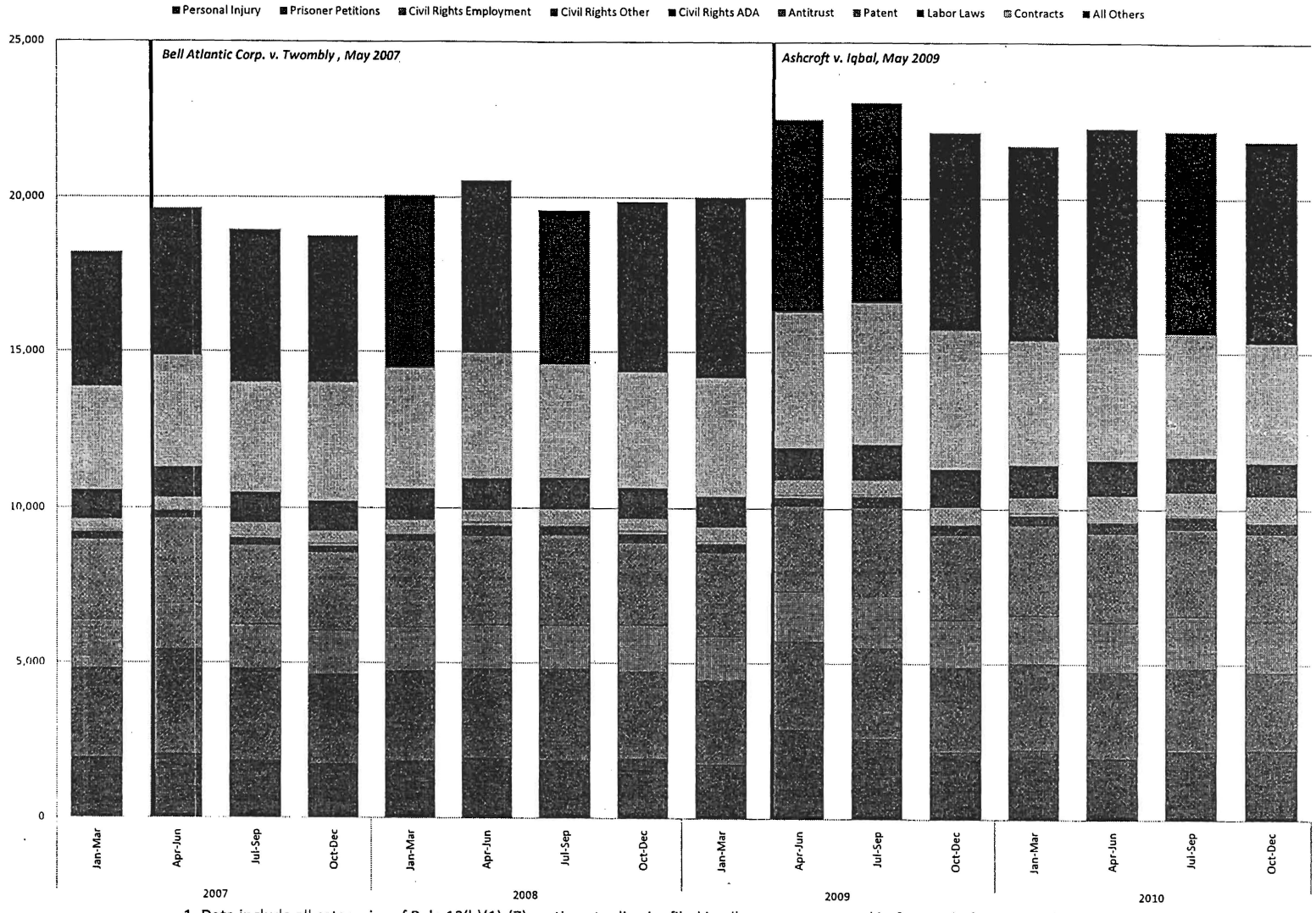
	2007				2008				2009				2010			
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
DENIED	2,928	2,471	2,873	2,244	3,538	2,469	3,039	2,306	3,097	2,774	3,385	2,751	3,383	2,857	3,430	2,674
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	247	242	202	160	277	218	260	190	244	247	254	219	256	267	293	223
Prisoner Petitions	416	290	410	251	437	238	437	269	402	345	512	286	434	313	421	296
Civil Rights Employment	268	230	275	187	224	228	246	198	238	231	252	242	233	236	272	216
Civil Rights Other	412	342	339	305	418	365	384	266	433	329	374	291	427	317	351	256
Civil Rights ADA	28	28	26	19	23	29	43	34	40	44	36	49	49	44	49	43
Antitrust	16	14	12	8	11	22	11	5	36	13	25	10	22	15	23	7
Patent	71	42	84	61	78	53	72	53	69	38	92	35	81	71	99	111
Labor Laws	162	177	130	141	192	157	190	145	180	155	182	195	210	151	208	161
Contracts	567	527	653	497	626	506	635	519	637	581	734	655	673	620	690	630
All Others	741	579	742	615	1,252	653	761	627	818	791	924	769	998	823	1,024	731
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
MOOT	837	736	859	680	902	954	887	760	973	1,016	1,233	988	1,259	1,137	1,300	1,149
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	66	79	77	58	80	95	81	65	98	100	67	65	105	83	82	92
Prisoner Petitions	89	53	91	72	112	95	95	64	78	101	117	92	102	109	121	103
Civil Rights Employment	93	81	64	66	90	70	65	66	107	85	112	90	100	113	109	123
Civil Rights Other	138	120	140	122	170	160	169	148	173	189	201	162	154	167	211	173
Civil Rights ADA	16	6	17	6	8	14	10	8	12	11	11	22	8	26	26	18
Antitrust	2	0	20	3	1	0	21	7	0	6	6	20	6	4	2	2
Patent	21	5	23	10	8	10	19	16	21	8	32	17	15	24	32	20
Labor Laws	46	51	44	32	46	46	45	65	60	65	83	54	72	55	81	61
Contracts	155	138	141	134	163	229	149	127	177	194	230	184	285	224	252	199
All Others	211	203	242	177	224	235	233	194	247	257	374	282	412	332	384	358
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
GRANTED IN PART AND DENIED IN PART	1,224	869	1,053	807	1,192	939	1,199	967	1,262	1,095	1,442	1,156	1,482	1,338	1,642	1,098
Category	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
Personal Injury	78	43	57	54	65	65	81	59	64	41	64	71	63	118	88	77
Prisoner Petitions	139	63	123	60	149	95	155	62	161	95	192	92	203	97	193	70
Civil Rights Employment	175	132	121	103	166	132	147	104	150	134	147	120	150	162	172	112
Civil Rights Other	278	228	215	190	246	176	213	187	300	220	254	221	273	249	335	218
Civil Rights ADA	18	8	15	10	24	15	15	19	32	15	21	15	18	31	21	9
Antitrust	9	8	8	4	4	2	7	6	12	8	6	6	15	4	29	12
Patent	10	8	13	12	13	12	33	25	16	14	21	19	18	23	13	17
Labor Laws	62	43	55	51	54	48	50	48	63	42	88	54	59	47	72	51
Contracts	218	141	180	147	186	162	208	170	182	247	241	216	234	252	291	194
All Others	237	195	266	176	285	232	290	287	282	275	408	342	449	355	428	338
	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	Apr-Jun	Jul-Sep	Oct-Dec
	2007				2008				2009				2010			

1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal, and exclude motions to dismiss filed in MDL cases.
2. Data are not available to discern whether or identify which motions to dismiss were granted with or without leave to amend.
3. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts.

Motions to Dismiss Filed by Nature of Suit

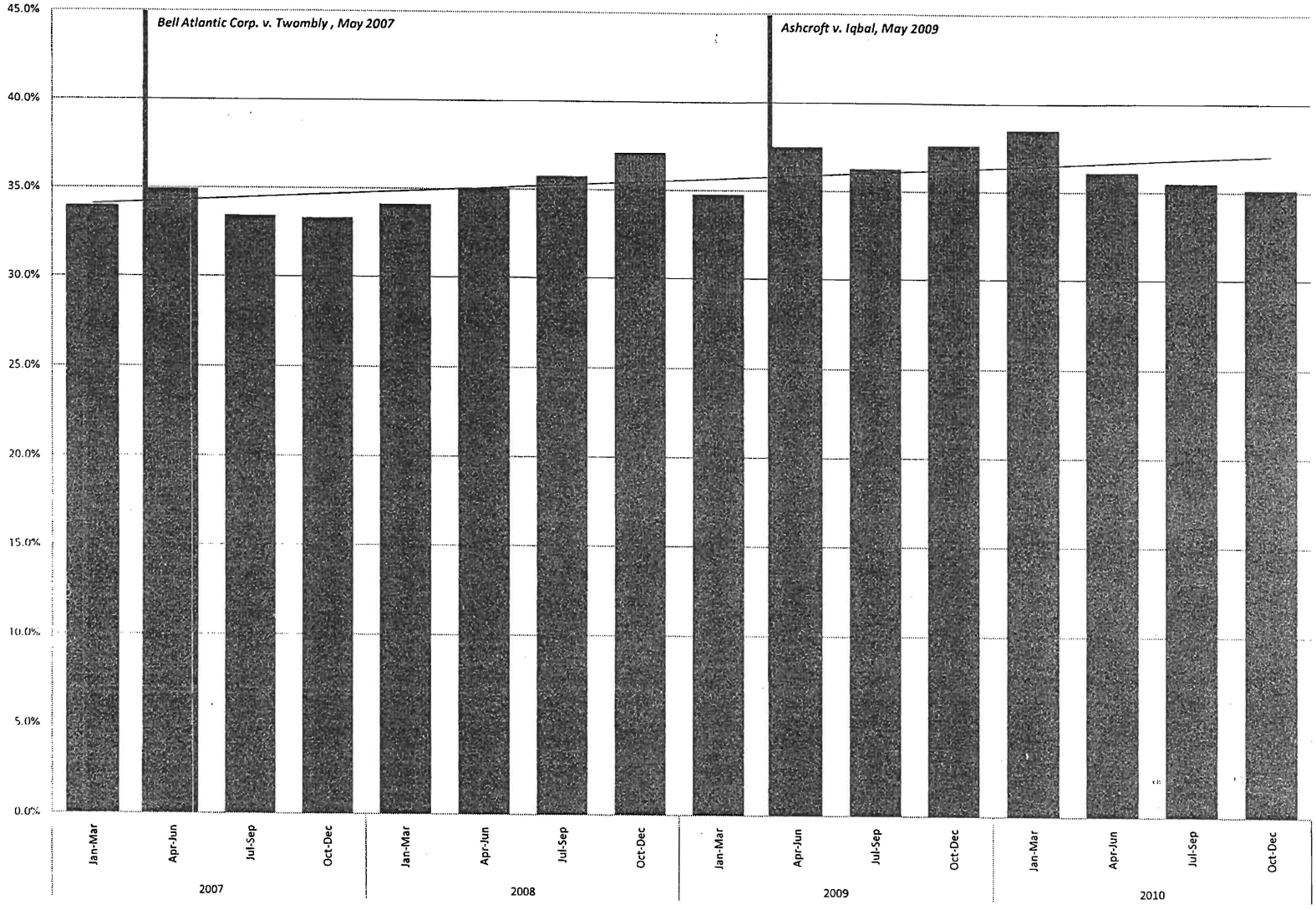


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2. Data do not include motions to dismiss filed in MDL cases.
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Motions to Dismiss Filed as Percentage of Total Cases Filed

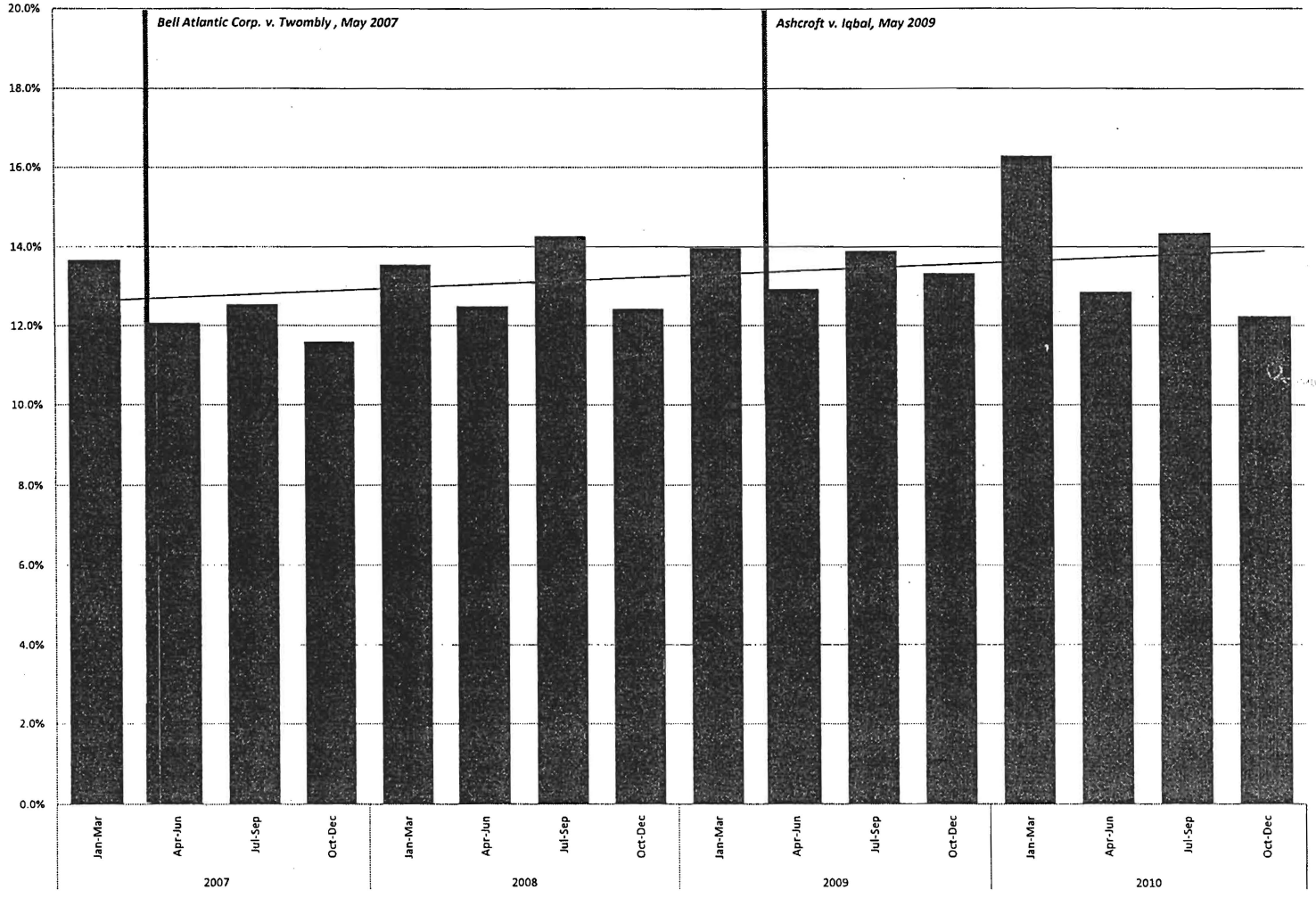


1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal.
2. Data do not include motions to dismiss filed in MDL cases; total cases do not include MDL cases.
3. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: March 15, 2011

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Motions to Dismiss Granted as Percentage of Total Cases Filed

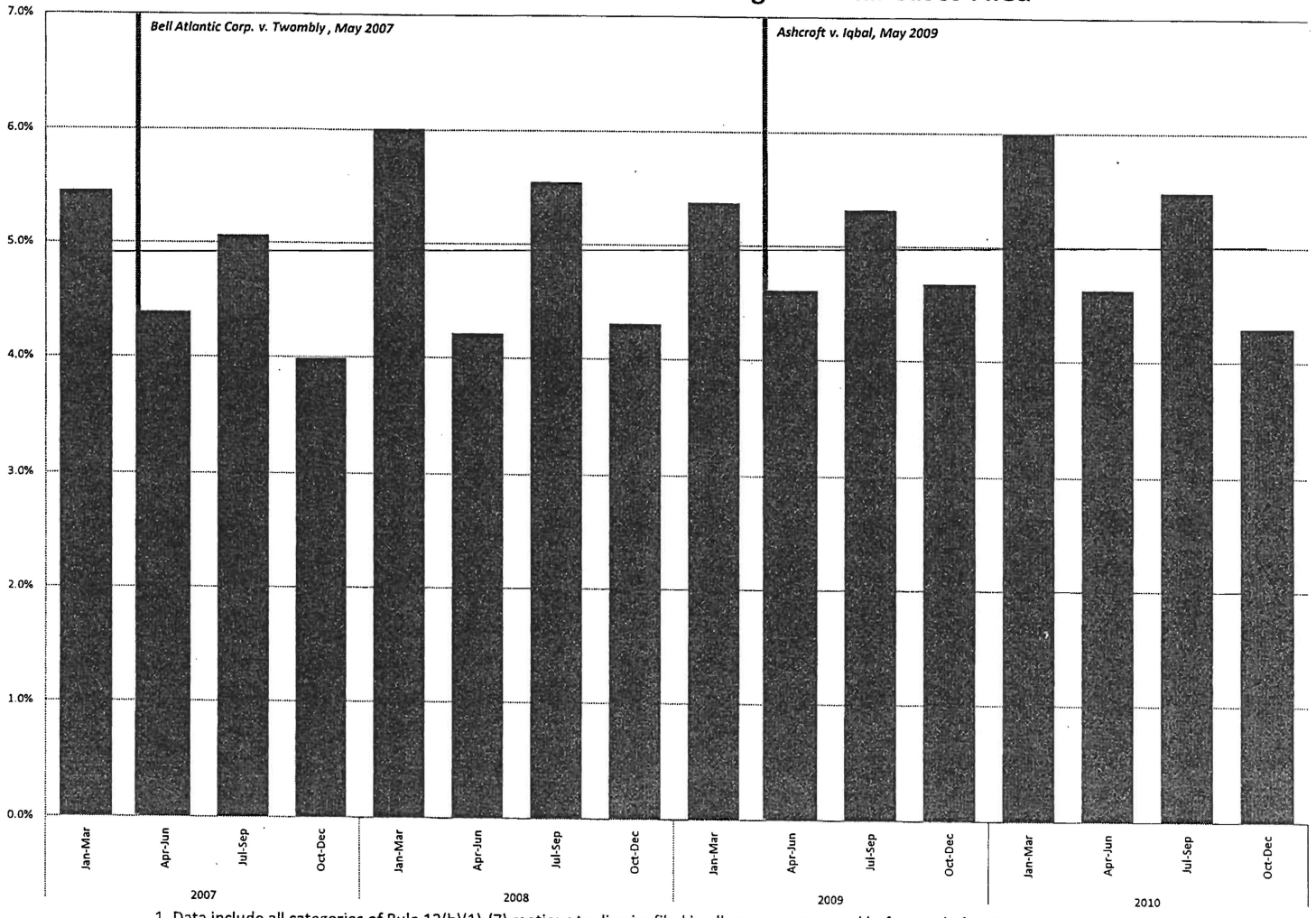


1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal.
2. Data do not include motions to dismiss granted in part or motions to dismiss filed in MDL cases; total cases do not include MDL cases.
3. Data are not available to discern whether or identify which motions to dismiss were granted with or without leave to amend.
4. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.
5. Trend line does not account for increased rate of filings of motions to dismiss after Iqbal and therefore is not an accurate reflection of the rate at which motions to dismiss are granted relative to the number of motions filed.

Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts

Motions to Dismiss Denied as Percentage of Total Cases Filed

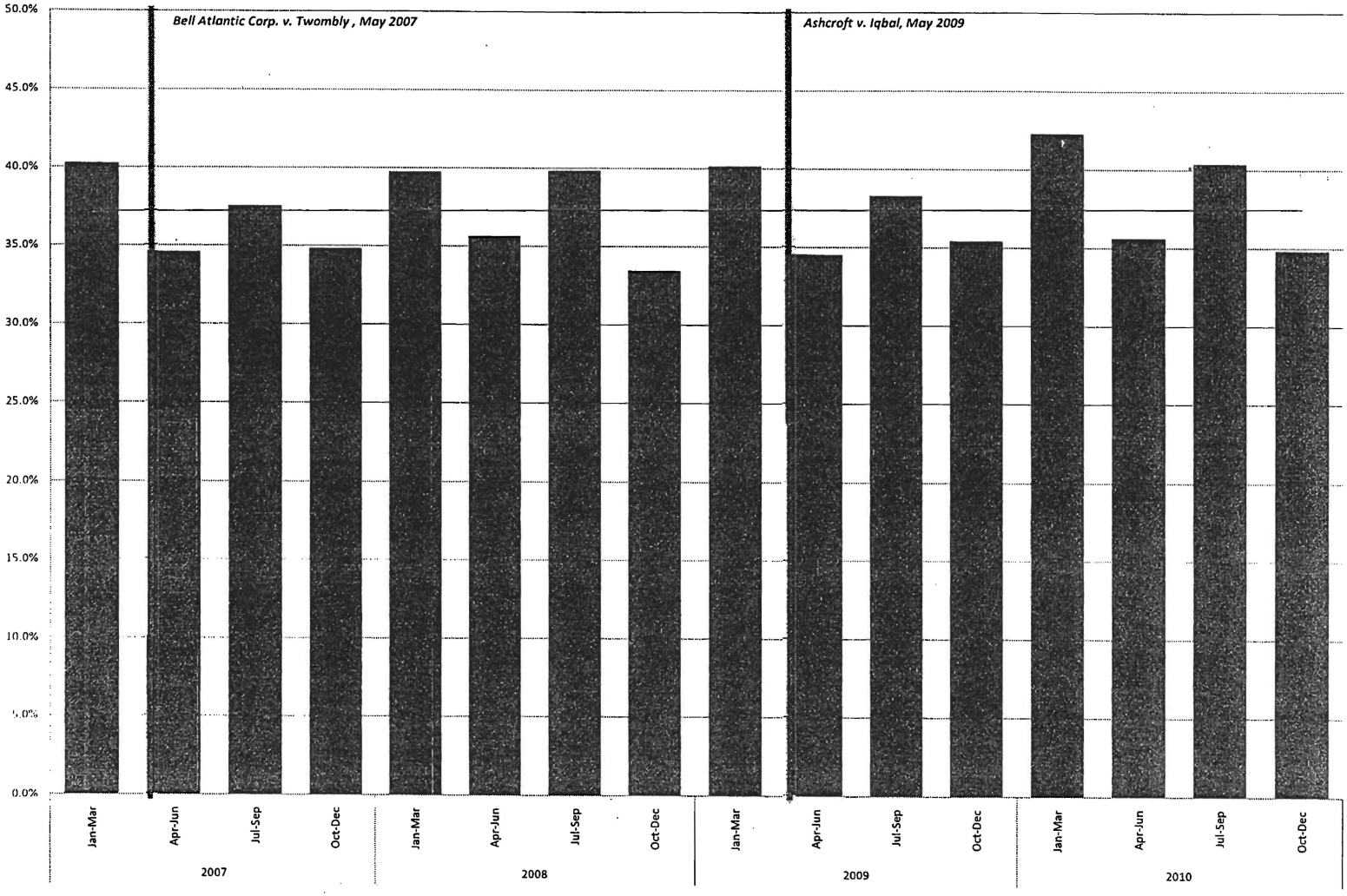


1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal.
2. Data do not include motions to dismiss filed in MDL cases; total cases do not include MDL cases.
3. Data are not available to discern whether or identify which motions to dismiss were granted with or without leave to amend.
4. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.
5. Trend line does not account for increased rate of filings of motions to dismiss after Iqbal and therefore is not an accurate reflection of the rate at which motions to dismiss are denied relative to the number of motions filed.

Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts

Motions to Dismiss Granted as Percentage of Total Motions to Dismiss

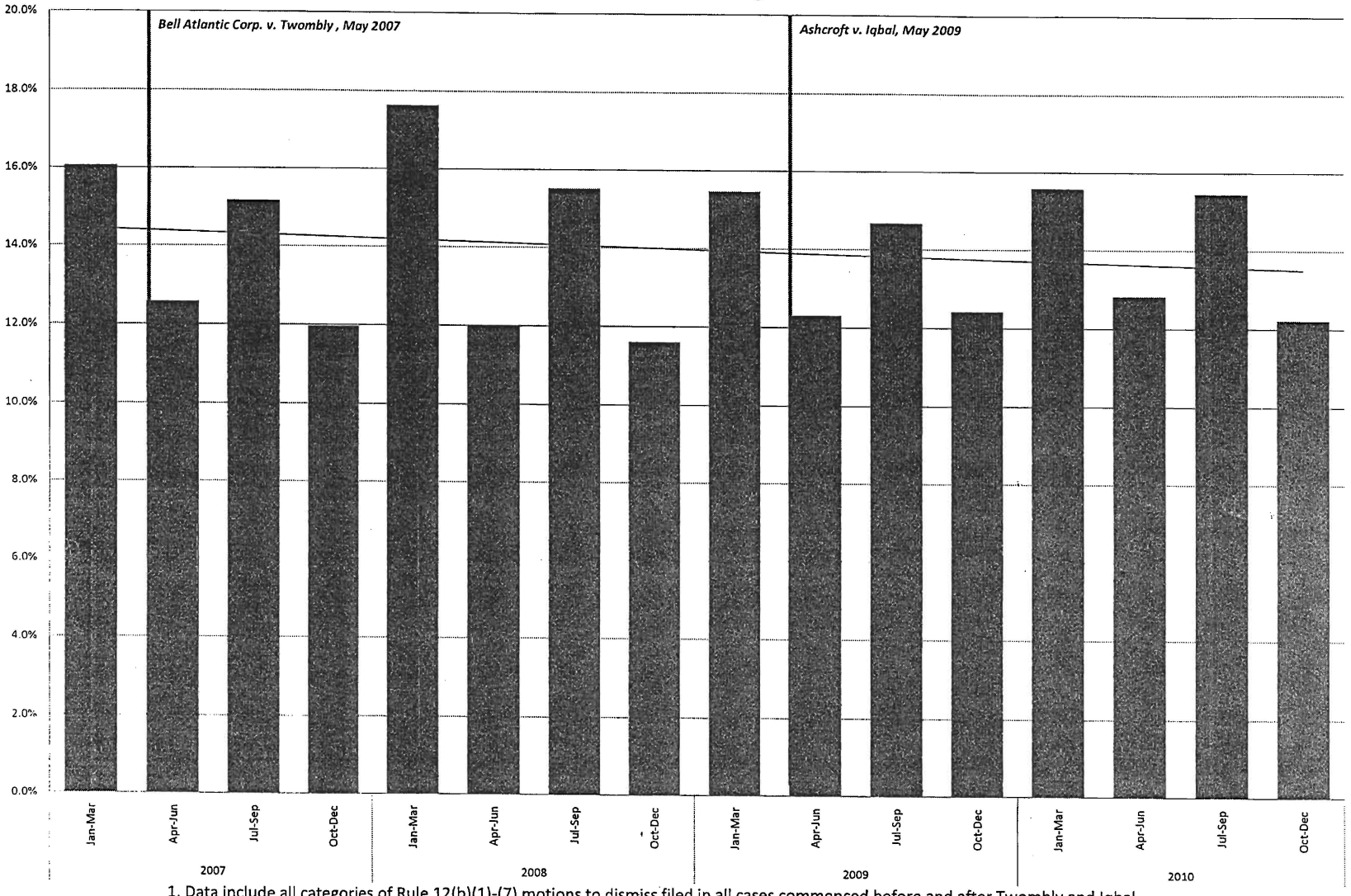


1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal.
2. Data do not include motions to dismiss granted in part or motions to dismiss filed in MDL cases.
3. Data are not available to discern whether or identify which motions to dismiss were granted with or without leave to amend.
4. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: March 15, 2011

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Motions to Dismiss Denied as Percentage of Total Motions to Dismiss

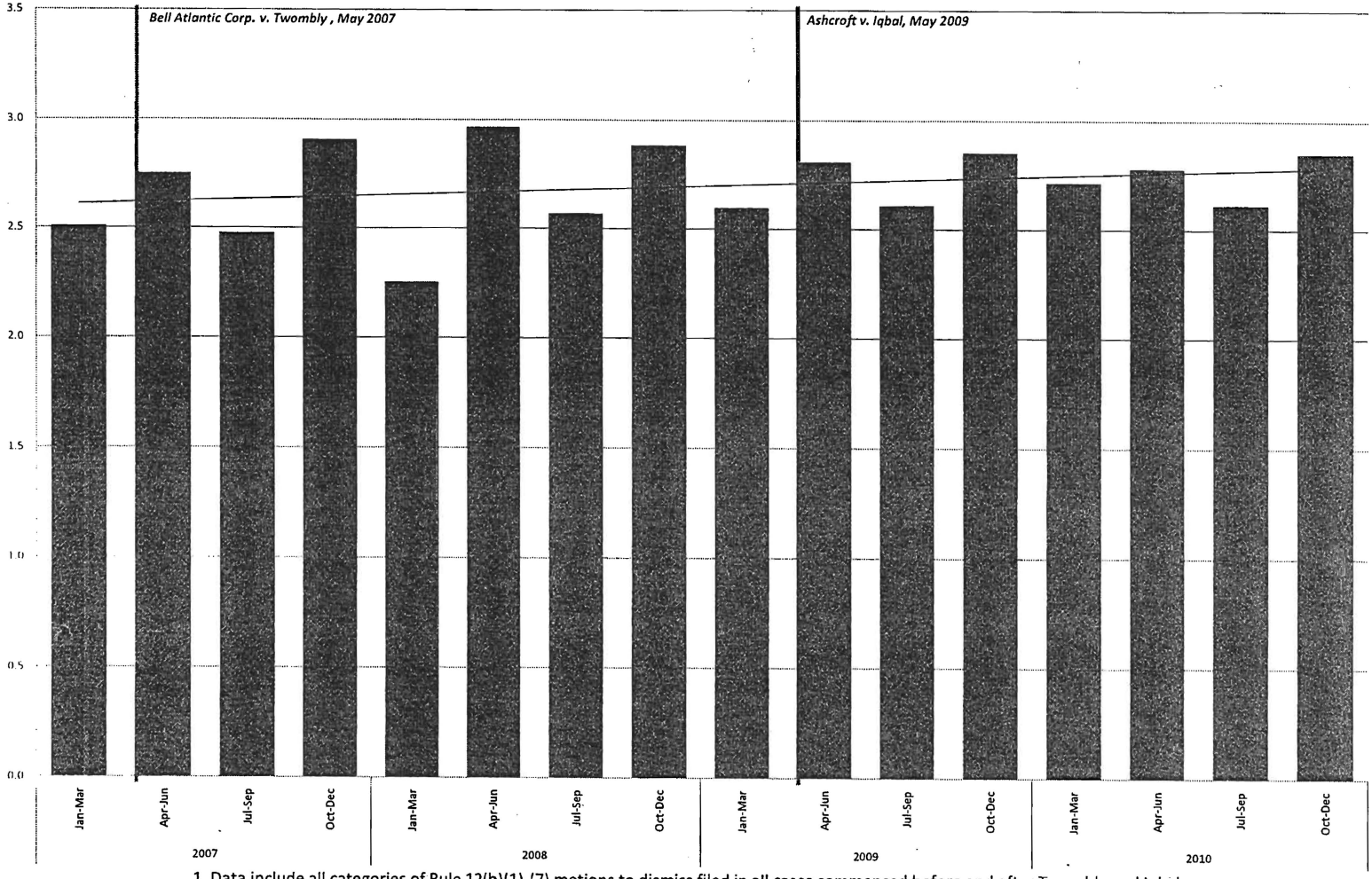


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Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts

Ratio of Motions to Dismiss Granted to Motions to Dismiss Denied



1. Data include all categories of Rule 12(b)(1)-(7) motions to dismiss filed in all cases commenced before and after Twombly and Iqbal.
2. Data do not include motions to dismiss granted or denied in part, or motions to dismiss filed in MDL cases.
3. Data are not available to discern whether or identify which motions to dismiss were granted with or without leave to amend.
4. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.
5. The increase in the trend line appears to be due to the decline in the motions denied as a percentage of motions filed, not an increase in the motions granted as a percentage of motions filed.

Revised: March 15, 2011

Prepared by Statistics Division, Administrative Office of the U.S. Courts

The FJC's Report will be provided at the meeting

The latest version of the memorandum on case law under *Twombly* and *Iqbal* will be posted shortly under the "What's New" column on the Federal Rulemaking web site at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx

TAB 6

PRESERVATION/SANCTIONS ISSUES

Since the November full Committee meeting, the Discovery Subcommittee has continued to study preservation and sanctions issues. This study has included a conference call in early February and a meeting in late February. In addition, a panel of experts discussed these issues during the January, 2011, meeting of the Standing Committee. That panel included two members of the Discovery Subcommittee and several others who were on the Duke E-Discovery Panel. The ideas discussed during the Standing Committee meeting were among those considered by the Subcommittee.

These agenda materials should include the following items in addition to this memorandum:

Notes on Feb. 20, 2011, Subcommittee meeting

Notes on Feb. 4, 2011, Subcommittee conference call

Three-page summary of elements of possible preservation rule provided by Duke E-Discovery Panel

Dec. 15, 2010, memorandum from Katharine David providing illustrative examples of preservation obligations found in a variety of federal and state statutes and ordinances. This memorandum resulted from research that also included a memorandum done by Andrea Kuperman on case law on preservation and sanctions in various circuits that was included in the agenda materials for the November, 2010, Committee meeting

At its meeting on Feb. 20, 2011, the Subcommittee discussed the most productive way of proceeding toward possibly recommending rule amendments to deal with preservation and sanctions issues. Although there was some initial discussion of the possibility of proceeding with a sanctions rule proposal immediately, the consensus ultimately was that it would be preferable to proceed more deliberately.

By way of background, as the Committee has discussed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. A "back end" sanctions rule might not present the same difficulties that could arise with a "front end" preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a "backward looking" sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. As before, the significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee is also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee's conclusion was that it needs more knowledge, and that the way to gain that needed insight is to hold a conference before the Fall full Committee meeting so that it can report back to the Committee, building on the knowledge base the conference would provide. Ideally, therefore, this conference would occur long enough before the next full Committee meeting so that the Subcommittee can react to what it learns and present the initial fruits to the Committee. Then, based on the Committee's discussion in Fall, 2011, the Subcommittee would hope to have a rule proposal to present to the Committee during its Spring, 2012 meeting, perhaps in a form that would be ready for public comment.

The general idea for the conference is that it include an array of those experienced in preservation and general E-Discovery issues, including specialists in technical and technological issues. Well in advance of the conference, the Subcommittee would provide attendees with illustrations of rule-amendment ideas falling into three general categories. The order of these categories does not indicate their priority or any preference in the eyes of the Subcommittee:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.
>
> Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?
>
> Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

The conference could be educational for the Committee by explaining how preservation issues arise in real-life practice. By addressing the various categories of rules described above, it could provide insights about which category seems most promising to produce helpful consequences, and about the specific features of rules that seem likely to produce helpful or harmful consequences.

Against that background, the remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee's considered views, and are offered only for purposes of fostering discussion. These exemplars build in part on an early set of possible amendment ideas included in the agenda materials for the November, 2010, full Committee meeting. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though

they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of the proposed conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,][1] every person who reasonably expects [is reasonably certain][2] to be a party[3] to an

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[1] The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

[2] Would the bracketed phrase be preferable?

[3] Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of "spoliation" under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court's power to enforce subpoenas should reach that far.

action cognizable in a United States court[4] must preserve discoverable [electronically stored][5] information as follows.

(b) Trigger for Duty to Preserve. The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:[6] [7]

(1) Service of a pleading or other document asserting a claim;[8] or

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[4] This formulation is modeled on Rule 27(a), which speaks of a petitioner who "expects to be a party to an action cognizable in a United States court" and of "persons whom the petitioner expects to be adverse parties."

[5] One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

[6] At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

[7] The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a "catch-all" final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

[8] This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who "should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." See Krupski v. Costa Crociere, S.p.A., 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a "duty" to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule 15(c) to

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim[9] or taking any other action in anticipation of litigation;[10] or

(5) Receipt by the person of a notice or demand to preserve discoverable information;[11] or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation under the person's own retention program.[12]

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argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

[9] This terminology is meant to track Evidence Rule 408.

[10] This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

[11] This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

[12] Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

[(7) Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information.][13]

(c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}[14] as follows:

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See Kerkendall v. Department of the Army, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party if material evidence, can claim that it had no pertinent duty to preserve.

[13] Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

[14] The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke

(1) ***Subject matter.*** *[Alternative 1]* The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;[15]

(1) ***Subject matter.*** *[Alternative 2]* The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;[16]

(1) ***Subject matter.*** *[Alternative 3]* The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;[17]

(1) ***Subject matter.*** *[Alternative 4]* The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;[18]

(2) ***Sources of information to be preserved.*** *[Alternative 1]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control[19]

Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

[15] The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

[16] The effort here is to narrow the scope to what the rulemakers were trying to identify as "core information" in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is "evidence." For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

[17] This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be not duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule 26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don't have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

[18] This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

[19] This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

that is reasonably accessible to the person;[20]

(2) ***Sources of information to be preserved.*** *[Alternative 2]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control that is routinely accessed in the usual course of business of the person;[21] the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

(A) Deleted, slack, fragmented or unallocated data on hard drives;

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[20] The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

[21] The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

(B) Random access memory (RAM) or other ephemeral data;

(C) On-line access data such as temporary internet files;[22]

(D) Data in metadata fields that are frequently updated, such as last opened dates;

(E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

(F) Backup data that substantially duplicate more accessible data available elsewhere;

(G) Physically damaged media;

(H) Legacy data remaining from obsolete systems that is unintelligible on successor systems [and otherwise inaccessible to the person]; or

(I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;[23]

(3) ***Types of information to be preserved.*** The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within Rule 34(a)(1).[24]

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[22] This provision would not preclude a court order that such information must be preserved. See, e.g., Columbia Pictures Indus. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

[23] This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

[24] The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

(4) ***Form for preserving electronically stored information.*** A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.[25] The person need not preserve the same electronically stored information in more than one form.[26]

(5) ***Time frame for preservation of information.*** The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during}

[Alternative 1] __ years prior to the date of the trigger under Rule 26.1(b)[27]

[Alternative 2] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)[28]

In a related vein, should preservation duties extend to "land or other property possessed or controlled" by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

[25] This provision is borrowed from Rule 34(b)(2)(E)(ii). If "ordinarily maintained" includes the form in which information is preserved for litigation purposes, this could be circular.

[26] This provision corresponds to Rule 34(b)(2)(E)(iii).

[27] This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can't be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

[28] This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted

[Alternative 3] a reasonable period under the circumstances.[29]

(6) ***Number of key custodians whose information must be preserved.***[30] The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).[31]

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the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

[29] Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

[30] This sort of provision was suggested by the Duke Panel. It is not clear that "key custodian" is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court's use of the "custodian" term, see Edelen v. Campbell Soup Co., 265 F.R.D. 676, 684 (N.D.Ga. 2010) ("Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.").

[31] This provision is a very halting first effort that bristles with issues. The question of how to define "key custodian" has already been mentioned. The question whether we are talking about "possession" or "control" of the information or something else seems somewhat tricky.

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in

(d) **Ongoing duty.** *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.[32]

(d) **Ongoing duty.** *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.[33]

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is

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the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

[32] The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statue of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

[33] This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

under Rule 37(e).[34]

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions[35] [under these rules][36] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:[37]

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[34] This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

[35] A perennial question is to determine what is a "sanction." For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a "sanction." To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider Major Tours, Inc. v. Colorel, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs' argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge's decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

[36] This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to "inherent authority" or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

[37] Note that including a provision like this could obviate reliance on "inherent authority" to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: "Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific

(1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];[38]

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];[39]

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401}

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provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information."

[38] This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule 37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

[39] This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called "sanctions" by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

[material] to the claim or defense of the party seeking sanctions;[40]

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.[41]

(2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,[42] but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;[43]

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[40] Again, the moving party's difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

[41] This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

[42] As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

[43] This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

> In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of

(B) *[Alternative 1]* the court may not impose a sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as

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dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment motion. The 9th Circuit disagreed (id. at 386):

> Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

evidence];[44]

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;[45]

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability[46] of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

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[44] This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

[45] This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

[46] This phrase is far from ideal, but attempts to capture what is meant.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

(a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.

(b) **Trigger for Duty to Preserve.** *[Alternative 1]* The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].

(b) **Trigger for Duty to Preserve.** *[Alternative 2]* The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

(1) Service of a pleading or other document asserting a claim; or

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action

in anticipation of litigation; or

(5) Receipt of a notice or demand to preserve discoverable information; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.

(c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information][47] in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.[48]

(d) **Ongoing duty.** The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).

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[47] One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

[48] The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on whether discarded materials were indeed privileged. This problem will be mentioned again below.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

(1) ***Burden of proof.*** The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

(2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation

of Rule 26.1;

(B) *[Alternative 1]* the court may not impose a sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

(3) ***Payment of Expenses.*** Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 3

This approach relies entirely on a "back end" rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary][49]:

(A) permit additional discovery;

(B) order the party to undertake curative[50] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[51] caused by the failure.

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[49] Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data that would not be characterized as "sanctions." Saying they may be used only "when necessary" might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of "necessity," much as that consideration could matter to judges considering what to do about backup tapes and the like.

[50] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[51] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

(2) Absent extraordinary circumstances [irreparable prejudice],[52] the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[53] unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[54] the court may consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[55]

(B) the reasonableness of the party's efforts to preserve the information, including

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[52] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

[53] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[54] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[55] Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

the use of a litigation hold and the scope of the preservation efforts;[56]

(C) whether the party received a request that information be preserved, the clarity and reasonableness[57] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[58]

(E) the proportionality of the preservation efforts to any[59] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[60] regarding any unresolved disputes concerning the preservation of discoverable information.

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[56] The use of "scope" is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including "key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and "scope" will hopefully permit sensible assessment of an array of circumstances.

[57] Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

[58] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc. for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

[59] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[60] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court's guidance when addressing other courts?

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Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent "irreparable prejudice") in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

Notes of Meeting
Discovery Subcommittee
Advisory Committee on Civil Rules
Dallas, TX
Feb. 20, 2011

The Discovery Subcommittee met in Dallas, TX, on Feb. 20, 2011. Those participating were Hon. David Campbell (Chair, Discovery Subcommittee); Hon. Lee Rosenthal (Chair, Standing Committee); Hon. Paul Grimm (by telephone), Chilton Varner, Daniel Girard, Anton Valukas, Elizabeth Cabraser, Prof. Edward Cooper (Reporter of the Advisory Committee), Peter McCabe (Administrative Office), Jeffrey Barr (Administrative Office), Andrea Kuperman (Chief Counsel, Rules Comm. Support Office), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

The purpose of the meeting was to discuss how to address preservation/sanctions issues during the full Committee's April meeting and beyond. Judge Campbell introduced the issues by suggesting that it may be that the Subcommittee needs input from outside the Committee. Compare, for example, the mini-conference with lawyers familiar with New Jersey practice in relation to the discoverability of lawyer/expert interactions. That event provided not only very valuable insights, but also the reassurance that "real world" considerations underlie rule-change proposals.

A useful initial way of looking at the question how to proceed is to ask how soon a rule change could go into effect. If the Subcommittee could, a year from now, have a preservation/sanctions proposal as fully developed as the Rule 45 proposal is now, it could be presented to the full Committee with the recommendation that it be published for public comment. If that happened, the new rule could go into effect on Dec. 1, 2014. As a practical matter, then, unless the Subcommittee were in a position to develop a proposal ready for submission to the full Committee and then to the Standing Committee this April, any change would not go into effect until almost 2015. Given such a time line, becoming fully informed makes sense. For that purpose, holding a conference would probably be essential.

Three categories of possible rule provisions

One way of thinking about the situation would be to consider three possible rule-amendment approaches. If so, all three approaches could be presented to those participating in a conference. Beyond evaluating the specific provisions of such a rule, the conference could evaluate which general approach would be most useful.

Category 1: Preservation proposals could delve into the specifics of digital data with great precision. For examples, some proposals from the Lawyers for Civil Justice, and perhaps from Tom Allman, offer specifics at the level of whether slack space and RAM must ever be preserved. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.

Category 2: This sort of preservation rule might be more like some outlined in Prof. Marcus's Aug. 5, 2010, memorandum. It would address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal including specifics about preservation in the form of directives about what must be preserved.

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It might begin in a form like the ones recently circulated by Judges Campbell and Grimm. Judge Campbell's sketch, which built on Judge Grimm's earlier one, is attached to

these Notes as an Appendix. It would likely influence preservation decisions, but would not in form contain any specific directives about specific preservation issues. Instead, it could protect against sanctions, or at least more severe sanctions, for those who make reasonable preservation decisions. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it.

Probably prototypes of such rules could be prepared for circulation at a conference during which participants could speak both to the specifics and to the more general question whether one or another sort of rule would be preferable.

Timing and logistics

In terms of timing, it might be that the best thing would be to point toward having a conference far enough in advance of the November full Committee meeting so that the results could be digested and some reaction formulated before the preparation of materials for that Committee meeting. Then during the full Committee's Fall meeting it could evaluate and discuss the first cut drafting work, providing guidance for the Subcommittee. The Subcommittee could then return to the drafting task and, ideally, present a full amendment package during the Spring, 2012, meeting so it could then be presented to the Standing Committee. That would lead to publication in August, 2012, and could produce amendments that go into effect in December, 2014.

A reaction to this time line is that it is very ambitious. Prof. Marcus's Aug. 5, 2010, memo could serve as the basis for an intermediate approach like that described in Category 2, and perhaps as an initial version for Category 1. But developing something really detailed that would fit into Category 1 might be more difficult. In addition, in terms of a conference, the event would likely take considerably longer than the half-day mini-conference with the New Jersey lawyers.

Proceeding sooner with a sanction rule

Another approach was suggested: Perhaps the Subcommittee could develop a draft sanctions rule along the lines sketched by Judges Campbell and Grimm, and submit that to the Advisory Committee this coming April, with the hope it could be published for comment this coming August. That might be possible with the work done so far. It might also be a way to provide some relief for those who find themselves under great pressure now due to preservation problems, and are consequently in need of immediate relief. And it could shed considerable light on whether anything more -- in particular, some sort of preservation rule -- would be important. Perhaps a quick job could provide relatively immediate relief, and it might turn out to do the full job.

One member's reaction was that, having reviewed all the materials for this meeting, it does not seem that there is agreement on a full-bore amendment proposal yet. And going forward with something now could prove to be counterproductive. If it is actually possible to develop a good complete rule, it could be a "huge distraction" to begin now with a narrow rule. Seriatim consideration of the issues "could go on forever."

Another related consideration was voiced: Beginning down the amendment path with a narrower rule might actually serve to delay other changes. Once the narrower rule was in place, some disciplined study of how it was working and what was left unattended might be a necessary predicate for any further amendments.

A different consideration is that confronting the difficulties of devising a preservation rule could be a valuable educational process for some who presently favor that course. To the extent there is a learning curve that might prompt some who now say they favor trying to devise a

preservation rule to reconsider that view, there may be an additional value in deferring until the Subcommittee is fully educated. Those same people might actually oppose a sanctions rule now on the ground that more reform is needed and that going forward now with a sanctions rule would drain support for more complete reform. In 1980, for example, Justices Powell, Stewart, and Rehnquist formally dissented from adoption of discovery amendments that went into effect that year on the ground that, while they were desirable changes, they did not do enough. A similar reaction could occur this time.

It could therefore be that the eventual conclusion of the longer course of study would be an amendment proposal that would look a lot like the current "fast track" approach -- that only a sanctions rule was possible or needed. Having spent considerable time looking at the details and challenges of drafting a preservation rule might cause people initially enthusiastic about that prospect to reexamine their attitudes.

On the other hand, at least some say that even a rule that says only that people should "be reasonable" would be a major help. There are people who feel strongly that such a rule would be very valuable even though it probably would not say more than case law presently says. For one thing, the circuits do not all speak with one voice, particularly about culpability. The Second Circuit's *Residential Funding* decision has unsettled many, and an early sanctions rule change could probably address that angst.

Another reaction was that, if one considered a pie chart presentation of concern about preservation rulings of federal courts, one would find only very few people focused on these issues. Those people may be very exercised, but they are not that numerous. It would be a mistake to rush aid to the small minority who are worried if we are uncertain whether it is warranted, or what form it should take.

Another member offered two recent cases as contrasts. Both are big cases, but they are radically different in atmosphere and progress. The main difference is the level of trust between the attorneys. Where there is a low level of trust, both sides suspect spoliation. If one tried to design a rule for the bad case, it is not clear what would produce improvements in that sort of case. A detailed rule might really be counterproductive. It seems that the differences between these two cases depend on different corporate cultures to some extent. Rules can't change that sort of thing quickly, although they probably can influence it in the long run. A deliberate course would be the course of wisdom.

These comments prompted the recollection that some say outside counsel are obsessed about some issues, such as trigger, that don't seem to preoccupy inside counsel nearly as much. It was also noted that specifics in rules may become "rights" or "duties" that parties say must always be followed slavishly. Rarely, if ever, is that the goal of the rulesmakers, but it may often be the outcome of specifics in real-life litigation.

Another member agreed that it would be very helpful to have input from a variety of constituencies, perhaps some without an immediate stake in these issues. For example, we might hear not only from corporations, but also the Government, mass tort plaintiffs, environmental litigators, products liability litigators. Given this need, we should not rush into this project. It would be very helpful to have at least some mock-ups of possible rule approaches because that would make the discussion concrete.

The discussion was summed up as producing a consensus that we should not shoot for the upcoming rulemaking cycle. The Rule 45 proposal is ready, but this one is not. At the Austin meeting, we will tell the full Committee of our plans for a conference that would thoroughly

ventilate the various rules.

The discussion turned to some of the specific ideas outlined in Prof. Marcus's Aug. 5 memo. The goal was to address preliminary reactions to the issues raised, in particular as they relate to a possible rule of the sort suggested as Category 2 above.

Rule 26.1(a) -- general duty to preserve

This provision was introduced as perhaps being unnecessary because it is so general. It states a general duty of preservation. Having such a rule would provide rule text to show that no supersession of other preservation obligations (besides the litigation-anticipation obligation) is intended. The draft keys to whether the person will be a litigant in a federal court, although it would often be difficult for a litigant to know that litigation will be in federal court even if it is confident it will be a litigant in some court. The rule could limit the obligation to electronically stored information or make it apply to all discoverable information. Presumably whatever justification there is for a rule addressing preservation extends no further than what is discoverable. But it may be extremely difficult to foresee what will be discoverable before litigation is even filed.

An initial concern was that the impact of a preservation directive be considered from the perspective of prospective plaintiffs. A "little guy" acting in complete good faith might very well begin to suspect, indeed to believe, that he has a valid claim without realizing that this insight gives rise to an obligation to preserve potential evidence. It is important that we tie this provision back into some actual prejudice resulting from the unavailability of this evidence. Without that, it could become a club for defendant to use against "ordinary people" who are plaintiffs.

Another member pointed out that the party with the burden of proof inherently has an incentive to preserve, and that this person suffers due to failure to preserve. There might seem to be some piling on if failure to preserve can also be used against the person who, due to failure to preserve, has less evidence to satisfy his burden of proof due to his failure to preserve.

A reaction was that this sort of concern can be handled under a sanctions rule that is backward-looking because such a rule could make the sophistication of a party one factor in deciding whether the party acted reasonably.

This comment prompted the concern that it may be impossible to draft a preservation rule without hurting plaintiffs. Meanwhile, the bad faith litigant will avoid sanctions by arguing that "they can't prove prejudice." These concerns must be kept in mind.

Rule 26.1(b) -- Trigger

The Aug. 5 memo builds on the proposal of the Duke E-Discovery Panel to offer three alternatives. First, one could have a general duty looking to when a person becomes aware of circumstances that would lead a reasonable person to expect to be a party to litigation. A second approach would be to go beyond the general provision in the rule and offer examples of the sorts of events that should produce that insight. A third approach would use the listing as a limit, not just as examples, and say that the duty is triggered only by the listed events. That third approach would presumably prompt much litigation about what falls within one of the specifications. But it would also raise a severe risk that events would occur that any reasonable person would consider sufficient to trigger a preservation duty but which had not been foreseen by the drafters. A solution might be to add a catch-all final category such as "any other similar event that would cause a reasonable person to foresee being a party to litigation," but that would seem also to undercut the limiting effect of the rule.

An initial reaction was to the inclusion of an event that would result in a duty to preserve under the person's own preservation program. Is this wise or appropriate? Isn't it likely to cause many to avoid having preservation programs? And maybe it has nothing to do with the sorts of concerns involved here. How about "We back up everything on the third Thursday of every month and retain the backup tape for five years." Suppose one Thursday (Thanksgiving, say) the backup was forgotten, and that three tapes were recycled after two years. Should that affect whether the duty to preserve on which we are focusing is triggered? Similarly, should all statutory or regulatory preservation requirements be included? Aren't some of them focused on very different things?

On the other hand, it might seem odd if one who has a duty to preserve under a statute or regulation could argue that its violation of that duty is immune from litigation sanctions when the material would also be important in litigation. Perhaps the answer is that the whole concept of trigger that matters to us is limited to the one resulting from the prospect of litigation, so that the fact that some statute called for preservation when litigation was not foreseeable is adventitious.

The focus turned to Alternative 2, the general provision with a series of examples. Is this really helpful? It was asked: Are there other rules with lists like this one? Rule 26(a)(1) has a list of exclusions from initial disclosure. Rules 26(f) and 16(c) have lists of topics that can be considered in conferences about discovery between the parties, or in a pretrial conference before the court. Fed. R. Evid. 901(b) has a list of "illustrations" of ways to authenticate evidence that is overtly included for illustration and not limitation. Fed. R. Evid. 404(b) also includes a nonexclusive list of other purposes of admission of evidence that may reflect on character.

The consensus was that, of the three approaches, Alternative 2 should be pursued.

Rule 26.1(c) -- Scope

The scope drafts also offered three alternatives. The first called for a potential party to "take all actions reasonable [and proportional] under the circumstances" to preserve discoverable information. Alternative 2 was defined to require "reasonable [and proportional] efforts to preserve any information that would be within the scope of discovery under Rule 26(b)(1)," with the possibility of an additional limitation "in regard to the potential claim of which the person is or should be aware." Alternative 3 set out specifics for the subject matter (4 alternative formulations), sources of information to be preserved (2 alternatives), types of information to be preserved, the form for preserving the information, the time frame for preserving the information (3 alternatives), and the number of key custodians.

An initial reaction was that "I can't imagine that Alternative 3 can solve anything. I move to exclude number 3." This reaction prompted the comment that these items were on the Duke Panel's list. It is useful to see whether the list could work in a rule.

A different reaction was that the words "all" and "any" were frequently used in this draft. Those words can cause considerable mischief in this context; how can a "reasonable" preservation effort aspire to preserve "all" information. Even if it is an aspiration, it cannot be achieved. Would that mean that this standard could never be met? It was agreed to try to remove all such statements.

A different concern was raised. What does "proportional" mean here? As a front-end matter, it is difficult to determine what is proportional before the nature or number of claims is know. Would it not be better to say only "reasonable." Alternatively, how about explaining the factors to which proportionality refers instead of just invoking the word?

Another member noted the same reaction to the use of "proportional."

Perhaps the solution is to shift to something like " . . . considering the nature of the action, the stakes, . . ." using the 26(b)(2)(C) phrases. Another factor to include explicitly might be the cost of preservation.

Another suggested phrasing was "must take reasonable actions under the circumstances to preserve, taking into account the proportionality criteria of Rule 26(b)(2)(C)."

That prompted the question how one makes this judgment before a suit has been filed? When is an auto manufacturer to begin broad preservation -- when it learns of one steering malfunction? when it learns of three? when it learns of ten?

An alternative phrase might be "normal course of business." That would be a way to take account of the size and ordinary practices of the given enterprize. As the litigation proceeds (assuming one begins) the application of proportionality concept evolves.

A different hypo. was raised: What if the prospective defendant can imagine 21 theories on which suit could be filed. Must it preserve with regard to all 21 theories? Should that preservation duty narrow after suit is filed if the actual suit raises only two theories? A response was to compare the relation back provisions of Rule 15(c). Those seem to contemplate that, so long as all the claims arise out of the same event or transaction, a potential party should be expected to preserve its evidence to respond to those claims. But there the exception is applied to nullify an argument by the party that did not preserve that its failure to preserve should prevent the other side from adding something to the case. Should the same expectation be applied to justify affirmatively punishing the party that failed to preserve?

Should this be limited to the specific party involved in the suit. An example was offered: When issues began to arise with TCE pollution of groundwater in an area, and claims were asserted against one or two sources of TCE, the reality was that all the potential defendants were on notice even though not yet sued.

Subject matter

Discussion turned to proposed 26.1(c)(1), the subject matter provision in the third 26.1(c) alternative. Alternative 1 called for preservation of "any information relevant to any claim that might be asserted." Alternative 2 called for preservation of "any information that constitutes evidence of a claim or a defense to a claim." Alternative 3 limited the duty to information that a potential claimant has demanded be preserved. Alternative 4 looked to "any information that a reasonable person would appreciate should be preserved under the circumstances."

A first reaction was that Alternative 1 should include information relevant to a defense as well as a claim, as provided in brackets.

A more general reaction was that the only workable standard was Alternative 4. That prompted the reaction "What does that tell anyone? It is circular." A response was that lawyers will find it useful.

A different reaction was that for many large organizations this scope provision could be very burdensome. "Do I have to preserve everything?" A reaction was that this is where the trigger is important; this should only be done where suit is in prospect.

The discussion prompted the thought that there seemed little enthusiasm for a detailed rule. Perhaps that means that others will react the same on detailed consideration of the possibilities. The

details were often troubling and difficult. Perhaps the whole concept should be dropped.

A reaction was "If we can't pull together a draft, how can we expect a mini-conference to help?"

A different reaction was that one's receptiveness to something like this rule may depend in part on how unhappy one is with the current situation.

It was suggested, given the hour, that it would not be possible at this meeting to work through the entire draft regarding even preservation. The goal for the present is to have a Category 2 exemplar for a mini-conference. The interim solution would be for Professor Marcus to trim down the Aug. 5 memo treatment of the preservation rule.

Sanctions -- Rule 37

Before the meeting, both Judge Grimm and Judge Campbell had circulated draft ideas of possible Rule 37 amendments that could potentially improve matters regarding preservation.

One reaction was that maybe the way to deal with the preservation end of things is with a protocol, not with a rule. A protocol could be tailored to different types of cases, and could be revised much more nimbly than is possible in the somewhat lumbering rules process.

A general reaction was that the current problem is that the discussion of preservation happens too late. In 90% of the cases in which problems erupt, the problems could have been solved up front. That prompted frustrated agreement. Rule 26(f) has directed the parties to confer about preservation up front since 2006. One judge observed: "I've had that requirement in my standard pretrial order, but still parties usually don't do it." A reaction was that, for the present, the discussion "needs to be forced."

One approach might be to impose a fairly strict required preservation regime in all cases, and require a motion to be relieved of the obligation. Then the parties would have an incentive to address the problem.

In federal court in Baltimore, there is a protocol for E-Discovery. It is on the court's website, but up until now it has not seemingly gotten the attention of lawyers. Attorney awareness is a major problem.

A revision to Rule 37 might make considerable strides toward solving these problems. For one thing, it could provide an overarching standard of reasonableness. That could tie in with trying to predict at the outset what would be found satisfactory later. A nationally-uniform standard would be extremely desirable in this area.

Such a rule could also restrict sanctions in the area of greatest concern -- case dispositive sanctions. One approach is to say "non-monetary" sanctions are covered by the rule, and can only be imposed when the rule's reasonableness standard is violated.

Judge Grimm circulated a possible approach to a rule before the meeting in a memorandum, and Judge Campbell developed a somewhat different rule. Discussion focused on Judge Campbell's draft (attached as an Appendix to these Notes).

Attention focused on paragraph (2) of the Campbell draft. The draft says both bad faith and prejudice must be found for covered sanctions to apply. Can serious sanctions never be imposed on

a party who did not act in bad faith? That seems to change the rule from the Fourth Circuit's *Silvestri* case, in which it is difficult to say that the plaintiff acted culpably, but the court was persuaded that the defendant was deprived of a chance to present a defense because the allegedly malfunctioning airbag was not preserved. Is that such a distinctive case that it need not cause us to pause?

Paragraph (2) could use "or" in place of "and," but that would leave *Residential Funding* in effect and one of the goals of the effort is to replace that standard.

Leaving "and" in paragraph (2) could be solved if the paragraph began "Absent extraordinary circumstances." "That exclusion would be for cases like *Silvestri*." The Note could explain that the focus is on cases in which the loss of the evidence -- whether or not due to a party's culpable behavior -- so harmed another party's ability to litigate that case that it was effectively unable to contest. Ordinarily the lost evidence must be central to the case, like the airbag.

Another example was offered -- a case in which a power boat exhaust system was the alleged cause of the injury. Plaintiff's expert destroyed the exhaust system while testing it. The effect of such an action is that one cannot either defend or prosecute such a claim. With electronically stored information that severity of harm cannot occur, or almost never occurs.

A response was "There have been a lot of Silvestris." To say that it is "extraordinary" is debatable. But the problem is not there; it's in the digital information area. It is rare that the item that was lost is the item that matters in the case, as was true in *Silvestri*. In that sort of situation, one can say that irreparable prejudice has occurred.

At least when the party that failed to preserve also has the burden of proof, this problem may illustrate the difficulty of defining the forbidden sanctions that would be proscribed by the sanctions rule under discussion. In *Silvestri*, the district court dismissed, which would clearly be one of the forbidden ones. But essentially the same result would have followed had the district judge only excluded the testimony of plaintiffs' expert witnesses; that presumably would have led to summary judgement or judgment as a matter of law in favor of defendant. The same result might follow if the judge permitted some testimony from the experts, but forbidden them to express opinions covered by Fed. R. Evid. 702 about whether the airbag was defective, or should have deployed in the crash and thus prevented plaintiff's severe injuries. Would the sanctions rule forbid use of those sanctions except in "extraordinary" circumstances?

At some point, would this progressive limitation in the sanctions power seem inconsistent with the "automatic" sanction of Rule 37(c)(1)? Often, that rule is invoked to exclude expert opinions revealed on the eve of trial because they were not disclosed earlier. Perhaps that is the same, because the court may excuse failure to disclose if it is "harmless," with calls for consideration of whether the other side will be able to respond at trial to the new theories. And the Rule 37(c)(1) sanction is designed in part to enforce the disclosure regime installed in the rules in 1993. But it seems at least that the presumptive attitude is different -- sanctions are to be automatic unless the party that failed to disclose them can prove its failure is harmless, while under the current sanctions approach the party that failed to preserve is protected unless the other side can prove prejudice and fault.

Another member urged that "Irreparable prejudice has to be a basis for the ultimate sanction." A reaction was that it is important to give the court leeway about whether there has been irreparable prejudice. A reaction was that one has to hold an evidentiary hearing. "It is difficult to conceive of destroying the item involved without some intent to conceal." Electronic discovery is different; loss of information is easy and sometimes automatic.

The question was raised: How different is it for the plaintiff to argue that the lost emails would prove his case to be a slam dunk, but now it cannot be established. Is that really different?

One possible example is when the design documents and the memos about the design decision are lost. What innocent justification is there for discarding those items?

One conclusion is that "it is easy to claim prejudice."

A different point was raised: Factor (v) is "the resources of the party." Financial resources of the parties are an important factor. Large organizations are not the same as individuals. Another member agreed that this analysis was "dead on."

Factor (vii) focused on whether the party sought guidance from the court on "unresolved disputes." What are those? Should somebody just throw everything away without asking the judge about it because no dispute has yet arisen about preservation?

The goal is to give a carrot to a party who promptly self discloses a preservation problem: "Judge, we recycled our backup tapes last week. What should we do now?" The idea is that prompt acknowledgement maximizes the possibility that curative measures can be taken, and will not be too expensive.

It was suggested that another factor that might be included is cost of preservation. A reaction was that factor (vi) implicitly includes consideration of costs.

Another suggestion was that proportionality should be included in factor (ii).

A question was raised about factor (viii). What is that about? Conduct not related to preservation? What does it add?

Another point was that it would be important to say that the more severe the prejudice, the more severe the sanction. Similarly, the greater the bad faith, the greater the sanction. But should that be true if there is no prejudice, it was asked. Wouldn't that create a due process problem if a party with complete bad faith tried to destroy the evidence but failed?

The concluding comment was that the goal in April should be to illustrate what such a rule might look like. If it became the favored approach after a mini-conference, all these issues would have to be addressed.

APPENDIX
Draft Sanctions Rule Discussed During Meeting

Possible Rule 37(g):

(1) If a party failed to preserve discoverable information that reasonably should have been preserved in anticipation of the litigation, and additional discovery becomes necessary because of the failure, the court may:

(A) Permit such additional discovery; and

(B) Require the party that failed to preserve the discoverable information to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) If a party failed to preserve discoverable information that reasonably should have been preserved in anticipation of the litigation, and the court determines that the failure was willful, in bad faith, or caused irreparable prejudice in the litigation, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vii) or may give appropriate jury instructions at trial.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved in anticipation of the litigation, and whether the failure was willful or in bad faith, the Court may consider the following factors, among others the Court finds relevant:

(i) the extent to which the party was on notice that litigation was likely and that the discoverable information could be relevant in the litigation;

(ii) the reasonableness of the party's efforts to preserve the discoverable information, including the use of a litigation hold and the scope of the preservation efforts;

(iii) whether the opposing party requested that discoverable information be preserved and the reasonableness of the request;

(iv) the parties' good faith consultation in seeking to agree on the scope of preservation;

(v) the resources of the party;

(vi) the proportionality of the preservation efforts to any anticipated litigation;

(vii) whether the party promptly sought guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information;

(viii) the reasonableness of the party's conduct.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Feb. 4, 2011

On Feb. 4, 2011, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Those participating included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Lee Rosenthal (Chair, Standing Committee, Hon. Mark Kravitz (Chair, Advisory Committee), Hon. Paul Grimm, Chilton Varner, Elizabeth Cabraser, Prof. Edward Cooper (Reporter of the Advisory Committee), Dr. Emery Lee (FJC Research), Andrea Kuperman (Judge Rosenthal's rules law clerk), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee). Daniel Girard and Anton Valukas were unable to participate.

Judge Campbell introduced the discussion as preparatory to a further discussion to occur during a dinner meeting in Dallas on Feb. 20, 2011. On Feb. 20, it is likely that the most fruitful topics to address would be (1) whether the Committee could devise a rule that would truly be helpful in dealing with the concerns it has heard about, (2) what additional information -- such as advice from technical experts -- would be useful in addressing questions about preservation, and (3) whether the chief focus should be on devising a sanctions rule rather than trying directly to define a preservation obligation. One goal of the meeting on Feb. 20 will be to answer these questions by the end of the meeting.

The discussion began with a report on the panel presentation before the Standing Committee at its January, 2011, meeting. During the Standing Committee's meeting, there was a panel discussion of preservation and sanctions issues, involving several members of the Discovery Subcommittee and also others who were on the Duke Panel on E-Discovery.

An initial summary began with the observation that it seemed that all on the panel agreed that the problems of preservation and sanctions were serious, and that focusing solely on motions in court (as the FJC research has done) did not capture the entire picture. Instead, many did conduct their affairs with an eye on the most demanding standards used anywhere, leading to massive over-preservation in many instances. The existing uncertainty is due to the variation in caselaw on preservation in different places in the federal judicial system, and in particular to the Second Circuit's *Residential Funding* decision, which said that simple negligence can suffice to support serious sanctions. Coupled with that is concern about Judge Scheindlin's *Pension Committee* decision, announcing that failure to issue a written litigation hold could be per se evidence of gross negligence.

So in general there would potentially be much value in a rule that made a finding of serious culpability a prerequisite for imposition of sanctions. Such a rule could provide reassurance that reasonable efforts to preserve would not produce dire sanctions even if a judge later concluded that more extensive efforts would have been more appropriate. It could also provide national uniformity in sanctions standards that presently is lacking.

But focusing on culpability alone would probably not do the job. An illustration was the Fourth Circuit's *Silvestri* ruling, which upheld dismissal of a plaintiff's suit against General Motors due to plaintiff's failure to retain the allegedly defective airbag, with the result that by the time the suit was filed GM could not examine either the airbag or the car. It would be difficult to say that plaintiff there was guilty of much fault. He was very seriously injured in the accident, and was in the hospital when his parents found a lawyer for him. The lawyer hired two experts to examine the car and airbag, and they made measurements and took photos (and advised the lawyer to notify GM it should examine the car). Plaintiff later fired the lawyer (perhaps due to unhappiness about the size of the bills from the experts) and filed suit using a different lawyer. It would be difficult to regard plaintiff's actions as evincing bad faith or willful loss of the evidence. The car in question did not even belong to him; he had borrowed it from his landlady. He was disfigured due to the accident,

and probably had an extended recuperation period. The car was sold a few months after the accident, probably before he was fully recovered. But the court was convinced that GM had been unfairly deprived of its ability to mount a defense. So culpability and materiality both are factors that bear on sanctions.

And culpability alone may not suffice to justify severe sanctions in the absence of a persuasive indication that important evidence had been lost. Consider, for example, a litigant who, in complete bad faith, uses Evidence Eliminator to try to expunge the evidence. Suppose the effort fails, or that the same evidence can be obtained from another source. Arguably there could come a point at which due process would forbid merits sanctions (sanctions that significantly affect the resolution of the merits of the case). Punishment for contempt could be warranted, but not a default or dismissal. (Note that the Supreme Court's *National Hockey League* statement that case-ending sanctions may be used for "general deterrence" cuts against this argument.)

The question whether a sanctions rule, standing alone (i.e., without a companion preservation rule), would suffice also received some discussion during the Standing Committee meeting. The more general question whether a rule should attempt to regulate pre-litigation activity prompted some disagreement among Standing Committee panel members.

One reaction from a participant in the Standing Committee meeting was that it would be excellent if the Subcommittee could come up with language that would provide good direction on the trigger and the scope of the duty to preserve. But there seems a considerable likelihood that such language would have to be so broad that it would not provide useful guidance to anyone. At least, there seemed agreement among the members of the Standing Committee that the Advisory Committee should "dive into sanctions" and attempt to make the treatment of sanctions uniform nationwide. An effective rule on sanctions might bear fruit in relation to the preservation duty in the sense that people would want to make sure to avoid sanctions and therefore take care to do what the sanctions rule said would protect them. The rule could then provide guidance about what preservation efforts are necessary to avoid sanctions without purporting to operate directly on the preservation decisions when they are made, particularly when that is before litigation commences.

Another who was present during the Standing Committee meeting emphasized that there was a shared sense that there is a real problem. "Fear produces behavior." The fear is produced by the threat of eventual sanctions. The behavior is over-preservation. It was recognized that it would probably be much more difficult to devise a preservation rule than to tackle sanctions, and therefore that the Advisory Committee might end up with a sanctions rule. But that difficulty would not be a reason to stop looking at a preservation rule also.

Another participant observed that it was clear from the practitioners on the panel that the extent of the problem can't be measured from motions filed in court. The effects of *Residential Funding* and *Pension Committee* play out in many ways, such as in Rule 26(f) meetings, as lawyers jockey for leverage. "These are real concerns." Therefore it might be best to worry less about rulemaking authority for the present, and focus less on pre-litigation behavior. The court can take action later based on what that pre-litigation behavior was. At the same time, it would be good to take a wider view than current Rule 37(e), which is limited to sanctions "under these rules." The most pressing concerns are the absence of uniformity and fear of sanctions. Whether the "under these rules" provision is a major concern might be debated; there is relatively good authority that inherent authority sanctions may be imposed only on proof of bad faith. But presently the courts do not seem to be particularly careful about determining whether their sanctions are based on Rule 37 or on inherent authority, which tends to obscure attention to bad faith.

There was also a report on progress in designing TREC, a search technique that appears to

be nearing success. A forthcoming article by Maura Grossman of the Wachtell, Lipton firm reports on favorable recent results. This project is important because it may offer a relatively inexpensive solution to the problem of searching for responsive materials from a huge quantity of electronic records.

A reaction to the discussion was that the thing for the Subcommittee to do now would be to continue to work on a sanctions rule, and make a point of talking to technical people. But it would also be important to continue to tinker with preservation issues, even though it may not be possible to come up with a rule that deals with these issues. "Right now, we have five or six standards on sanctions, and business is driven by the most demanding one." It was suggested further that review of Prof. Marcus's Aug. 5, 2010, memo offering initial drafting ideas could provide a method of evaluating rules for a trigger or scope of preservation.

Focusing on sanctions, it was suggested that a revised Rule 37 provision could announce that no party would be sanctioned if its conduct was reasonable, and also that the reasonableness of that conduct could be linked to a series of factors listed in the rule that could be elaborated upon in a Committee Note. The question would then become whether having that rule on the books would really provide important guidance to parties making preservation decisions.

Another participant agreed, and emphasized that it would be important for such a rule to overcome the Second Circuit "mere negligence suffices" rule, at least for "major sanctions."

Another suggested that the rule would need to integrate prejudice into the mix. Perhaps it could assure that, in the absence of "irreparable prejudice," sanctions may not be imposed on one who behaved reasonably. This might be a "minimalist rule," but would have the advantage of "providing carrots rather than sticks." And the "irreparable harm" idea could be seen as very rare. The Fourth Circuit's *Silvestri* case shows that it can happen, but it does not happen very frequently.

A note of caution was offered: What is a "sanction"? It will be important to ensure that such a rule does not constrict the court's ability to manage discovery in a realistic manner. For example, Rule 26(b)(2)(B) now provides guidance about whether to order a party to search for material in sources that are not reasonably accessible. One factor that a court could consider in deciding whether to order such an effort would be whether the party had improperly failed to preserve something that would be accessible, making resort to the inaccessible sources necessary. But if ordering restoration of those sources were viewed as "sanction," a Rule 37 provision along these lines might seem to forbid such an order.

Another perspective was that two general types of rules seemed to be emerging:

(a) A standards rule: Such a rule might forbid sanctions in the absence of bad faith, willfulness, or something of the sort (with a suitable invocation of prejudice as well).

(b) A backward-looking rule specifying preservation behavior: Such a rule could elaborate on what sorts of preservation behavior would constitute "reasonable behavior" and exempt a party from sanctions. The addition of this detail would serve to make the rule "backward looking" in the sense that the detail could provide guidance for those making decisions (including pre-litigation decisions) about what to preserve.

A different caution was offered: We must be alert to the question whether the current level of angst is really driven by one or two highly-publicized decisions. Perhaps a "minimalist" rule that overrules those decisions will, by that alone, have done most of the job. If so, undertaking the difficult task of doing more may not be warranted. One response was that there is too much concern

out there about variations among the circuits; it's not just about a couple of decisions, even though those decisions have garnered much attention. Given the level of concern, it would be premature to turn away from the remainder of the problem.

Several concurred that it would be important for the Committee to examine all aspects of the problem carefully and thoroughly, even if many seemed not to provide a suitable focus for rulemaking. For one thing, it may seem that differences in caselaw have resulted from divergent interpretations of Rule 37(e); we should be alert to the need to clarify its operation. For another, it was observed that "The angst won't go away if we simply overrule *Pension Committee*." Instead, there would be "grave disappointment" if this Committee terminated its efforts with a bland "bad faith" rule. As evidence of the level of attention to these deliberations, it was also noted that the Feb. 2 issue of a publication evidently designed for corporate general counsel reported that the Committee was moving forward with a rule. The point is not the accuracy of the report, but the degree of interest. It is important for the Committee fully to explore the issues raised.

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger. The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:**

    a. **A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or**

    b. **Specific triggers (which could appear in the text or Advisory Committee Note):**

        i. **Written request or notice to preserve delivered to that person (perhaps in a prescribed form).**

        ii. **Service on, or delivery to, that person of a**

            A. **Complaint or other pleading,**

            B. **Notice of claim,**

            C. **Subpoena, CID or similar instrument.**

        iii. **Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.**

        iv. **Statutory, regulatory, contractual duty to preserve.**

        v. **Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).**

2. **Scope. The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:**

a. Subject matter of the information to be preserved.

b. Relevant time frame.

c. That a person whose duty has been triggered must act reasonably in the circumstances.

d. Types of data or tangible things to be preserved.

e. Sources on which data are stored or found.

f. Specify the form in which the information should be preserved (*e.g.*, native).

g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.

h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.

i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.

3. Duration. The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.

4. Ongoing Duty. The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.

5. Litigation Hold. The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.

6. Work Product. The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).

7. Consequences/Procedures. The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.

a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).

i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)

b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.

c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.

d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.

e. Identify the elements that the complainant must specify, such as:

i. The information or tangible things lost.

ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).

iii. The prejudice suffered.

f. The rule should address burden of proof issues.

8. Judicial Determination. It should provide access to a judicial officer, following a meet and confer, to

a. Resolve disputes

b. Apply Rule 26(c)/proportionality

c. Consider the potential for cost allocation

d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Laws Imposing Preservation Obligations

This memorandum summarizes statutes, regulations, ordinances, and rules imposing preservation obligations. During the May 2010 Conference on Civil Litigation, the E-Discovery Panel suggested that the Civil Rules Advisory Committee examine the possibility of adopting a rule on preservation. Following the 2010 Conference, the Discovery Subcommittee began examining the possibility of adopting a rule on preservation and determined that it would be useful to identify laws that impose a duty to preserve. The Discovery Subcommittee asked me to research existing laws imposing preservation obligations to give them a broad sense for the kinds of laws that already work in this area. This memo summarizes a representative sampling of those laws.

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I. Sampling of Laws Imposing Preservation Obligation

There are thousands of federal, state, and municipal statutes, regulations and ordinances that impose a duty to preserve.[1] The Code of Federal Regulations alone contains over 5000 references to record keeping and maintenance. And all 50 states have statutes that establish record keeping requirements. Municipalities also have record retention requirements, such as requirements that local businesses maintain records relating to permit applications. *See, e.g.,* BERKELEY, CAL., CODE §§ 9.72.130 (2010) (taxicab drivers), 9.72.080 (firearms dealers).

Some statutes and regulations apply generally to all types of businesses (e.g., employment laws) and others apply only to those doing business in a certain area (e.g., food manufacturers, bingo operators) or engaged in a certain activity (e.g., contracting with the government, exporting goods).

These laws impose the duty to preserve on a broad spectrum of entities and individuals, including: employers,[2] firearms dealers,[3] storers of nuclear fuel and radioactive waste,[4] kosher meat

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[1]I did a search of federal statutes and regulations and state statutes for a representative sample of the laws that impose a duty to preserve. I also reviewed ordinances from several large cities and included some of Berkeley's more unique ordinances imposing preservation requirements. In short, this memo covers a representative sampling of the laws imposing a duty to preserve rather than an exhaustive summary of all of the federal, state, and municipal laws imposing a duty to preserve. If the Subcommittee desires more examples, I can continue to collect statutes and regulations.

[2]29 U.S.C. § 211; *Id.* § 1027; 29 C.F.R. § 516.1-516.9; *Id.* § 825.500; *Id.* § 1627.3; CAL. GOV'T CODE § 12946 (West 2005).

[3]BERKELEY, CAL., CODE § 9.72.080.

[4]10 C.F.R. § 72.72.

providers,[5] butchers,[6] restaurants,[7] transporters of inedible kitchen grease,[8] motor vehicle fuel distributors,[9] taxicab drivers,[10] resorts,[11] contact lens sellers,[12] licensed professionals,[13] auctioneers,[14] alligator parts dealers,[15] cigarette and tobacco distributors,[16] schools,[17] childcare centers,[18] pest

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[5]N.Y. AGRIC. AND MKTS. LAW § 201-b(3) (McKinney 2010).

[6]ALA. CODE § 2-15-3 (2010).

[7]BERKELEY, CAL., CODE § 11.60.040

[8]CAL. FOOD & AGRIC. CODE § 19313.1 (West 2010).

[9]CAL. HEALTH & SAFETY CODE § 43026(d) (West 2006).

[10]BERKELEY, CAL., CODE § 9.52.130.

[11]*Id.* § 11.20.130.

[12]CAL. BUS. & PROF. CODE § 2546.5(c) (West 2010).

[13]*Id.* § 2532.6(c)(3)(speech-language pathologists and audiologists); *Id.* § 4846.5(e) (veterinarians); *Id.* § 4980.54(d) (family and marriage therapists); *Id.* § 4996.22(b) (social workers); FLA. STAT. § 494.00295 (2010) (mortgage brokers); TEX. OCC. CODE ANN. § 559.055 (West 2004) (pharmacists).

[14]CAL. CIV. CODE § 1812.607(g) (West 2009).

[15]ALA. CODE § 9-12-207(d) (2010).

[16]CAL. BUS. & PROF. CODE § 22978.5(a) (West 2010).

[17]CAL. EDUC. CODE § 17611 (West 2002).

[18]ALA. CODE § 38-7-13 (2010); S.C. CODE ANN.§ 63-13-70 (2009).

control dealers,[19] commercial fundraisers,[20] stores providing recycling programs,[21] salvage pools,[22] bingo operators,[23] slot machine licensees,[24] collection agencies,[25] wine shippers,[26] dentists,[27] pharmacies,[28] hospital districts,[29] operators of medical waste treatment facilities,[30] telephone medical advice services,[31] cremationists,[32] reinsurers,[33] mold remediators,[34] sexually oriented businesses,[35]

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[19]CAL. FOOD & AGRIC. CODE § 12114 (West 2010).

[20]CAL. GOV'T CODE ANN. § 12599.7 (West 2005).

[21]CAL. PUB. RES. CODE § 42252(d) (West 2007).

[22]CAL. VEH. CODE § 11540(b) (West 2010).

[23]ALA. CODE § 45-8-150.09 (2010).

[24]FLA. STAT. § 551.104(6) (2010).

[25]ALASKA STAT. ANN. § 08.24.280(a) (West 2010).

[26]TEX. ALCO. BEV. CODE ANN. § 54.06(b) (West 2010).

[27]ARIZ. REV. STAT. ANN. § 32-1264 (2010).

[28]CAL. BUS. & PROF. CODE § 4169(a)(5) (West 2010).

[29]TEX. HEALTH & SAFETY CODE ANN. § 61.053(j) (West 2010).

[30]CAL. HEALTH & SAFETY CODE § 118165 (West 2006).

[31]CAL. INS. CODE § 10279(a)(5) (West 2010).

[32]ALA. CODE § 34-13-121(h) (2010).

[33]TEX. INS. CODE ANN. § 4152.205(a) (West 2009).

[34]TEX. OCC. CODE ANN. § 1958.156 (West 2004).

[35]TEX. LAB. CODE ANN. § 51.016 (West 2010).

foundries,[36] utilities,[37] body-piercing salons,[38] tattoo facilities,[39] employee leasing companies,[40] mail-in secondhand precious metals dealers,[41] bail bond agents,[42] government contractors,[43] accountants,[44] lawyers,[45] chemical manufacturers,[46] and railroads.[47]

Some of these laws are brief and others are extremely comprehensive. A sampling, from least to most comprehensive:

Example A:

Restaurants:

> 1. At least fifty percent by volume of each restaurant's food packaging, in which prepared food is provided to customers, or which is kept, purchased, or obtained for this purpose, shall be degradable or recyclable.
>
> 2. Each restaurant shall maintain written records evidencing its

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[36]N.Y. ARTS & CULT. AFF. LAW § 14.06 (McKinney 2010).

[37]N.Y. ENERGY LAW § 17.103(2)(a) (McKinney 2004).

[38]FLA.STAT. § 381.0075(11)(a)(7) (2010).

[39]ALA. CODE § 22-17A-6(3) (2010).

[40]FLA.STAT. § 468.525(3)(g) (2010).

[41]*Id.* § 538.32.

[42]*Id.* § 648.36.

[43]41 C.F.R. § 60-741.80.

[44]18 U.S.C. § 1520.

[45]MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (lawyers); ME RULES OF PROF'L. CONDUCT R. 1.15(2)(iii).

[46]15 U.S.C. § 2607.

[47]49 C.F.R. § 234.273.

compliance with this section.

BERKELEY, CAL., CODE § 11.60.040(A).

Example B:

Each license holder shall maintain records for three years showing the continuing education programs completed by the license holder.

TEX. OCC. CODE ANN. § 559.055 (West 2004).

Example C:

In addition to any other records required to be kept pursuant to this chapter, every transporter of inedible kitchen grease shall record and maintain for two years all of the following:

(a) The name and address of each location from which the transporter obtained the inedible kitchen grease.

(b) The quantity of material received from each location.

(c) The date on which the inedible kitchen grease was obtained from each location.

CAL. FOOD & AGRIC. CODE § 19313.1 (West 2010).

Example D:

(a) Every butcher shall keep a record of every cow or animal of the cow kind killed, showing the color, earmarks and brand of each cow or animal of the cow kind killed or butchered and the date when killed or butchered and, if purchased, from whom purchased, the residence of the person from whom the same was purchased and when and also the approximate gross weight at the time purchased and at the time killed or butchered.

(b) Any butcher who fails to keep such record or who fails to make the required entries above specified within 24 hours after butchering any cow or animal of the cow kind shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500.00 and may be sentenced to hard labor for the county for a period of not exceeding 12 months.

(c) All persons shall have a right to inspect at any time the book required to be kept by this section.

ALA. CODE § 2-15-3 (2010).

Example E:

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

42 U.S.C. § 1974.

Example F:

(a) General requirements. Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer,

lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least $150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term personnel records relevant to the complaint, compliance evaluation or action would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) Failure to preserve records. Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the Act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, that this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(c) The requirements of this section shall apply only to records made or kept on or after the date that the Office of Management and Budget has cleared the requirements.

41 C.F.R. § 60-300.80.

Example G:

(a) Each licensee shall keep records showing the receipt, inventory (including location), disposal, acquisition, and transfer of all special nuclear material with quantities as specified in § 74.13(a) of this

chapter and for source material as specified in § 40.64 of this chapter. The records must include as a minimum the name of shipper of the material to the ISFSI or MRS, the estimated quantity of radioactive material per item (including special nuclear material in spent fuel and reactor-related GTCC waste), item identification and seal number, storage location, onsite movements of each fuel assembly or storage canister, and ultimate disposal. These records for spent fuel and reactor-related GTCC waste at an ISFSI or for spent fuel, high-level radioactive waste, and reactor-related GTCC waste at an MRS must be retained for as long as the material is stored and for a period of 5 years after the material is disposed of or transferred out of the ISFSI or MRS.

(b) Each licensee shall conduct a physical inventory of all spent fuel, high-level radioactive waste, and reactor-related GTCC waste containing special nuclear material meeting the requirements in paragraph (a) of this section at intervals not to exceed 12 months unless otherwise directed by the Commission. The licensee shall retain a copy of the current inventory as a record until the Commission terminates the license.

(c) Each licensee shall establish, maintain, and follow written material control and accounting procedures that are sufficient to enable the licensee to account for material in storage. The licensee shall retain a copy of the current material control and accounting procedures until the Commission terminates the license.

(d) Records of spent fuel, high-level radioactive waste, and reactor-related GTCC waste containing special nuclear material meeting the requirements in paragraph (a) of this section must be kept in duplicate. The duplicate set of records must be kept at a separate location sufficiently remote from the original records that a single event would not destroy both sets of records. Records of spent fuel or reactor-related GTCC waste containing special nuclear material transferred out of an ISFSI or of spent fuel, high-level radioactive waste, or reactor-related GTCC waste containing special nuclear material transferred out of an MRS must be preserved for a period of five years after the date of transfer.

10 C.F.R. § 72.72.

***Example H* (29 C.F.R Part 516 (containing several sections)):**

§ 516.2 Employees subject to minimum wage or minimum wage and

overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) Items required. Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR Part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) Records of retroactive payment of wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(c) Employees working on fixed schedules. With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each workweek as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works. Also,

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows that exact number of hours worked each day and each week.

§ 516.5 Records to be preserved 3 years.

Each employer shall preserve for at least 3 years:

(a) Payroll records. From the last date of entry, all payroll or other records containing the employee information and data required under any of the applicable sections of this part, and

(b) Certificates, agreements, plans, notices, etc. From their last effective date, all written:

(1) Collective bargaining agreements relied upon for the exclusion of certain costs under section 3(m) of the Act,

(2) Collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act, and any amendments or additions thereto,

(3) Plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act,

(4) Individual contracts or collective bargaining agreements under section 7(f) of the Act. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement,

(5) Written agreements or memoranda summarizing the terms of oral agreements or understandings under section 7(g) or 7(j) of the Act, and

(6) Certificates and notices listed or named in any applicable section of this part.

(c) Sales and purchase records. A record of (1) total dollar volume of sales or business, and (2) total volume of goods purchased or received during such periods (weekly, monthly, quarterly, etc.), in such form as the employer maintains records in the ordinary course of business.

516.1 Form of records; scope of regulations.

(a) Form of records. No particular order or form of records is prescribed by the regulations in this part. However, every employer subject to any provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the "Act"), is required to maintain records containing the information and data required by the specific sections of this part. The records may be maintained and preserved on microfilm or other basic source document of an automatic word or data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.

(b) Scope of regulations. The regulations in this part are divided into two subparts.

(1) Subpart A of this part contains the requirements generally applicable to all employers employing covered employees, including the requirements relating to the posting of notices, the preservation and location of records, and the recordkeeping requirements for employers of employees to whom both the minimum wage provisions of section 6 or the minimum wage provisions of section 6 and the overtime pay provisions of section 7(a) of the Act apply. In addition, § 516.3 contains the requirements relating to executive, administrative, and professional employees (including academic administrative personnel or teachers in elementary or secondary schools), and outside sales employees.

(2) Subpart B of this part deals with the information and data which must be kept for employees (other than executive, administrative, etc., employees) who are subject to any of the exemptions provided in the Act. This section also specifies the records needed for deductions from and additions to wages for "board, lodging, or other facilities," industrial homeworkers and employees whose tips are credited toward wages. The sections in subpart B of this part require the recording of more, less, or different items of information or data than required under the generally applicable recordkeeping requirements of subpart A.

(c) Relationship to other recordkeeping and reporting requirements. Nothing in 29 CFR part 516 shall excuse any party from complying with any recordkeeping or reporting requirement imposed by any other Federal, State or local law, ordinance, regulation or rule.

§ 516.6 Records to be preserved 2 years.

(a) Supplementary basic records: Each employer required to maintain records under this part shall preserve for a period of at least 2 years.

(1) Basic employment and earnings records. From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) Wage rate tables. From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation.

(b) Order, shipping, and billing records: From the last date of entry, the originals or true copies of all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (not including individual sales slips, cash register tapes or the like) which the employer retains or makes in the usual course of business operations.

(c) Records of additions to or deductions from wages paid:

(1) Those records relating to individual employees referred to in § 516.2(a)(10) and

(2) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

§ 516.7 Place for keeping records and their availability for inspection.

(a) Place of records. Each employer shall keep the records required by this part safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or a duly authorized

and designated representative.

(b) Inspection of records. All records shall be available for inspection and transcription by the Administrator or a duly authorized and designated representative.

§ 516.8 Computations and reports.

Each employer required to maintain records under this part shall make such extension, recomputation, or transcription of the records and shall submit to the Wag e and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in the records as the Administrator or a duly authorized and designated representative may request in writing.

§ 516.9 Petitions for exceptions.

(a) Submission of petitions for relief. Any employer or group of employers who, due to peculiar conditions under which they must operate, desire authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified in this part, may submit a written petition to the Administrator requesting such authority, setting forth the reasons therefor.

(b) Action on petitions. If, after review of the petition, the Administrator finds that the authority requested will not hinder enforcement of the Act, the Administrator may grant such authority limited by any conditions determined necessary and subject to subsequent revocation. Prior to revocation of such authority because of noncompliance with any of the prescribed conditions, the employer will be notified of the reasons and given an opportunity to come into compliance.

(c) Compliance after submission of petitions. The submission of a petition or the delay of the Administrator in acting upon such petition will not relieve any employer or group of employers from any obligations to comply with all the applicable requirements of the regulations in this part. However, the Administrator will provide a response to all petitions as soon as possible.

II. Treatment of E-Discovery Panel Elements

The E-Discovery Panel recommended that the preservation rule take into account the following elements: (1) trigger, (2) scope, (3) duration, (4) ongoing duty, (5) litigation hold, (6) work product, (7) consequences/procedures, and (8) judicial determination. As shown above, the laws imposing preservation obligations vary widely. A survey of these laws revealed no single law that included all of the E-Discovery Panel's recommended elements.

Some of the elements, including the effect of a litigation hold, the application of privilege, and access to a judicial officer, were not addressed in any of the laws I reviewed. Other elements, such as scope, duration, and consequences were included in many laws. These elements received a wide range of treatment.

A. Trigger

Most of the laws imposing a preservation obligation do not have a "trigger," as they require ongoing maintenance of certain types of records.

Some laws that set forth general recordkeeping requirements also include a more comprehensive duty to preserve after a "trigger event." For example, after a contractor has "received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced," it becomes obligated to preserve "all personnel records relevant to the complaint, compliance evaluation or action." 41 C.F.R. § 60-300.80. And "[u]pon notice that a verified complaint against it has been filed" employers, labor organizations, and employment agencies "shall maintain and preserve any and all records and files until the complaint is fully and finally disposed of and all appeals or related proceedings terminated." CAL. GOV'T CODE ANN. § 12946 (West 2005). Other statutes extend the duration of the duty to preserve when regulatory proceedings are instituted, a lawsuit is filed, or an audit or investigation

is underway. *See infra* Section II.C.

B. Scope

As explained above, laws imposing preservation obligations vary widely. Some are very precise about the scope of the obligation, while others are less so. The Consumer Product Safety Act uses very broad language to describe the records that must be maintained:

> Every person who is a manufacturer, private labeler, or distributor of a consumer product shall establish and maintain such records, make such reports, and provide such information as the Commission may, by rule, reasonably require for the purposes of implementing this chapter, or to determine compliance with rules or orders prescribed under this chapter.

15 U.S.C. § 2065(b).[48] Similarly, Florida motor carriers are required to keep "pertinent records and papers as may be required by the department for the reasonable administration of this chapter." FLA. STAT. § 320.0715(4) (2010). Another statute that provides little guidance: "[e]very childcare center or group childcare home shall maintain a register setting forth essential facts concerning each child enrolled under the age of eighteen years." S.C. CODE ANN. § 63-13-70 (2009).

Other laws provide more guidance. For example, the state statutes that require those applying for or holding a professional license to retain records of professional training and education tend to be straightforward. One example:

> Applicants shall maintain records of completion of required continuing education coursework for a minimum of two years and shall make these records available to the board for auditing purposes upon request.

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[48]The CPSA's implementing regulations (which do not cover all consumer products) are more specific and provide guidance as to which records must be maintained and, in some cases a time period that the records should be retained. *See* 16 C.F.R. Parts 1115, 1117-18, 1130, 1203-05, 1209-12, 1605. But for the products that are not covered by the regulations, the general recordkeeping requirement provides little guidance.

CAL. BUS. & PROF. CODE § 4980.54(d) (West 2003).

Other regulations list the specific documents to be retained. For example, 29 C.F.R. § 516.2 imposes a duty on employers to keep all records that contain any of the "items required" listed in the regulation (including name, home address, date of birth, hours worked, and rate of pay). The City of Berkeley requires taxicab drivers to keep waybills that include "information on where and when the passengers entered vehicle, where the passengers were discharged, and the amount of fare collected." BERKELEY, CAL., CODE § 9.52.130(1). The State of California requires auctioneers to maintain all records that "include the name and address of the owner or consignor and of any buyer of goods at any auction sale engaged in or conducted by the auctioneer or auction company, a description of the goods, the terms and conditions of the acceptance and sale of the goods, all written contracts with owners and consignors, and accounts of all moneys received and paid out, whether on the auctioneer's or auction company's own behalf as agent, as a result of those activities." CAL. CIV. CODE § 1812.607(g) (West 2009). The State of Alabama requires butchers to "keep a record of every cow or animal of the cow kind killed, showing the color, earmarks and brand of each cow or animal of the cow kind killed or butchered and the date when killed or butchered and, if purchased, from whom purchased, the residence of the person from whom the same was purchased and also the approximate gross weight at the time purchased and at the time killed or butchered." ALA.CODE § 2-15-3(a) (2010).

Some federal regulations also provide a list of records that must be kept. The Equal Employment Opportunity Commission requires employers to keep personnel or employment records related to:

> (i) Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his

> advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual,
>
> (ii) Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee,
>
> (iii) Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings,
>
> (iv) Test papers completed by applicants or candidates for any position which disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action,
>
> (v) The results of any physical examination where such examination is considered by the employer in connection with any personnel action,
>
> (vi) Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.

29 C.F.R. § 1627.3(b)(1).

Other laws include examples of records that must be kept, but do not limit the duty to those records. For example, under 41 C.F.R. § 60-300.80, contractor employers are required to keep records which:

> include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.

Section 60-300.80 also gives examples of the personnel records a contractor should preserve if a complaint of discrimination has been filed, a compliance action has been initiated, or an enforcement action has been commenced. But it does not limit the duty to preserve to the items listed:

> The term personnel records relevant to the complaint, compliance evaluation or action would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

Id.

Another approach is to provide a "safe harbor" and deem records sufficient if certain conditions are met. For example:

> Each schoolsite shall maintain records of all pesticide use at the schoolsite for a period of four years, and shall make this information available to the public, upon request, pursuant to the California Public Records Act. A schoolsite may meet the requirements of this section by retaining a copy of the warning sign posted for each application required by Section 17612, and recording on that copy the amount of the pesticide used.

CAL. EDUC. CODE § 17611 (internal citations omitted). And Proposed 29 C.F.R. § 2530.209-2(c) would provide that:

> Records required to be maintained by a single employer plan under § 2530.209-2(a) will be deemed sufficient if:
>
> (1) With respect to service from the later of the date the employer adopts the plan or [effective date of regulation], they contain all information with respect to service with that employer that is relevant to a determination of each employee's benefit entitlements under the plan, and
>
> (2) With respect to service before [effective date of regulation], if any, they include all records maintained by the employer on and after February 9, 1979, for the purpose of determining employee's benefit entitlements under the provisions of the plan.

C. Duration

Some documents are required to be retained for a short period of time, while others must be

retained for many years or indefinitely. On the short end, retailers or restaurants purchasing alligator parts "shall maintain a bill of sale for each purchase for a period of six months after such purchase." ALA. CODE § 9-12-207(c) (2010). On the long end, public utility holding companies are required to maintain some records for fifty years. *See* 17 C.F.R. § 257.2.

Some provisions imposing preservation requirements specify precisely how long the information must be preserved:

- Any accountant who conducts an audit of a regulated issuer of securities "shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded." 18 U.S.C. § 1520(a)(1).
- Officers of elections shall retain election records "for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for...." 42 U.S.C. § 1974.
- "Every employer shall make and keep for 3 years payroll or other records for each of his employees...." 29 C.F.R. § 1627.3.
- Mortgage brokers must maintain copies of all mortgage loan origination disclosure statements for four years. OHIO REV. CODE ANN. § 1322.06(B) (West 2010).

Other laws contain indefinite retention periods. For example, Proposed 29 C.F.R. §

2530.209-2(d) provides that records must be retained "as long as any possibility exists that they might be relevant to a determination of benefit entitlements." Some provisions imposing a duty to preserve require simply that certain records be "kept," but do not specify how long. *See, e.g.*, COLO. REV. STAT. § 11-41-112(1)(l) (West 2003); BERKELEY, CAL., CODE § 11.60.040(A).

There are also provisions that provide only a minimum duration of the duty to preserve. For example, the SEC requires brokers and dealers to preserve records "for a period of not less than six years." 17 C.F.R. § 240.17a-4. Similarly, the State of California requires auctioneers to preserve certain records "for a period of not less than two years" (CAL. CIV. CODE § 1812.607(g) (West 2009)) and commercial fundraisers to maintain records "for not less than 10 years following the completion of each solicitation campaign." CAL. GOV'T CODE § 12599.7(a) (West 2005).

Some laws contain more complex schemes for determining how long records must be retained. For example, 49 C.F.R. § 382.401, which obligates employers to maintain records related to alcohol and drug testing, sets forth different lengths of time that records must be preserved, depending on the type of record:

> (b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:
>
> (1) Five years. The following records shall be maintained for a minimum of five years:
>
> (i) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,
>
> (ii) Records of driver verified positive controlled substances test results,
>
> (iii) Documentation of refusals to take required alcohol and/or controlled substances tests,
>
> (iv) Driver evaluation and referrals,

> (v) Calibration documentation,
>
> (vi) Records related to the administration of the alcohol and controlled substances testing programs, and
>
> (vii) A copy of each annual calendar year summary required by § 382.403.
>
> (2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices).
>
> (3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.
>
> (4) Indefinite period. Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and drivers shall be maintained by the employer while the individual performs the functions which require the training and for two years after ceasing to perform those functions.

Other laws extend the amount of time documents must be preserved when an investigation is underway, an administrative proceeding is instituted, or a lawsuit is filed. For example, Section 19141.6 of California's Revenue and Taxation Code extends the obligation to preserve indefinitely when a protest or lawsuit is pending:

> Information for any year shall be retained for that period of time in which the taxpayers' income or franchise tax liability to this state may be subject to adjustment, inluding all periods in which additional income or franchise taxes may be assessed, not to exceed eight years from the due date or extended due date of the return, or during which a protest is pending before the Franchise Tax Board, or an appeal is pending before the State Board of Equalization, or a lawsuit is pending in the court of this state or the United States with respect to California franchise or income tax.

Section 5097(d)-(e) of California's Business and Professions Code likewise extends the preservation obligation indefinitely during the pendency of "any board investigation, disciplinary

action, or legal action involving the licensee or the licensee's firm":

> (d) Audit documentation shall be maintained by a licensee for the longer of the following:
>
> (1) The minimum period of retention provided in subdivision (e).
>
> (2) A period sufficient to satisfy professional standards and to comply with applicable laws and regulations.
>
> (e) Audit documentation shall be maintained for a minimum of seven years which shall be extended during the pendency of any board investigation, disciplinary action, or legal action involving the licensee or the licensee's firm. The board may adopt regulations to establish a different retention period for specific categories of audit documentation where the board finds that the nature of the documentation warrants it.

Another example, which extends the duration of the duty to preserve when an audit or investigation is underway, provides that the obligation endures until the recordholder is released, in writing:

> All records pertaining to offshore and onshore Federal and Indian oil and gas leases shall be maintained by a lessee, operator, revenue payor, or other person for 6 years after the records are generated unless the recordholder is notified, in writing, that records must be maintained for a longer period. When an audit or investigation is underway, records shall be maintained until the recordholder is released by written notice of the obligation to maintain records.

30 C.F.R. § 1212.50.

In the following example, the obligation to preserve records is extended to two years after a USDA audit of those records, with the caveat that "any destruction of records" will be at the risk of the producer when "there is reason to know, believe or suspect that matters may or could be in dispute or remain in dispute":

> Such records and accounts must be retained for two years after the date of payment to the producer under the program, or for two years

> after the date of any audit of records by USDA, whichever is later. Any destruction of records by the producer at any time will be at the risk of the producer when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.

7 C.F.R. § 81.13.

Several laws imposing a duty to preserve provide that they do not supersede preservation requirements set forth in other laws. For example, Section 1520(c) provides: "[n]othing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document." 18 U.S.C. § 1520(c). Similarly, "[n]othing in 29 CFR part 516 shall excuse any party from complying with any recordkeeping or reporting requirement imposed by any other Federal, State or local law, ordinance, regulation or rule." 29 C.F.R. § 516.1(c).

Other statutes, like Section 5079(d)(2) of California Business and Professions Code, require that the duty to preserve extend for "[a] period sufficient to satisfy professional obligations and to comply with applicable laws and regulations."

D. Ongoing Duty

Most of the preservation laws impose an ongoing duty to preserve "all" or "any" records of a certain kind. I did not come across any laws providing an end point to the duty to preserve, such that there would be no duty to preserve information generated after the date of the trigger event.

E. Litigation Hold and Work Product

I found no preservation laws addressing the effect of a litigation hold or whether actions taken in furtherance of the preservation duty are protected by work product or other privilege.

F. Consequences

Sanctions imposed for failure to preserve range from small monetary fines to large monetary fines, adverse inference instructions, hard labor, and prison.

Under the Employee Retirement Income Security Program, an employer who fails to maintain records in accordance with the statute must pay "a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause." 29 U.S.C. § 1059(b). The Customs Regulations Guildelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1641 penalizes brokers $10,000 for failure to maintain satisfactory accounting records or records of other documents filed with Customs. 19 C.F.R. Pt. 171, App. C. at XI.B.5. However, the penalty may be subject to mitigation:

> $10,000 penalty for failure to maintain satisfactory accounting records will only be subject to mitigation in full if the broker can prove that satisfactory accounting records and documents records are being kept. Mitigation in a lesser degree may be afforded upon a showing by the broker that a bona fide attempt was made to establish a satisfactory accounting and/or recordkeeping system, or upgrade a deficient system, but such efforts proved unsuccessful or only partially effective.

Id. at XI.D.5.

Other statutes punish violators with adverse inference instructions. Where government contractors violate recordkeeping provisions, "there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor." 41 C.F.R. § 60-300.80(b). That presumption is rebuttable and "shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control." *Id.* Likewise, inadequate audit documentation "shall raise a presumption that the procedures were not applied, tests were not performed, information was not obtained, and relevant conclusions were not reached." CAL. BUS. & PROF. CODE § 5097(c) (West 2003). Again,

this presumption "shall be a rebuttable presumption affecting the burden of proof relative to those portions of the audit that are not documented as required.... The burden may be met by a preponderance of the evidence." *Id.*

At least one statute, which imposes a duty on butchers to keep records of cows that are butchered, provides that a butcher who fails to keep such records "may be sentenced to hard labor for the county." ALA.CODE § 2-15-3(b) (2010).

Some sanctions provisions include a state of mind component. Most of these provisions require willful or malicious behavior, but at least one requires only negligence. The Chemical Weapons Convention Regulations imposes penalties for willful violations:

> Civil penalty for failure to establish or maintain records. Any person that is determined to have willfully failed or refused to establish or maintain any record or submit any report, notice, or other information required by the Act or the CWCR, or to have willfully failed or refused to permit access to or copying of any record, including any record exempt from disclosure under the Act or the CWCR as set forth in paragraph (a)(2) of this section, shall pay a civil penalty in an amount not to exceed $5,000 for each violation.
>
> Criminal penalty. Any person that knowingly violates the Act by willfully failing or refusing to permit entry or inspection authorized by the Act; or by willfully disrupting, delaying or otherwise impeding an inspection authorized by the Act; or by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information; or by willfully failing or refusing to permit access to or copying of any record, including records exempt from disclosure under the Act or the CWCR, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, be imprisoned for not more than one year, or both.

15 C.F.R. § 719.2(b)(2)-(c).

An accountant who knowingly or willfully violates his duty to preserve corporate audit records "shall be fined ..., imprisoned not more than 10 years, or both." 18 U.S.C. § 1520(b). The

statute concerning private securities litigation, 15 U.S.C. § 77z-1, provides that "[a] party aggrieved by the willful failure of an opposing party to comply with [the duty to preserve] may apply to the court for an order awarding appropriate sanctions." The California statute that imposes preservation obligations on taxpayers limits penalties for violating the statute to $50,000 "if the failure to maintain or the failure to cause another to maintain is not willful." CAL. REV. & TAX. CODE § 19141.6(c)(2) (West 2004). A custodian of health care records appointed by the Kansas state board of healing arts is not subject to civil liability for destroying health care records "except upon clear and convincing evidence that the custodian of records maliciously altered or destroyed health care records." KAN. STAT. ANN. 65-28,128(e)(6) (2010). Appraisers are subject to criminal penalties if they willfully violate the duty to preserve records of appraisal activities. N.H. REV. STAT. ANN. § 21-J:14-e (2010). Under an Indiana statute that imposes a duty to preserve health care records: "[a] provider is immune from civil liability for destroying or failing to maintain a health record in violation of this section if the destruction or failure to maintain the health record occurred in connection with a disaster emergency ..., unless the destruction or failure to maintain the health record was due to negligence by the provider." IND. CODE § 16-39-7-1 (2006).

Some sanction schemes are more complex. Take, for example, this I.R.S. regulation:

> (a) Imposition of monetary penalty – (1) In general. If a reporting corporation fails to furnish the information described in § 1.6038A-2 within the time and manner prescribed in § 1.6038A-2(d) and (e), fails to maintain or cause another to maintain records as required by § 1.6038A-3, or (in the case of records maintained outside the United States) fails to meet the non-U.S. record maintenance requirements within the applicable time prescribed in § 1.6038A-3(f), a penalty of $10,000 shall be assessed for each taxable year with respect to which such failure occurs. Such a penalty may be imposed by the District Director or the Director of the Internal Revenue Service Center where the Form 5472 is filed. The filing of a substantially incomplete Form 5472 constitutes a failure to file Form 5472. Where, however, the

information described in § 1.6038A-2(b)(3) through (5) is not required to be reported, a Form 5472 filed without such information is not a substantially incomplete Form 5472.

(2) Liability for certain partnership transactions. A reporting corporation to which transactions engaged in by a partnership are attributed under § 1.6038A-1(e)(2) is subject to the rules of this section to the extent failures occur with respect to the partnership transactions so attributed.

(3) Calculation of monetary penalty. If a reporting corporation fails to maintain records as required by § 1.6038A-3 of transactions with multiple related parties, the monetary penalty may be assessed for each failure to maintain records with respect to each related party. The monetary penalty, however, shall be imposed on a reporting corporation only once for a taxable year with respect to each related party for a failure to furnish the information required on Form 5472, for a failure to maintain or cause another to maintain records, or for a failure to comply with the non-U.S. maintenance requirements described in § 1.6038A-3(f). An additional penalty for another failure may be imposed, however, under the rules of paragraph (d)(2) of this section. Thus, unless such failures continue after notification as described in paragraph (d) of this section, the maximum penalty under this paragraph with respect to each related party for all such failures in a taxable year is $10,000. The members of a group of corporations filing a consolidated return are jointly and severally liable for any monetary penalty that may be imposed under this section.

(b) Reasonable cause – (1) In general. Certain failures may be excused for reasonable cause, including not timely filing Form 5472, not maintaining or causing another to maintain records as required by § 1.6038A-3, and not complying with the non-U.S. maintenance requirements described in § 1.6038A-3(f). If an affirmative showing is made that the taxpayer acted in good faith and there is reasonable cause for a failure that results in the assessment of the monetary penalty, the period during which reasonable cause exists shall be treated as beginning on the day reasonable cause is established and ending not earlier than the last day on which reasonable cause existed for any such failure. Additionally, the beginning of the 90-day period after mailing of a notice by the District Director or the Director of an Internal Revenue Service Center of a failure described in paragraph (d) of this section shall be treated as not earlier than the last day on which reasonable cause existed.

(2) Affirmative showing required – (i) In general. To show that reasonable cause exists for purposes of paragraph (b)(1) of this section, the reporting corporation must make an affirmative showing of all the facts alleged as reasonable cause for the failure in a written statement containing a declaration that it is made under penalties of perjury. The statement must be filed with the District Director (in the case of failure to maintain or furnish requested information permitted to be maintained outside the United States within the time required under § 1.6038A-3(f) or a failure to file Form 5472) or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed (in the case of failure to file Form 5472). The District Director or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed, as appropriate, shall determine whether the failure was due to reasonable cause, and if so, the period of time for which reasonable cause existed. If a return has been filed as required by § 1.6038A-2 or records have been maintained as required by § 1.6038A-3, except for an omission of, or error with respect to, some of the information required or a record to be maintained, the omission or error shall not constitute a failure for purposes of section 6038A(d) if the reporting corporation that filed the return establishes to the satisfaction of the District Director or the Director of the Internal Revenue Service Center that it has substantially complied with the filing of Form 5472 or the requirement to maintain records.

(ii) Small corporations. The District Director shall apply the reasonable cause exception liberally in the case of a small corporation that had no knowledge of the requirements imposed by section 6038A; has limited presence in and contact with the United States; and promptly and fully complies with all requests by the District Director to file Form 5472, and to furnish books, records, or other materials relevant to the reportable transaction. A small corporation is a corporation whose gross receipts for a taxable year are $20,000,000 or less.

(iii) Facts and circumstances taken into account. The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of the experience and knowledge of the taxpayer. Isolated computational or transcriptional errors generally are not inconsistent with reasonable cause and good faith. Reliance upon an information return or on the advice of a professional (such as

an attorney or accountant) does not necessarily demonstrate reasonable cause and good faith. Similarly, reasonable cause and good faith is not necessarily indicated by reliance on facts that, unknown to the taxpayer, are incorrect. Reliance on an information return, professional advice or other facts, however, constitutes reasonable cause and good faith if, under all the circumstances, the reliance was reasonable. A taxpayer, for example, may have reasonable cause for not filing a Form 5472 or for not maintaining records under section 6038A if the taxpayer has a reasonable belief that it is not owned by a 25-percent foreign shareholder. A reasonable belief means that the taxpayer does not know or has no reason to know that it is owned by a 25-percent foreign shareholder. For example, a reporting corporation would not know or have reason to know that it is owned by a 25-percent foreign shareholder if its belief that it is not so owned is consistent with other information reported or otherwise furnished to or known by the reporting corporation. A taxpayer may have reasonable cause for not treating a foreign corporation as a related party for purposes of section 6038A where the foreign corporation is a related party solely by reason of § 1.6038A-1(d)(3) (under the principles of section 482), and the taxpayer had a reasonable belief that its relationship with the foreign corporation did not meet the standards for related parties under section 482.

(c) Failure to maintain records or to cause another to maintain records. A failure to maintain records or to cause another to maintain records is determined by the District Director upon the basis of the reporting corporation's overall compliance (including compliance with the non-U.S. maintenance requirements under § 1.6038A-3(f)(2)) with the record maintenance requirements. It is not an item-by-item determination. Thus, for example, a failure to maintain a single or small number of items may not constitute a failure for purposes of section 6038A(d), unless the item or items are essential to the correct determination of transactions between the reporting corporation and any foreign related parties. The District Director shall notify the reporting corporation in writing of any determination that it has failed to comply with the record maintenance requirement.

(d) Increase in penalty where failure continues after notification – (1) In general. If any failure described in this section continues for more than 90 days after the day on which the District Director or the Director of the Internal Revenue Service Center where the Form 5472 is required to be filed mails notice of the failure to the reporting

corporation, the reporting corporation shall pay a penalty (in addition to the penalty described in paragraph (a) of this section) of $10,000 with respect to each related party for which a failure occurs for each 30-day period during which the failure continues after the expiration of the 90-day period. Any uncompleted fraction of a 30-day period shall count as a 30-day period for purposes of this paragraph (d).

(2) Additional penalty for another failure. An additional penalty for a taxable year may be imposed, however, if at a time subsequent to the time of the imposition of the monetary penalty described in paragraph (a) of this section, a second failure is determined and the second failure continues after notification under paragraph (d)(1) of this section. Thus, if a taxpayer fails to file Form 5472 and is assessed a monetary penalty and later, upon audit, is determined to have failed to maintain records, an additional penalty for the failure to maintain records may be assessed under the rules of this paragraph if the failure to maintain records continues after notification under this paragraph.

(3) Cessation of accrual. The monetary penalty will cease to accrue if the reporting corporation either files Form 5472 (in the case of a failure to file Form 5472), furnishes information to substantially complete Form 5472, or demonstrates compliance with respect to the maintenance of records (in the case of a failure to maintain records) for the taxable year in which the examination occurs and subsequent years to the satisfaction of the District Director. The monetary penalty also will cease to accrue if requested information, documents, or records, kept outside the United States under the requirements of § 1.6038A-3(f) and not produced within the time specified are produced or moved to the United States under the rules of paragraph (f)(2)(ii) of this section.

(4) Continued failures. If a failure under this section relating to a taxable year beginning before July 11, 1989 occurs, and if the failure continues following 90 days after the notice of failure under this paragraph is sent, the amount of the additional penalty to be assessed under this paragraph is $10,000 for each 30-day period beginning after November 5, 1990, during which the failure continues. There is no limitation on the amount of the monetary penalty that may be assessed after November 5, 1990.

(e) Other penalties. For criminal penalties for failure to file a return and filing a false or fraudulent return, see sections 7203 and 7206 of the Code. For the penalty relating to an underpayment of tax, see

section 6662.

(f) Examples. The following examples illustrate the rules of this section.

Example 1 Failure to file Form 5472. Corp X, a U.S. reporting corporation, engages in related party transactions with FC. Corp X does not timely file a Form 5472 or maintain records relating to the transactions with FC for Year 1 or subsequent years. The Service Center with which Corp X files its income tax return imposes a $10,000 penalty for each of Years 1, 2, and 3 under section 6038A (d) and this section for failure to provide information as required on Form 5472 and mails a notice of failure to provide information. Corp X does not file Form 5472. Ninety days following the mailing of the notice of failure to Corp X an additional penalty of $10,000 is imposed. On the 135th day following the mailing of the notice of failure, Corp X files Form 5472 for Years 1, 2, and 3. The total penalty owed by Corp X for Year 1 is $30,000. ($10,000 for not timely filing Form 5472, $10,000 for the first 30-day period following the expiration of the 90-day period, and $10,000 for the fraction of the second 30-day period). The penalty for Years 2 and 3 for the failure to file Form 5472 is also $30,000 for each year, calculated in the same manner as for Year 1. The total penalty for failure to file Form 5472 for Years 1, 2, and 3 is $90,000.

Example 2 Faiure to maintain records. Assume the same facts as in Example 1. In Year 5, Corp X is audited for Years 1 through 3. Corp X has not been maintaining records relating to the transactions with FC. The District Director issues a notice of failure to maintain records. Corp X has already been subject to the monetary penalty of $10,000 for each of Years 1, 2, and 3 for failure to file Form 5472 and, therefore, a monetary penalty under paragraph (a) of this section for failure to maintain records is not assessed. However, an additional penalty is assessed after the 90th day following the mailing of the notice of failure to maintain records. Corp X develops a record maintenance system as required by section 6038A and § 1.6038A-3. On the 180th day following the mailing of the notice of failure to maintain records, Corp X demonstrates to the satisfaction of the District Director that the newly developed record maintenance system will comply with the requirements of § 1.6038A-3 and the increase in the monetary penalty after notification ceases to accrue. The additional penalty for failure to maintain records is $30,000. An additional penalty of $30,000 per year is assessed for each of years 2 and 3 for the failure to maintain records for a total of $90,000.

26 C.F.R. § 1.6038A-4(a)-(g).

G. Judicial Determination

I found no preservation laws that provide access to a judicial officer.

III. Conclusion

There are thousands of federal, state, and municipal statutes, regulations, and ordinances that impose a duty to preserve. These laws impose preservation obligations in a myriad of ways. While none of these laws include all of the elements suggested by the E-Discovery Panel, they do include some of the elements and shed light on different ways the duty to preserve has been imposed.

TAB 7

Conference Subcommittee March Agenda

I have set out below a new Draft Agenda to explain the topics that are still on the table. Some of these topics have not generated a great deal of enthusiasm, and may well drop off the table. However, I have included them here so that the Advisory Committee, subcommittee, and interested outside observers will be able to reflect on what we have considered before we allow a valuable proposal to be shelved. This Agenda is a Mark-up of the 1/17/11 and 2/18/11 Agendas and reflects the current state of our thinking following the March 4 meeting by conference call. Notes on the March 4 meeting are attached.

As an overview, there is strong support for focusing on the outset of the litigation – the requirements and timing of the Rule 26(f) conference among the parties and the Rule 16 Conference with the Court. That is the point in the litigation where the parameters (and tone) of the litigation are set. That is the time that the lawyers should cooperate, and that is also the time that the judge can exercise early judicial case management. There are various suggestions with respect to the timing of those conferences and the degree to which parties should be able to launch discovery prior to the Rule 16 Conference so that the Judge can focus on concrete discovery issues.

At the same time, some of the responses from the Subcommittee noted that we really need more information from experienced practitioners about what the actual experience is with these conferences. Is the Rule 26(f) conference really useful and is it occurring? Why do judges not conduct Rule 16 conferences if they do not? (The results of the FJC Survey suggest strongly that many judges do not conduct such conferences.) Emery Lee has suggested at our last meeting that there may be a need for more basic research and indeed this is an area where some focused questioning of lawyers and judges may be useful. Whether initial disclosure is useful or not is also a question that could be put to lawyers and judges.

There is also strong support for making proportionality more prominent in the Rules. While it is true that proportionality is already included in Rule 26(b)(2)(C), and that Rule is referenced in Rule 26(b)(1), it is simply a fact that parties and indeed Courts frequently refer to the permissible scope of discovery by focusing solely on the first two sentences, and sometimes only the first sentence of Rule 26(b)(1). Rule 26(g)(1)(B)(iii) repeats the need for proportionality, but commands even less attention. Proportionality is somewhat akin to the notice requirement of Rule 45 that has been there but is often ignored. When proportionality is so important, some greater emphasis should be given to it.

There continues to be strong support for some amendments to the discovery Rules, in particular adopting the suggestions of Dan Girard to limit discovery abuse, and perhaps including pre-motion conferences before discovery motions, although there is also a suggestion that if the conference is not held within a given period of time, the motion can be filed.

This Agenda does not include the issues of *Iqbal/Twombly* and the appropriate response, if any, to those decisions, including any changes to pleading or initial discovery to deal with the issues raised. Those issues are being dealt with separately by the Committee. Similarly, the Agenda does not deal with the issues of E-Discovery, preservation, and sanctions for E-Discovery abuses, all of which are being dealt with by the Discovery Subcommittee. While other issues of Discovery are discussed in the Agenda, they are discussed with the recognition that the Discovery Subcommittee may decide to pursue them or to cooperate in formulating responses to those issues.

It is noteworthy that the proposals receiving most support further some of the main themes that emerged from Duke: proportionality for discovery, cooperation, judicial case management, and perhaps some tweaking of current Rules to discourage abuse.

I hope that the current Agenda will be the basis for the next discussion of the Subcommittee as well

as for comment by any interested observers at the Austin meeting.

Rule 7: Pleadings and Motions

There have been suggestions that pre-motion conferences should be required before certain types of motions, such as motions to dismiss, motions for summary judgment and discovery motions. The Rules currently include the requirement for a "meet and confer" before discovery motions, see Rule 37(a)(1), but do not require a conference with the Court.

There is much to be said for pre-motion conferences. They can assure that motions to dismiss will not be met with a request to amend, and some summary judgment motions could be discouraged. This may be worthwhile discussing, but my sense is that there is no groundswell to interfere with individual judges' rules on this subject. Some judges like the conferences while others do not. An Administrative Office survey of district web sites has shown only a few local rules or practices requiring pre-motion conferences. **There could be a requirement that a party wishing to make a motion to dismiss advise the Court of such a motion prior to making it. That could be the subject of a conference, or part of the Rule 16 Conference.**

However, there continues to be some enthusiasm for the promotion of pre-motion conferences before discovery motions. There are reports of judges being inundated with discovery motions. Discovery issues often can be disposed of at such conferences. **I respectfully suggest the SDNY Rule: "No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has been resolved as a consequence of such a conference."**

There is some support for the SDNY Rule, although there is also a question whether the current requirement of a meet and confer does much good. This may also be the subject of further FJC research.

There is also a suggestion that if a pre-motion discovery conference were required, there should be a requirement that if no conference occurs within a given period of time, the motion can be filed. This would avoid precluding the motion by not holding the conference.

Rule 16: Pretrial Conferences; Scheduling; Management.

Because there was consensus at Duke that judicial management should be encouraged, this Rule warrants substantial attention.

1. The Rule requires the District Judge or the Magistrate Judge to issue a scheduling order. But the Rule does not require that the judicial officer confer with the parties – even by phone. Rule 16(b)(1) now requires that the scheduling order be issued after the court receives the Rule 26(f) report from the parties, or after "consulting" with the parties at a "scheduling conference or by telephone, mail, or other means." Failing to confer with the parties prevents judicial interaction and possible control of the case at the outset. We also know from the FJC survey that in many cases an order setting a cutoff of discovery is not in fact issued. **Consider adding a requirement to Rule 16(b)(1) that the scheduling order is to be issued after a conference with the judicial officer, whether in person or by telephone, unless the judicial officer waives the requirement of a conference for good cause.**

2. **Consider setting a date by which the parties must abandon any claims or defenses that can no longer be asserted in good faith. This could be added to Rule 16(b)(3)(B) as a permitted subject of a scheduling order.**

3. **The timing of the scheduling order is 120 days after any defendant has been served or 90 days after any defendant has appeared, whichever is earlier. This builds delay into the process, particularly for cases that could be resolved promptly at the outset. See Rule 16(b)(2). This is related to the timing of the initial Planning conference of the parties and the submission of their Rule 26(f) report to the Court, although those timing requirements can be excused by the Court. See Rule 26(f)(1),(2), (4). Consider shortening the time limits in Rule 16(b)(2). Perhaps also consider scheduling the conference before a responsive pleading is scheduled to be filed so that the Court can consider any question of amendments to moot motions to dismiss.**

4. **While probably not a part of a Rule, individual courts could develop model scheduling orders for various types of cases, and the FJC could provide guidance on the various scheduling orders that are being used for various types of cases.**

5. **There is also some support for increasing the items that should be included in a Rule 16 Order.**

Discovery Issues. The Discovery Subcommittee under Judge Campbell has primary responsibility for discovery issues and any discovery proposals must be coordinated with that subcommittee. Our subcommittee will work with Judge Campbell on any proposals that merit further pursuit. The issue of E-Discovery, and particularly any rule with respect to preservation and sanctions was a major subject of the Duke Conference and is already being pursued by Judge Campbell and his Subcommittee. Therefore that major subject will not even be discussed in this Agenda. However, there were other subjects that could be part of our Agenda but which must be coordinated with Judge Campbell's subcommittee. They are discussed in the November Agenda Materials (NAM) at 355-58. I have highlighted some of the issues below, but continue to welcome any other suggestions.

Rule 26: Duty to Disclose: General Provisions Governing Discovery

1. Required Disclosures. Rule 26(a)(1). Some have suggested that initial disclosures are nearly useless and should be eliminated. Others have suggested that they should be strengthened. See NAM at p. 355. The employment lawyers are pursuing a set of initial form interrogatories and requests to produce to be used in employment discrimination cases. These may be a model for other specific cases, using discovery once again to accomplish the tasks assigned to initial disclosure as it was first adopted in 1993. We should discuss whether there is any sentiment to proceed further on this issue at this time.

2. Scope of Discovery: Rule 26(b)(1): The bar is divided on whether there should be a change in the scope of discovery, and this may not be a subject on which there is consensus, to the extent that the Rule includes the possibility of discovery with respect to "any matter relevant to the subject matter" after a showing of good cause. However, **we should consider whether the concept of proportionality should be included in the scope of discovery. As noted at the outset, while proportionality is included in the Rule, and referred to in the paragraph concerning the scope of discovery, it comes at the end of the paragraph and is not usually referred to when describing the scope of discovery. If it were included in the first sentence of the Rule, it would actually be referred to by courts when describing the scope of discovery and measuring the permissibility of requested discovery.**

3. Include a requirement of cooperation in the Rules. Rule 37 is entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." But there is no substantive requirement to cooperate in the Rule. The duty of cooperation could be included in Rules 16, 26(b), (f), and (g).

The duty of cooperation could be emphasized by amending Rule 1. There is some support for making it clear that Rule 1 applies to parties as well as to judges, obliging parties and their lawyers to use the Rules to serve the just, speedy, and inexpensive determination of every action. (There have been other proposals to change the reach of Rule 1, but they have failed to command any support.)

4. Timing of Discovery: Rule 26(d): Discovery cannot be propounded until the parties have met and conferred at their Rule 26(f) conference. This may delay the progress of discovery. **It may be useful to allow discovery to be propounded prior to the Rule 26(f) conference, and to allow disputes with respect to initial discovery to be raised with the Court at the Rule 16 Conference. The Rule could provide that initial discovery requests could be propounded, but no responses are required before the initial conference with the Court. The timing of the initial proceedings should be examined.**

5. Cost shifting. There are various proposals for cost-shifting. **There is some support for making it clear that the Court can order conditions – including the payment of costs as a condition of any discovery. This could be placed in Rule 26(b)(2). The possibility of conditions already appears in connection with ESI in Rule 26(b)(2)(B).**

6. **The three Girard proposals (NAM 356-57):**

a) Amend Rule 26(g)(1)(B)(I) to specify that signing a discovery request, response, or objection represents that the document is "not evasive, consistent with these rules and..."

b) Clarify Rules 37 and 34 to make it clear that sanctions may be imposed if a party fails to produce documents as well as if the party fails to respond that inspection will be permitted.

c) Discourage boilerplate responses to Rule 34 Requests by making it clear whether documents are being withheld on the basis of objections.

7. Should there be any Rule that stays discovery pending a decision on a motion to dismiss. There is a division on this subject and it relates to the *Iqbal/Twombly* issues.

8. Contention Interrogatories: There are some cases where interrogatories are useful, but they can be abused. The question is whether there should be further limits. Contention interrogatories are permitted now, but the court can order that they await the completion of designated discovery. The presumption could be reversed and require that contention interrogatories only be served after the conclusion of discovery, unless the court otherwise orders.

9. The numerical limits for discovery methods and the subjects of discovery could be changed. See NAM p. 358. **There is particular support for considering an initial limit on requests to produce under Rule 34. On the other hand, there is pretty strong opposition to including numerical limits on requests to admit on the grounds that it is difficult to set such limits and it may drive parties to make more general requests for documents rather than particular requests.**

10. There is some question as to whether Requests to Admit are useful and whether they should be limited in number and whether they should require Court approval before serving them.

I continue to welcome any additional items that should be on our Agenda.

2010 Conference Subcommittee Meeting: 4 March 2011

The 2010 Conference Subcommittee met by conference call on March 4, 2011. Subcommittee participants included Judge John G. Koeltl, Subcommittee Chair, Professor Steven Gensler, Judge Paul Grimm, and Judge Gene H.K. Pratter. Judge Mark R. Kravitz, Advisory Committee Chair, also participated, along with Judge David G. Campbell, chair of the Discovery Subcommittee. Judge Lee H. Rosenthal and Judge Diane Wood represented the Standing Committee. Judge Barbara Rothstein and Dr. Emery Lee represented the Federal Judicial Center. Peter McCabe, Esq., Andrea Kuperman, Esq., and James Ishida represented the Administrative Office. Professor Edward H. Cooper participated as Reporter.

Judge Koeltl began the meeting by noting that the purpose of the meeting is to focus on the part of the 2010 Conference agenda that addresses possible changes in the Civil Rules. Many proposals were made. Some already have been put aside because, however worthy in purpose, they would add undesirable detail and length to the rules. Those that remain on the active agenda can be winnowed down to a smaller package of changes that deserve serious consideration in the first round. It likely will be better to develop a group of changes that can be proposed and take effect at the same time, gaining more concentrated attention and impact.

Pursuing these projects will take time. The Advisory Committee's immediate agenda is full. The April meeting will study a proposal to publish a set of Rule 45 changes for comment, including alternative approaches to some provisions. It will review the early work toward discovery issues focused on preservation and spoliation, problems that seem to be aggravated by discovery of electronically stored information. With the FJC study of the docket data on Rule 12(b)(6) dismissals, including the fate of amendments, the many questions raised by the *Twombly* and *Iqbal* decisions will be ripe for extended discussion.

The result of this meeting should be an agenda that describes potential rules amendments for consideration at the Advisory Committee meeting. The list may prompt Committee members to suggest additional changes, and to comment on the value and urgency of the agenda items. Suggestions were made at the November meeting that the Subcommittee should take a more aggressive approach to respond to the problems identified at the 2010 Conference. Developing that discussion this April will be useful. The devoted observers who follow the Committee's work also may be prompted to make similar contributions.

RULE 16, 26 (F)

The Conference demonstrated widespread support for looking at how cases begin. The timing of Rule 16 conferences, and of the Rule 26(f) party-discovery conference, should be studied. One possibility would be to require an early initial Rule 16 conference with the judge. "We really need to know what's going on." The
rules do not seem to be working as intended.

One judge noted that it is not clear whether lawyers in his court actually have Rule 26(f) conferences. "I get very few reports."

Another judge noted that many judges request attorneys to provide a lot of information before the Rule 16 conference. She does this. This practice requires the lawyers to get together to discuss

the case. The result is to focus on the areas of agreement and the areas of disagreement. Another judge said she does the same thing. She asks whether the lawyers intend to make motions, what is a desirable trial date, and so on. Three other judges noted that they follow similar practices, and that they all get Rule 26(f) reports. The reports usually are detailed, especially in cases with e-discovery.

The question becomes the perennial one: do we need more rules? Will adding requirements simply increase costs for the parties? Or will generalizing these desirable practices reduce costs? At least three judges said that the practices reduce costs by eliminating a lot of litigation. And they can induce settlement. The lawyers, moreover, often want to talk to the judge. The conference can be enormously helpful even when there are no pending motions, and even when the parties believe they are in agreement on many issues.

Another judge agreed that the Rule 16 conference is critical. The lawyers may agree to an early settlement conference.

Rule 16(b) directs that there must be a scheduling order, but it does not direct that there be an actual conference with the court. In addition, the FJC survey for the Conference suggests that scheduling orders may not always be entered as required. The survey found that discovery cutoffs were set in only 44% to 45% of the cases studied. That may be explained by disposing of some cases by motion or early settlement, but it is suspicious.

As useful as a mandatory Rule 16 conference in all cases may seem, there is a fair question whether judges have the necessary resources. The Eastern District of California has a case load of 1,200 cases per judge. Holding a conference in all of those cases could prove impossible.

The burden of a mandatory conference could be reduced by extending the provision of Rule 16(b)(1) that authorizes exemptions from the scheduling-order requirement for categories of cases by local rule. Or an exemption could be allowed for the categories of cases exempted from initial disclosure by Rule 26(a)(1)(B) — the categories were drawn from a study of local rules creating exemptions from the sheduling-order requirement, and were estimated at the time to account for approximately one-third of the federal docket. Or the conference requirement could be mollified — either reduced to "should," or as "must, unless the court orders otherwise."

It remains uncertain whether a national rule can be effective in changing actual practice. Judicial education may be an important first step. But a mandatory rule "would send a strong message." "There is a need in virtually every represented litigant's case for a conference with the judge." If indeed some judges now shirk the scheduling-order requirement, it would be useful to know why. The data from the FJC study for the Conference probably will not reveal the characteristics of the cases that did not have scheduling orders.

The FJC has been asked by the Committee on Court Administration and Case Management to study the congested courts to see what distinguishes these districts from districts with the fastest case dispositions. It would be good to know whether failure to issue a scheduling order coincides with slower dockets; it is difficult to imagine managing a case without a scheduling order.

Learning whether judges are holding Rule 16 conferences, and the reasons for not holding them when not held, could be important. So too for learning whether Rule 26(f) reports are not provided in significant numbers of cases, either generally or in particular courts.

One difficulty will be bridging the gap between association and causation. For example, longer times to disposition in courts that tend to omit scheduling orders might show that the absence of a scheduling order causes delay. But it also might reflect only the reality that the parties will

manage the case in light of conditions that make a prompt trial, or even prompt disposition of dispositive motions, unlikely. Requiring prompt preparation for events that will occur only long after the close of discovery and a motions deadline might even be counter-productive.

It was suggested that "to do it right," a survey would have to be made by addressing questions to judges. Surveys of judges are approached with caution because of the burdens involved. And if there are not "huge effects," it can be difficult to pin down the effects of any particular practice. But it may be possible to find useful information in the replication data base. Docket information may not be as reliable. A Rule 26(f) report, for example, should be docketed, and under a label that identifies it, but that may not always be the case.

It was suggested that the National Center for State Courts has done many studies of the practices that distinguish efficient courts from inefficient courts. We should look to them to see whether they can provide valuable information. But it also was noted that it may be difficult to transfer statistics from state courts to federal courts because of real differences in the nature of the cases. And of course their studies will not tell us what federal judges are doing.

Getting information about current federal practices in courts around the country will be important. The FJC has not done a survey of district judges recently; a survey of magistrate judges was done more recently to explore the use of the 2006 e-discovery rules. The FJC may be able to do both a judge survey and also an exploration of the data base. The work should be coordinated with other Judicial Conference committees to make the most of the work and the burdens that will be imposed. Before that is done, it will be important to have some idea of what rules changes are being seriously considered.

The purpose of the proposed work will be to test the hypothesis that Rule 16 conferences are not held early enough, and perhaps regularly and often enough. It may be that there are good reasons for the time lag built into Rule 16(b), for example, but it is important to know what is happening.

DISCOVERY

Many of the Conference panels addressed discovery issues. The Discovery Subcommittee is already at work on issues of preservation and spoliation, particularly with respect to electronically stored information. Whatever additional issues the Discovery Subcommittee wishes to study will become their responsibility. To the extent that issues remain, this Subcommittee can take them on.

Proportionality is one of the topics that drew repeated attention. Rule 26(b)(2) addresses proportionality directly, although not by name. Other discovery rules reflect it as well, particularly Rule 26(g)(1)(B)(iii). But there are grounds to suspect that judges often fail to enforce proportionality, in part because parties do not raise it. Rule 26(b)(1) expressly incorporates Rule 26(b)(2)(C), and this redundancy was deliberately adopted and maintained in the Style Project to emphasize the importance of proportionality. But it is not discussed as frequently as it would be if litigators and courts thought it to be fundamental. And "it is a long way from Rule 26(b)(1) to 26(b)(2)(C)." Perhaps "proportionality" should be added as an explicit rule term. If it is inserted, perhaps in Rule 26(b)(1), it will be important to provide examples. Apart from the Committee Note, best practices guides might prove most effective.

It was suggested that the trick is to get judges to apply proportionality in a sensible manner. Education is needed to emphasize what proportionality is, and what is the judge's role in achieving it. A judge remarked that "I do it all the time in routine cases, but it is more difficult in complicated cases." One device that often works is to require letters from the lawyers saying what each thinks is the best outcome, what the worst; there is a remarkable overlap. With a pretty accurate view of

what the case is worth, it is possible to back out a discovery plan. A plaintiff, for example, may be told that it can pose discovery questions that require no more than X hours of the defendant's time to answer. The result often is discovery that is focused remarkably well. Another judge said that after a case survives a motion to dismiss, he directs the parties for estimates of damages, and then tells the lawyers they have to present litigation budgets to their clients.

Daniel Girard proposed three modest rules amendments at the conference. The first would discourage evasive responses by amending Rule 26(g)(1)(B)(i) to provide that signing a discovery request, response, or objection certifies that it is "not evasive." The second would repair gaps in rule language by amending Rule 37(a)(3)(B)(iv) to authorize a motion to compel if "a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34." A supporting change would be made in rule 34(b)(2)(B). The third change would address a problem of ambiguity created by many discovery responses. The responding party often begins with a long set of boilerplate objections, repeats the objections in responding to each individual request, and then produces documents without revealing whether responsive documents have been withheld under cover of the general objection. The proposed cure would add a sentence to Rule 34(b)(2)(C): "Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection." All three proposals deserve continuing study.

Another "discovery" topic is initial disclosure. It provokes divided reactions. Some lawyers think it worthless. Others think it valuable. Still others think it is ineffective in its present form, but could be made useful by returning to the more searching disclosures required in the 1993 version.

Cost-shifting is another perennial discovery topic. Defense interests want it to be considered. It would be controversial. Perhaps it could be approached in conjunction with proportionality — a party who is willing to pay part of all of the costs of expanded discovery might be allowed, by court order, to go beyond what the court otherwise would find proportional.

PRE-MOTION CONFERENCES

Some courts, whether by local rule or individual judge practice, require a conference with the court before filing a discovery motion. This practice could be adopted as a national rule. And it could be extended to require a conference before filing a motion to dismiss or for summary judgment. Would a rule amendment be a good idea?

A judge noted that another member of his court requires a conference before a motion is filed under Rule 12 or Rule 56. That judge has the same number of motions as he has without the conference requirement. It would be wrong to draft a rule that enables a judge to forbid filing a motion authorized by the rules. Before pursuing this idea, it would be good to develop empirical information to test whether a conference reduces the number of motions, or improves the quality of motions and facilitates faster or better-informed disposition.

Another judge said that he does hold conferences before a summary-judgment motion can be filed, and that he occasionally holds conferences before 12(b)(6) motions — most likely in complex cases such as securities-law actions. The conference is not designed to prevent motions. "If you want to file a motion, that's fine." He also offers a party who faces a motion to dismiss an opportunity to amend, but with the warning that if the pleading is amended and the motion is granted, leave to amend again will not be granted. Holding pre-motion conferences is important because Rule 16 conferences tend to be held much too late. His practice is to call parties in for a conference after there is an answer or a motion filed before an answer.

A judge agreed that it is desirable to offer leave to amend up through the time when the pleader sees the motion to dismiss and knows what the issues are. This practice is possible because every morning the judge receives a print-out listing all the actions taken the day before in every case on his docket. When there is a motion to dismiss the plaintiff is offered an opportunity to amend, with the warning that if they choose not to amend a dismissal — if that is the outcome — will be with prejudice.

The local rule in the Southern District of New York requiring a conference before filing a motion under the discovery rules has virtually done away with discovery motions. It is not to be expected that pre-filing conferences will do away with motions to dismiss or for summary judgment. But many districts or judges require pre-motion conferences, and find that the issues are worked out.

One source of information would be to survey local rules and individual judge orders requiring pre-motion conferences. In the Eastern District of Pennsylvania, for example, the conference is left up to individual judges; most require the conference. Other judges noted that they require parties to have good-faith discussions among themselves before the conference; this is important to the conference's success. If the survey shows that most judges do it for discovery motions, it might be desirable to adopt a uniform practice by amending the national rules. But adopting the conference requirement for Rules 12 and 56 is likely to be much more controversial. And a conference requirement for discovery motions is not likely to work for all cases — it could easily prove a disaster with pro se litigants.

Additional information may be gleaned from lawyers as the Southern District of New York works on a pilot project. The possibility of requiring pre-filing conferences for motions under Rules 12 and 56 is being considered. The experience in discovery has been a success — the virtual disappearance of actual motions contrasts with other districts that confront many "case-delaying discovery motions."

It was agreed that the Administrative Office will undertake a survey of local rules and individual judge practices reflected on district-court websites.

RULE 1

Several participants in the Conference suggested that Rule 1 should be revised to make it clear that attorneys as well as the court are responsible for administering the rules to achieve the just, speedy, and inexpensive determination of every action. Lawyers are uniquely responsible for the cooperation so often praised at the conference, and they are initially responsible for holding litigation tactics in reasonable proportion to the needs of the action. The 1993 Committee Note, indeed, observes that attorneys share Rule 1 responsibilities with the court. Revised rule text would provide an anchor for the duty to cooperate. And it could be framed in a way that avoids any need to attempt an explicit definition or formulation of what it means to cooperate. The rule could "put lawyers on the hook," and give judges a tool to enforce reasonable behavior.

This suggestion was met by the complaint that it seems vague. Rule 1 seems largely symbolic, but amending it to place purported responsibilities on lawyers would be an invitation to litigate collateral issues. Cooperation is more a function of bar culture, and toward the extremes becomes a matter of professional responsibility.

A similar observation suggested that Rule 1 is well established. Changing the rule text may cause more problems without accomplishing much good. Elizabeth Cabraser's conference writings showed that courts are increasingly using Rule 1 to address discovery abuses. If the Subcommittee chooses to keep this topic on the agenda, it may be that the current agenda will carry forward for a

while without any further deletions. That is not inappropriate; topics that elicit little interest in the next few months can be discarded as the work progresses.

Rule 1 will be kept on the list of topics for further discussion. The number itself serves as a reminder that it will be wise to order the agenda around themes rather than rule numbers. Discussing the concept of cooperation can include discovery, motion practice, Rule 1, and perhaps other topics. Rule 1 should not come first on the list, lest it seem to be presented as the most important or promising topic.

"ROCKET DOCKET"

Loren Kieve's Conference paper extolling the case-management procedures used in the Eastern District of Virginia, commonly called the "Rocket Docket," suggests approaches that deserve close study. They have achieved remarkable reductions in the average time required to conclude their cases. The paper describes studies that find lawyers generally like this approach. But it is not so clear that lawyers really do like it. There is at least equal support for the conclusion that many lawyers hate it. The impact of the practices is that a lawyer with a case there cannot attend to anything else, and cases tend not to settle because the lawyers are so busy with discovery and motions. Another participant suggested that judges love it and lawyers hate it. Yet another said that lawyers generally hate it. It also may be wondered what litigants think about it.

A judge who tried cases in the Eastern District as a lawyer said that their practice abandons the individual docket practices followed in most districts. Motions are heard on Fridays. Any available judge entertains the motions. They are decided from the bench — even summary-judgment motions may be decided this way.

Some statistics exist on the effects of the rocket docket. The average time to disposition is 157 days from filing to conclusion, 44% of the national average. Only the Western District of Wisconsin is quicker, and its speed reflects special circumstances. It will be useful to explore what other studies have been done. Loren Kieve's paper describes some academic studies.

If this topic generates truly serious interest, it may be important to design a careful study of the sort the FJC does so well. But before that, it will be useful to arrange to hear from judges in the Eastern District and lawyers who practice there. An effort will be made to identify lawyers who favor the practice and those who question it. Separate panels of judges and lawyers will be invited to present their views to the Advisory Committee at the November meeting.

MOTION PRACTICE

Time limits to act on motions continue to be suggested. One version would simply set a deadline; 60 days is a common period. Other versions would add a consequence — the motion is automatically granted, or automatically denied, if the deadline is missed. These suggestions tend to be popular with lawyers, and viewed with dismay by judges who actually have to manage crowded dockets. They will remain on the agenda.

SPECIFIC DISCOVERY LIMITS

Suggestions are regularly made that limits should be imposed on the number of Rule 34 requests to produce and Rule 36 requests for admission, similar to the Rule 30 and 31 limits on the number of depositions and the Rule 33 limits on the numbers of interrogatories. As with the present limits, the court could expand — or for that matter reduce — the presumptive numbers. Defining what counts as a single Rule 34 request might prove even more difficult than the attempt to define

a single interrogatory. The FJC study done for the Conference suggests that many cases have few if any requests to admit, while some cases do encounter relatively large numbers. These topics will remain on the agenda.

Specific questions also have been raised about contention interrogatories. Some observers suggest they be forbidden. Others suggest they should be deferred to the close of all discovery. In the past, it has been thought that contention discovery can be useful in the early stages of an action to narrow the actually disputed issues and thus help to control other discovery. Perhaps pleading practice will evolve in directions that reduce this potential value. Again, this topic will remain on the agenda.

GENERAL

The meeting concluded by noting again the importance of judicial education. It would be good to know whether there is a correlation between attendance at FJC conferences and a judge's discovery management practices. Educating judges is important. Education in the needs of civil litigation may be particularly important for judges who come to the bench from a background primarily in criminal law. Issues such as case management and proportionality are important issues to be covered with new judges.

The importance of education can be seen from another angle. Rule 26(b)(2) was added to impose proportionality limits in 1983. Its proponents thought they had solved the problem of disproportionate discovery. No one thinks the solution has been implemented effectively enough, often enough. And the current uneasiness about evolving pleading standards may wash back to corrode the faith in proportionality — if pleading standards are seen to be increasingly applied to the disadvantage of plaintiffs, the corresponding demand for discovery to facilitate sufficient pleading may add to the difficulty of rule revision.

"Duke" Subcommittee Notes: November 4, 2010

The Duke Subcommittee held a conference call on November 4, 2010. Participants included Judge John G. Koeltl, Chair, and members Professor Steven S. Gensler, Judge Paul W. Grimm, Peter D. Keisler, Esq., and Judge Gene Pratter. Judge Mark R. Kravitz participated as chair of the Advisory Committee, as did Judge Lee H. Rosenthal, chair of the Standing Committee. Judge Barbara Rothstein participated as Director of the Federal Judicial Center, and Judge Diane P. Wood participated as liaison from the Standing Committee. Andrea Kuperman, Rules Clerk for Judge Rosenthal, and Peter McCabe, of the Administrative Office, also participated.

Judge Koeltl reminded participants of the next steps to be taken. Supporting materials are included in the agenda book for the November Advisory Committee meeting. They include a "Menu" that summarizes many of the proposals for revising the Civil Rules that were advanced at the Duke Conference. The Menu also notes a few of the proposals that seem to focus on identifying and fostering best practices, but that also might lead to rules amendments. A separate slot on the November agenda addresses a range of approaches that might be taken if it is determined that the pleading decisions in the *Twombly* and *Iqbal* cases justify amendments of the rules.

One of the Subcommittee chores will be to consider the optimal allocation of effort among this Subcommittee, the Discovery Subcommittee, and the Advisory Committee. Many of the Conference suggestions focus on discovery. Responses to pleading issues might include some version of discovery shaped — and controlled — to enable adequate pleading. The Discovery Subcommittee chaired by Judge Campbell is already working on the preservation and spoliation issues that figured prominently in Conference discussions, particularly with respect to discovery of electronically stored information. This Subcommittee may come to be involved with some of these matters, launched by Conference discussions, in light of the overlap of pleading with discovery, the sheer volume of discovery proposals, and the prospect that at some point some subcommittee may need to be charged with exploring pleading proposals.

The immediate task is to prepare for the Subcommittee meeting on November 16 in conjunction with the Advisory Committee meeting. It will be important to determine the priorities for Subcommittee work. One approach may be to develop a package of rules amendments that respond to Conference proposals. That would be a good outcome. But it is not the only possible good outcome. It also can be good to study the proposals and to conclude that the most important improvements should be pursued first by means of fostering best practices through education programs, readily accessible publications, pilot projects, and like endeavors.

Illustrations of possible rules changes are easy to come by. Among them is to increase the emphasis in Rule text on the need for proportionality. Rules 1, 16, or 26 are possible locations. Among the discovery proposals are those that would increase use of presumptive limits on the number of discovery events; examples might be limiting the numbers of Rule 34 requests to produce or Rule 36 requests for admissions. Dan Girard suggested a number of modest changes that, together, might significantly reduce the level of evasive discovery responses.

More generally, it will be desirable to work toward proposals that will be attractive to, and win support from, a broad spectrum of lawyers.

It will be helpful, if time allows, to have Subcommittee members make suggestions for important topics before the November 16 meeting. The suggestions may range across the full range of possibilities, without any reason to rely only on the topics identified in the menu put together to stimulate discussion.

The ways of addressing best practices also should be considered. Judge Koeltl has consulted with Judge Rothstein and with Judge Robinson, who chairs the Court Administration and Case

Management Committee. CACM is focusing its attention on the next generation CM/ECF system. This is a long-term and ongoing project. The design of the system will affect the way judges do their work. They are not now engaged in any separate case-management work or designing any pilot projects. But they would like to be informed of the work done by this Subcommittee.

CACM has recently released the second edition of their Civil Litigation Management Manual. It is really very good. A number of judges worked very hard on it. But it says that it is not to be relied on as authority, and that it creates no rights. It is a tool to be used primarily by judges and CACM is reluctant to dictate its view of best practices to other judges. It does not appear to have been written for use by lawyers who could rely on it to suggest its practices to judges. But it would be good to promote its use by lawyers who could understand the best practices and, in turn, suggest them to judges. Judge Robinson will speak with Judge Leighton about these questions.

The Manual could be updated to refer to the Duke Conference papers. It is available in e-form, so updating is easily possible. Of course the Manual is a CACM responsibility. The Civil Rules Committee's role would be to advance helpful suggestions for revising the Manual, and for publicizing it more effectively. The Manual is introduced to new judges at the "baby judges" school, but it would be good to promote it with more senior judges.

Judge Rothstein observed that the Manual is supported by joint work of the FJC and AO staffs. Producing it involved a lot of work. But it has not caught on in the way that pocket guides have. It might help to put big parts of the Manual into separate pocket guides that would seem more easily accessible. Perhaps the form is what puts people off — it may seem massive and difficult to penetrate. But the new edition has been available only for about a month. It may catch on better with time.

It also was observed that "many resources can become too many." It is one thing to direct lawyers and judges to the resources that are available now. If they proliferate into a greater number of overlapping materials, the result may be confusion that detracts from the hoped-for uses.

A more specific question was whether the material in the Manual on e-discovery might usefully be broken out into a pocket guide. A lot of useful Conference proposals address e-discovery, and combining them into the Manual and then a pocket guide based on the Manual could be helpful.

Other Conference materials that might usefully be added to the Manual include Steve Sussman's best practices, and Judge Grimm's e-discovery rules for the District of Maryland.

Judges Rosenthal and Grimm, and Professor Gensler, agreed to work with Judge Rothstein and the FJC and CACM to promote additions to the Manual and to promote use of the Manual.

Professor Gensler's good work in gathering local e-discovery rules was noted as the basis for asking whether it would be useful to undertake a similar effort to survey local rules on general discovery management. This would be a big project. And formal local rules will not reflect the full world of current practices. Local rules do not often embody the range of practices even within the relevant district, and Conference participants observed that individual judges do not always comply with local rules. But making a compendium available for consultation by all courts could be useful as they continue to address the problems that were highlighted at the Conference, and could help to identify and promote best practices. The question whether to undertake this task was held open, perhaps to be addressed at the November 16 meeting.

Various views were expressed about the relative sense of urgency underlying different Conference topics. It was agreed that there is a real sense of urgency about e-discovery topics; the Discovery Subcommittee is already working on some of these. There also is a real sense of unease about developing pleading standards, although there is no consensus on what — if anything —

should be done to address this topic. There was widespread agreement that active, hands-on judicial case management is important, and that in many cases there is not enough of it. So too it was agreed that cooperation among lawyers is very important, and that the culture of lawyering should be redirected toward increased cooperation.

In addition to these areas of agreement, many lawyers expressed great frustration that judges often take too long to rule on motions. There were some suggestions to impose specific presumptive time limits, perhaps 60 or 90 days. But there are reasons for the delays. Judges have many tasks apart from ruling on motions in civil litigation. And many of the motions are not designed for speedy disposition. Summary-judgment motions often "arrive in boxes," and there may be many of both the motions and the boxes. Some motions generate a suspicion that they were filed for the purpose of adding to delay, not in hopes of a speedy disposition. The six-month list provides effective encouragement to decide motions, albeit on a time frame double the suggested 90 days. There are a lot of zeros in the reports of motions held for more than six months, accompanied, to be sure, by significant spikes in the number of motions rulings made on the eve of the reporting deadline. And some substantial part of lawyer dissatisfaction on this score may be due to other things. One part is frustration at "never seeing the judge." No pre-argument conference, no planning discovery, no deciding discovery disputes, no hearing on the motion. Those topics go back to the wish for active, hands-on case management.

Both the hearings on the current Rule 56 amendments and the Duke Conference discussions described concerns about a specific problem with timely motion rulings. Rulings on summary judgment motions seem too often to be delayed until the eve of trial. That is a bad practice. It should be discouraged in the Manual.

Turning to pilot projects, Judge Koeltl noted that the IAALS has some pilot projects ongoing in state courts. The Northern District of Illinois has advanced a long way in an e-discovery project, monitored by the FJC. The Sedona Conference is considering design of a pilot project. Should the Subcommittee, with the FJC, encourage others? Perhaps something on ECF? Something to compare to the Seventh Circuit project? Or Steve Sussman's best practices, or the District of Maryland rules? Some districts might be eager to do what can be done to explore means of enhancing efficiency in case management.

If the Subcommittee comes to promote pilot projects, it will be important to strive for coordination, a focus on small numbers, and help from the FJC. FJC help will be critical in ensuring that projects are designed in ways that support evaluation of the results — whether the pilot practices worked, and what impact they had. As one example, it might be useful to talk with the people managing the Seventh Circuit project to find out what improvements might be made in designing a parallel project. Copycat projects are not likely to be helpful. But a project designed in a different way, or to assess a different approach, could be useful.

Consideration of possible pilot project subjects will be an important part of the Subcommittee work going forward.

REPORT: DUKE CONFERENCE SUBCOMMITTEE

TO: Civil Rules Advisory Committee

FROM: Hon. John G. Koeltl, Chair Duke Conference Subcommittee

The Duke Conference Subcommittee has been formed to determine the best ways to seize the benefits of the papers, panel discussions, and general participation presented at the Conference. The Conference generated a wealth of valuable ideas that deserve prompt and effective consideration. The importance of carrying forward the impetus provided by the Conference is reflected in the Report to the Chief Justice.

The Subcommittee launched its work during a conference call meeting on September 10. Notes are attached.

Many of the Conference ideas seem best suited to implementation by means that do not involve amending the Civil Rules. Some — such as the repeated suggestions that the Rules are just fine as written, and what is missing is solid enforcement — seem best considered as suggestions for developing programs and materials that will better educate judges, and perhaps the bar, in pervasive but general ways. Many offer more detailed suggestions of best practices that can be followed within the present rules. The frequently repeated pleas for prompt, continuing, and active case management are a familiar example. Again, manuals, best-practices guides, and education are useful tools to address these concerns. But many of these suggestions also may be cast in terms that suggest possible rule amendments. An example is the suggestion that an early pretrial conference be made mandatory, apparently for fear that educational efforts may not prove sufficiently effective.

Other suggestions go directly to amending the Rules, beginning with Rule 1.

The Subcommittee will sort through the suggestions in an effort to determine which should be initially pursued outside the rule-amending process. A recommendation to take that approach may eventuall y yield to the conclusion that only a rule amendment will effect the desired improvement; close and continuing attention will be devoted to the more important issues. The Federal Judicial Center will play a central role in these activities.

Consideration of possible rule amendments will begin with a comprehensive review of the Conference materials. Many of the proposals are identified in the Subcommittee Menu, which also is attached. The list is not all-inclusive. Some of the proposals seem unlikely to be manageable in the regular process. The choices reflected in the menu may be wrong, however; suggestions for added rules topics will be welcome. Even within the list, not all ideas are equally strong candidates for development with the resources available for the first phase. The Subcommittee will be aided in its consideration by the reactions of the full Advisory Committee as to relative importance and feasibility.

The menu includes many suggestions directed to initial disclosure under Rule 26(a)(1) and to discovery more generally. Continuing dissatisfaction with discovery practice is no surprise. These suggestions raise important questions as to the allocation of responsibilities among the Discovery Subcommittee, the Duke Conference Subcommittee, any subcommittee that may be assigned to study pleading practices when the time comes to determine whether new rules are needed, and the Advisory Committee. Limits on the amount of work that can fairly be assigned to any one subcommittee, the apparent separability of some issues from others, and the overall value of maintaining the momentum generated by the Conference will affect the ways in which these allocations are made.

SUBCOMMITTEE MENU: RULES PROPOSALS

INTRODUCTION

This memorandum compiles some of the suggestions made at the Duke Conference for amending the Civil Rules. Many of the suggestions addressed discovery and pleading. Most of those suggestions are omitted here. The Discovery Subcommittee is working on preservation and spoliation issues, and may take up other discovery issues. But some discovery issues are noted here because it may become useful for this Subcommittee to address them. Any allocation between the Discovery Subcommittee and this Subcommittee will turn on the overall volume of discovery issues taken on for prompt attention and on the severability of some issues from the ongoing work of the Discovery Subcommittee. Pleading issues are being addressed separately for the time being; this Subcommittee or some new Subcommittee may be asked to address them when the time for action comes close.

The mass of Conference materials is great. A few proposals have been omitted deliberately because they do not seem likely prospects for present consideration. Others may have been overlooked. Subcommittee members should add any proposal that seems to merit consideration, drawing not only from explicit Conference proposals but also from ideas inspired by the Conference.

Descriptions of the proposals are generally brief. The purpose is to identify topics that deserve prompt development, not to provide full-blown evaluation.

The proposals are organized roughly in the order of Rule number, recognizing that some proposals affect two or more Rules and that others do not fit well within any present rule.

Some proposals present issues that might be addressed by rules amendments, but also might be addressed by other means, often working within the framework of a present rule. These proposals are described separately, choosing those that seem plausible candidates for consideration in the rulemaking process.

I RULES PROPOSALS

The Duke Conference deliberately and successfully sought out participants representing the full spectrum of experience with, and perspectives on, contemporary practice under the Civil Rules. As hoped, they generated proposals that reflect the diversity of their experiences and perspectives. Conflicting proposals may indicate that present practice has it just about right, but must be evaluated to make that diagnosis. So too, the absence of conflict does not mean that a proposal is worthy of further consideration.

General

One ABA respondent thinks the Civil Rules "include too much detailed preparation and filing."

Rule 1

Many participants drew support from the lofty goals of Rule 1 — the "just, speedy, and inexpensive determination of every action and proceeding." Some of the discussion suggested, or at least implied, that Rule 1 might be revised to provide greater direction on better realizing these related aspirations.

The need to set reasonable time limits for processing an action, and for holding litigants to the time limits, might be expressed.

The need for proportionality, reasonably tailoring the level of litigation activity to the needs of each action, might be expressed in Rule 1, not merely in the discovery rules.

Lawyers, not only the courts, might be made responsible for working toward the Rule 1 goals.

Various arguments were made that tradeoffs must be made between the Rule 1 goals. Speedy and inexpensive determinations may in some sense reduce the total quality of justice produced by the system across all cases, but they are intrinsically important. This concern is in part another argument for expressing the need for proportionality. Essentially the same conclusion can be reached from an opposite direction: justice is not sacrificed but achieved by increasing speed and reducing expense in order to maintain a system that is reasonably available to determine disputes. Alan Morrison's paper observes: "The good news is that courts and parties rarely rely on Rule 1"; "to be accurate, Rule 1 should be recast to require the courts to provide a 'just determination of every action,' and to do so with 'appropriate speed and without undue expense' under the circumstances."

ACTL/IAALS pilot project rules would add these words to Rule 1: "just, timely, efficient, and cost-effective determination * * *." In addition, whether as part of Rule 1 or perhaps as a new Rule 1.1, the rules would direct the court and the parties to "assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." The Center for Constitutional Litigation responds that "[m]andating cost/benefit analysis is neither desirable nor practical." The attempt in Rule 26(b)(2) to require proportionality in discovery "is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases." It should not be extended.

The most ambitious Rule 1 proposal is advanced in Bone, Improving Rule 1: A Master Rule for the Federal Rules. 87 Denver U.L. Rev. 287 (2010), presented as a conference paper. A brief summary would be misleading. Essentially he argues that Rule 1 reflects the values of 1938: procedure is separate from substance, it is instrumental, it works best when judges are free from any technical rules but can exercise discretion to proceed in ways that achieve the best result in each particular case. A different view is required today. "[T]he most sensible goal for procedure is distributional. * * * [A]n optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants. * * * Adjudication has a public purpose," to enforce substantive law. "[O]utcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." Different substantive rights invoke different levels of importance — "if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight." There is more. Rethinking the purposes of procedure does not lead to specific rules proposals, but it could be a place to begin.

Rule 2: One Form of [Transsubstantive] Action

Skepticism about the attempt to squeeze all varieties of litigation into a single "transsubstantive" set of rules was expressed frequently. Much of the attention focused on pleading and discovery, but the questions are more general. Reform could be sought by different strategies. One would carry forward the general character of the rules, making special provision only for "complex" cases or categories of cases that in practice have proved to fare poorly in the general rules. Another would be to create a "simplified" system that reduces the opportunities for extensive litigation. Pleading and discovery are likely to hold center stage in exploring these matters. But the

purpose of the inquiry may be sufficiently separate from the base-line pleading and discovery questions to justify independent consideration.

The IAALS "areas of convergence" paper, p. 8, suggests adhering to transsubstantivity in general, but with flexibility to create different sets of rules for certain types of cases. It found "some support" for experimenting with simplified procedure.

The ABA 21st Century proposals were "open to the idea that different standard timelines might be applied depending on the nature or size of the matter," pointing to a 4-track system in New Jersey. Don L. Davis pointed to the three-level Discovery Control Plans under Tex.R.Civ.P. 192.4.

Vice Chief Justice Hurwitz describes special Arizona procedures for medical malpractice actions, including three sets of uniform interrogatories — plaintiff to individual health-care provider, plaintiff to institutional provider, and defendants to plaintiff. There also is a complex case court project, governed by separate pretrial rules.

Professor Gensler writes at length on case management, exploring alternatives that include more particularized, less discretion-dependent rules for all cases; abandoning trans-substantivity, in whole or in part, by adopting substance-specific rules tailored to different categories of litigation; "track" systems more formalized than general case-management authority; and "simplified rules" for some — presumably simpler — types of cases.

One ABA respondent pointed to California Code of Civil Procedure §§ 90-100 as a model of Economic Litigation for Limited Civil Cases.

Rule 4

Professor Carrington urges that the Committee consider amending Rule 4(d) waiver-of-service provisions by extending the payment of expenses of service to defendants who are not located in the United States, see Rule 4(d)(2).

Rule 7

The ABA would require that every motion be accompanied by a certificate that counsel have conferred in good faith, or attempted to confer, to resolve or narrow the issues in dispute. Only stipulated motions and those for summary judgment would be excepted. Some ABA respondents, however, suggested that "meet and confer" is a waste of time — no one gives up anything anyway. A somewhat different criticism is that the requirement encourages unreasonable behavior: the lawyer can always back off before the court learns of it by a motion.

There was criticism of local rules read to require "permission" to file a motion. But several respondents in the NELA survey urged such a requirement for summary judgment, at least in employment cases.

Rule 8(b)

Quite apart from pleadings that state a claim, answers also came in for substantial criticism. The ABA proposals reflect a fear that "responsive pleading has become an expensive game." "[A]n answer is often an opaque, uninformative document." It would be cheaper to allow a simple general denial along with any affirmative defenses, but this alternative seems unattractive, particularly if pleading obligations are raised for claims. Plaintiffs could help themselves by making fact

allegations "in short factual sentences." This is not a proposal to revise Rule 8(b). Earlier versions may suggest the reason — Rule 8(b) is just fine as written; the problem is widespread disregard.

Many NELA respondents expressed great dissatisfaction with answers that flout Rule 8(b) requirements.

Rule 11

Professor Miller suggests it might help to partially reinstate compensation and punishment as legitimate objectives "to promote efficiency and compliance." In addition, it may be possible to "see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values." 60 Duke L.J. 1, 126.

One ABA respondent suggested a deadline to abandon claims or defenses. If a claim or defense is not in fact pursued after the deadline, the adversary should be awarded the fees and expenses incurred in preparing to contest it.

Rule 12

The ABA suggests adding a requirement that except in complex cases, the court rule promptly on a motion to dismiss, and must rule within 60 days after full briefing.

Rule 16

Most of the proposals aimed at pretrial conferences recommend stronger case management by more vigorous use of present Rule 16. But the New York City Bar recommendation is this: "Strong and consistent judicial management will * * * be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now." A defendant that intends to file a Rule 12(b) motion or a motion for summary adjudication should inform the court so that the initial pretrial conference can be scheduled before the motion is filed. ACTL/IAALS Rule 8.1 similarly requires a pretrial conference "as soon as practicable after appearance of all parties." Rule 8.2 requires the judge to set a trial date as soon as possible after the initial conference. Rule 9.4 independently requires that a trial date be set at the earliest practicable time, and forbids change "absent extraordinary circumstances."

In addressing case management, Professor Miller emphasizes the need for training, education, and other work outside the rules. But he adds: "It may be that recent thinking about management matters has been too static and that Rule 16 and the Manual are not yet sufficiently delineated and textured to meet the challenges of the more difficult aspects of contemporary litigation." 60 Duke L.J. 1, 117-118.

Rule 23

The Center for Constitutional Litigation takes issue with "common impact" rulings by some courts that are described as allowing certification of a class only if each and every class member is harmed in the same way. The proposal would amend Rule 23(b)(3) so that the predominance of common questions is determined "solely based on issues presented at trial," and so that the fact or quantity of individual injury "need not be proven at trial." A new rule 23(c)(6) would support this provision by permitting an award of aggregate class damages, to be allocated after trial by statistical or sampling methods, or some other reasonable method.

Rule 48

Judge Higginbotham's paper reflects continuing interest in restoring the 12-person civil jury, adding a casual footnote suggesting a 10-2 majority verdict rule. (An effort to restore 12-person juries was defeated in the mid-1990s.) Paul Carrington's paper also focuses on the 12-person jury.

Rule 56: Summary Judgment

Summary adjudication: The New York City Bar proposes a new procedure that blends disposition on the pleadings with summary judgment as we know it. The proposal is well fleshed out, warranting description of the details. A defendant can make a conventional motion to dismiss for failure to state a claim, and is entitled to a stay of all discovery pending resolution of the motion. Instead, the defendant may answer — including any affirmative defenses and counterclaims — and move for summary adjudication. Summary adjudication requires enhanced initial disclosures that include 14 hours of deposition "of each side," and other disclosures within a scope determined by the court. Decision is governed by the summary-judgment standard, but may not be deferred for further discovery. Any issue resolved by summary adjudication becomes the law of the case. A plaintiff may move for summary adjudication if the defendant moves for it, and also if the defendant unsuccessfully seeks a conventional Rule 12(b) dismissal or files an answer. The theory is that motions on the pleadings fail too often, in part because leave to replead is commonly given, while summary judgment is available only after costly discovery. Summary adjudication of some issues will control the scope of discovery, even if it does not resolve any claim, counterclaim, or other claim. Determination of the scope of the mandatory disclosure would be shaped by the issues that commonly prove important in the particular type of litigation, and often would be limited to easily available documents and the like.

The New York County Lawyers' Association explicitly disagrees with the City Bar. Issues that are properly decided without discovery can be resolved under Rule 12. Rule 56 can be used to focus summary judgment on specific issues, with authority to stage discovery as appropriate to those issues. The motion for summary adjudication may be used deliberately to delay discovery. And if summary adjudication is granted on some issues, the attempt to deny discovery on those issues might undesirably curtail discovery. And adhering to the summary adjudication would be unfair if subsequent discovery showed it was wrong. (Note: it is unclear how the "law of the case" phrase in the City Bar proposal is intended. Standard law-of-the-case doctrine permits a district court to depart from its own earlier rulings in a case when error appears.)

Stueve & Keenan propose to allow depositions of nonparties only by agreement or order. In part because of this limit they would allow parties to oppose summary judgment by a declaration, "based on substantial facts, of what they reasonably project that a non-party trial witness' testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible." Sanctions may be imposed for making a representation "that proves false at trial."

Accelerated disposition: The ACTL/IAALS proposals include consideration of an "application" procedure adopted in some Provinces of Canada. The details are sketchy. But the idea is that a plaintiff may commence an action with what is in effect a motion for summary judgment, supplying supporting materials — documents and affidavits — at the outset. Depositions are limited to what is in the affidavits. The court may combine the procedure for decision on the record as it develops with a trial on some particular points.

(The 2010 version of Rule 56 allows a party to move for summary judgment at any time until 30 days after the close of all discovery. The Committee Note observes that a plaintiff can move for

summary judgment at the beginning of the action. This procedure may be useful in collection cases, bringing summary judgment back close to its origins. In addition, needs for prompt specific relief can often be addressed by injunction, see Rule 65. Declaratory relief may be suitable for expeditious handling in situations that do not call for much discovery. These opportunities, the newly emphasized availability of partial summary judgment, and the general authority to manage an action probably suffice.)

Prompt Ruling: Complaints heard during the hearings on Rule 56 amendments were repeated at the conference: some courts take too long to rule on summary-judgment motions, and at times fail to rule at all. The ABA advances an expectation that courts are expected to rule promptly, and always within 90 days after full briefing; it is not clear whether this is proposed as a rule amendment.

Permission to File: Several of the NELA respondents suggested that abuses of Rule 56 in employment cases justify imposing a requirement that a party get court permission to file the motion.

Inefficiency: During the Rule 56 review there were several suggestions that deciding a motion for summary judgment often is more work for the judge than a trial. One NELA respondent offered a similar thought: "[I]t has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment." Others voiced the same thought.

Self-Serving Self-Contradiction: An NELA respondent suggests: "Allow clients to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment." This addresses the common practice of refusing to consider self-serving, self-contradicting affidavits.

Disposition on an Administrative Record: Proceedings for review on an administrative record often are resolved without discovery. That is the reason why "an action for review on an administrative record" is excluded from initial disclosure by Rule 26(a)(1)(B)(i). The full routine of Rule 56 summary judgment may be more procedure than these cases need. For that matter, the standard for review is different from the summary-judgment standard. It would be possible to adopt a new and streamlined rule specifically for prompt disposition. But there is good reason to believe that courts generally manage to achieve disposition on the administrative record without undue complication or confusion of the parties. Little need appears to pursue this subject.

Rule 68: Settlement

Conference participants addressed settlement from a variety of perspectives. Professor Nagareda's paper frames the question: "how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial." Current pretrial procedures focus on whether trial should occur, but trials rarely occur. And discovery imposes great costs in moving from motions on the pleadings to summary judgment. Perhaps procedures should be developed to help the parties price the settlement value of the claim. One possibility is a "preliminary judgment," provided by the court at an early stage; the judgment could be rejected by any party, but would provide a valuable anchor for converging on settlement value.

Rule 68 has hovered somewhere in the back cupboards of the Committee agenda for several years. Informal suggestions, and occasional formal requests, would invigorate Rule 68 by various means. Stiffer sanctions — fee shifting — are the most common element. There has been considerable resistance to taking up this thorny topic in the wake of unsatisfactory attempts in the 1980s and 1990s. But the time may come again.

Initial Disclosures

Rule 26(a)(1) initial disclosures were questioned by many participants. The subject may be sufficiently distinctive to be considered independently of other discovery topics.

The questions were almost mutually offsetting. Some suggest that the initial disclosures are nearly useless because they do not do enough — all of the same materials will be sought again by discovery demands that embrace them within requests that seek all information relevant to the same issues, not merely the information the disclosing party may use to support its own positions. Others suggest that the initial disclosures are unnecessary because they do too much, forcing the parties to work to disclose materials that the other parties would not bother to seek in discovery.

There is a plausible argument that initial disclosures should either be broadened so as to support a meaningful reduction in subsequent discovery, replaced by some other form of automatic discovery, or abandoned.

Abandonment is easy to accomplish. The ABA proposes both to broaden and to narrow initial disclosures. Disclosure of witnesses would be broadened to cover "each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subject of the information for each individual." It would be narrowed by deleting any initial disclosure requirement as to documents. The parties would be expected to discuss and attempt to agree on exchange of documents before the initial pretrial conference.

Replacement might take a variety of forms of automatic discovery. Initial efforts to develop form interrogatories are under way. A relatively modest approach might amend Rule 33 to allow serving interrogatories, of a sort perhaps vaguely defined,
with the complaint and with the answer. The interrogatories could address the topics now covered by Rule 26(a)(1), or go further. They might include a request to produce all documents identified in the response, or perhaps some subset of the identified documents.

Expanded disclosure obligations can be easily imagined. Arizona Rule 26.1 establishes sweeping disclosure obligations that could be used as a model. (The IAALS survey of Arizona lawyers paints a rather mixed picture on experience under Rule 26.1, but supports the conclusion that this approach merits consideration.) The Center for Constitutional Litigation would require that, in a civil equivalent of *Brady* requirements for prosecutors, defendants produce materials that support the plaintiff's allegations. Judge Baylson suggests a "civil Brady" rule in broader terms: concepts of professional responsibility should oblige attorneys to disclose all materially unfavorable information (also rendered as information favorable to the other side), and parties should be likewise required to disclose; rules of professional confidentiality and privilege should not restrict this duty.

In addition to scope, timing also might be addressed. The ABA proposes that the plaintiff's disclosures be made within 30 days from filing the complaint, and the defendant's within 30 days from filing an answer.

There was one particular rule suggestion. An NELA respondent said that defendants almost always identify the address and phone number of witnesses as "c/o the attorney." The rule should be clear that the actual address and phone number are required.

Discovery: Detailed Changes

Allocation of discovery work between this Subcommittee and the Discovery Subcommittee will be an ad hoc accommodation of the agendas and interests of each. Often enough it will make

sense to assign detailed proposals to the Discovery Subcommittee. But coordination requires initial consideration — it may be useful for this Subcommittee to open up proposals that seem worthy, whether the result is to develop them fully or instead is to commend them for full development by the Discovery Subcommittee.

Scope: The ABA 21st Century proposals reflect a division among Special Committee members — some would eliminate discovery on the "subject matter" of the action. The final ACTL/IAALS proposals suggest consideration of a narrower scope — perhaps by changing the definition of relevance.

Cost Shifting: A proposal by Lawyers for Civil Justice illustrates the kinds of topics that are so important as to be readily separated from more detailed discovery work. This proposal is captured in the first sentence of the suggested rule: "A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules." (A similar protection for nonparties appears later.) The ACTL/IAALS final report suggests considering cost-shifting or co-pay rules.

Professor Nagareda suggests that a plaintiff should pay the defendant's discovery costs if the defendant wins on summary judgment. How about partial summary judgment? Affecting the tactical uses of Rule 56 motions?

Controlled Access: Judge Higginbotham's proposal is a good (and brief) example of a generic possibility: Require the parties to file statements of "likely controlling issues of fact and law." The court then asserts early case control over access to discovery in two steps: First, a hearing on access; then a hearing on access with a "'peek at the merits.' The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery."

Judge Baylson makes a related suggestion that might be cast in rule form: mid-way during discovery, each party files a statement of contentions "in limited, numbered paragraphs with record support, with the opposing party making a substantive response." See the Manual for Complex Litigation (Fourth), § 11.473. This can help the parties adjust their discovery efforts.

Girard Proposals: Three specific proposals by Daniel Girard provide a good illustration of possible small-scale revisions that might accomplish quit a bit. They are advanced in Girard & Espinosa, "Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules," 87 Denver U.L. Rev. ___ (2010):

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * " documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying

procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce; rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" — a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

(3) Rule 34: General Objections: The underlying behavior is a tendency of responding parties to begin a response with a boilerplate list of general objections, and often to repeat the same objections in responding to each individual request, and at the same time to produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. The proposed cure is to add this sentence to Rule 34(b)(2)(C): "Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection." (Judge Baylson makes a related suggestion, observing that "[s]ome parties serve objections routinely and maintain them * * *, preferencing every response as 'subject to objections.' This tactic delays discovery and may obfuscate the search for facts." Absent party agreement otherwise, "objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.")

Start Discovery Sooner: Delaying discovery until after the Rule 26(f) conference is a bad idea, or so it is argued by a respondent to the ABA survey.

Stay Discovery Pending Motions: Various suggestions were made about staying discovery pending disposition of a motion to dismiss. The ABA proposal is that the court has discretion whether to stay discovery, but adds that the court should promptly rule on the motion — the ruling should not take more than 60 days in cases that are not "complex." The ACTL/IAALS Pilot Program Rule 6.1 similarly relies on discretion. The New York City Bar proposal would stay discovery pending disposition of a motion to dismiss or for summary adjudication, unless the court finds good cause to allow discovery. In order to deter strategic use of the motions, discovery should proceed on an expedited basis if a motion is made and denied. Lawyers for Civil Justice propose a stay unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Exchange Initial Discovery Requests: The New York City Bar recommends that parties be required to exchange actual discovery requests at the Rule 26(f) conference and a Rule 16(b) conference so that the reasonableness of the discovery can be discussed with the court.

Place of Depositions: More than one NELA respondent would require "corporate deponents" to travel to the district where litigation is conducted. Cf. present Rule 37(d)(1).

Word-Processing Format: A suggestion that pops up at intervals over the years is renewed: Rule 33, 34, and 36 discovery requests should be in an electronic form that allows responses directly in the form.

Number of Interrogatories: An NELA respondent suggests that the limit on the number of interrogatories should be deleted. A larger number of simpler, subject-specific interrogatories can be drafted and answered with less time and expense.

Contention Interrogatories: The ABA finds that contention interrogatories "have become a tool of oppression and undue cost"; they should be prohibited absent agreement of the parties or court order. The New York City Bar believes that contention interrogatories "to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process."

Limit Rule 34: Lawyers for Civil Justice and allies propose limits to 25 requests, to 10 custodial or information sources, and to two years prior to the complaint. Others propose comparable limits; Arizona limits requests to 10 distinct items or categories of items.

Requests to Admit: The ABA again finds oppression, and recommends a limit of 35 requests. (The FJC survey, p. 10, found requests used in 25% to 30% of the closed cases; plaintiffs and defendants reported different medians and means, but the means were always well above the medians — indicating that means, mostly hovering just above 20, are influenced by numbers at least veering toward 35 in quite a few cases.) The ACTL/IAALS invokes the general principle of proportionality, interpreting it to mean that contention interrogatories and requests to admit should be used sparingly, if at all.

Other Limits: The ACTL/IAALS final proposals include limiting the persons from whom discovery can be sought (Arizona allows depositions of parties, expert witnesses, and document custodians; court permission or stipulation is required for others); limiting the time available for discovery; limits on the amount of money a party can spend, or force its opponent to spend on discovery; discovery budgets approved by the clients and the court. Stueve & Keenan would limit depositions to parties, requiring agreement or order to depose expert witnesses and nonparties; in return, they would establish nationwide subpoenas to compel trial testimony.

Sanctions: There are many laments that sanctions are rarely imposed, generating reflex refusals to provide discovery designed to provoke a motion to compel. One NELA respondent spoke to the other side: "[T]he presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries."

Definitions: An NELA respondent: "Add a definitions section to FRCP to reduce wrangling about, for example, whether questions containing 'respecting,' or 'relevant to' or 'related to' must be answered, and if so, what these words include."

Expert Witnesses

The broader proposals for restricting expert-witness practice are better suited to the Evidence Rules than to the Civil Rules. The ACTL/IAALS pilot program rule 11 would require that a Rule 702 expert's testimony be "strictly limited to the contents of the report" furnished in writing. That could be accomplished in Rule 26(a)(2)(B). In addition, the rule would allow only one expert witness per party to testify on "any given issue." (Arizona allows only one witness per side on an issue; if coparties cannot agree, the court chooses.) Their final report suggests that depositions of experts be eliminated if the testimony is limited to the contents of the report.

II NONRULES PROPOSALS

As noted above, some suggestions for reform could be implemented either by rule amendments or by other means of encouraging best practices. In addition, some proposals may fit within the Rules Enabling Act framework without looking toward actual rule amendments. Only a few of these suggestions are noted here.

Enforce Rules

There were many comments, often in different contexts, that much could be accomplished by simply enforcing present rules. One example recurred through the NELA responses — many NELA members believe courts do not honor the discovery rules in ERISA litigation. Apparently the courts treat ERISA claims as review on an "administrative" record that is not to be supplemented..

Summary Judgment

The NELA respondents produced staggering numbers of responses bewailing delay in ruling on summary judgment until the eve of trial. A related and also frequently expressed concern is the practice of holding a final pretrial conference before ruling on summary judgment. And there are requests for oral argument. A variation suggests oral argument before the nonmovant has to file a brief. None of these seems particularly amenable to rule text provisions.

Local Rules

"Local rules projects" have been pursued under the aegis of the Standing Committee. Continuing dissatisfaction with local rules was expressed in several of the surveys. There was widespread feeling that local rules are not always consistent with the national rules. In addition, implementation of the local rules themselves may not be consistent — some individual judges depart from both national and local rules.

Local rules also were praised by some of the ABA answers. One virtue is that they give notice of practices that will be followed whether or not expressed in a formal rule — better that all lawyers have access, not just the knowing insiders. Another is that they may be useful means of trying out ideas that may be proved to warrant general adoption. Yet another may be flexibility: generating sets of model local rules for specific types of litigation may be a way to respond to the shortcomings of transsubstantive procedure. Patent litigation rules are offered as an example.

The National Employment Lawyers Association found a consensus that local rules are not consistently applied within the district. It recommends that the judges of each district meet periodically to discuss their variations on local practice. (This does not seem a likely subject for Rule 83.)

Miscellaneous

Require attorneys to disclose to their own clients an expected budget of the costs of the case from beginning to end, including attorney fees; this should include aggregate data from other cases, and "how they are resolved, on average."

Go Slow

One ABA response echoed a theme that sounds periodically in rules discussions: "Please stop monkeying with the Civil Rules every year or so. Stability and predictability are important * * *. Trying to fix every new problem with a new civil rule is making our system more complex, expensive, and Canonical."

"Duke" Subcommittee Notes: September 10, 2010

The Duke Subcommittee held a conference call on September 10, 2010. Participants included Judge John G. Koeltl, Chair, and members Professor Steven S. Gensler, Judge Paul W. Grimm, and Judge Gene Pratter. Judge Mark R. Kravitz participated as chair of the Advisory Committee. Judge Barbara Rothstein participated as Director of the Federal Judicial Center, and Judge Diane P. Wood participated as liaison from the Standing Committee. John Rabiej, Chief of the Rules Committee Support Office, also participated.

Judge Koeltl began the call by sketching the scope of the Subcommittee's responsibilities. The Duke Conference last May generated much valuable empirical information, with more to come. It also generated many suggestions for work to be done. The work will include consideration of many proposals to amend the Federal Rules of Civil Procedure. It also will include work by the Rules Committees outside the formal Enabling Act process to encourage the work of other groups and, in varying ways, participate in such work. Programs to educate judges and lawyers in the opportunities available to improve administration of present rules will be important.

There may be opportunities to shape the development of manuals that present similar work in more detail, readily and continually available. Professor Marcus has noted that many of the American Bar Association Litigation Section suggestions look like a litigation manual. The Court Administration and Case Management Committee has created a Civil Litigation Management Manual; the second edition is about to appear. It may be possible for this Subcommittee to find a way to enlist the Advisory Committee in the evolution of successive editions.

Continuing empirical projects also will be important. Pilot projects may be used to test new ideas, and will be useful if they are carefully designed at the outset to support accurate evaluation of the results. Still other forms of work may be devised.

Initial consideration of Civil Rules amendments will be undertaken by different groups within the Advisory Committee. Many of the specific proposals, and many of the concerns expressed by the participants, focused on discovery and pleading. The Discovery Subcommittee has already begun to study issues surrounding preservation of potentially discoverable information, with a particular focus on electronically stored information. Other specific discovery issues may also fall within its responsibilities. The first steps in canvassing possible rule changes responding to the pleading decisions in the Twombly and Iqbal cases are being taken by the Advisory Committee chair and reporter. If — or when — the time comes to develop specific proposals, it will be decided whether the work should proceed without the help of a subcommittee. If a subcommittee is assigned to lay the groundwork, it will be necessary to decide whether, in light of other subcommittees' responsibilities, to form a new subcommittee or to rely on an existing subcommittee.

Other rules changes will fall to this Subcommittee. There may be some discovery questions that should be considered by this Subcommittee because they are far separate from the detailed proposals developed by the Discovery Subcommittee or because the Discovery Subcommittee has as much work as it can handle and coordinated work seems feasible. Suggestions to adopt presumptive limits on the permissible number of documents that can be requested under Rule 34, or on the permissible number of requests to admit under Rule 36, may be an example. Another might be finding a way to sharpen the Rules focus on the need for proportionality. The concept appears, without the label, in Rule 26(b)(2)(C), and in the cross-reference to (b)(2)(C) at the end of Rule 26(b)(1). The questions whether "proportionality" should be referred to as such, and whether it might be directly incorporated in defining the scope of discovery, may be fairly severable from the ongoing work of the Discovery Subcommittee. So of the questions whether there is some way to reduce obfuscating, delayed, and evasive responses to discovery requests. Rule 26(g) addresses this problem, but there may be ways to make it more effective. As it is, the fundamental statement of the obligation to ensure that discovery requests, responses, and objections are neither unreasonable nor

unduly burdensome is buried at the very end of the longest rule in the books. This vital principle may need a more prominent statement in the rules.

Another possibility for the discovery rules would be to undertake a fundamental rethinking of the 1938 package of notice pleading, broad discovery, and summary judgment. That work could be undertaken apart from the ongoing Discovery Subcommittee work to improve the detailed implementation of the basic present system. But there is no sense that the time has come for such drastic revision. The Rules Committees have not shown any sign of interest in such a project. There is little reason to expect that any support would emerge. And in the unlikely event that the rules committees might come to think fundamental restructuring is desirable, there is no reason to believe there would be any substantial support beyond the committees. That seems to hold even for less drastic steps, such as further narrowing the scope of discovery that is available without showing good cause. Work of this scope will not be pursued further.

Other rules topics remain. One that drew some attention was to adopt an across-the-board requirement that any motion be preceded by a pre-motion conference, at least among the lawyers and possibly with the court.

Apart from work focused on possible Rule amendments, other projects are likely to involve cooperation with other groups. The Federal Judicial Center has already launched new education programs for judges that reflect lessons learned from the Duke Conference. This Subcommittee may find a useful role to play in supporting these programs. Bar associations and other groups will become involved in programs aimed at practicing lawyers; again, this Subcommittee may find a useful supporting role.

Another useful effort may involve development of "best practices" guides. Some were discussed at the Duke Conference, including Susman's Rules for cooperation that the discovery panel seemed to accept as good practices.

The most important thing is to seize and carry on the forces generated by the Conference. The purpose was to seek help in shaping the Rules Committee's agendas. Great help was provided. It must not be allowed to go to waste.

Judge Kravitz picked up the example of the Susman Rules. They cover a variety of discovery topics. One is that each side can pick 20 documents from the other's privilege log and submit them for in camera examination by the trial judge for a determination whether there is a valid privilege claim. This practice can greatly reduce the misuse of privilege logs to shield critical documents from discovery. Expert depositions are limited to four hours. Cooperation is encouraged — the lawyers agree to call each other before sending a letter or e-mail message. All depositions are videotaped, a process that by itself elicits more cooperative behavior. Agreement is encouraged on such matters as the identification of people whose e-mail messages must be preserved, allowing destruction of others in the ordinary course of system operation.

General discussion began with the observation that Elizabeth Cabraser probably would endorse the Susman Rules. They are calculated to eliminate the "stonewalling" that plaintiffs' lawyers find a continuing problem.

It was noted that some of the best practices discussed at the Conference are established in local district rules. The pre-motion conference is an example. And attorneys who distrust each others' tactics use video depositions.

Another participant noted that "this is cooperative behavior." A video deposition is very useful if there's a dispute about what happened. At least one magistrate judge asks lawyers to videotape their conferences, and finds it works very well. If we want to "tweak the rules," "cooperation" could be worked into Rule 26(f). The District of Maryland Guidelines add an expectation of privacy. The Guidelines became effective last July 1; they were the work of a bar advisory committee. In time, they may provide a useful subject for study. One approach would be to interview attorneys and clients to find out whether the local policy makes it easier to cooperate. Although the Guidelines are already in place, they could be treated as a useful pilot project. Maryland has the advantage of being close to the Federal Judicial Center.

Judge Rothstein noted that the Federal Judicial Center has a number of case-management manuals, called pocket guides. It may be desirable to develop some more pointed guides. The Sedona Conference has developed collaboration principles that might be used to good advantage. Another participant suggested that cooperation is so important that it is useful to put it into the rules in addition to relying on guides. A further suggestion was that experience shows that cooperation is easier for lawyers if the court stresses the need. "Non-confrontational" discovery may be a less threatening label than "cooperative" discovery.

A related suggestion was that bar groups such as the ABA Litigation Section could put on programs to show that vigorous representation is consistent with cooperation, and indeed is better for clients.

The importance of best practice guides and other forms of encouragement was noted by recalling a theme that sounded periodically throughout the conference. If we simply followed present rules in good faith, there would be no need for new rules that attempt to coerce the behavior that the rules now contemplate.

A rejoinder observed that eliciting full cooperation through the present rules will not satisfy those who want significant changes in what the rules permit. The American College of Trial Lawyers and the Institute for the Advancement of the American Legal System want significant changes that would radically limit discovery. The ABA did not propose specific rules changes, but identified pressure points. Steve Gensler has a nice paper for the Sedona Conference on the benefits of cooperation as better representation of the client. The Susman Rules are a useful model. Still, some "tweaks in the rules" would be useful to reassure all lawyers that cooperation is not a sign of weakness.

The prospect of modest rules changes was countered by the observation that "rules changes take forever." Best practices guides can be very useful. Education can be blended in with the statements of best practices. It would be useful to prepare videos that illustrate what does not work. And experienced lawyers would love to make the videos — many are ham actors at heart. Another participant agreed with these suggestions.

Another idea for a pilot project would be tracking systems for different types of cases. The idea would not be a "rocket docket," but simpler procedures designed to reduce cost and delay. Tracks might be assigned on the basis of subject matter, or on some measure of complexity. But past efforts should be remembered — a RAND study showed that tracking systems were not particularly helpful, at least in part because no one wanted to believe that their cases were "simple." And there is a further problem. "Simple cases" can need a lot of supervision when the lawyers refuse to cooperate. And lawyers who cooperate can do very well in complex cases without extensive judicial supervision. It was observed that the FJC did a study of hand-picked districts; some still have forms of tracking systems. It may be that districts that wanted tracking systems liked them. As compared to ad hoc case management, a formal system promotes uniformity and "gives cover to do what you

want to do." And there are simpler sorts of simplified systems. Judge Campbell described at the Conference a much-simplified system that he offers to those that want it — no discovery, no motions, trial within 90 days. This is a new effort; it may become a useful subject for study.

Pilot projects can be undertaken without searching out sources of funding. What is required is to persuade district courts to do it. The FJC can help with the design. And up-front FJC involvement is needed to ensure the design will yield useful empirical data.

Local rules also may be the source of fruitful study. Local rules limiting discovery would be a good subject. The District of Maryland has e-discovery rules, and other districts also have local rules or protocols for e-discovery. The Seventh Circuit project is going along; the first phase resulted in the survey that was described at the Conference, and the second phase is under way. Professor Gensler has a nearly complete list of local e-discovery rules. These rules are an example of subjects that could be surveyed to assess actual current practices that lie outside the national rules.

This discussion concluded with the observation that "there are lots of ideas." The hope is that this Subcommittee will bring order to the process of sorting through them, focusing on what makes the most sense, queuing them up, "so we don't squander the wealth of Conference ideas."

Turning back to publications, the idea of works more extensive than "pocket guides" was raised. A manual "with as much authority and publicity as the Manual for Complex Litigation could do much good. The Manual "is a bible. Everything you want to know is there." If the Civil Litigation Management Manual is good, it would be useful to get people accustomed to using it. And enlisting the Rules Committees in the project to assist the Court Administration and Case Management Committee might make the work still better.

Returning to the topic of rules changes, it was suggested that the Subcommittee needs to gather things together into a package. Topics would include "tweaking" changes; cooperation — perhaps better labeled "non-confrontation"; the possibility of injecting proportionality into the rules in ways more visible than the present rules. As an example, "how many judges now think of proportionality as a limit on the scope of discovery defined in Rule 26(b)(1)"?

The value of "proportionality" was questioned: "proportional to what? To many things. Too many. Perhaps it is not enforceable."

A second caution was noted. The discovery panel at the Conference concluded that there is no need for rule changes, unless they be designed to encourage people to follow the rules we already have. But "a reasonable catalogue of possible rule changes may be a good beginning." We know how long it takes to adopt rules changes; we do not want to lose momentum.

Initial disclosure was considered. Rule 26(a)(1) limits disclosure to witnesses and documents a party may use to support the claims or defenses. Claims or defenses are identified in the pleadings. A complaint is based on the kinds of information the plaintiff should have before filing. Disclosure might be more useful if directed more toward the information needed after filing and when facing a motion to dismiss. It was observed that those who want more initial disclosure link it to diminished discovery. That could be a problem. Views expressed at the Conference suggested that the present system for initial disclosure is generally useless; it should either be expanded or be abolished.

Turning back to case management, it was asked whether there is any effort to link controls on judges to controls on litigants? All reports say that lawyers believe that more hands-on judge involvement is required. There is a general perception that too many judicial officers are not

sufficiently involved. The question may be one of motivating judges, and with it modifying lawyer and litigant behavior. A possible rule change would be to require early Rule 16 conferences.

Another possible rule change would be to require that motions be decided in a prescribed number of days. But any general rule could not take account of the vast differences in the amount of time required to decide different motions, much less the number of motions that confront a judge at any time, to say nothing of other docket responsibilities. There is no reason to consider this possibility.

This theme continued with the observation that many of the comments at the Conference were directed at judges. But it may turn out that good practices can accomplish much good and also save judge time. One judge reported that most discovery disputes can be decided without a motion, and without briefing — a phone call, with a reporter participating, can resolve most matters. Another judge described a local rule that requires a telephone conference with the judge before making a discovery motion, and requires the lawyers to confer with each other before the conference. These practices really work. The lawyers try hard to resolve their differences without making the call, and often do.

A similar practice in the District of Maryland identifies a "duty" discovery judge who will resolve discovery disputes promptly if the judge assigned to the case is not available. The system has been used twice. Knowing a judge is available resolves disputes without need to go to the judge. This is an example of the value of creating an inventory of ideas that are already out there.

And these practices illustrate things that can be done by rule. A local rule can require a pre-motion conference with the judge; the Southern District of New York has such a rule. But if the practice proves to be a truly good idea, it can be incorporated in the national rules to ensure uniformity and encourage its use.

It was agreed that it would be helpful to compile local rules that illustrate best practices. Ideas that seem particularly good could be publicized. The Subcommittee will explore means of doing this, perhaps with the help of the Administrative Office and the FJC. Again, the Civil Litigation Management Manual may be a good place to start. The Seventh Circuit Practitioner's Handbook for Appeals is another example of the sort of best-practices guide that can be useful.

Turning back to programs to educate judges in the good practices developed in other courts, it was noted that the FJC programs for new judges focus heavily on case management. Work is being done on a special-focus program on case management for more experienced judges; one of the challenges will be to find ways to encourage judges to attend.

Summarizing this discussion, several specific proposals for moving the process along were undertaken.

Professor Cooper undertook to provide a catalogue of the possible Rule changes that remain on the table to be discussed, after putting aside the wholesale revision of the Rules and a change in the scope of discovery. There is no need to catalogue the ongoing work of the Discovery Subcommittee on E-Discovery, preservation and sanctions, and the current work of the Chair and Reporter on pleading standards.

Judge Wood undertook to circulate the Seventh Circuit Manual that deals with attorney conduct.

Professor Gensler undertook to work with Judge Rothstein and John Rabiej to determine whether there is a current, readily available catalogue of local rules and practices dealing with discovery and cooperation in the District Courts. These may be reflected in either Local Rules or Standing Orders.

Judge Grimm undertook to circulate the recently adopted local rules for discovery in the District of Maryland.

Judge Koeltl undertook to touch base with CACM to determine what projects CACM had underway in the area of case management to see how we might be of assistance, and to avoid duplication.

All members were encouraged to contact Judge Koeltl with any specific suggestions with respect to pilot projects that warranted discussion so that the FJC could be involved in planning and assessment.

All members were invited to contact Judge Koeltl with thoughts about anything else the Subcommittee should be exploring.

Members are encouraged to provide their input by **October 4, 2010** so that the Committee can possibly hold another conference call prior to the next Advisory Committee meeting on November 15, 2010, and, in any event, have a breakfast meeting at that meeting.

The call concluded be repeating the need to sort out work that can be accomplished in the near term, work — most obviously rules changes — that requires a longer-term effort, and work that can begin now but take place over extended periods. It will be important to keep moving forward.

TAB 8

Oral Report on the Work of the Appellate-Civil Subcommittee

TAB 9

RULE 6(d): "3 DAYS ARE ADDED": STYLE GLITCH AND SUBSTANCE

Introduction

Two quite different questions are posed by Rule 6(d). One, the more fundamental, is whether the "3 days are added" provision encompasses too many different modes of service. That question has caused uncertainty in the past, and has been on the agenda for a while.

The other is a styling glitch that occurred in 2005, before the Style Project but at a time when amendments were drafted under Style Project protocols. The glitch is easily fixed. The harder question is whether the fix should be proposed immediately. Proper timing seems interdependent with two alternatives. If Rule 6(d) is to be changed in substance, it may be better to propose all changes at once. Even if not, it may make sense to delay for a while to see whether the Style Project has produced other missteps that can comfortably be accumulated for corrections in a single package.

I "[W]ithin a specified time after service"

A. THE PROBLEM AND THE FIX

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

As easy as it is to forget the details, the 2005 amendment of what then was Rule 6(e) was prompted by the emergence of four competing ways to calculate the 3 extra days. As the Committee Note says, the amendment was intended "to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served." That is all that was intended.

Styling the language, however, chose words that can easily be read to change something more. Before the amendment, the 3 extra days were provided when a party had a right or was required to act within a prescribed period after service of a notice or other paper "upon the party" if the paper or notice "is served upon the party" by the designated means. "[A]fter service," and "service is made" were meant to convey the same thought — the purpose is to allow extra time to a party who has been served by a means that may not convey actual notice as quickly as personal service or leaving the paper at home or office. There was no thought to provide extra time to the person making service. Probably that was because no one paused to recall that a few rules provide time to act after making service, rather than after being served.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

Literally, to take one example, a defendant who wants to amend an answer could argue that if it mailed the answer it has 24 days to amend under Rule 15(a)(1)(A), because it "may act within a specified time after service." This literal reading may be resisted on the ground that it makes no sense to allow a party to expand its own time to act by choosing the means of service. The defendant knows when the answer was served, even if the mails do not carry it to the plaintiff for two, three,

four, or perhaps even more days. Courts may come to read the rule that way. But the literal meaning also may prevail.

Not much is lost if the literal reading should prevail. None of the opportunities to deliberately generate an added 3 days is likely to create much difficulty. Allowing 17 days for the two 14-day periods would do no more than might happen under the most extensive applications of the former 10-day periods that were measured without counting intervening Saturdays, Sundays, and legal holidays. Rule 15's 20 days were 20 days, but moving from 21 to 24 days at the pleading stage does not seem a big deal.

Neither is much lost if a literal reading awards 3 added days to an unwary litigant who discovers this reading in a moment of desperation, flailing about for a means to recover from an inadvertent failure to act within the basic time period.

But something could be lost if a party deliberately relies on the literal reading, only to be caught up short by a court that rejects this view in favor of the pre-2005 meaning. Our defendant who counted on a right to amend on the 24th day, and preferred to wait past the 21st day, might be required to ask leave to amend and be denied. Or permission must be sought to serve a third-party complaint, or to demand jury trial. It does not seem at all likely that a court would deny a worthy motion for any of these things, particularly if the party claimed deliberate reliance on the new rule language. Still, some risk is there.

This contretemps has been explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A lesson in the Perils Of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). The article, and correspondence with Professor Duane, are attached. There is no indication that the potential trap has been sprung on any litigant, but it may have happened out of sight, and could happen still.

It would be easy to fix the glitch, and probably it should be fixed:

> When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

B. Timing

The fix is easy. Why not do it straightaway?

One snag is that similar provisions appear in other sets of rules. Appellate Rule 26(c) is "after service," but apparently there is no problem because no Appellate Rule sets a time to act after serving, rather than after being served. Criminal Rule 45(c) is nearly verbatim the same as Rule 6(d), but the Criminal Rules Committee Reporters have found no Criminal Rule that creates problems analogous to Civil Rules 14, 15, and 38. They suggest that Criminal Rule 12.1(b)(2) "could be affected," but think any ambiguity is unlikely to cause a serious problem."[1] Bankruptcy Rule 9006(f), on the other hand, read as Rule 6(d) now reads for many years before 2005 — "within a prescribed period after service * * * and the notice or paper * * * is served by mail * * *." The Bankruptcy Rules, moreover, incorporate Civil Rules 14, 15, and 38 either for adversary proceedings or for all litigation. The Bankruptcy Rules Committee Reporter, however, has not been able to

[1] Criminal Rule 12.1(a) authorizes the government to request that the defendant notify the government of any intended alibi defense. If the defendant serves notice, 12.1(b)(1) requires the government to disclose the witnesses it will rely on to establish the defendant's presence at the scene of the offense. 12.1(b)(2) sets the time to disclose as "14 days after the defendant serves notice * * * under Rule 12.1(a)(2), but no later than 14 days before trial."

discover any case addressing the question whether the 3 added days are provided to a person who makes service by mail.

In keeping with recent tradition, it would be desirable to change all these sets of rules in tandem, even though the Appellate and Criminal Rules do not seem to present any occasion to measure time after making service. In addition to uniform wording of parallel provisions, it is possible that a future rule might measure time after making service, requiring a belated amendment of the 3-added-days rule.

Another reason for delay may extend beyond the time required to coordinate with the other advisory committees. There is no apparent urgent need to make the change. The problem has been identified in a law review article, not in developing case law. Unwitting victims who rely unsuccessfully on a literal reading of the new language may be hard to find. Waiting to see what other drafting glitches may emerge from the Style Project itself may make sense. They could be presented as a package for correction in a few years, or earlier if some more important mistake is found. That would avoid a bothersome parade of technical amendments, perhaps some of them offered in years with no other occasion to crank up the public comment period.

Finally, and more specifically, this may be the time to renew the question whether the 3 days should be added following service by any means other than mail.

II Which Modes of Service?

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar question whether Rule 6(d) should add 3 days after being served by leaving the paper with the court clerk, electronic means, or other means consented to in writing. Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Mail may well take more than a day. But what of the others? Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

As noted in part I, Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry that denying 3 added days will affect strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked

to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments took hold on December 1, 2009. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

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December 3, 2010

Peter McCabe
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, D.C. 20544

Dear Mr. McCabe:

I have a suggestion that I would like you to pass along to the Advisory Committee on the Federal Rules of Civil Procedure. It concerns a little-known change that was recently made by accident in the provision of Rule 6 with respect to the proper method for calculating deadlines under the rules.

During the recent stylistic amendments to those rules, the language of what is now Rule 6(d) was amended to refer to situations in which a party may take certain actions only "within a specified time after *service*" (emphasis added).

That unfortunate change, although intended to be merely stylistic, has actually wrought an unintended change in the operation of that Rule.

The mistake can, fortunately, be easily corrected by amending Rule 6(d) to refer instead, as it did before the amendment, to situations in which a party must act within a specified time "after *being served.*"

These two phrases are not synonymous, as I explained in the attached article, *The Federal Rule Of Civil Procedure That Was Changed By Accident: A Lesson In The Perils Of Stylistic Revision*, 62 S.C. L. REV. 41 (2010).

I would be grateful if you would bring this letter and the attached article to the attention of the Advisory Committee and its Chair. Thank you for your consideration and attention.

Yours truly,

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THE FEDERAL RULE OF CIVIL PROCEDURE THAT WAS CHANGED BY ACCIDENT: A LESSON IN THE PERILS OF STYLISTIC REVISION

JAMES J. DUANE*

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I. INTRODUCTION

Recently, the Federal Rules of Civil Procedure underwent a controversial and massive set of stylistic revisions. The process involved "legions of experts,"[1] took two and a half years to complete, and produced more than 600 documents.[2] The drafters insisted that this Style Project would not result in any unintended substantive changes in the Rules.[3] According to the Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of

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1. Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1762 (2004).

2. Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (pt. 1), MICH. B.J., Sept. 2005, at 56, 56.

3. *See id.* ("This project was a style project, and the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes.").

Civil Procedure, its goal was "to translate present text into clear language that does not change the meaning."[4] Indeed, the drafting consultant to the project promised that "the Advisory Committee on Civil Rules took extraordinary steps to avoid making any substantive changes"[5] and stated that "it's almost impossible to convey how excruciatingly careful our process was for redrafting the civil rules to improve their clarity, consistency, and readability—without making substantive changes."[6]

These stylistic revisions have resulted in a tremendous improvement in the clarity and elegance of many of the Federal Rules of Civil Procedure. As a professor who tries each year to teach these Rules to a new set of law students, my job in particular has been made much easier by many of the improvements. But a lively controversy remains regarding whether this benefit was worth its potential cost. Some observers question the value of this project, and others predicted that any alteration of the wording of the Rules would inevitably result in unintended changes of substance. In the view of one commentator, "[s]erious questions exist as to whether the benefits of restyling outweigh the considerable costs of performing this immense task and then in assimilating the product—plus the costs imposed by the inevitable changes of substance inadvertently made by the restylers, and the costs of litigating about those changes."[7] Another skeptic complained of "the near-impossibility of making significant textual changes without changing meaning."[8] That critic predicted: "If the Advisory Committee's distinguished members, advisors, consultants, and reporter missed things that I caught, I have to believe that others will catch things that we all missed."[9]

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4. *Id.* at 1761. Professor Cooper added that "the new rules are intended to bear the same meanings as the rules they replace." *Id.* at 1763.

5. *Id.* at 56. *See also* Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 521–42 (2009) (discussing the goals and methodology of the Advisory Committee); Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure* (pts. I & 2), MICH. B.J., Sept. 2005, at 56, 56–57, MICH. B.J., Oct. 2005, at 52, 52–55 (same).

6. Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25, 25 (2008–2009).

7. FEDERAL RULES OF CIVIL PROCEDURE AND SELECTED OTHER PROCEDURAL PROVISIONS 807 (Kevin M. Clermont ed., Foundation Press 2009) (discussing in an "editor's note" the amendments effective December 1, 2007). One critic lamented that too much of the recent work of the Advisory Committee has consisted of "obsessive 'restyling' and other silly tinkering." *See* RICHARD D. FREER, CIVIL PROCEDURE 308 (2d ed. 2009).

8. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 164 (2006). Professor Hartnett predicted that lawyers dealing with the new rules would, at the very least, "be able to discover and make plausible arguments that [a] new rule does not mean the same thing as [an] old rule." *Id.* at 165.

9. *Id.* at 164–65. In 2009, another commentator echoed the prediction that "there are likely to be other undesirable substantive changes that have yet to be found." Counseller, *supra* note 5, at 565. This is the Article everyone has been waiting for.

As it turns out, the warnings of these critics were prophetic. Despite their best efforts, those involved in the Style Project accidentally changed the way one of the Civil Rules now operates. This Article points out and examines that accidental change, and explains how it will lead to significant complications in the litigation of important issues in real cases, at least until the rule is amended once again.

II. THE QUESTION PRESENTED

Consider the following scenario, which involves an issue that arises with reasonable frequency. Imagine that you are an attorney for the defendant in a civil case in federal court. About two weeks ago, you prepared and filed an answer on behalf of your client. Upon review of that answer, it comes to your attention that there were some important procedural steps you meant to take; you are certain your client would not be pleased to discover that you neglected these steps. (If it makes the story easier for you to think about or enjoy, feel free to assume that you can blame the mistake on a younger lawyer at the law firm or on an office assistant who failed to follow your clear instructions.)[10] Let us assume that the mistakes included one or more of the following three possibilities: (1) You forgot to assert the defenses that the court has no personal jurisdiction over your client, who is subject to suit only in some other venue that would be far more convenient, and that the defendant was not properly served with process;[11] (2) You forgot to request a trial by jury, as you had a right to do;[12] (3) You

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10. One lawyer found that his client's right to a jury trial was lost, even though he made a proper demand and filed it on time, because he failed to serve it in a timely fashion as a result of what was (according to him) "a mistake of his temporary secretary." O'Grady v. U.S. Dist. Court for the E. Dist. of Cal., No. 99-70117, 1999 WL 728524, at *1 (9th Cir. Sept. 16, 1999). Perhaps that is how one becomes a "temporary" secretary.

11. Obviously I am listing the three procedural defenses, *see* FED. R. CIV. P. 12(b)(2), (3), & (5) (referencing the procedural defenses of lack of personal jurisdiction, improper venue, and insufficient service of process), that are most readily subject to waiver under Rule 12(h)(1). I am not including the fourth defense governed by that rule, "insufficient process," *see* FED. R. CIV. P. 12(b)(4), in order to keep this hypothetical situation as realistic as possible. In the real world, it is virtually unheard of for any plaintiff to make that mistake or for any defendant to seriously raise that defense (much less worry about waiving it). *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353, at 334 (3d ed. 2004) (noting the rarity of Rule 12(b)(4) motions). A plaintiff need only use the preprinted model forms provided in the Appendix to the Federal Rules of Civil Procedure, and even in the exceptionally rare case in which the summons is technically deficient, a party can amend it with the permission of the court, *see* FED. R. CIV. P. 4(a)(2), so that error would almost never result in dismissal.

12. *See* FED. R. CIV. P. 38(a) (providing that the right to trial by jury, as declared by the Seventh Amendment or as provided by federal statute, is inviolate). This is a matter of grave concern to some litigants because the choice between a jury and a judge will sometimes make an enormous difference in the outcome of a case. *See* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 477–78 (2005) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63 & tbl.16 & n.11 (1966); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its*

forgot to include in your answer a third-party claim to implead a third-party defendant from whom your client may be entitled to contribution or perhaps even full indemnification.[13]

The good news is that a defendant who neglected to attend to these details when preparing his answer can sometimes correct them.[14] But there is bad news, and a lot of it. Even though the defendant may have a constitutional right to demand a trial by jury or dismissal for lack of personal jurisdiction, a defense lawyer who does not act quickly enough can easily waive those rights.[15] Nor are these unimportant matters; depending on the details of a case, it may make a profound difference to the client whether the defense lawyer preserves the right to insist on a transfer, a dismissal for lack of jurisdiction or improper service of process, or a jury trial.[16] To make matters worse, let us assume that you have good reason to believe that the judge assigned to this case would not be inclined to do you any favors, perhaps based on your experience with the judge in other cases or what you know about the judge's attitude toward defendants charged

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Effects, 18 LAW & HUM. BEHAV. 29, 34, 48 & tbls.12 & 13 (1994); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964)).

13. *See* FED. R. CIV. P. 14(a)(1) (providing that a defendant must obtain leave of the court if it wishes to implead a third party more than fourteen days after serving its original answer).

14. *See* FED. R. CIV. P. 15(a)(2) (providing that a party may amend its pleadings with the other party's consent or with leave of the court and noting that the court should grant leave to amend when justice so requires).

15. *See* FED. R. CIV. P. 12(h)(1) (discussing waiver of the defense of lack of personal jurisdiction); FED. R. CIV. P. 38 (discussing the procedure for demanding a jury trial and the waiver of this right).

16. Why do such issues sometimes matter so greatly to the client? The reasons are well-known to any experienced litigator and not important enough for our purposes to deserve any extended discussion here. Those who desire proof of this assertion need only attend to the fairly significant number of cases decided by the United States Supreme Court with respect to the Seventh Amendment of the Constitution or the Fourteenth Amendment Due Process right to object to the personal jurisdiction of a trial court. Every one of those cases involved parties who were willing to undertake the considerable expense and risk of going all the way to the highest court in the land, sometimes on an interlocutory basis before the case was decided on the merits. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) (personal jurisdiction); Burnham v. Superior Court of Cal., 495 U.S. 604 (1990) (personal jurisdiction); Chauffeurs Local 391 v. Terry, 494 U.S. 558 (1990) (right to jury trial); Ross v. Bernhard, 396 U.S. 531 (1970) (right to jury trial). And those cases represent only the tip of the iceberg, because they do not include the far greater number of cases in which some party petitioned without success for a writ of certiorari on those same grounds. *See, e.g.*, Vaughn v. City of N. Branch, 103 F. App'x 73 (8th Cir. 2004) (right to jury trial), *cert. denied*, 543 U.S. 1065 (2005); Anderson v. Dassault Aviation, 361 F.3d 449 (8th Cir. 2004) (personal jurisdiction), *cert. denied*, 543 U.S. 1015 (2004); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (personal jurisdiction), *cert. denied*, 538 U.S. 1035 (2003). It should also be noted, however, that a "mere" dismissal for improper service of process or lack of personal jurisdiction, although technically not on the merits, may effectively spell the end of the case forever if the statute of limitations expired shortly after the defendant was served, as it often does. *See* Advantedge Bus. Grp. v. Thomas E. Mestmaker & Assocs., 552 F.3d 1233, 1236 (10th Cir. 2009) (citing Gocolay v. N.M. Fed. Sav. & Loan Ass'n, 968 F.2d 1017, 1021 (10th Cir. 1992)) ("[A] dismissal without prejudice can have the practical effect of a dismissal with prejudice if the statute of limitations has expired.").

with the sort of conduct involved in this case. You are anxious, therefore, to find out how quickly you need to act to remedy these situations, preferably without needing to obtain the consent of the judge.

A bit of research quickly reveals the following relevant deadlines[17]:

1. The defenses of personal jurisdiction, venue, and service of process will be waived and lost forever because you omitted them from your answer,[18] unless you act quickly enough to assert them "in an amendment allowed by Rule 15(a)(1) as a matter of course."[19] That rule "requires the party to act very quickly"[20] because a defendant who wishes to amend his answer in that fashion may do so only "within 21 days after *serving* it."[21] These requirements "provide a strict waiver rule,"[22] and after the deadline, the court is powerless to overlook the waiver, even if it is persuaded that the defense has merit and would otherwise require the dismissal of the action.[23]

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17. The deadlines enumerated following this sentence were slightly changed as part of a set of revisions that went into effect on December 1, 2009. *See* FED. R. CIV. P. 6 advisory committee's note (2009 Amendments). At that time, Rule 6 was amended to delete the provision that had formerly excluded weekends and holidays from the calculation of certain deadlines, and the Federal Rules of Civil Procedure were altered to convert almost every deadline into some multiple of seven days so that litigants could simply reckon their obligations in terms of a specific number of weeks. Most ten-day deadlines therefore became fourteen days, and twenty-day deadlines became twenty-one days. *See id.* None of these simple numerical conversions had any bearing on any of the points made in this Article.

18. *See* FED. R. CIV. P. 12(h)(1) (discussing waiver of 12(b) motions).

19. FED. R. CIV. P. 12(h)(1)(B)(ii).

20. 5C WRIGHT & MILLER, *supra* note 11, § 1391, at 514.

21. FED. R. CIV. P. 15(a)(1)(A) (emphasis added). Prior to the amendment of this rule in December 2009, this deadline was twenty days. FED. R. CIV. P. 15(a)(1)(B) (2008) (amended 2009). This rule applies in the fairly common situation in which "a responsive pleading is not allowed," ordinarily because the answer contained no counterclaim, *see* 5B WRIGHT & MILLER, *supra* note 11, § 1345, at 37 (discussing when responsive pleadings are required), and "the action is not yet on the trial calendar." *See* FED. R. CIV. P. 15(a)(1)(B) (2008) (amended 2009). We shall assume that both of these propositions apply to this hypothetical case. Technically, and curiously, this deadline is not one of those specifically enumerated time limits that cannot be extended by the court, *see* FED. R. CIV. P. 6(b)(2), so perhaps in theory one might argue that this deadline could be extended by a judge. But any amendment granted pursuant to an "extension" of the time to amend a pleading under Rule 15(a)(1) would not truly be an amendment "as a matter of course"—that is, one made without judicial permission—but would be the functional equivalent of an amendment under Rule 15(a)(2). *See* Fed. R. CIV. P. 15(a) (noting that any amendment not made as a matter of course must be done either with leave of the court or with written consent of the opposing party). The federal courts have noted that allowing a judge to "extend" the time limits set forth under Rule 15(a)(1) would frustrate the letter of Rule 12(h)(1)(B), which declares that such defenses are waived if they are not included either in the answer or in an amendment permitted as a matter of course. *See* Ellibee v. Leonard, 226 F. App'x 351, 358 (5th Cir. 2007); Glater v. Eli Lilly & Co., 712 F.2d 735, 738 (1st Cir. 1983); Konigsberg v. Shute, 435 F.2d 551, 552 (3d Cir. 1970) (per curiam); Wurz v. Santa Fe Int'l Corp., 423 F. Supp. 91, 93 (D. Del. 1976).

22. *Glater*, 712 F.2d at 738.

23. In most other cases, the failure to amend one's pleading as a matter of course within this twenty-one day deadline is not a matter of great importance because even after that point, a pleading may be amended with the consent of the court and the court is to grant such consent "freely . . .

2. The failure to demand a jury trial in the answer also amounts to a waiver of that precious constitutional right,[24] unless the defendant acts quickly and makes such a demand in writing "no later than 14 days after the last pleading directed to the issue is *served*."[25] A party who waives this right by failing to make a timely demand can, in theory, request forgiveness and a jury trial with a motion under Rule 39(b).[26] But receiving a jury trial through this motion is an illusory prospect for most litigants because granting the motion is within the court's discretion, and "district judges have been extremely reluctant to exercise that discretion."[27] Virtually every litigant who makes a late jury demand does so as a result of "inadvertence" or ignorance of the law—but that excuse, under the law in most circuits, either requires that the court deny the motion for a jury trial,[28] or is at least a sufficient reason to deny the motion,[29] even if the delay in making the demand was fairly minimal.[30]

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when justice so requires." FED. R. CIV. P. 15(a)(2). But that kind of amendment would not be an amendment "as a matter of course," *compare* FED. R. CIV. P. 15(a)(1), *with* FED. R. CIV. P. 15(a)(2), and therefore would not spare the defendant from waiver under Rule 12(h)(1)(B). *See Ellibee*, 226 F. App'x at 358–59 (reversing a dismissal for lack of proper service where the defendant waived that defense by asserting it for the first time in an amended answer less than one month after the deadline to amend as a matter of course); *Konigsberg*, 435 F.2d at 551–52 (reversing the dismissal of a suit for lack of personal jurisdiction because the defendant waived that defense by failing to raise it until seeking leave to amend its answer only eight days after the deadline to amend as a matter of course); J. Slotnik Co. v. Clemco Indus., 127 F.R.D. 435, 440 (D. Mass. 1989) (holding that objection to service of process was waived because it was not raised in the answer or in an amendment as a matter of course); *Wurz*, 423 F. Supp. at 93 (finding that the defendants waived the defense of improper venue because it was first asserted in an amended answer only one week after the deadline to amend as a matter of course).

24. *See* FED. R. CIV. P. 38(d).

25. FED. R. CIV. P. 38(b)(1) (emphasis added). Prior to its amendment in December 2009, Rule 38 required the demand to be made within ten days after service of the answer. *See* FED. R. CIV. P. 38(b)(1) (2008) (amended 2009). For the sake of simplicity, we shall assume that this is a fairly typical case in which the defendant's answer was the last pleading in the case.

26. *See* FED. R. CIV. P. 39(b) (noting that on motion the court can order a jury trial on any issue for which one might have been demanded).

27. 9 WRIGHT & MILLER, *supra* note 11, § 2321, at 270; *see also, e.g.*, Gelardi v. Transamerica Occidental Life Ins. Co., 163 F.R.D. 495, 496 (E.D. Va. 1995) (citing Keatley v. Food Lion, Inc., 715 F. Supp. 1335, 1338 (E.D. Va. 1989)) ("This court grants such motions infrequently, and ordinarily only when the moving party presents some exceptional circumstance, beyond mere inadvertence, to justify the original waiver."). It is easy to understand why so many judges are extremely reluctant to give parties a jury trial after they have waived that right; denying such a motion will always decrease the length and complexity of the trial by eliminating the need for jury selection and jury instructions, and will also decrease the risk of reversal on appeal. *See* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 130 tbl.1 (2009) (noting that the reversal rate in the federal cases studied was 20.4% for jury trials compared with 16.5% for bench trials).

28. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 356 (2d Cir. 2007) (quoting Noonan v. Cunard S.S. Co., 375 F.2d 69, 70 (2d Cir. 1967)); Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1065 n.4 (9th Cir. 2005) (quoting Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000, 1002 (9th Cir. 2001)); Galella v. Onassis, 487 F.2d 986, 996–97 (2d Cir. 1973)

3. The failure to implead the additional defendant can also be remedied without the consent of the judge, but only if the defendant files a third-party complaint adding that new party no later than "14 days after *serving* its original answer."[31] After that deadline expires, the defendant may only implead additional parties if he makes a motion and obtains the consent of the court.[32]

So far, this is all perfectly plain. But then things get a little tricky. All three of these important deadlines dictate that the controlling time periods for the defendant to remedy his mistakes began to run on the day that the defendant served his answer on the plaintiff.[33] To find out whether you can fix some or all of these mistakes, therefore, you would need to check the file and find out the precise date on which you served the answer. But let us assume that when you go back through your file to see the precise date on which you served the answer, the records indicate that you are now extremely close to missing one or more of the deadlines. Maybe you have only a few hours left, or perhaps you have missed the deadline by only a day or two; it does not matter for our purposes which is the case. For one reason or another, the precise calculation of the relevant deadline is a matter of exceptional urgency.

(citing *Noonan*, 375 F.2d at 70) ("Untimely requests for jury trial must be denied unless some cause beyond mere inadvertence is shown.").

29. Andrews v. Columbia Gas Transmission Corp., 544 F.3d 618, 632 (6th Cir. 2008) (citing Misco, Inc. v. U.S. Steel Corp., 784 F.2d 198, 205 (6th Cir. 1986)); Dill v. City of Edmond, Okla., 155 F.3d 1193, 1208 (10th Cir. 1998) (quoting Nissan Motor Corp. v. Burciaga, 982 F.2d 408, 409 (10th Cir. 1992)); Farias v. Bexar Cnty. Bd. of Trs. for Mental Health Mental Retardation Servs., 925 F.2d 866, 873 (5th Cir. 1991) (citing Bush v. Allstate Ins. Co., 425 F.2d 393, 396 (5th Cir. 1970)); Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983); *see also* McCray v. Burrell, 516 F.2d 357, 371 (4th Cir. 1975) (citing Gen. Tire & Rubber Co. v. Watkins, 331 F.2d 192, 197–98 (4th Cir. 1964)) (affirming denial of Rule 39(b) motion in the absence of "exceptional circumstances").

30. Richardson v. Stanley Works, Inc., 597 F.3d 1288, 1292, 1297 (Fed. Cir. 2010) (upholding denial of a jury trial even though demand was filed less than three weeks late); Mega Life & Health Ins. Co., v. Pieniozek, 585 F.3d 1399, 1404–05 (11th Cir. 2009) (upholding denial of a jury trial even though demand was filed only five weeks after the deadline); U.S. Sec. & Exch. Comm'n v. Infinity Grp. Co., 212 F.3d 180, 195–96 (3d Cir. 2000) (upholding denial of a jury trial where demand for the jury trial was less than two months late and the delay caused no prejudice to the opposing party, and noting that "the only justification for the delay was attorney inadvertence"); King v. Patterson, 999 F.2d 351, 352–53 (8th Cir. 1993) (holding that the district court did not abuse its discretion in refusing to grant a jury trial even though a pro se litigant filed his demand less than three months late); Wienke v. Haworth, Inc., No. 92-1021, 1993 WL 6830, at *6 (6th Cir. Jan. 11, 1993) (unpublished table decision) (finding no abuse of discretion by the district court in denying a jury trial even though demand was filed less than three weeks late); Rump v. Philips Lifeline, No. C 09-3271 SI, 2009 WL 3320266, at *1–2 (N.D. Cal. Oct. 14, 2009) (striking a jury demand filed only three weeks late, despite a concession by the district court that the rules governing the deadline for jury demands in cases removed from California state courts "create[] ambiguity and a trap for the unwary").

31. FED. R. CIV. P. 14(a)(1) (emphasis added). Before the amendment in December 2009, the rule set this deadline at ten days after service. FED. R. CIV. P. 14(a)(1) (2008) (amended 2009).

32. FED. R. CIV. P. 14(a)(1).

33. *See* FED. R. CIV. P. 14(a)(1), 15(a)(1), & 38(b).

But there is one possible glimmer of hope. It turns out from your review of the file—no surprise—that you did not serve your answer by personal delivery to the office of the plaintiff's counsel, which would have been rather unusual, but instead sent it to opposing counsel by mail or by electronic transmission.[34] At that point you dimly recall reading something about situations in which a little extra time is sometimes available when a party serves papers by mail.

This set of facts is entirely realistic and squarely poses the following critical question: In the fairly common case in which a defendant desires to take some important action that the Rules only permit within a certain number of days after service of the answer upon opposing counsel—for example, demanding a jury, amending the answer as a matter of course, or impleading an additional party without the consent of the judge—does the law give the defendant an additional three days to complete those actions if, as will usually be the case, the defendant served that answer by mail?

The remainder of this Article is devoted entirely to an examination of this seemingly straightforward question. The answer, as it turns out, is not as simple as most readers are likely to assume. Indeed, it involves some surprisingly intricate issues of statutory construction, all made necessary as the direct result of the supposedly "stylistic" revisions to the Federal Rules of Civil Procedure.

III. THE EVOLUTION OF RULE 6 OF THE FEDERAL RULES OF CIVIL PROCEDURE: WHAT IT SAID BEFORE AND AFTER ITS STYLISTIC REVISION

Every experienced lawyer knows at least a little bit about the provision in Rule 6 of the Federal Rules of Civil Procedure that provides three extra days when calculating certain deadlines that begin to run with service by mail.[35] But one important limitation was written into this rule from the beginning. For the first sixty-five years that the Civil Rules were on the books, dating all the way back to their enactment in 1938,[36] Rule 6 provided three extra days to only one party: the party to whom service was sent through the mail.

The original text of Rule 6 made this point plainly:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice

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34. Of course, it is permissible to serve the answer by delivering it personally to the plaintiff's lawyer or by leaving it at the lawyer's office, FED. R. CIV. P. 5(b)(2)(A) & (B), but that would be relatively unusual. Such personal service usually involves a bit of additional inconvenience. Service by mail is generally more convenient and equally effective in meeting any applicable deadlines, since such service "is complete upon mailing," FED. R. CIV. P. 5(b)(2)(C).

35. *See* FED. R. CIV. P. 6(d).

36. *See* Letter of Transmittal from Homer Cummings, Att'y Gen. of the United States, to Congress (January 3, 1938), *in* 308 U.S. 647 (discussing the United States Supreme Court's adoption of the "Rules of Civil Procedure for the District Courts of the United States").

> or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.[37]

That language was unchanged for nearly half a century, until it was amended in 1987 to replace the words "upon him" with "upon the party,"[38] and then amended in 2001 to include methods of service other than mail.[39] With those two fairly modest amendments in place, the rule read as follows after December of 2001:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.[40]

Under the language of that rule, three extra days were given to "a party" only if (1) the time for that party to take some action began to run when some paper was served "upon *the* party," and (2) that paper was served "upon *the* party" by mail or some method other than personal service.[41] The use of the definite article made it obvious that the party getting the three extra days was the same party who was served with the paper that began the running of the party's time to act. The original version of Rule 6 made this point even more explicit, by announcing that the extra time was given only to "a party" after some paper was "served upon him by mail."[42]

Under the version of Rule 6 that was on the books for more than half a century before 2005, therefore, the law was plain and unambiguous. A defendant or any other party who was required to do something within a certain number of days after serving his pleading or any other paper would not receive three extra days merely because he served it upon opposing counsel by mail.[43]

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37. FED. R. CIV. P. 6(e) (1937), *reprinted in* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 6App.01 [1] (3d ed. 1997).

38. FED. R. CIV. P. 6(e) (1987), *reprinted in* MOORE, *supra* note 37, § 6App.09 [1].

39. FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6App.11 [1].

40. *Id.*

41. *Id.* (emphasis added).

42. *See* FED. R. CIV. P. 6(e) (1937), *reprinted in* MOORE, *supra* note 37, § 6App.01 [1]. Up until one year ago, the corresponding provision in the Federal Rules of Appellate Procedure explicitly made this same point, granting three extra days only "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on *that* party[,]" and the paper is not served by personal delivery. FED. R. APP. P. 26(c) (2005) (emphasis added). The clarity was unfortunately lost, however, in an amendment to that rule that took effect in December 2009; the rule now applies "[w]hen a party may or must act within a specified time after service." FED. R. APP. P. 26(c) (2009).

43. This meant that service by mail would sometimes give one party a little more time than the other to get something done, even if they were technically subject to the same deadline. For

As the federal courts agreed, this three-day extension simply never applied "to actions taken by a party after the service of a notice or other paper by that party."[44]

This result made plenty of sense and is what any observer would have intuitively suspected. The obvious purpose behind the "three-day rule" is to compensate for the fact that, although service by mail is complete upon mailing, the party being served does not receive a document the same day the opposing party mails it to him.[45] The rule operated as a sort of presumption that a party generally does not receive a paper served by mail until approximately three days later.[46] It therefore gave an additional three days to the party who was waiting by the mailbox for something to arrive, "to afford equal response time to those served by mail."[47] But no reason exists to extend that same indulgence to a party who *serves* papers by mail. If a defendant serves his answer by mail on a plaintiff, the plaintiff obviously does not see it the same day, but any defendant who serves his answer has of course already seen it regardless of how it was served,[48] and can hardly insist that he deserves more time to decide whether to amend that answer merely because he mailed it to someone else. That is the simple and compelling reason why Rule 6, at least until recently, only gave extra

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example, when Rule 38 states that the plaintiff and the defendant are permitted to demand a jury trial within a certain number of days after the service of the last pleading, *see* FED. R. CIV. P. 38(b)(1), the defendant's service of the answer by mail under the former version of Rule 6 meant that the plaintiff's time to serve a timely demand would expire three days after the deadline for the defendant to do so. *See* FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6 App. 11[1].

44. Lewis v. Sch. Dist. #70, 523 F.3d 730, 739 (7th Cir. 2008) (quoting FED. R. CIV. P. 6(e) (2001) (amended 2007)); *accord* Mosel v. Hills Dep't Store, 789 F.2d 251, 253 (3d Cir. 1986) (per curiam) (holding that Rule 6(e) only "allows a party [that has been] served additional time to respond, in order to account for the time required for delivery of the mail"); Hill v. Vill. of Loomis, Neb., No. 4:09CV3061, 2009 WL 1813563, at *1 (D. Neb. June 25, 2009) (citing *Lewis*, 523 F.3d at 739; Kabacinski v. Bostrom Seating, Inc., No. 02-CV-8910, 2003 WL 21250651, at *2 (E.D. Pa. Mar. 7, 2003)); Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972) (rejecting the argument that defendant should receive three extra days under Rule 6(e) to demand a jury, stating that the "[d]efendant is the party who served the answer, and not the party upon whom service was made"). In reaching these results, the courts relied entirely on the portion of Rule 6 that referred to service "upon the party," *see Lewis*, 523 F.3d at 739; *Mosel*, 789 F.2d at 253; *Hill*, 2009 WL 1813563, at *1; *Priest*, 56 F.R.D. at 479, which, as we shall see, is no longer in the rule.

45. *See* Carr v. Veterans Admin., 522 F.2d 1355, 1357 (5th Cir. 1975) (noting that "the probable purpose of Rule 6(e) [is] to equalize the time for action available to parties served by mail with that afforded those served in person").

46. *See* Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 148 & n.1 (1984) (per curiam) (citing FED. R. CIV. P. 6(e) (1937) (amended 2007)).

47. Tushner v. U.S. Dist. Court for the Cent. Dist. of Cal., 829 F.2d 853, 855 (9th Cir. 1987).

48. *See* FED. R. CIV. P. 11(b). This is not merely a common-sense truism; it is a legal requirement. A defendant who mails his answer to opposing counsel before he has read it over closely and thought about it carefully—perhaps to beat some deadline or avoid a default—is not merely unwise; he is violating the rules. *See id.*

time to the party who was waiting for something to arrive in the mail before he could get started on his next move.

But the admirable clarity of this aspect of Rule 6 began to unravel in a pair of accidental changes made by the Advisory Committee in the past five years. In 2005, the Advisory Committee amended the rule to read as follows:

> Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).[49]

According to the Advisory Committee Notes attending this amendment, its purpose was simply to clarify the method for calculating how the three days would be added.[50] The Notes contained no indication that the Advisory Committee had any reason for shortening the phrase "service of a notice or other paper upon the party" merely to "service," a change that the Advisory Committee obviously saw as a mere stylistic improvement requiring no explanation.[51] That stylistic change was carried forward two years later in the more recent amendment that went into effect on December 1, 2007.[52] According to the Advisory Committee Notes, the amendment was "intended to be stylistic only" and was merely "part of the general restyling of the [Federal Rules of Civil Procedure] to make them more easily understood and to make style and terminology consistent throughout the rules."[53] As amended, the rule now reads:

> When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).[54]

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49. FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1].

50. More specifically, the Advisory Committee Notes to this 2005 amendment explain that it was intended to resolve some outstanding controversies as to (1) whether the three additional days should be added at the beginning or at the end of the time calculation, and (2) whether applying the additional days to a time period of ten days would result in a combined period of more than eleven days, thus no longer requiring the exclusion of intervening weekends and holidays. FED. R. CIV. P. 6 advisory committee's note (2005 Amendments).

51. *See* FED. R. CIV. P. 6 advisory committee's note (2005 Amendments) (failing to provide justification for the specified change).

52. *See* FED. R. CIV. P. 6(d) (2007), *reprinted in* MOORE, *supra* note 37, § 6App.13 [1]. When this portion of former Rule 6(e) was amended, it was restyled as Rule 6(d) because of the simultaneous deletion of former Rule 6(c). *Compare* FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1], *with* FED. R. CIV. P. 6(d). For the sake of simplicity and to minimize confusion, I shall refer to this portion of the rule in the text of this discussion simply as "Rule 6."

53. FED. R. CIV. P. 6 advisory committee's note (2007 Amendment).

54. FED. R. CIV. P. 6(d).

When one carefully compares this language with former versions of the rule, the most conspicuous change is the deletion of the phrase "upon the party," which had previously appeared twice in the rule to clarify that it applied only when a party's time to perform some act began to run with "the service of a notice or other paper *upon the party* and the notice or paper is served *upon the party*" by mail.[55] Those words are now gone, and the Advisory Committee added no language to take their place.[56] The same ambiguity infects the title of this subsection: "Additional Time After Certain Kinds of Service." Both the title and the text of the rule now speak merely of service and contain not one word to imply that a distinction is to be made between the party who serves a document and the party served with that document.

Why did the Advisory Committee make this change and shorten "the service *of a notice or other paper upon the party*" merely to "service"? The Advisory Committee never gave any explanation for this unfortunate deletion and must have thought that the italicized words were redundant, but that was only partially correct. The phrase "of a notice or other paper" was indeed unnecessary prolixity. (What else would you serve under the Rules—coffee?) But as we now see, the last three words in that phrase were neither redundant nor unimportant. The Advisory Committee may have been laboring under the mistaken assumption that any time a party is subject to some deadline under the Rules that begins to run with the service of some paper, that deadline will always commence with the service of that paper *upon that party* by someone else.[57] If that assumption were true, those three words would have been redundant in the former version of Rule 6, and their deletion would not change the law. But that assumption is not true, for the Rules contain at least three important time limitations that permit a defendant to take certain action within a specified number of days after it has served its answer.[58]

How does this change in the language of the rule affect the resolution of the question outlined in Part II of this Article? The answer is inescapable and unambiguous—and just as plainly contrary to what the rule said before the supposedly "stylistic" revision. Rule 6 now states, with no trace of textual

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55. *See* FED. R. CIV. P. 6(e) (1987), *reprinted in* MOORE, *supra* note 37, § 6App.09 [1] (emphasis added).

56. *Compare* FED. R. CIV. P. 6(e) (2005), *reprinted in* MOORE, *supra* note 37, § 6App.12 [1], *with* FED. R. CIV. P. 6(d). The Advisory Committee could have easily preserved the sense of the former language by rephrasing it to state that three days are given to a party (1) after he is served, or (2) after being served, or (3) after service upon that party. For the first time in its history, the rule now says none of those things.

57. The Advisory Committee on the Federal Rules of Civil Procedure was, by its own admission, influenced by its favorable experience with the earlier restyling of the Federal Rules of Criminal Procedure, *see* Cooper, *supra* note 1, at 1762, which also contain a rule allowing three extra days "after service." FED. R. CRIM. P. 45(c). But the critical difference is that the Federal Rules of Criminal Procedure, unlike the Federal Rules of Civil Procedure, do not impose a single deadline upon any party that begins to run when that party serves papers upon someone else.

58. *See* FED. R. CIV. P. 14(a)(1), 15(a)(1)(A), & 38(b)(1).

ambiguity, that three extra days are allowed when "a party may or must act within a specified time *after service* and *service is made*" by mail or some method other than personal delivery.[59] Under the only literal reading of these plain words, three additional days are available to a defendant who serves his answer by mail and then wishes to (1) amend that answer as a matter of course under Rule 15,[60] (2) demand a trial by jury under Rule 38,[61] or (3) implead a third-party defendant without leave of the court under Rule 14.[62] As we have seen, all three of these rules provide a strict time limit in which a defendant is permitted to take some action after the service of its answer. There is simply no other way to read the rule, unless one pretends that the deleted words are still there.

IV. AN EXAMINATION OF RULE 6 IN LIGHT OF THE PRINCIPLES OF STATUTORY CONSTRUCTION

The unfortunate and accidental change in Rule 6 is a time bomb waiting to go off. Lawyers frequently wait until what they think is their last day to get something done, often after they have given themselves the benefit of the "three extra days" to which they deem themselves entitled. In one recent case where the losing litigant had sixty days to prepare and file a notice of appeal—a one-sentence document that only takes one minute to dictate—his experienced attorney waited a full sixty-three days to file the notice because he mistakenly thought he had three extra days under this rule; the court dismissed the appeal as a result.[63] It is only a matter of time before some defendant will arguably miss by one or two days the time limit for amending its answer as a matter of course, or for demanding a jury trial after serving its answer. It has happened before, and it will happen again.[64] What will the parties argue in such a case, and how will the judge rule? The most likely arguments are easy to foresee and will surely bear out the prediction of one critic that "the restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in

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59. *See* FED. R. CIV. P. 6(d) (emphasis added). To be more precise, Rule 6 now applies to situations where service is made in any manner other than personal delivery, including service by mail, by leaving it with the court clerk, by electronic means with the written consent of the party being served, or by any other means that the opposing party consented to in writing. *See* FED. R. CIV. P. 5(b)(2)(C), (D), (E), & (F).

60. *See* FED. R. CIV. P. 15(a)(1)(A).

61. *See* FED. R. CIV. P. 38(b)(1).

62. *See* FED. R. CIV. P. 14(a)(1).

63. McCarty v. Astrue, 528 F.3d 541 (7th Cir. 2008).

64. *See, e.g.*, Tushner v. U.S. Dist. Court for the Cent. Dist. of Cal., 829 F.2d 853, 855–56 (9th Cir. 1987) (determining that a district court judge erred in striking a demand for a jury trial in an action removed from state court, where the plaintiff's demand, by the calculations of the district judge, was filed and served only one day late, although the Court of Appeals concluded that the demand was two days early); Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972) (holding that the defendant served its demand for a jury trial two days beyond the deadline).

light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule."[65] We will examine the most likely arguments now, starting with the most important.

A. Is Rule 6 Plain and Unambiguous?

Let us consider the position of those defendants who will inevitably need to persuade some court that they are entitled to three extra days to amend their answer or to demand a trial by jury because they served their answer by mail. In support of that conclusion, these defendants can make an impressive collection of arguments in favor of reading the rule precisely as it is written, all of them based on well-settled maxims of statutory construction.

First and foremost, the defendant will point out that courts should read the Federal Rules of Civil Procedure in accordance with "their plain meaning," just like a statute.[66] If the "statutory text is plain and unambiguous," the courts "must apply the statute according to its terms."[67] As we have seen, no trace of ambiguity exists in the text of Rule 6 as it is now drafted. The rule gives three extra days to all those who are permitted to take certain actions "within a specified time after service"[68]—and that is true of literally every defendant who serves his answer by mail.

As a result of its recent amendments, Rule 6 now refers in unqualified terms to any deadline that begins with "service," even though we know that those who drafted the rule surely had a more specific situation in mind. But as the Supreme Court has stated, "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that [its drafter] was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[69]

Moreover, the Supreme Court has shown special reluctance to find ambiguity in a rule or statute by comparing it with an earlier version of the same text. In a case decided a few years ago, the Court interpreted a statute, just like Rule 6, that was the subject of an amendment deleting a few words in "an apparent legislative drafting error."[70] In arguing that the Court should regard the text as ambiguous and should therefore consult the pertinent legislative history, one of the parties to that case reasoned, "for the most part, by comparing the present statute with its predecessor," and by arguing that there was "no apparent

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65. Hartnett, *supra* note 8, at 178.

66. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540 (1991) (citing Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989)).

67. Carcieri v. Salazar, 129 S. Ct. 1058, 1063–64 (2009) (citing United States v. Gonzales 520 U.S. 1, 4 (1997)); *see also* Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.").

68. FED. R. CIV. P. 6(d).

69. Brogan v. United States, 522 U.S. 398, 403 (1998).

70. Lamie v. U.S. Tr., 540 U.S. 526, 530 (2004).

reason" why Congress would have intentionally deleted the missing words.[71] The Court dismissed that contention as beside the point, holding that "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes."[72] By that same logic, one is hard-pressed to argue that courts should regard Rule 6 in its current form as ambiguous merely because it produces different results from the version that preceded it.

Just about the only way to read Rule 6 in a manner that would avoid the plain import of its literal terms is to assume that the Advisory Committee intended the phrase "service" to mean "service upon that party." This would require reading into the statute words that simply are not there—indeed, the very words that were intentionally deleted in the most recent pair of stylistic amendments to the rule.[73] That would violate the maxim that courts "ordinarily resist reading words or elements into a statute that do not appear on its face."[74]

The Advisory Committee could also have preserved the former sense of Rule 6 if it had worded the rule to refer to situations in which a party is permitted or required to take some action within a specified time "after *being served*," instead of as it now reads, "after *service*."[75] More than a dozen Federal Rules of Civil Procedure prescribe a time period in which a party may or must act after "being served" with some paper.[76] The Advisory Committee could have easily used that language in Rule 6, and by doing so would have explicitly limited the rule's provision of three additional days to the party who was waiting for some document to come in the mail. To read into a statute a phrase that the drafters were willing and able to use in other contexts "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'"[77]

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71. *Id.* at 533 (quoting Brief for Petitioner at 17, *Lamie*, 540 U.S. 526 (2004) (No. 02-693), 2003 WL 21295241).

72. *Id.* at 534 (citation omitted).

73. *Compare* FED. R. CIV. P. 6(e) (2001), *reprinted in* MOORE, *supra* note 37, § 6App.11 [1], *with* FED. R. CIV. P. 6(d).

74. Dean v. United States, 129 S. Ct. 1849, 1853 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)) (internal quotation marks omitted); *see also* Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

75. *See* FED. R. CIV. P. 6(d) (emphasis added).

76. *See* FED. R. CIV. P. 12(a)(1)(A)(i), 12(a)(1)(B), 12(a)(1)(C), 12(f)(2), 26(a)(1)(D), 31(a)(5), 32(d)(3)(C), 33(b)(2), 34(b)(2)(A), 36(a)(3), 37(d)(1)(A)(i), 38(c), 59(c), 68(a), & 81(c)(2)(B). It deserves mention that the Criminal and Appellate Rules also contain several rules setting deadlines requiring a party to take certain action within a specified number of days after "being served." *See* FED. R. CRIM. P. 59(a) & 59(b)(2); FED. R. APP. P. 6(b)(2)(B)(ii), 10(c), & 17(a).

77. Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 194 (6th ed. 2000)). This principle of statutory construction has been frequently employed by the Court. *See, e.g.*, Eisenstein *ex rel.* United States v. City of New York, 129 S. Ct. 2230, 2235 (2009) (refusing to interpret "party" to include a "real party in interest" when the two phrases were used in different

These considerations, taken together, amount to a powerful argument that the language of Rule 6 is plain and unambiguous, and therefore must be enforced according to its terms, unless perhaps there is some equally compelling and countervailing doctrine of statutory construction that might justify a departure from that plain language.

B. Legislative History and the Intent of the Drafters

In arguing that the defendant should not receive three extra days merely because he served his answer by mail, as we have seen, the plaintiff cannot resort to the language of Rule 6 as it now stands. Under the only natural construction of the plain text of the rule, three days are given to anyone who is required to do something after service by mail, regardless of whether the service was by that party or upon that party. With the text furnishing no support for its position, the plaintiff will have no choice but to argue for a nonliteral interpretation based on what we know, or think we know, from the legislative history about the intentions of those who wrote this change.

But in the case of an unambiguous rule like Rule 6, it is beside the point whether its plain text arguably conflicts with the intentions of those who wrote it. The Supreme Court has made this point in just about every way that can be imagined. Because the courts do not "resort to legislative history to cloud a statutory text that is clear,"[78] the stated intentions of the drafters are simply "irrelevant to the interpretation of an unambiguous statute."[79] Even in cases in which the legislative history creates "a direct conflict" with the plain language of some statutory text, "the text must prevail."[80] When "the statutory language is clear, there is no need to reach . . . arguments based on statutory purpose [or] legislative history . . . ."[81] Consequently, where the text of some rule is unambiguous, the courts should "reject . . . at the very outset"[82] any evidence offered from the legislative history to prove that the drafters did not intend to

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portions of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure); Jones v. Bock, 549 U.S. 199, 222 (2007) (refusing to treat "claim" as synonymous with "action" when various federal statutes confirmed that "Congress knew how to differentiate between the entire action and particular claims when it wanted to"); Bailey v. United States, 516 U.S. 137, 150 (1995) (refusing to interpret a statute governing the "use" of a firearm to cover a firearm "intended to be used," because another statute included that very phrase and therefore "demonstrate[d] that Congress knew how to draft a statute to reach a firearm that was 'intended to be used'").

78. Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994).

79. Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 n.3 (1989) (citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977)); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1332 n.3 (2010) (stating that "reliance on legislative history is unnecessary in light of the statute's unambiguous language").

80. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1466 n.6 (2009).

81. Boyle v. United States, 129 S. Ct. 2237, 2246 (2009).

82. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005).

change some aspect of the law that was nevertheless changed—even if only accidentally—by that plain language.[83]

Nor does it make any difference that the Federal Rules of Civil Procedure are supposed to "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[84] Even if a literal reading of Rule 6 could lead to some sort of injustice, that admonition is not a license for courts to construe procedural rules "to mean something other than what they plainly say."[85] The admonition to interpret the rules to secure the just disposition of a case "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives."[86]

Even if we were to assume for the sake of argument that it would be proper for courts to look beyond the plain language of Rule 6, it is far from clear that the stated intentions of its drafters should be controlling in this context. In fairness, one must concede that the plain text of the rule will now produce results that those who drafted it almost certainly did not intend.[87] The earlier version of the rule clearly settled that the party making service by mail would never be entitled to three extra days,[88] and the Advisory Committee has explicitly disclaimed any intention to change the substance of the rule, insisting that its most recent changes to this portion of the rule were meant to be merely stylistic.[89] But those assurances are by no means decisive. In two recent cases, two circuits of the United States Court of Appeals expressed doubts that they could overlook such ambiguities merely because an Advisory Committee insisted that its work was intended to be stylistic only. The Second Circuit pointed out that the Advisory Committee amended one of the Federal Rules of Appellate Procedure in ways that arguably amounted to an unintended change in

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83. In *Exxon Mobile*, the Court was "presented with a bizarre proposition: a statute that by its terms overrul[ed] [prior law], but whose drafters [said], in essence, 'we didn't mean it.'" FREER, *supra* note 7, § 13.3, at 770. As we have seen, that is a fair description of what has become of Rule 6 after its recent stylistic revisions. *See supra* Part III.

84. FED. R. CIV. P. 1.

85. Carlisle v. United States, 517 U.S. 416, 424 (1996). The Court was interpreting the virtually identical provision of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."). The same reasoning would apply with as much force to the interpretation of the Federal Rules of Civil Procedure.

86. *Carlisle*, 517 U.S. at 424.

87. *See* Cooper, *supra* note 1, at 1761 ("[T]he goal of the Style Project is to translate present text into clear language that does not change the meaning.").

88. *See supra* notes 43–48 and accompanying text.

89. FED. R. CIV. P. 6 advisory committee's note (2007 Amendments); *see also* Cooper, *supra* note 1, at 1761.

the law, despite its assertion that the change was "intended to be stylistic only,"[90] and concluded that this danger required it to "warn litigants of a potential minefield."[91] And the Fifth Circuit likewise concluded that the recent amendment to Rule 55 of the Federal Rules of Civil Procedure, although also "intended to be stylistic only,"[92] may well have altered the legal standard for setting aside a default judgment.[93] Both courts thought it necessary to caution litigants that the respective Advisory Committee had arguably created apparent changes in the controlling procedural rules, and that they would not necessarily disregard those unintentional changes merely because of the Advisory Committee's assurances that they intended to limit their changes to matters of style.

The Supreme Court evidently agrees with that conclusion and has indicated that it will not automatically defer to an Advisory Committee's assurances that a change in the wording of a rule involves nothing but a matter of style. In the Court's only decision to date involving the stylistic revisions to the Federal Rules of Civil Procedure, after noting that the most recent revisions to Rule 19 were reportedly intended to be "stylistic only," it made a point of noting that it had undertaken an independent assessment of the effect of those changes, at least in the context of that rule.[94] It comes as little surprise that the Court proceeded on the assumption that the judiciary has the final responsibility to determine whether the Advisory Committee succeeded in its intention to draft changes that would be merely stylistic. Although members of the Court have expressed different views as to how much weight the Advisory Committee Notes should be given when interpreting procedural rules,[95] a majority of the Court agrees that

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90. Sorensen v. City of New York, 413 F.3d 292, 297 n.2 (2d Cir. 2005) (quoting FED. R. APP. P. 4 advisory committee's note (1998 Amendments)) (internal quotation marks omitted).

91. *Id.*

92. *In re* OCA, Inc., 551 F.3d 359, 370 n.29 (5th Cir. 2008) (quoting FED. R. CIV. P. 55(c) (1987) (amended 2007); FED. R. CIV. P. 55(c); FED. R. CIV. P. 55 advisory committee's note (2007 Amendments)) (internal quotation marks omitted) (citing Fed. Sav. & Loan Ins. Corp. v. Kroenke, 858 F.2d 1067, 1069 (5th Cir. 1988)).

93. *See In re* OCA, Inc., 551 F.3d 359, 370 n.29 (5th Cir. 2008) (quoting FED. R. CIV. P. 55(c)).

94. Republic of Philippines v. Pimentel, 128 S. Ct. 2180, 2184 (2008) ("The Rules Committee advised the changes were stylistic only, and we agree." (citation omitted)). Those last three words suggest that the Court properly regards itself as obligated to decide for itself whether to accept the assurances of the Advisory Committee that the amendments have changed nothing but matters of style.

95. *Compare* Schiavone v. Fortune, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is 'of weight.'" (quoting Mississippi Pub. Corp. v. Murphee, 326 U.S. 438, 444 (1946))), *with* Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2498–99 (2010) (Scalia, J., concurring) ("I join the Court's opinion except for its reliance on the Notes of the Advisory Committee as establishing the meaning of Federal Rule of Civil Procedure 15(c)(1)(C). The Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary. But the Committee's intentions have no

there are circumstances in which "the policy expressed in the rule's text points clearly enough in one direction that it outweighs whatever force the Notes may have."[96]

These rules of statutory construction surely apply with even greater force in the context of Rule 6, where there is no direct conflict between the unambiguous meaning of its plain text and its legislative history. The Advisory Committee Notes to this rule and all of its assorted stylistic amendments have not addressed the specific issue we are considering here.[97] The most that could be said about the legislative history in this context is that there is a conflict between the change made by the plain language of the rule and the generic statements by its drafters that they did not intend to make any changes other than to the style.[98] That hardly furnishes a substantial basis for disregarding the plain language of the rule.

C. Does a Literal Reading of Rule 6 Lead to Absurd Results?

Apart from the arguments based on legislative history—or more specifically, the silence of the legislative history to suggest that the Advisory Committee intentionally changed the rule in the way identified here—the plaintiff's only other possible argument would be to emphasize the policy consequences of a literal reading of Rule 6 as it is drafted. The Supreme Court will countenance a departure from the plain language of a rule only in the extremely narrow class of cases in which a literal reading will lead to absurd results. The Court has often reiterated the familiar principle that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[99]

One can argue with considerable force that it makes no sense to give a defendant three extra days to decide whether to demand a jury trial or to amend his answer as a matter of course and assert a lack of personal jurisdiction merely because he served his answer by mail.[100] To put it in other words: there is no sensible reason to give that defendant three more days than we would give to a codefendant in the same case who served his answer on the same day by personal delivery to the plaintiff's counsel. But although that result may seem

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effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls.").

96. Williamson v. United States, 512 U.S. 594, 602 (1994) (interpreting Rule 804(b)(3) of the Federal Rules of Evidence).

97. *See* FED. R. CIV. P. 6 advisory committee's notes.

98. *See* FED. R. CIV. P. 6 advisory committee's note (2007 Amendment).

99. Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)) (internal quotation marks omitted).

100. *See supra* notes 43–48 and accompanying text.

unwise or unnecessary, it hardly amounts to a showing that those results can be described as "absurd."

The Supreme Court has made it clear that courts have precious little discretion to disregard the plain language of a rule or statute on the basis of the results to which it would lead. Just a few years ago, the Supreme Court was called upon to interpret a federal statute that severely limited the ability of federal inmates to seek habeas corpus relief based on changes in the law after their convictions became final on direct review.[101] The Court deemed itself bound to give a literal interpretation to the plain language of the statute[102] even though this led to a bizarre conclusion that would, for many prisoners, "make it possible for the limitations period [for a habeas petition] to expire before the cause of action accrue[d]."[103] In a masterpiece of understatement, the Court acknowledged that this conclusion was of course "harsh" and "strict," but nevertheless stated that the result was not the sort of "absurd" consequence that would permit the courts to refuse to enforce the rule according to its plain language.[104] And this was in a case, mind you, brought by a man sentenced to thirty years in prison without any chance of parole, making a claim that his guilt had not been proved in the manner required by law![105]

Even though a literal reading of Rule 6 will now lead to some strange results, it is far from clear that the results will be utterly senseless or manifestly absurd. At least in the context of Rule 38, which gives both parties the same number of days to demand a jury trial after the answer is served, one could plausibly imagine that the drafters of Rule 6 intended to expand its provisions to make the deadline for a jury trial demand uniform for both parties—as the rule now does—rather than having the deadline expire on two different days.[106] I am not suggesting that the Advisory Committee actually anticipated, much less intended, this result. But the fact that we can imagine a plausible purpose behind the change makes it much more difficult for a plaintiff to argue that the literal reading of the rule produces such manifestly absurd results that every defendant has constructive notice that the rule cannot be interpreted in accordance with its literal terms.

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101. *See* Dodd v. United States, 545 U.S. 353, 354–55 (2005).

102. *Id.* at 359.

103. *Id.* at 361 (Stevens, J., dissenting). The majority opinion did not deny that this was an accurate description of the Court's holding. *See id.* at 359.

104. *Id.* at 359–60.

105. *Id.* at 355.

106. In at least one reported case decided before the 2005 amendment to this rule, a defendant specifically complained that under Rule 6 the plaintiff served with the answer by mail received three extra days "within which to serve a written demand for a jury trial, and that [the] defendant should have the same privilege." Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972). That argument was rejected, but only because it was foreclosed by the language of Rule 6 at that time—the same language that has since been deleted.

In deciding whether a literal reading of Rule 6 would be "absurd," it must be emphasized that this is not a case where the plain language might lead to results that one could describe as harsh or strict, that could cause anyone to lose valuable rights through inadvertence, or that could unfairly catch either party by surprise.[107] Because the most literal reading of Rule 6 is the most generous to a defense attorney who seeks a few extra days to correct an error that might otherwise inadvertently waive his client's constitutional rights, it is also the reading that is most consistent with the spirit of the Federal Rules of Civil Procedure and their rejection of "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome"[108] of the litigation. A literal enforcement of Rule 6 as it is now written will indeed lead to results that are unintended and strange—but only by dispensing three extra days to litigants who do not really deserve them. If the Supreme Court felt bound to follow the "plain language" of a statute even though it sometimes resulted in the denial of habeas corpus relief to possibly innocent inmates who had been unjustly convicted, it is impossible to argue with a straight face that the unintended generosity of Rule 6 would constitute a result so absurd as to constitute a license to refuse to follow its plain language.

Besides, although a literal reading of Rule 6 leads to strange and almost surely unintended results, one cannot push that logic too hard. Under any conceivable interpretation of Rule 6, even one that would be most faithful to its former wording, the rule is still fraught with lines that are difficult to logically justify. For example, when a rule requires a lawyer to respond after being served with some document—for example, a set of interrogatories[109]—Rule 6 never gives the lawyer three extra days to prepare that response if the opposing party personally delivers the discovery request to the lawyer's office and leaves it with

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107. It stands to reason that an unintended consequence of a statute's plain language will most likely be deemed intolerably "absurd" when it leads to results that are harsh or strict, rather than unreasonably merciful or forgiving. For example, a rule that unexpectedly causes innocent parties to lose valuable constitutional rights should be more readily rejected as absurd than one that (like Rule 6) unexpectedly makes that result less likely. The Supreme Court has never yet said this, but it makes perfect sense, and follows logically from what the Court has written in this context. *See, e.g.*, Nelson v. Adams USA, Inc., 529 U.S. 460, 465 (2000) ("The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."); Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.").

108. Conley v. Gibson, 355 U.S. 41, 48 (1957). Moreover, giving virtually every defendant three extra days before they inadvertently waive their constitutional right to demand a jury trial, or their constitutional right to demand a dismissal for lack of personal jurisdiction, is certainly more consistent with the insistence that "[p]leadings must be construed so as to do justice," FED. R. CIV. P. 8(e), and that the right to a trial by jury "is preserved to the parties inviolate." FED. R. CIV. P. 38(a).

109. Interrogatories, like many other discovery devices in the federal rules, must be answered within thirty days after they are served upon the party who is obligated to respond to them. FED. R. CIV. P. 33(b)(2).

the secretary. It *does* give the lawyer three extra days, however, if the opposing party serves the interrogatories by email or fax or some other electronic means.[110] What sense does that make? Electronic transmission of a document never takes three days, not even in Elbonia. The framers presumably reasoned that a lawyer receiving service electronically might not check his email every day.[111] (The framers have not met any of the students I have taught in the past decade.) But the same can be said when service consists of the delivery of papers left with an office assistant; plenty of documents delivered by couriers sit unopened for a day or two after delivery—and yet the rule allows no extra time to parties served in that fashion.[112] The bottom line is that no reading of the three-day rule in Rule 6 will generate results that are perfectly consistent with its underlying rationale. That fact cuts strongly against the conclusion that the plain language of the rule should be disregarded merely to make the rule "just a little bit less absurd" in light of its supposed logic.

D. The Consequences of Not Enforcing the Rule as it is Written

As we have shown, a literal reading of Rule 6 leads to results that are strange and unintended, but not absurd. One could well argue, however, that a refusal to enforce this rule as it is now written would indeed lead to results so intolerable as to be absurd. As the Supreme Court has noted, it is especially inappropriate to deviate from the "plain language" of a rule when reading additional words into the text "would lead to absurd results."[113]

Only a plain reading of Rule 6 will eliminate the risk that the rule will inevitably act as a pitfall for some hapless litigant who took it at face value in calculating how much time he had to get something done. With good reason, the Supreme Court has cautioned that a procedural rule should not be interpreted in a manner that would convert it "into a trap for unwary litigants."[114] Indeed, this

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110. FED. R. CIV. P. 6(d) (giving extra time to those served under Rule 5(b)(2)(E) (electronic service), but not to those served under Rule 5(b)(2)(B)(i) (service by personal delivery to a person's office)).

111. The Advisory Committee's Notes to Rule 6 offer no explanation for this rule. But it is presumably the same logic adopted by those who included a similar provision in the Appellate Rules on the basis of their view that "[e]lectronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later." FED. R. APP. P. 26 advisory committee's notes (2002 Amendments).

112. *Compare* FED. R. CIV. P. 5(b)(2)(B)(i) (addressing service upon an office assistant), *with* FED. R. CIV. P. 6(d) (failing to give three additional days for parties served under Rule 5(b)(2)(B)(i)).

113. *See* Harbison v. Bell, 129 S. Ct. 1481, 1487 n.6 (2009) (refusing to read additional language into a statute governing federally appointed attorneys because such an interpretation "would lead to absurd results" by requiring an inmate to secure "new counsel" in addition to his appointed counsel).

114. *See* Darby v. Cisneros, 509 U.S. 137, 147 (1993).

very reason is at the heart of the Court's repeated insistence that unambiguous rules be applied in accordance with their plain meaning.

If any unintended substantive change in the wording of a rule could be disregarded merely because the drafters had made a generic disavowal of such an intention, future courts and litigants would in effect be required to apply the following bizarre maxim of statutory interpretation: When interpreting any Federal Rule of Civil Procedure, just to be safe, you must always be sure to go back and compare it with the language of the same rule before its stylistic revisions in the earlier part of the twenty-first century, make a careful note of all the differences—and then disregard all those differences that changed the operation of the rule in any way.

That principle of statutory construction—perhaps *deconstruction* would be more accurate—would completely defeat the entire purpose behind the stylistic revisions.[115] It would also make the Federal Rules of Civil Procedure as mysterious and as difficult to interpret as the Seventh Amendment, and with the passage of time would require federal judges to embark on "needless and intractable excursions into increasingly unfamiliar territory."[116] That truly would be absurd.

V. CONCLUSION

One proponent of the stylistic revisions predicted that advocates will "seize on every nuance" introduced by the changes "and attempt to wring advantage from it."[117] He even suggested that proponents of plain language interpretation—which would apparently include me—will be engaged in an intentional act of willful deception. "In the first years, the effort often will be willful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended."[118] To all these sinister-sounding charges, I fear that have no choice but to plead guilty as charged. But that does not change the inescapable fact that, as this Article has demonstrated, Rule 6 has been the subject of just such an unintentional substantive change.

Someday soon, a defendant will be accused of waiting one or two days too long to demand a jury, to amend his answer to add the defense of personal jurisdiction, or to implead a third-party defendant without the consent of the

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115. *See* Cooper, *supra* note 1, at 1761.

116. Chauffeurs Local 391 v. Terry, 494 U.S. 558, 581 (1990) (Brennan, J., concurring). The phrase is taken from Justice Brennan's apt description of the difficulties caused by the Seventh Amendment's unfortunate use of the word "preserved" and the Supreme Court's resulting jurisprudence that requires courts, when deciding whether a party has a constitutional right to a jury, to undertake an examination of the eighteenth century actions brought in the courts of England prior to the merger of the courts of law and equity. *See id.* 574–81.

117. Cooper, *supra* note 1, at 1783.

118. *Id.*

court. That defendant, perhaps after reading this Article, will contend that he was technically not too late because he served his answer by mail and point out that Rule 6, by its plain terms, now gives an extra three days to everyone whose time to take some action began "after service" of some paper. He will persuasively insist that he had every reason to take the rule at face value when calculating how much time he had to make up his mind.[119] He will also remind the court that a literal reading of the rule would cause no real unfairness to opposing counsel or deprive either side of some lawful right to which it was entitled.

When that day comes, it will be difficult for the district court to meet all those arguments with the response: "Well, you should not have taken that rule literally, because your research should have led you to discover that the former version of the rule had a few extra words that compelled the opposite conclusion, and that the drafters who removed those words explicitly stated that they did not intend to make any change in its operation." That reasoning would convert the interpretation of the Federal Rules of Civil Procedure into an exercise in cryptography. As the defendant will correctly point out, it makes much more sense to interpret and apply the rules as they are written and to handle the unanticipated consequences of those changes, if need be, through the normal process of amending their language.

As matters now stand, at least until the next time that Rule 6 of the Federal Rules of Civil Procedure is amended, its three-day provision is a terrible trap destined to catch some unwary defense attorneys by surprise. As I have shown, the best available arguments of statutory construction all weigh heavily in favor of the conclusion that the rule should be enforced according to its plain language. But that leads to some admittedly strange results that are not easy to justify in terms of the underlying purpose behind the rule—which may well persuade some district judges to reach the contrary conclusion and to interpret the rule so that its earlier meaning is not altered. If that happens, some defense lawyer will find to his horror that he has inadvertently waived some extremely precious right of his client, perhaps even a constitutional right, because he relied on the plain language of Rule 6 and took it at face value. How ironic that this ticking time bomb has been unintentionally planted in the rule governing the calculation of time.

The good news is that all of these problems can—and inevitably will—be cured through an extremely simple amendment to Rule 6(d).[120] The portion of

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119. Even good lawyers will sometimes have good reasons to wait as long as possible before making certain kinds of seemingly easy procedural decisions. *See* Bowles v. Russell, 127 S. Ct. 2360, 2372 n.9 (2007) (Souter, J., dissenting on other grounds) (noting the reasonableness of waiting "until the penultimate day under [a] judge's order" to file a notice of appeal since "filing the notice of appeal starts the clock for filing the record, which in turn starts the clock for filing a brief" (citations omitted)).

120. Indeed, the Advisory Committee has recently begun a discussion of whether Rule 6(d) should be amended, although because of concerns other than the problem identified in this Article.

that rule that extends an extra three days to parties who "may or must act within a specified time after *service*"[121] must be restored to refer, as it did for many years, to parties who must take some action within a specified time after *being served.* That simple change will eliminate all of the unfortunate problems that the stylistic revisers created. As it turns out, a surprising amount of confusion and complexity can be injected into the operation of a rule by the deletion of a single word.[122]

But until the inevitable day when that change is made, a sobering note of caution is required for those law students and defense attorneys who read this Article before finding themselves in a situation like the one described above. You should not take the liberty of presuming that you can take Rule 6 literally or assume that you will be able to persuade the court that you were given three additional days by the stylistic revision of the rule. That is a risk not worth taking. You will be much better off in every way, and sleep better at night, if you forget everything you read in this Article and assume that you do not have three additional days. This Article has been written instead for the benefit of two groups: (1) those future defense lawyers who did not see this Article (or this paragraph) in time and are trying after the fact to persuade a court that they did not miss a deadline;[123] and (2) the members of the assorted Advisory Committees and the many others involved in the amendment process who might be tempted to dabble in "stylistic" revisions in the future. You would be wise to proceed with caution. It turns out that the fears of your critics[124] were prophetic. It is exceptionally difficult, if not impossible, to engage in the extensive revision of the language of a set of rules without inadvertently making changes of real substance.[125]

See Minutes, Advisory Comm. on Evidence Rules, 31 (Nov. 20 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV11-2009-min.pdf (discussing the Civil Rules Advisory Committee's request for advice on whether the three-day extension should be applicable for service by e-delivery and service pursuant to agreed means).

121. FED. R. CIV. P. 6(d) (emphasis added).

122. In the words of one noted British commentator: "It's funny how one insect can damage so much grain." ELTON JOHN, *Empty Garden (Hey Hey Johnny), on* JUMP UP (MCA 1992).

123. Good luck with that. As you can see, you have the clear weight of authority in your favor, and the author of this Article has already written your entire brief for you. But nobody can predict with confidence how a judge will rule in a given case. And that is the entire problem with the recent amendment to Rule 6.

124. *See* Hartnett, *supra* note 8, at 178 ("[T]he restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule.").

125. After completing the first draft of this Article, I reviewed the recently proposed stylistic changes to the Federal Rules of Evidence, and found no fewer than four unintended substantive changes that would have been made by the "merely stylistic" changes that had been proposed for Rules 103(a), 411, 611(b), & 804(a)(1). *See* James J. Duane, *Some Comments on the Proposed Style Revision of the Federal Rules of Evidence*, 1–8 (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2009%20Comments%20Committee%20Folders/EV%20Comments%202009/09-EV-018-Comment-Duane.pdf. After I brought these changes to the attention of the Advisory

Committee, it voted to change its proposed revisions to all four of those rules along the lines that I had suggested to avert the substantive changes they were on the verge of making by accident. *See* Memorandum from Judge Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules to The Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (May 10, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-D.pdf.

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January 11, 2011

James J. Duane
Professor of Law
Regent University School of Law
Virginia Beach, VA 23464

Dear Professor Duane:

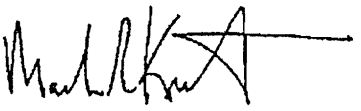
Thank you for sending the Civil Rules Committee your article proposing an amendment to Rule 6 of the Federal Rules of Civil Procedure. The issue you raise stems from an amendment that took effect in 2005, reflecting work on time-computation rules that began in 2002 and involved collaboration with the Appellate, Bankruptcy, and Criminal Rules Committees. The issue you identify did not arise as a result of the project that led to the restyled Civil Rules that took effect on December 1, 2007. But the language you point to reflects a similar intent; it was not intended to make a substantive change.

Your proposed amendment to Rule 6 will be considered by the full Civil Rules Committee at its April 2011 meeting. The committee is carefully monitoring the application of, and experience under, the changes made in the time-computation and style projects. Similar to the approach taken after the successful restyling of the Appellate, Criminal, and Evidence Rules, the committee is likely to take additional time to assess the impact of the amendments before proposing additional changes. Such additional amendments are best proposed as a single package that could include clarification of the 2005 time-period amendment to Rule 6, to prevent the confusing effect of numerous or frequent amendments. Waiting to consolidate such amendments seems prudent especially because the committee is unaware of any case since 2005 in which the revised language of the rule has caused the problem suggested in your article. And if the problem raised in your article does arise, courts have the authority under the existing rules to make the necessary adjustments.

Information on the status of the committee's action on your proposal will be contained in the minutes of the committee's meetings, which will be posted on the judiciary's rulemaking website at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx>.

We are grateful for your careful review of the amendments to the rules and for your work to help insure that the rules continue to serve the bench, bar, and public well.

Sincerely,



Mark R. Kravitz
Chair, Advisory Committee on Civil Rules

cc: Professor Edward Cooper
Peter McCabe, Secretary

TAB 10

October 2011						
S	M	T	W	T	F	S
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November 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
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20	21	22	23	24 Thanksgiving	25	26
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						U.S. Federal Holidays are in Red.

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March 2012						
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April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
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8 Easter Sunday	9 Easter Monday	10	11	12	13	14
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29	30					
						U.S. Federal Holidays are in Red.